



CALIFORNIA SUPREME COURT CONFIRMS EMPLOYER'S EXIT SEARCHES MUST BE ON-THE-CLOCK

In a decision that should come as little surprise to anyone who has been paying attention to wage and hour cases coming out of the California Supreme Court in the last few years, the Court has ruled that employees who were required to submit to retailer's exit bag checks must be compensated for their time. The case, *Frlekin v. Apple, Inc.* was decided by the request of the Ninth Circuit.

Frlekin is a class action brought by a group of Apple store retail employees who were required to submit to post-clock-out searches of their bags before leaving Apple store premises. According to the employees' allegations, these searches were not cursory, lasting from 5 to 20 minutes depending on the availability of a manager or security guard, and involved verifying personal technology serial numbers against a serial number log.

Apple argued that because the security checks involved bags that employees brought to work purely for their own convenience, bag searches should be treated like an employee's decision to use employer-provided non-mandatory transportation options (for example, an employer's parking lot shuttle). Prior California cases have ruled that an employee's use of optional employer-provided transportation is not

In a Nutshell, What Do Employers Need to Know About *Frlekin*?

Employers should assume that any mandatory or routine exit searches are "on the clock." Employers should also take note that *Frlekin* is retroactive, meaning that it applies to bag checks occurring both before and after the decision was issued.

compensable time because the use is purely for voluntary and for the convenience of the employee. *Frlekin* rejects Apple's comparison. Unlike optional transportation use, which was designed to benefit employees, Apple's bag searches were designed to protect and benefit Apple by preventing theft. Moreover, the checks were mandatory and employees who refused to submit to searches would be subject to discipline. More fundamentally, the Court called Apple's contention that employees who brought bags or personal devices to work did so purely for their own convenience both "farfetched and untenable" given the realities of "ordinary 21st Century life."

Although *Frlekin* does not specifically rule on the ability of employers to forbid employees from bringing bags or personal devices altogether, employers should take note that the Court termed Apple's suggestion

that it could implement a total ban on personal bags "draconian." From a business standpoint, employers considering such policies should bear in mind that they will alienate many employees. From a legal standpoint, depending on implementation, outright personal property bans could also create liability under discrimination or privacy laws.

After Frlekin, How Can Employer Bag Checks Be Conducted?

Prior cases addressing the *de minimis* rule have emphasized that employers are responsible for structuring routine work activities to occur "on the clock." (see our article [here](#) on a Ninth Circuit case dealing with the application of the *de minimis* rule to employee bag checks.) Frlekin emphasizes the same point. One option is to structure facilities and policies to eliminate the need for bag searches.

- Employers may require employees to store personal belongings in lockers or breakrooms so that employees reclaim personal belongings after leaving security areas.
- Employers may limit the size, shape, type, and the number of bags employees may bring to work.
- Employers have the right to prohibit employees from receiving third-party deliveries at work.

If routine security checks are unavoidable:

- Have sufficient security personnel available and use technology where appropriate to minimize employee waiting time.
- Written policies should reflect that security checks must be complete before clock-out.
- Review facility layouts to make sure that access points for employee clock-out are outside areas where security checks are required.

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