

California Compliant: California's Supreme Court Reiterates Standard for Resolving Whether Time Spent for Security Checks Is "Hours Worked"

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It hardly seems controversial that businesses must pay employees for their "hours worked." It can be less clear, however, which activities are "work." California's industry-specific Wage Orders, which will be reviewed this year by the resurrected Industrial Welfare Commission (read more [here](#)), generally provide that "hours worked" are times when an employee is: 1) "subject to the control of an employer"; or 2) "suffered or permitted to work."

If that definition leaves you scratching your head, you're not alone – the Ninth Circuit repeatedly has asked California's Supreme Court to explain how to apply the definition in specific instances. On March 25th, California's high court declared that "hours worked" includes time that employees spend waiting in their cars at a security gate on the employer's property so a security guard can "peer into the vehicle." Companies that require employees to undergo onsite security checks should ensure they understand whether, or when, they must pay workers for time spent on such activities.

"Hours Worked" and California's Various Wage Orders

One reason wage and hour questions can be complicated in California is that the state has seventeen different **Wage Orders**. Most of the Wage Orders relate to specific industries or occupations, with a catch-all for "miscellaneous employees." **Guidance** from the state's Division of Labor Standards Enforcement explains how to determine which Wage Order applies. The threshold question is whether "a business is covered by an *industry* order" because many of the Wage Orders regulate wages, hours and working conditions in specific industries. If a business does not fall within one of those industries, an "*occupational* order" may apply to the employee. Wage Order #1 is an industry order, covering employees in the "manufacturing" industry. Wage Order #4 is an occupational order, for employees in "professional, technical, clerical, mechanical, and similar occupations." Employees not falling within Wage Orders #1 through #16 are covered by Wage Order #17.

The Wage Orders include definitions, including for "hours worked." All but two of the Wage Orders define "hours worked" in the same way, as "the time during which an employee is subject to the control of an employer and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The "control of an employer" clause and the "suffered or permitted to work" clause operate independently, such that time is "hours worked" if either is true.

When Is Time Spent for Security Checks "Hours Worked"?

Many companies require employees to present identification or other credentials to access buildings or worksites. Some employers impose more elaborate security protocols, such as bag checks or vehicle searches. The time that workers spend waiting for, and undergoing, security checks may be "hours worked," depending on the context. California's Supreme Court has discussed the relevant factors in two decisions issued since 2020.

Retailer's Bag Searches for Loss Prevention – *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038

The plaintiffs in *Frlekin v. Apple Inc.* had worked in Apple's retail stores. They asserted, on behalf of a class of Apple store workers, that Apple failed to pay its employees for all "hours worked" because they were not compensated for time they spent waiting for and undergoing searches of their personal items before they were permitted to leave the store. In the lawsuit, which was filed in the United States District Court for the Northern District of California, Apple argued that its workers were not under its "control" during exit searches because they could have avoided the searches by coming to work without personal bags or items, so that no search was required. The district court judge agreed and granted Apple's

motion for summary judgment. On appeal, the Ninth Circuit punted the question to the California Supreme Court by asking it to decide who was right.

Answering the call, California's Supreme Court (applying Wage Order #7, covering the "mercantile" industry) first noted that Wage Orders are liberally construed in favor of employees. The court also noted that Apple's exit searches sometimes took up to twenty minutes and were "imposed mainly for Apple's benefit by serving to detect and deter theft." The court rejected Apple's claim that only "unavoidable" activities can subject employees to the "control" of an employer, reasoning that "[i]nterpreting the 'hours worked' control clause as Apple suggests to cover only unavoidably required activities would not comport with the wage order's plain language or its history."

In resolving the question before it, the court offered specific factors that should be considered when analyzing whether "onsite employer-controlled activities" are "hours worked." In addition to the "mandatory nature" of an activity, relevant factors include "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or the employer, and whether the activity is enforced through disciplinary measures." Apple's exit searches were: mandatory (employees were subject to discipline if they did not comply); primarily benefited Apple; prevented employees from leaving the store until the search was concluded; and required the employees "to perform specific and supervised tasks while awaiting and during the search." Accordingly, the store employees were under Apple's "control" when they were waiting for and undergoing exit searches, and their time was "hours worked," for which the employees should have been paid.

Vehicle Searches at Security Gates – *Huerta v. CSI Electrical Contractors* (2024 WL 1245291)

Two years after the California Supreme Court's decision in *Frlekin*, the Ninth Circuit again asked California's Supreme Court for help with a similar question – whether "time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then" pass through a security gate is "hours worked" under Wage Order #16 (on-site occupations in construction, drilling, logging, and mining industries). The plaintiff in *Huerta v. CSI Electrical Contractors* worked for a subcontractor at a solar power facility in northern California. On his way to and from the work site, he was required to stop his vehicle at a security gate. At the gate, guards scanned his badge and "sometimes peered inside" his vehicle and the truck bed for "stolen tools or endangered species." He asserted, among other things, that employees should have been paid for the time they spent waiting for and undergoing security checks at the gate. The district court granted the employer-defendant's motion for summary judgment and as in the *Frlekin* case, the Ninth Circuit dodged the question by asking the California Supreme Court to weigh in (and also to resolve two additional questions specific to Wage Order #16).

The California Supreme Court answered the question the same way it did in the *Frlekin* case, finding that it makes no difference whether employees are in their personal vehicles while waiting for and undergoing a search. "An employee in his personal vehicle may be subject to his employer's control within the meaning of the wage order if sufficient indicia of control are present." The search at the security gate was an "onsite employer-controlled activity," and the factors articulated in the *Frlekin* decision compelled the result that workers were subject to the employer's control during that time. The searches were mandatory and in service of the employer's interests. Like the employees at the Apple store, the workers at the solar power facility had to perform specific, supervised tasks during the search, including: driving to the gate; waiting in the vehicle until the search could be performed; rolling down a window; presenting an identification badge to the guard; and submitting to a visual (and sometimes physical) inspection of the vehicle. Time spent for such searches therefore constituted "hours worked."

Employers that compel workers to submit to searches or heightened security checks may want to consult with counsel to determine whether time spent on such activities would be considered "hours worked" in specific situations and if so, how they should track the time employees spend to comply with the company's requirements.

Distinguishing Typical Protocols for Entering and Exiting Facilities

California's high court made clear in *Huerta* that the vehicle security checks mandated by the employer in that instance are distinguishable from ordinary requirements that employees "present their badges for inspection and scanning" to enter or exit a workplace. The court explicitly rejected the *Huerta* employer's argument that its vehicle checks at the security gate were akin to the process of entering a parking garage where an employee must open a window, extend an arm out of



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the window, and scan a card to trigger access through a gate. "The fact that security workers were employed to operate the Security Gate and conduct inspections – in lieu of security cameras or automated gate that would open" after an employee scans a card "is evidence that the [] process involved more than facilitation of ingress and egress" to the site. Likewise, "the fact that the procedure itself could take up to a minute or more per vehicle suggests" that the process was more involved than "simply scan[ning] a badge."

Neither *Frlekin* nor *Huerta* should be understood, therefore, as holding that the mere acts of scanning a card or badge, or locking/unlocking doors, in the absence of other indicia of an employer's "control," constitute "hours worked" under the Wage Orders. Of course, employers should stay tuned, because the analysis could change based on the Industrial Welfare Commission's anticipated revisions of the Wage Orders.

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