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Must Maine Employers Provide Compensation for COVID-19 Temperature Checks? Reexamining *Frlekin v. Apple*, the FLSA, and the Portal-to-Portal Act in the Time of Coronavirus

By Hannah Wurgaft and Peter Lowe

In light of the coronavirus pandemic, the Equal Employment Opportunity Commission (EEOC) is permitting employers to take employees' temperatures, administer COVID-19 tests, and otherwise screen employees for COVID-19 symptoms. Over the next several months, employees may spend extra time in lines awaiting screening protocol. Must employees be compensated while awaiting and undergoing COVID-19 screenings in the workplace? Here, we revisit *Frlekin v. Apple*, the FLSA, and the Portal-to-Portal Act for guidance.

Frlekin v. Apple and a Subsequent Amazon Settlement

We recently reported on *Frlekin v. Apple*, a California ruling requiring Apple to compensate employees for time spent awaiting and undergoing security screenings when leaving the workplace. Under California law, employers must pay their employees for all "hours worked," defined as "the time during which an employee is subject to the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not [he is] required to do so." You may recall that in the *Apple* case, the Court found employees remained under the company's control during security checks, and were thus entitled to compensation, because they must: 1) comply with the policy under threat of discipline, 2) remain on Apple property until they are searched, and 3) "perform specific… supervised tasks while awaiting and during the search." The court also determined that employees remain under Apple's control during security checks because the policy, and the search itself, benefits Apple.

At the end of April, Amazon settled a very similar lawsuit in Kentucky, agreeing to pay $11.1 million to nearly 200,000 warehouse workers for time spent waiting in security lines before and after their shifts.

The FLSA and Portal-to-Portal Act

As noted in our previous article, unlike in California, Maine state law does not define compensable work time. Therefore, the Fair Labor Standards Act (FLSA) provides the applicable compensation standard for Maine employers. Under the FLSA, an activity that is "integral and indispensable to the principal activities" of an employee's job is compensable. *De minimis*, or "insignificant" periods of time beyond scheduled working hours, such as carrying tools to a worksite, are not compensable. Additionally, under the Portal-to-Portal Act, the following activities are not compensable: 1) walking, riding, or traveling to or from the actual place of performance, and 2) activities that are "preliminary or postliminary" to the employee's "principal activity.

In a 2005 case, *IBP, Inc. v. Alvarez*, production workers in a poultry processing plant located in Portland, Maine argued their time spent donning and doffing safety gear before and after their shifts, as well as time spent waiting to don and doff, was compensable under the FLSA and the Portal-to-Portal Act. The Court held that time spent waiting to don safety gear qualified as a "preliminary" activity and was not compensable. The Court stated, "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity.'" In their analysis, the Court pointed to 29 C.F.R. § 790.7(g), which states "checking in and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks" are examples of preliminary or postliminary activities not compensable under the FLSA and the Portal-to-Portal Act.

Additionally, in a 2014 case, *Integrity Staffing Solutions, Inc. v. Busk*, the U.S. Supreme Court found that under the FLSA and the Portal-to-Portal Act, warehouse workers were not entitled to compensation for time spent awaiting and undergoing security screenings because the screenings were not a "principal activity" and were not "an intrinsic element" of their jobs. The employees were certainly not hired to undergo security screenings, and if the screenings were eliminated, employees' abilities to complete their work would not be impaired.

Advice for Maine Employers

So, where does this leave us? If an employee clocks in before getting in line for their daily temperature check, you will want to pay them for their time because making a deduction would be challenging based on the uncertain duration of the check. The tricky questions arise when the screenings take place *before* the employee clocks in, which is probably more commonplace.

The case law under the FLSA and Portal-to-Portal Act would support the position that most employees are not entitled to compensation for time spent awaiting and underdoing COVID-19 screenings when they are performed as a preliminary activity to entering the workplace. It could be argued that individuals working in health care settings should be compensated for time spent awaiting and undergoing screenings if this is an intrinsic element of their job. Each business and industry should consider how this may apply to their operations and to their workplace culture and expectations.

In any event, Maine employers should implement new COVID-19 screening policies and streamline protocols to cut down on wait times. Consider staggered start-times to further reduce wait times and crowding. Carefully monitor the process to determine if more screening personnel are needed. And if you experience delays, evaluate the impact on employees and whether your pay practices need to be reconsidered.