

They Also Serve Who Only Stand and Wait – and Get Paid for It

Working Together

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When the poet John Milton observed that “they also serve who only stand and wait,” it was unlikely that he was thinking about employees who are required to pass through security clearance when leaving the workplace at the end of their shift. However, the federal Ninth Circuit Court of Appeals has thought about such employees, and the court decided that the time spent waiting in line to reach the check-out point was compensable under the Fair Labor Standards Act.

In the case of *Busk v. Integrity Staffing Solutions, Inc.* [713 F. 3d 525], decided last year by the Court of Appeals, the employees were warehouse workers who filled orders for Amazon.com customers. The employees were required to undergo a security clearance at the end of their shifts, to be searched and pass through metal detectors. The purpose was to minimize loss of product through warehouse theft, known in the trade as “shrinkage.” The employees alleged that they could wait in line up to 25 minutes to get through security, and that this time should be paid time.

Analysis of this claim involved the 1947 amendment to the Fair Labor Standards Act known as the Portal-to-Portal Act, which generally precludes compensation for activities that are “preliminary” or “postliminary” to the principal activities of the job. (This is the only use of the word “postliminary” that this author has ever encountered.) Most Portal-to-Portal Act cases involve time spent either in travel from the workplace entrance to the actual work station, or in changing into and out of special clothing – known as donning and doffing cases. Preliminary and postliminary activities are compensable if they are integral and indispensable to the employer’s principal activities. For example, putting on and taking off protective gear was necessary to the principal work of a silicon chip manufacturing plant because changing on premises was required by the very nature of the work to avoid contaminating the silicon chips.

The Court of Appeals decided that the security clearances were likewise necessary to the primary work of a warehouse employee because security was required by the employer for its benefit for the purpose of preventing theft. However, there seems to be some circular reasoning here. Every preliminary and postliminary activity is required by the employer, or it wouldn’t be an issue in the first place. And although preventing shrinkage is obviously advantageous to the employer, it does not seem to be dictated by the very nature of the work, as is cleanliness to the manufacture of silicon chips.

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Perhaps for this reason, the U. S. Supreme Court agreed to hear an appeal from the Court of Appeals decision, which should occur during the Supreme Court’s current term. However, the lesson of this decision as it now stands is that employees who suffer a delay in leaving work for security procedures (or presumably who must arrive early to pass through check-in procedures) may have a right to compensation for that time, regardless of when they actually “punch in” and commence work.

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