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Apple, Amazon and the Wage Payment Issues Arising from Employee Security Screenings

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Apple, Inc. retail employees who allege they should have been compensated for off-the-clock time spent undergoing the store's mandatory screening processes have renewed their bid for class certification in federal court in California. In the complaint filed in *Frlekin v. Apple, Inc.*, Docket No. 3:13-CV-03451 (N.D. Cal.), the plaintiff employees alleged that the global technology giant engaged in illegal and improper wage practices in violation of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201, et seq., and California labor laws, by requiring store employees to wait in line and undergo off-the-clock security bag searches and clearance checks when they left for meal breaks or at the end of their shifts. This practice, the employees alleged, deprived them of wages they should earn during what they contend is compensable time at "work."

In opposing class certification, Apple has maintained class certification should be denied because (i) different stores implement the screening policy differently, (ii) employees who do not bring bags or their own Apple devices to work are not subjected to the bag and technology screenings, and (iii) there is not sufficient commonality in the class, particularly with respect to the plaintiffs' individual wage and overtime claims.

On May 13, 2014, the court denied Apple's bid for dismissal, expressing that the fact issues concerning the implementation of the screening policy at various stores and under various circumstances precluded the entry of summary judgment. Then, in that

same order, the court stayed the Apple litigation pending the outcome of *Busk v. Integrity Staffing Solutions, Inc.*, 135 S. Ct. 513 (2014), another employee screening case for which the United States Supreme Court had granted certiorari.

On December 9, 2014, the Supreme Court ruled unanimously that hourly warehouse workers for e-commerce giant Amazon, who were required to undergo security screenings before leaving the warehouse each day, were not entitled to pay for this time under the FLSA. The Supreme Court reiterated in *Busk* that the Portal-to-Portal Act, 29 U.S.C. § 251, which was enacted to exempt employers from FLSA liability for claims based on activities preliminary or "postliminary" to the principal activities performed by an employee, was designed to exclude from compensation pre-shift screening conducted for employee safety and post-shift screening conducted to prevent employee theft. The Supreme Court determined that the mandatory security screening of Amazon's warehouse contractors was a postliminary activity that was neither integral nor indispensable to the principal activities performed by the workers and, therefore, the workers were not entitled to wages or overtime for the time spent undergoing that screening process. *Busk*, 135 S. Ct. at 518.

In past cases, the Supreme Court has explained that just because certain pre-shift activities are necessary for employees to engage in their principal activities "does not mean that those pre-shift activities are 'integral and indispensable' to a 'principal activity.'" *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 39 (2005). Some courts also have noted that "indispensable" and "integral" are not synonymous; whereas indispensable means "necessary," integral means "essential to completeness." *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007). In *Busk*, the Supreme Court further explained that an analysis that focused on whether the particular activity was required by the employer rather than whether the activity was "integral and indispensable" to the productive work the employee was hired to perform would turn the analysis upside down and "sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address." *Id.* at 519. Accordingly, the Supreme Court unanimously ruled against the Amazon warehouse workers, finding that the time they spent waiting to undergo and undergoing the security screenings was not intrinsic to the duties they were employed to perform or indispensable to their performance of those duties. *Id.*

When the Supreme Court shot down the Amazon workers' bid for unpaid wages and overtime, the Apple workers also suffered a setback. On December 23, 2014, the Apple employees agreed that the Supreme Court's decision in *Busk* was dispositive of their FLSA claims and, thus, stipulated to the dismissal of those claims. But the Apple case has not gone away. The Apple employees continue to pursue their California state-law wage payment and overtime claims, which are not preempted or governed by federal law. They allege that under the California Labor Code, the relevant inquiry for determining whether wages are owed is the degree of control exerted by the employer over the employee, a test rejected by the Supreme Court in *Busk* (under the FLSA).

It will be interesting to see how the *Frlekin v. Apple, Inc.* wage claim litigation plays out in court under principles of California law. The Supreme Court's ruling in *Busk* may stymie this type of wage and hour litigation under the FLSA. However,

because state wage and hour laws differ from the FLSA, the Court's ruling in *Busk* may not impact or preclude the prosecution of claims for unpaid wages and overtime under certain state laws. Thus, while companies like Amazon, Apple, JCPenney and CVS (which also have been sued under similar circumstances) may cheer the Supreme Court's ruling in *Busk*, it is imperative that employers who implement workplace screenings – or regularly deal with portal-to-portal or other wage and hour issues – consult with experienced employment counsel to review and audit their wage and hour policies and procedures to avoid unnecessary wage claim litigation.