

They Also Serve Who Only Stand and Wait – At No Extra Charge

Working Together

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Last month, this blog discussed a case pending at the U.S. Supreme Court on the issue of whether employees who were required to pass through a security clearance at the beginning and end of their shifts could claim that the time spent waiting in line for clearance should be considered paid time under the Fair Labor Standards Act. The federal Ninth Circuit Court of Appeals had decided that this waiting time should be paid time, although our prior blog article modestly suggested that the reasoning of the Court of Appeals seemed somewhat flawed.

The Court of Appeals has now been reversed (and our blog article affirmed) by a unanimous decision of the Supreme Court. The Court held that the FLSA had been amended in 1947 by the Portal to Portal Act to distinguish between principal and indispensable activities of the job, and incidental time spent at the beginning or end of the workday. Under the amended FLSA, employers must treat the principal activities as paid time, but not the preliminary or “postliminary” activity.

The Supreme Court then found that the check-in and check-out procedures at issue in the Busk case were not principal activities of the job. By focusing on the fact that the employer required the security clearance, the Court of Appeals misinterpreted the statute; if the clearance were not required by the employer, the employees would not have to wait in line in the first place. But even preliminary waiting time imposed by the employer is not compensable under the FLSA if it is not essential to the performance of the job.

As the prior article discussed, there are some preliminary activities, such as putting on protective clothing, which are indispensable because otherwise the job could not be properly performed, and these activities are compensable. But time spent in a simple security check, even if required by the employer to control pilfering, is not paid time.

Posted in U.S. Supreme Court

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