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Apple Workers Bag 9th Circ. Win After Calif. Justices Weigh In

By **Lauren Berg**

Law360 (September 2, 2020, 5:15 PM EDT) -- Apple must pay its retail store workers for the time they spend waiting for their bags and personal belongings to be screened at the end of their workday, the Ninth Circuit said Wednesday in a ruling that aligned itself with the California Supreme Court.



The Ninth Circuit said Wednesday that the time Apple workers spend going through security checks is compensable under California labor law. (AP Photo/Richard Vogel, File)

In a 12-page unanimous opinion in the certified class action suit, a three-judge panel reversed a California **judge's decision** that the security checks did not constitute work and could have been avoided by employees not bringing a bag, finding that time spent on an employer's premises waiting for required exit searches is compensable under Golden State labor law.

The question of compensability comes from California Industrial Welfare Commission Wage Order No. 7, which requires employers to pay workers the minimum wage for all hours worked, with "hours worked" meaning the time an employee is subject to the control of an employer.

The appellate panel's decision comes after it **certified a question** in August 2017 to the California Supreme Court asking it to determine just how voluntary an off-the-clock bag search is, given that the employees could opt to leave their bag at home but, because many people routinely carry bags, they may feel that they have little "true choice."

In February, the California high court determined that the **time is compensable**, saying that the "language and history" of various components of the definition of "hours worked" in Wage Order 7 suggests that Apple workers should be paid for time they are subject to the company's control.

The high court found that Apple's required exit searches occur in the workplace, involve a significant degree of control, are imposed primarily for the company's benefit and are enforced through the threat of discipline.

"We conclude that plaintiffs' time spent on Apple's premises waiting for, and undergoing, mandatory exit searches of bags, packages or personal Apple technology devices ... voluntarily brought to work purely for personal convenience is compensable as 'hours worked' within the meaning of Wage Order

7," the high court panel said.

The employees initially **filed suit** against Apple in 2013, claiming that the company's policy requiring them to clock out before undergoing two daily bag checks was illegal and led to about 90 minutes of unpaid work per week.

In its opinion Wednesday, the Ninth Circuit panel said the district court erred in granting summary judgment to Apple, saying that the California high court's holding means that the employees are entitled to summary judgment on the main issue of compensability.

The panel also rejected Apple's arguments that some of the class members didn't bring bags or personal devices to work or were never required to participate in checks and that it's disputed whether the security check policy was enforced through discipline. The panel said those disputed facts pertain only to individual remedies and not to the main legal question as to class-wide relief.

"Those purported disputed facts are irrelevant to whether time spent by class members waiting for and undergoing exit searches pursuant to the policy is compensable as 'hours worked' under California law," the panel wrote.

The panel reversed the district court's grant of Apple's motion for summary judgment and ordered the court to grant the employees' summary judgment motion; determine the remedy to be afforded to individual class members; and resolve any relevant factual disputes.

"We are very pleased with the Ninth Circuit's decision and believe it correctly resolved a long-standing and disputed issue of liability," the employees' attorney, Brett R. Gallaway of McLaughlin & Stern, told Law360 on Wednesday. "We are also very proud of our team's ongoing efforts and persistence throughout this litigation."

Representatives for Apple did not immediately respond to requests for comment.

U.S. Circuit Judges Susan P. Graber and Michelle T. Friedland and U.S. District Judge Consuelo B. Marshall sat on the panel that reached Wednesday's decision.

The employees are represented by Brett R. Gallaway and Lee S. Shalov of McLaughlin & Stern and Kimberly A. Kralowec and Kathleen Styles Rogers of The Kralowec Law Group.

Apple is represented by Julie A. Dunne of DLA Piper and Theodore J. Boutros Jr., Joshua S. Lipshutz, Bradley J. Hamburger and Lauren M. Blas of Gibson Dunn & Crutcher LLP.

The case is Amanda Frlekin et al. v. Apple Inc., case number 15-17382, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dave Simpson, Vin Gurrieri and Alex Lawson. Editing by Michael Watanabe.

Update: This story has been updated with comment from the employees' counsel.