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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W & L

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WHETHER CERTAIN SECURITY CHECKS CONSTITUTES COMPENSABLE WORK

The Department of Labor (DOL) and the courts have long struggled with the issue of what constitutes compensable "work" under the Fair Labor Standards Act (FLSA). Congress responded to the controversy in 1947 by enacting the Portal-to-Portal Act, which exempted employers from liability for claims based on two categories of work-related activities: Walking on the employer's premises to and from the location of the employee's "principal activity or activities," and activities that are "preliminary or postliminary" to "said principal activity."

The DOL has issued interpretive bulletins (IB) regarding what constitutes compensable preliminary and postliminary activity under the FLSA. Under these IBs, checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks are not normally compensable. Of particular concern is that once some type of work activity begins, under a concept known as the "continuous workday" rule, any activity that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of the Portal-to-Portal Act's exception, and is compensable. This is why waiting to don protective gear at the beginning of the day is generally considered non-compensable time, but waiting to doff the protective gear and doffing the protective gear at the end of the work day is normally deemed compensable.

These issues were confronted again in the December 9, 2014 ruling of the U.S. Supreme Court. *Integrity Staffing Solutions, Inc. v. Busk*, 23 WH Cases 2d 1485. This case involved a fact pattern in which the employer required its employees to undergo a security screening before leaving the warehouse at the end of each day, during which employees removed items such as wallets, keys, and belts from their persons and passed through metal detectors. The screenings were conducted to prevent employee theft and the employees alleged this time was compensable because it was done solely for the benefit of the employer.

A lower court in *Integrity Staffing Solutions* found that the post-shift activities involving security screenings were compensable as integral and indispensable to the employees' principal activities because the post-shift activities were necessary to the principal work performed and done for the benefit of the employer. The Supreme Court reversed, stating that: "[A]n activity is not integral and indispensable to an employee's principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities." "The screenings were not an intrinsic element of retrieving products from warehouse shelves or packing them for shipment and *Integrity Staffing* could have eliminated the screenings altogether without impairing the employee's ability to complete their work." The Court also noted that the screenings were not the "principal activity or activities which [the] employee is employed to performed," and that the "integral and indispensable test is tied to the productive work that the employee is employed to perform." It is insufficient to constitute compensable work merely because an employer requires an activity.

Editor's Note - The *Integrity Staffing Solutions* case is an important one, and surprisingly was a unanimous opinion, although there was a concurring opinion. Lower courts in the future will focus on how the Supreme Court described an "integral and indispensable" activity in determining whether future cases involving preliminary and postliminary activities are compensable. Employers will argue that emphasis in the opinion on the "productive work that the employee is employed to perform" will affect numerous donning and doffing cases that have been and are being litigated. Plaintiffs will say the opinion has no effect on donning and doffing law, but merely reaffirms existing precedents.

GOVERNMENT POSITION: WORKER PRESENTS NEW SOCIAL SECURITY NUMBER AND STATES PREVIOUS DOCUMENTS WERE NOT REAL

One of the most common (and difficult) immigration issues faced by employers occurs when an employer has accepted an employee's work authorization documents that appear genuine, but the employee later comes in and presents new identity and work authorization documents and states that the previous documents were not real. Employers are concerned whether this situation opens the employer up to any discrimination issues in any way if it chooses to keep or terminate the employee. The U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) issued a technical assistance letter on January 8, 2015, explaining an employer's responsibilities in this situation. Because of the importance of the issue, significant portions of the "correct steps" and opinion are stated below:

> In a situation where an employer has properly completed these steps, and an employee later provides the employer with new work authorization documentation and explains that the previously-presented documentation was not genuine, U.S. Citizenship and Immigration Services ("USCIS") - the agency that publishes the Form I-9 - provides additional guidance. According to the USCIS Handbook for Employers, Guidance for Completing Form I-9 (Form M-274 Rev. 04/30/13), available at http://www.uscis.gov/sites/default/files/files/form/m-274.pdf:
>
> > "You may encounter situations other than a legal change of name where an employee informs you or you have reason to believe that his or her identity is different from that previously used to complete the Form I-9. For example, an employee may have been working under a false identity, has subsequently obtained a work authorized immigration status in his or her true identity, and wishes to regularize his or her employment records. In that circumstance you should complete a new Form I-9. Write the original hire date in Section 2, and attach the new Form I-9 to the previously completed Form I-9 and include a written explanation.
> >
> > In cases where an employee has worked for you using a false identity but is currently work authorized, the I-9 rules do not require termination of employment . . . ."
>
> USCIS Handbook for Employers at 24.
>
> This Office cannot identify any violation of 8 U.S.C. § 1324b when an employer consistently accepts documents that employees choose to present that reasonably appear to be genuine and relate to the individual, regardless of whether an employee admits that the documents previously presented for employment eligibility verification were "not real." Nor can this Office identify any 1324b violation when an employer allows an employee to continue employment under the circumstances you present. However, to the extent an employer rejects valid work-authorization documentation or terminates employees because of their citizenship status or national origin, the employer could violate the anti-discrimination provision.

A further portion of the technical assistance opinion is quite important although it will not be quoted. It states that an employee who is terminated under the circumstances described above may allege citizenship status discrimination and may also allege national origin discrimination. The OSC indicates that an employer with a consistently-followed policy of terminating individuals for providing false information during the hiring process may have a legitimate non-discriminatory reason for the termination, and that whether or not OSC concludes that such a termination violates the anti-discrimination provision depends on the facts presented. The entire OSC technical assistance letter can be viewed at http://op.bna.com/dlrcases.nsf/r?Open=lfrs-9t7sbn.

Editor's Note - The OSC's technical assistance opinion cautions employers that terminating all employees who present different names, Social Security Numbers, or other document information, for falsifying documentation to the company, may result in discrimination claims. The first concern is whether such an employer has consistently followed a policy of terminating all employees who are determined to have provided false information, particularly since it appears common for employees to present documents that are falsified in some manner. For example, some studies indicate that 75% of job applicants falsify their employment application in some way.

A second concern relates to the natural reaction of an employer to simply request additional documentation from the employee to determine whether or not the employee is currently work authorized. The same technical assistance letter cautions that an unfair documentary practice occurs when an employer rejects valid Form I-9 documentation, demands more or different Form I-9 documentation, or requests specific I-9 documentation based on an employment-authorized individual's citizenship status or national origin. This advice is given in respect to what the OSC believes are "the correct steps going forward."

THE PRESIDENT'S DEFERRED ACTION FOR IMMIGRANTS STOPPED BY JUDGE

A district court judge in Texas on February 17, 2015 enjoined the Administration's efforts to offer work permits and safe harbor from deportation to some 4 million immigrants in the U.S. who are otherwise illegally in this country. The case was brought by the State of Texas and officials of 25 other states. The Justice Department will now decide in the coming days whether to seek an emergency stay (postponement) of the ruling, so that the executive action can go into effect during the litigation.

There was no ruling on the merits of the claim, but the fact that the judge temporarily enjoined the executive action indicates that judge thinks the states may well prevail on the merits. While the 123-page ruling criticized the Administration's actions, the legal ruling was based upon the failure to comply with the Administrative Procedure Act. This law generally requires federal agencies to publish a proposed regulation, and receive public comments before adopting a final version. Ultimately, the case is likely to end up in the U.S. Supreme Court.

BUSINESS GROUPS FILE LAWSUITS ATTACKING NLRB QUICKIE ELECTION RULE

A number of business organizations, including the U.S. Chamber of Commerce, have filed lawsuits against the NLRB quickie election rule that is scheduled to go into effect on April 1, 2015. The lawsuits argue that the "quickie elections" violate employers' free speech and due process rights to explain to employees election issues and inappropriately interfere with the time to determine voting issues. The lawsuits also contend the new rules are "arbitrary and capricious" because the NLRB has been unable to explain why the new procedures are necessary. Some 95% of all elections are now conducted within two months, and unions are winning more then two-thirds of them. The lawsuits say that as a result of the new rules, an election could be held in as short a period as 14 days, contrary to the election procedures of almost every other type. The lawsuits say that the new procedures of turning over employee contact information to unions, including personal cell phone numbers and email addresses, regardless of whether workers authorized this disclosure, violates the privacy rights of employees.

The original proposal to change the NLRB election rules was approved in December 2011 by the NLRB, and the U.S. Chamber successfully brought a lawsuit in 2011 and a federal judge determined that the rule had not been enacted with the required three-member majority. In February 2014, the NLRB issued a notice reinstating the same rule, which was approved by the NLRB on December 12, 2014, in a three-two vote. Two Republican members of the NLRB dissented stating that the final rule "manifest[s] a relentless zeal for slashing time" in the procedures "at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." *U.S. Chamber of Commerce v. National Labor Relations Board*, No. 15-00009 (D.D.C. Jan. 5, 2015).

Republican law makers led by Sen. Lamar Alexander, Chairman of the Senate Labor Committee, stated on February 11 that the new NLRB quickie election rule will "harm employers and employees alike." He said, "I refer to this as the ambush election rule, because it forces a union election before an employer has a chance to figure out what is going on. And worse, it jeopardizes employees' privacy by requiring employers to turn over employees' personal information, including email addresses, phone numbers, shift hours and locations to union organizers." He introduced an act known as the "National Labor Relations Reform Act," and also a Congressional Review Act, in a resolution to stop the NLRB new rule from going into effect.

Editor's Note - Employers should not count on the new NLRB quickie election rule being delayed from its April 1, 2015 implementation date. Employers would be wise to institute orientation and other policies to inform employees of their position on union matters and internal complaint procedures so that employees do not have to go to an outside union for assistance. It is also important for employers to provide training to supervisors and be alert to the signs of union organizational efforts.

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