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California Federal Court Leaves Retail Employees Holding The Bag

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The U.S. District Court for the Northern District of California recently decertified a workplace class action, recognizing that “[e]ven after a certification order is entered,” a court “remains free to modify it in the light of subsequent developments in the litigation.”

In [Heredia v. Eddie Bauer](#), the plaintiffs were hourly retail store employees who alleged unpaid wages for time spent in connection with their employer’s policy of performing “bag checks” or “security inspections” when employees left the store. The court had previously certified the class under Rule 23, but reversed course after discovery and an expert “time and motion” study revealed that “the class members did not experience a uniform policy of off-the-clock exit inspections.”

The plaintiff employee testified at her deposition that all employees underwent security inspections after they clocked out. There was no dispute that the employer’s written policies were “silent on whether the employees must clock out before or after undergoing the required security inspections,” and according to the court, the defendant employer had presented no evidence of security checks being conducted “on-the-clock.” Based on the limited record available to the court at the time, the court certified a class of all California hourly retail store employees under Rule 23, identifying two questions common to the class: whether the employer had a policy and practice to mandate that security checks be performed off-the-clock and, if so,

whether the time employees spent undergoing security checks is compensable as wages.

After the court's certification decision, the parties conducted additional discovery, including expert discovery and representative discovery from a sample of class members.

Expert evidence: The employer's expert conducted a "time and motion" study, observing nearly 1,500 hours of video footage of employees. The expert evidence demonstrated that between 60 and 80 percent of the security inspections took place on the clock.

Testimonial evidence: The parties also stipulated what they agreed was a representative sample of class members to be deposed. The defendant employer's summary of those depositions demonstrated that more than 50 percent of the security inspections took place on the clock.

Based on the "significantly developed" record, the court concluded that the security inspections for the majority of class members took place on the clock. The court found that its prior conclusion regarding the typicality of the named plaintiff's claims was "no longer supported by the record." Without a uniform policy, the court also found that the class was not ascertainable, holding that "it is impossible to know, without individualized inquiries, which employees have undergone exit inspections off the clock and were subjected to uncompensated time."

Thus, the "the question of whether all class members were subject to off-the-clock exit inspections resulting in uncompensated time cannot be resolved in one stroke," and decertification was warranted. Given the variability in the testimony of class members, the court found that "numerous mini trials" would be necessary to "decide whether each employee experienced uncompensated exit inspections," making class treatment inappropriate.

Ultimately, the court held that "based on the current record, the class as certified does not satisfy the Rule 23 requirements," and decertified the class. The court noted that had it known there was no single uniform policy in place mandating security inspections off the clock, "[i]t is doubtful that the Court would have certified the class" in the first place.

The *Heredia* decision is a useful reminder that while significant, class certification is not necessarily the end of a rigorous class action defense – especially where a plaintiff moves for class certification before the conclusion of discovery. Moreover, the decision reiterates the strategic benefits of expert evidence (including "time and motion" studies) for defeating class certification, especially when coupled with a plan to amass admissions during discovery.

The California Supreme Court recently heard oral argument in a case involving employer bag checks. A decision clarifying whether such time is compensable is expected in the next 60 days.