

No. S243805

Supreme Court
OF THE
State of California

AMANDA FRLEKIN, ET AL.,
Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,
Defendant and Respondent.

On a Certified Question from the United States
Court of Appeals for the Ninth Circuit
Case No. 15-17382

Supplemental Brief on Restated Question

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I. INTRODUCTION

As recently restated, the certified question accepted from the Ninth Circuit now encompasses “personal technology devices” in addition to “packages” and “bags.” The pertinent facts, law, and analysis are no different for “personal technology devices” than for “packages” and “bags.” All of the Check time embraced by the restated question is compensable under the “control” test, the “suffered or permitted to work” test, or both—for the same reasons previously explained in petitioners’ Opening Brief on the Merits, Reply Brief on the Merits, and Consolidated Answer to Amicus Curiae Briefs.

II. DISCUSSION

A. “Tech” Check Time Is Compensable Under the “Control” Test

Apple required its retail sales employees to comply with a single “Check” policy, which applied to personal packages, bags and Apple-branded “personal technology devices” alike. There are no relevant factual differences between Apple’s “bag” Checks and its “tech” Checks; the pertinent facts stated in the Ninth Circuit’s opinion apply equally to both. *See Frlekin v. Apple, Inc.*, 870 F.3d 867, 870-71, 872-73, *passim* (9th Cir. 2017).

All of the Checks imposed the identical restraints on Apple’s employees: (1) the Checks were all performed pursuant to Apple’s written company policy, which Apple enforced through threat of *discipline*; (2) during all Checks, the employees were *confined to store premises* and not permitted to leave and go home; and (3) during all Checks, employees were required to perform *employer-directed actions and movements*. *See* Opening Brief on the Merits (“OBM”) at 6-12 (summarizing facts, including facts

relevant to “tech” Checks, with record cites). Hence, all of the Checks are compensable under the “control” test for the same reasons already briefed.¹

1. Factually, Apple Exercised the Same Controls During “Tech” Checks as During Bag Checks

The pertinent section of Apple’s “Employee Conduct” manual (ER 114) expressly requires Checks not only of bags, but also of all Apple-branded personal technology devices, which includes iPhones, iPods, and MacBooks.² The section reads:

All employees, including managers and Market Support employees, are subject to personal package and bag searches. *Personal Technology must be verified against your Personal Technology Card* (see section in this document) during all bag searches. Failure to comply with this policy may lead to disciplinary action, up to and including termination.

Frlekin, 870 F.3d at 870 (quoting ER 115) (emphasis added); *see also* ER 392-406 (stating policy). “Tech” Checks and bag Checks are conducted “at the same time.” ER 109 [at 65:1-4], 171:10-12.

Apple requires its employees to record all of their personally-owned, Apple-branded devices on an Apple-issued “Personal Technology Card” on which the employee must write a description and the serial number of each device. ER 118, 170 [at 18:22-19:3], 193, 242. “Once the card is initially completed, a manager must verify the serial numbers and sign the card,” which then must be “carr[ied] at all times while working.” ER 118; ER 170 [at 19:5-6]. The cards “served as proof that the employees owned the

¹ See OBM at 16-43; Reply Brief on the Merits (“RBM”) at 13-29; Petitioners’ Consolidated Answer to Amicus Curiae Briefs (“AACB”) at 9-32.

² ER 117-18, 241-42, 300 (“tech” Check policy applies only to “employee-owned Apple product[s]” that can be purchased at an Apple store); ER 69 [at 48:13-14], 315 (“tech” Check policy does not apply to Samsung phones or Kindles).

devices listed when those devices were searched under the policy.” ER 5:27-6:1 (district court’s factual summary). Every time an employee leaves a store “for any reason,” he or she “must ensure” that a manager (or security guard) “verifies the serial numbers on [the] card against the product [the employee is] carrying.” ER 118. *Accord* ER 300, 303 (describing procedure).

The employees do this by, first of all, tracking down a manager (or a security guard) who is available to perform the Check, which often involves wait times and lining up while the manager Checks other employees or finishes other tasks.³ When the employees reach the head of the line, they are “asked to pull the [technology] card out of our wallet, show [the manager] the serial numbers listed on the card, then pull our devices out, find the serial number in the settings, and show the manager that the serial number[s] on the devices match the serial numbers on the card. Then we are subjected to a bag search, and finally, we are allowed to leave the store.” ER 314; *see* ER 156:3-7 (“The technology check was particularly time consuming because the manager ... would have to compare each letter and number of your devices’ serial numbers against the letter and number on your personal technology card.”), 300 (managers must “verify the serial number of the employee’s personal technology against the personal technology log”).

If a “questionable” personal technology device is found during a bag search, “Apple will reserve the right to hold onto the questioned item until it can be verified as employee owned.” ER 300; *see also* ER 118 (same). This procedure was intended to

³ ER 122 ¶7, 128 ¶5, 131¶4, 152 ¶6, 156 ¶6, 162 ¶6, 166 ¶6, 175 ¶7, 184 ¶5, 190 ¶6, 197 ¶5, 293 ¶5, 297 ¶5, 307 ¶6, 312 ¶6, 330 ¶5, 334 ¶6, 339 ¶¶69-72 (employee declarations on tracking down managers and waiting for “tech” Checks).

“make the employee more aware to log in all items at start of shift” on the employee’s “tech” card. ER 300. If the device “cannot be verified” as employee-owned, Apple will “keep” the device and the employee will be reported to “Loss Prevention.” ER 118, 300.

Until the entirety of this mandatory process is completed, the employees are not “allowed to leave the store.” ER 66 [at 127:23-128:4], 314.⁴ Together with the mandatory bag Checks, the “tech” Checks can take, on average, five to twenty minutes or more of employees’ off-the-clock, personal time every work day.⁵ Employees who fail to adhere to the “tech” Check policy are subject to discipline, “up to and including termination.” ER 115; *see Frlekin*, 870 F.3d at 870; OBM at 8 (citing record).

Employees find the “tech” Check policy degrading and insulting.⁶ The policy is imposed as one of many rules stated in an “Employee Conduct” manual that prohibits

⁴ ER 121 ¶¶3, 5, 127-28 ¶5, 131 ¶3, 136 ¶5, 151 ¶¶3, 5, 155 ¶3, 166 ¶4, 166 ¶6, 175 ¶6, 183 ¶3, 190 ¶6, 197 ¶4, 293 ¶5, 306-07 ¶¶3, 5, 311 ¶3, 329 ¶4, 345 ¶5, 350-51 ¶5, 356 ¶5, 371 ¶5 (employee declarations describing mandatory “tech” checks); *see also* ER 241-42 (describing “tech” policy as one of several “important Apple policies,” and “as an Apple employee, you are obligated to follow ALL Apple policies”), 324 (employees “don’t get to pick and choose” whether to follow “tech” Check policy).

⁵ ER 123 ¶10, 128 ¶5, 131 ¶4, 136 ¶6, 140 ¶8, 144 ¶7, 157 ¶6, 162 ¶6, 167 ¶7, 175 ¶7, 185 ¶¶7-8, 190, ¶6, 198 ¶7, 298 ¶8, 312 ¶6, 330 ¶5, 334 ¶8, 339 ¶¶67-68, 345 ¶8, 351 ¶8, 358 ¶10 (employee declarations on Check times). Apple claims the Checks take no more than “a few seconds” (30 seconds on “average”). *E.g.*, Answer Brief on the Merits (“ABM”) at 13, 39. Even if so, the time is no less compensable. *Troester v. Starbucks Corp.*, 5 Cal.5th 829, 844-45 (2018). The “tech” and bag Checks are “regularly reoccurring activities” that Apple has the capacity to track (ER 152:11-15, 330:17-21), and are therefore compensable. *Troester*, 5 Cal.5th at 846, 848. Even thirty seconds per day mounts up to over two hours’ work per full-time employee per year.

⁶ ER 215 (employee resisted using “tech” cards “as she deemed it insulting”); ER 225 (tech Checks are “a huge shock to the person”); ER 314-15 (“tech” Checks are “insulting and demeaning to Apple employees” and are “often performed in front of gawking customers,” which is “demoralizing”); ER 324 (tech Checks violated

Apple's employees from engaging in unprofessional conduct such as "[h]arassment," "[i]nsider [t]rading," and improper deportment. ER 114. The rule applies to "all" employees, without exceptions (other than the rare circumstance of an employee who may have carried no bag or tech on a particular day), and it presumes that employees regularly bring their bags and Apple-branded tech devices to work. *See* ER 115.⁷

The "tech" Check policy materially benefits Apple. Like the bag Check policy, it enables Apple to earn handsome profits by selling small, valuable electronic devices, such as iPhones and iPods, without adopting other, potentially more costly measures to adequately secure the devices from theft.⁸ Managers must "be very thorough with bag checks *and tech cards*, as these are key components to the impression of control in the store." ER 212 (emphasis added). Thus, the "tech" Checks deter theft not just as to individual Checked employees, but for Apple's retail workforce as a whole.

employee's "rights as an employee and a person since she was off the clock" and took "time away from her personal time"); ER 193 ("tech" Checks are "[n]ot an easy pill for our team to swallow"); ER 317-318 (questioning whether "tech" Checks are "a good business decision" and whether there is "a more intelligent and respectful" way to deter theft).

⁷ OBM at 41-42 & nn. 52-53 (discussing ubiquity of cell phones in modern life; citing authorities; citing Apple CEO Tim Cook's remark about the iPhone that "You wouldn't think about leaving home without it."); ER 118, 366 ¶5 (Apple "support[s] the ownership of personal technology" and provided employee discounts for Apple devices such as iPhones).

⁸ *See, e.g.*, OBM at 12 (citing record), 38; RBM at 29; AACB at 20, 31-32; Amicus Curiae Brief of Correctional Police Officers' Association at 18-19 & n.4.

2. Both “Tech” Check and Bag Check Time Is Compensable Under the “Control” Test

The “tech” Check time, like the bag Check time, is compensable under Wage Order 7 because it is “time during which an employee is subject to the *control* of an employer.” 8 Cal. Code Regs. §11070, ¶2(G) (emphasis added). Apple conceded that all Check time, not just bag Check time, is “controlled,”⁹ and the time falls within plain-language dictionary definitions of the word “control,” for reasons already briefed.¹⁰ The “unavoidably required” test adopted by the district court (and advocated by Apple) finds no support in the Wage Order’s text or regulatory history.¹¹ Under the oft-stated rule that the Wage Orders’ plain text must be liberally construed to protect employees, the time is compensable. *See, e.g., Troester*, 5 Cal.5th at 839.

This conclusion is fully supported by the relevant decisional law, as has also been previously briefed.¹² Under this Court’s precedents, the “extent,” “level” or “amount” of “the employer’s control” “during” the time in question is “determinative” of compensability. *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 840 (2015) (citing *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 587 (2000); *Ghazaryan v. Diva*

⁹ ER 47:20-48:13 (discussing “any of those things” an employee might have “elected to bring” to work); *see Frlekin*, 870 F.3d at 871 (recognizing Apple’s concession as to bag Check time).

¹⁰ *See* OBM at 17-28 (discussing Wage Orders’ plain text and adoption history); RBM at 14-20 (same); AACB at 10-15 (same).

¹¹ *See id.* To the contrary, the regulatory history demonstrates that the IWC intended to jettison a less protective test (“required”) and substitute the more protective “control” test, thereby making more time, not less, compensable. *See id.*

¹² *See* OBM at 28-40 (discussing decisional law); RBM at 20-29 (same); AACB at 15-24 (same).

Limousine, Ltd., 169 Cal.App.4th 1524, 1535 (2009)).¹³ Applying this standard, “controlled” time is routinely held compensable even if not “unavoidably required”—the standard Apple advocates. *See, e.g., Mendiola*, 60 Cal.4th at 837, 841 (on-site time compensable even though it could be avoided by seeking permission “to leave the worksite”); *Bono Enters., Inc. v. Bradshaw*, 32 Cal.App.4th 968, 972, 974-75 (1995) (on-site meal period time compensable although employees could avoid it by making “prior arrangements”).¹⁴

Here, Apple’s controls are threefold. Apple imposes its “tech” and bag Checks (1) in a written company policy enforced through threat of *discipline*. During all Check time, Apple’s employees are (2) *confined to store premises* and not allowed to leave, and (3) required to follow Apple’s search procedures “during which [their] *actions and movements are compelled*.” *Frlekin*, 870 F.3d at 872 (emphasis added). In short, Apple exercised more and greater levels of “control” during “tech” and bag Check time than the employers did over the bus-ride time in both *Morillion* and *Overton*.¹⁵

¹³ *Accord Stoetzel v. Department of Human Resources*, 7 Cal.5th 718, 747 (2019) (*Morillion* “focused on the word ‘control,’” which was “the basis of our decision”).

¹⁴ *Accord Ridgeway v. Wal-Mart Stores, Inc.*, 107 F.Supp.3d 1044, 1054-55 (N.D. Cal. 2015) (on-site layover time compensable even though employees could avoid it by requesting “prior” permission to leave); *Cervantez v. Celistica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009) (on-site pre-shift time compensable although employees were not required to “arrive early” and thus could have avoided the “control”); MJN Ex. 12 at 18, 24 (any time “the employee is not allowed to leave the premises” is compensable time, including “after the shift ends”).

¹⁵ *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263 (2006); *see* OBM at 30-38 (extensively discussing *Morillion* and *Overton*); RBM at 20-28 (same); AACB at 15-18 (same).

Under the Wage Orders' plain text, the regulatory history, and the governing decisional law, "tech" Check time is "controlled" and compensable.

B. "Tech" Check Time Is Compensable Under the "Suffered or Permitted to Work" Test

The "tech" Check time is compensable for the independent reason that it is time "during which" the employees were "suffered or permitted to work." 8 Cal. Code Regs. §11070, ¶2(G). Like the bag Checks, the "tech" Checks easily meet the plain-language, ordinary definition of "work," for reasons previously briefed.¹⁶ They involve physical or mental exertion to accomplish an end, namely, deterring theft, which benefits Apple.¹⁷ As discussed above, Apple was not only aware of the "tech" Checks, but required, monitored and controlled them. Hence, the work was "suffered or permitted" by an employer, as the Wage Order requires. *Morillion*, 22 Cal.4th at 584-85. Apple should pay for the Check time, rather than shifting the cost of theft prevention onto the backs of its employees, contrary to the Wage Order's text and purpose.¹⁸

Apple contends that compensable "work" should be confined to job duties the employees were "hired to perform"—essentially the same standard as the federal Fair

¹⁶ See OBM 43-51; RBM at 30-37; AACB at 33-41.

¹⁷ See OBM at 44-45 (citing *Black's Law Dictionary* (10th ed. 2014); *American Heritage Dictionary* (4th ed. 2000); *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003)).

¹⁸ See AACB at 30-32 (citing Lab. Code §402; 8 Cal. Code Regs. §11070, ¶8 (both prohibiting employers from forcing employees to bear theft-prevention costs)).

Labor Standards Act, as modified by the Portal-to-Portal Act.¹⁹ This argument is as unavailing for “tech” Checks as it is for bag Checks. Wage Order 7 says “work,” not “job duties.” Moreover, Wage Orders 4 and 5 both say “assigned duties” and/or “as interpreted in accordance with the provisions of the Fair Labor Standards Act.” 8 Cal. Code Regs. §11040, ¶2(K), 11050, ¶2(K). To judicially construe Wage Order 7 as already including the same limitations would render the quoted language of Orders 4 and 5 meaningless. It would also contravene the IWC’s intent to ensure that the Wage Orders are *more* protective than the Portal-to-Portal Act. This Court will not import a less protective federal standard into the Wage Orders absent convincing evidence of the IWC’s intent, which is wholly absent here. *See Troester*, 5 Cal.5th at 841; *Mendiola*, 60 Cal.4th at 843; *Morillion*, 22 Cal.4th at 592.

Lastly, the “tech” Checks *do* relate to the employees’ job duties—for the same reasons the bag Checks do.²⁰ Apple’s business model involves selling unsecured, “valuable goods”²¹ at retail, and in Apple’s stores, loss prevention, including internal theft, “is a team effort to protect the company’s products, assets, and brand.”²² “Each and every employee is responsible for” it, and the employees’ success or lack thereof will

¹⁹ ABM 53-55; *see Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 517 (2014) (tasks outside the “principal activity” the employees were “employed to perform” are excluded from compensability under Portal-to-Portal Act).

²⁰ *See* OBM at 51; RBM at 35-37; AACB at 41.

²¹ *Frlekin*, 870 F.3d at 873.

²² Petitioners’ Motion to Augment the Record (“MAR”) at 30.

“affect[] how all of the team members are rated on their annual reviews.”²³ In short, “reasonable attempts to investigate employee theft ... are a normal part of the employment relationship.” *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 717 (1992).

III. CONCLUSION

For the reasons discussed above, the answer to the restated question is “yes.”

Dated: August 28, 2019

Respectfully submitted,

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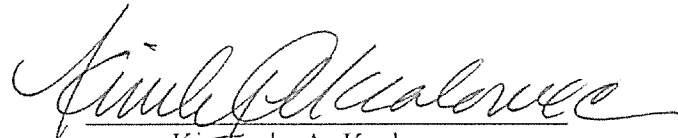
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 2,796 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(d)(2).

²³ MAR at 14, 30; *see also* MAR 15-22, 24-35; ER 200-01, 206 (all employees bear “responsibility” for “internal theft”); OBM 12 (citing record); RBM 35-36 (citing record).

Dated: August 28, 2019


Kimberly A. Kralowec

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by KRALOWEC LAW, P.C., located at 750 Battery Street, Suite 700, San Francisco, California 94111, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **SUPPLEMENTAL BRIEF ON RESTATED QUESTION; and**
2. **PROOF OF SERVICE.**

- **By Mail:** I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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