

3 Takeaways From The Calif. Supreme Court's Apple Ruling

By **Braden Campbell**

Law360 (February 14, 2020, 8:29 PM EST) -- The California Supreme Court has ruled that state law requires retailers to pay workers for time they spend waiting to be searched, handing a loss to Apple and exposing businesses to potentially costly class actions. Here, Law360 runs down the big takeaways from the court's decision.

Calif., Feds Split on Bag Checks

Thursday's ruling deepens a divide between California and federal law as to what constitutes work time that must be paid.

The California Supreme Court took up the case at the request of the Ninth Circuit, which is reviewing a Northern District of California ruling that granted Apple summary judgment in a class action brought by workers at its California retail stores. The workers argued they waited as long as 45 minutes without pay to have their bags searched for stolen merchandise and their iPhones verified as their own, per Apple's anti-theft policy.

The federal court asked whether this time counts as "hours worked" under California's Wage Order 7, a quasi-wage statute regulating pay, hours and working conditions in the retail industry. The wage order defines hours worked as the time workers spend under an employer's control and in which they are "suffered or permitted" to work, even if they aren't required to.

The California Supreme Court said the search time was work under the wage order because Apple controlled the workers during that period. Among other elements, the court noted that the workers couldn't leave while they were waiting to be screened and that they had to perform specific tasks before they could go, such as finding a manager or security guard to screen them. The court also rejected Apple's claim the searches were voluntary because the workers could choose not to bring bags or phones to work.

Michael Kun, an attorney in Epstein Becker Green's Los Angeles office, said the decision is "a frustrating one for many employers" because it doesn't mesh with federal law as discussed by the U.S. Supreme Court in a similar case known as *Integrity Staffing Solutions Inc. v. Busk*. In *Busk*, the high court said temporary workers in an Amazon warehouse weren't owed security line pay under the Portal to Portal Act, which amended federal wage law to require pay only for tasks that are "integral and indispensable" to workers' main duties.

“California employment laws often diverge from federal laws, and typically in ways that benefit employees, rather than employers,” said Kun, who co-chairs Epstein’s wage and hour practice.

Kate Gold, a partner in Proskauer Rose LLP’s Los Angeles office, said the ruling wasn’t a surprise. Not only does state law differ from federal law on the issue of when workers are eligible for pay, California courts have previously interpreted the law in ways favorable to workers, including by rejecting the federal “de minimis” doctrine, under which employees aren’t owed pay for short, tough to track periods of work, she said.

“I think [this decision] really punctuates what the law has been evolving into all along in California,” she said.

Efficiency Is the Name of the Game

To the extent California employers require their workers to undergo unpaid security screenings, the Apple ruling means they must now either pay up or ditch their bag-check policies. If the latter isn’t an option, employers’ best bet for keeping the payroll from swelling is to speed up the security line.

“If I was an employer, I would just be looking for ways to make these security searches as efficient as possible,” said attorney Laura Reathaford, who heads Lathrop GPM LLP’s California employment practice.

The court discussed several changes Apple could adopt to limit the scope of searches, such as imposing “reasonable restrictions” on the size, shape or number of bags workers bring in and providing workers with off-site lockers in which to store their personal items.

Other options employers could consider to speed up security lines include requiring workers to use clear bags that are more easily searched and staggering shifts so workers don’t need to be searched all at once, Reathaford said.

Proskauer’s Gold added that employers can avoid giving rise to claims of poor timekeeping by using technologies that track workers’ time to the minute.

Security Time Suits No Slam Dunk

Because the California Supreme Court said its decision applies retroactively, it’s “virtually certain” to lead to an uptick in lawsuits seeking pay for time workers spend in security lines, Epstein’s Kun said. But such suits won’t necessarily be an easy win for plaintiffs.

“While some [management] lawyers may encourage employers to wave the white flag and pay huge settlements in those cases, the truth is that those cases will now need more creativity and thoughtfulness from defense lawyers,” Kun said.

For example, attorneys for management may be able to beat class actions by showing there are many differences among members of the proposed group. If some workers bring bags to work and others don’t, that may make it harder for workers to win class certification, he said.

And workers’ success may vary depending on the policy they’re challenging, Lathrop GPM’s Reathaford

said. A policy like Apple's, in which workers have to track down managers or guards to conduct screenings, may slow down the process such that workers rack up significant periods of unpaid time. But if a company has guards wait by an exit, that could cut search time to seconds.

"I certainly would argue that if a search literally takes seconds a day, that that should not be compensable," she said.

--Editing by Jill Coffey.