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Sidebar:
New German law on gender quotas for executive positions in private companies enters into force

SECURITY SCREENINGS: WORKERS MAY HAVE TO WAIT BUT THEY DON'T HAVE TO BE PAID UNDER THE FLSA

By Lloyd W. Aubry, Jr.

The Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 are gifts that keep on giving – or taking depending on your point of view. For a minimum wage/overtime statute over 75 years old, one would think that basic concepts like the definition of compensable time and hours worked would have long been settled. Not so, as a recent U.S. Supreme Court decision, *Integrity Staffing v. Busk*, 574 U.S. ___ (2014), one in a long line of such cases, demonstrates. As employers increasingly

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impose security screenings to preclude "shrinkage," this case provides some needed guidance on what is and is not compensable time under federal law. The legal gymnastics of the decision also demonstrate why wage and hour litigation is likely to be with us for a long time.

The facts of the case are straightforward. Employees Jesse Busk and Laurie Castro worked as hourly employees in Nevada for Integrity Staffing Solutions, Inc., which provided warehouse staffing to Amazon.com throughout the United States. The employees retrieved products from warehouse shelves and packaged them for delivery to Amazon.com customers. Integrity required its employees to undergo a security screening before leaving the warehouse at the end of the day, a process that they alleged in their complaint could take up to 25 minutes. They also asserted the time could have been reduced to a *de minimis* amount with more screeners or staggered shifts. The screening was done to prevent employee theft and thus, according to the complaint, was required by and done for the benefit of the employer, and the employees were entitled to be compensated for their waiting time.

The legal background is ancient and arcane but provides the basis for the Court's 9-0, relatively short 9 page decision finding the waiting time non-compensable. In a 1946 decision (*Anderson v. Mt. Clemons Pottery*[1]), the Supreme Court defined work as "all time during which an employee is necessarily required to be on the employer's premises," which "provoked a flood of litigation" and lead to enactment of the Portal-to-Portal Act of 1947. In that Act, Congress provided that activities that are "preliminary or postliminary" to the principal activity are not compensable. In a 1956 decision (*Steiner v. Mitchell*[2]), the Supreme Court defined principal activities to include "all activities which are an integral and indispensable part of the principal activities."

With this legal background, the District Court granted Integrity Staffing's motion to dismiss on the basis that the security screenings were not integral and indispensable to pulling product and packaging them for delivery, the principal warehouse duties of the employees. The Ninth Circuit reversed on the

New German law on gender quotas for executive positions in private companies enters into force

By Dr. Lawrence Rajczak, MoFo Berlin

German parliament has recently enacted a new law that introduces a gender quota for executive leadership positions in private companies. Dubbed "*the greatest contribution to equality since the introduction of women's suffrage*" by German Federal Minister of Justice *Heiko Maas*, the bill was subject to a controversial debate before being ultimately adopted with a large majority of votes of the parliament's members in March. The law entered into force on May 1, 2015.

One of the law's key elements is the introduction of a mandatory gender quota for the supervisory boards of joint–stock companies. Membership of the respectively underrepresented gender on supervisory boards of German joint–stock companies that are publicly traded and subject to the so–called mandatory "equal employee co–determination" regime (in German: "*paritätische Mitbestimmung*"; this usually only applies to companies that have more than 2000 employees) must now meet a quota of at least 30 percent of the board's total seats. Non–compliance with the quota will lead to the seats that should go to the underrepresented gender remaining vacant ("empty chairs"); electing a member of the respectively overrepresented gender will be legally invalid. The affected companies will need to start implementing the quota gradually, beginning with the seats that come up for reelection in 2016. This first element of the reform will only apply to a limited number of publicly traded companies in Germany (only about one hundred companies will be affected), due to the large number of employees required to cross the codetermination threshold.

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basis that Integrity "requires the security screenings" which are thus "necessary" to the employees' primary work and are done for the benefit of the employer citing its own opinion in a similar case that also reached the Supreme Court in 2005 (*IBP Inc. v. Alvarez*[3]). On this basis, the Ninth Circuit held the employees stated a plausible claim for relief that the time was compensable.

The U.S. Supreme Court and then granted the employer's certiorari petition and reversed the Ninth Circuit, finding that simply requiring an activity did not make it compensable under the integral and indispensable test which is tied to the "productive work that the employee is *employed to perform*." Relying on dictionary definitions, Justice Thomas writing for the unanimous court stated that an activity is integral and indispensable to the principal activity "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." Justice Thomas pointed out that if the test is satisfied by the employer requiring an activity, the principal activities would include the very activities that the Portal-to-Portal Act was enacted to exclude.

Accordingly, the Court held that waiting in line for a security screening was <u>not</u> an intrinsic element of the employees' warehouse duties or, put another way, it could be dispensed with and the employees could still perform their principal warehouse duties of pulling and packaging product. Standing in line for security screenings was therefore not a compensable activity under the FLSA.

The 9-0 vote suggests that the decision was a straightforward application of the statutory provisions and existing case law. It didn't engender the familiar 5-4 split decision between the conservative and liberal/moderate wings of the Court to the dismay of employee advocates. Some observers even suggested that the unanimous 9-0 vote was at least in part the result of the U.S. Department of Labor filing an amicus brief in support of Integrity Staffing which cited to a 1951 wage/hour opinion letter on security screenings consistent with the Court's ultimate opinion. Employee advocates also pointed out that in the Statement of Interest to the government's amicus

The reform also has a second key element, however, that will apply to a considerably larger number (approximately 3,000 to 4,000) of German companies. Companies that are either publicly traded (regardless of the number of employees) <u>or</u> subject to any kind of entrepreneurial employee co–determination regime (which can already be the case for companies with more than 500 employees), will have the obligation to set for themselves binding quota targets in order to increase the quota of the respectively underrepresented gender on their supervisory boards, on their boards of directors, and on their top management levels.

The bill does not provide "hard" minimum quotas for these self–set targets. The companies can set them more or less freely. The law only requires that if one of the genders is currently represented with merely a quota of less than 30 percent on a certain management level, the self–set targets must be at or higher than the current status quo. Companies that are required to implement quota targets under the new law have until September 30, 2015, to implement their initial set of targets.

While failure to meet the self–set targets will itself carry no direct legal sanction, companies will have the obligation to report on the targets and their achievement status in their annually published management reports. Failure to meet this reporting obligation will carry an administrative fine of up to EUR 50,000.

It remains to be seen whether the new legislation will in fact serve to improve gender equality in executive positions on the scale that was envisioned by the Federal Minister of Justice, or whether – due to the relatively "soft" nature of the self–set target quota regime – the legislation will amount to little more than a symbolic act. In any case, the law forces larger German companies to put the topic on their internal agendas in order to be compliant with the described self–set target quota and reporting regimes.

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brief, the government disclosed that it employs workers under the exact same conditions as Integrity Staffing.

The decision does not, of course, affect the provisions of state laws some of which have more expansive definitions of compensable time and hours worked. Indeed, the *Integrity Staffing* case was filed as a nationwide class action under state and federal law and will continue in several states under state law. Justice Thomas also suggested that the arguments made by the employees are more appropriately presented to the employer at the bargaining table, assuming the employees are represented by a union.

In any case, with all the litigation in the case, in a rather ironic development that occurred while the case was pending at the Supreme Court, Integrity altered its screening procedures to reduce the time allegedly spent waiting in line from 25 minutes to 5 minutes.

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1 328 U.S. 680 (1946)
2 350 U.S. 247 (1956)
3 546 U.S. 21 (2005)

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