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## Employment Law

### All In A Day's Work: Supreme Court Holds That Walking and Waiting Times Are Compensable Work Under FLSA

In a unanimous decision announced this month, the United States Supreme Court clarified the definition of "workday" under the Fair Labor Standards Act ("FLSA"). Synthesizing exceptions under the Portal-to-Portal Act with the "continuous workday" regulations promulgated by the Department of Labor, the Court, in *IBP, Inc. v. Alvarez*, reiterated that the workday for which a nonexempt employee must be compensated begins the moment an employee performs any task or activity that is "integral and indispensable" to a "principal activity" of that employee.

Applied to the specifics of the two consolidated cases decided by the Supreme Court, time spent walking to and from the production area after donning integral and indispensable protective gear, the time spent waiting to doff such gear, and the time actually spent doffing such gear all constituted compensable work under the FLSA. According to the Court, the performance of these tasks or activities are themselves "principal activities" that mark the beginning of or constitute part of the continuous workday:

[W]e hold that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under §4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.

#### THE PORTAL-TO-PORTAL ACT EXCEPTS PRELIMINARY AND POSTLIMINARY ACTIVITY FROM THE WORKDAY

The Fair Labor Standards Act requires the payment of minimum wages and overtime to nonexempt employees. One issue that frequently arises is what activity constitutes compensable work for the purposes of the FLSA. After a series of Supreme Court decisions broadly defining "work" under the FLSA, Congress passed the Portal-to-Portal Act of 1947, which helped to identify what is, or is not, compensable work.

The Portal-to-Portal Act excepts from the coverage of the FLSA two categories of activities performed before or after an employee's principal activities, unless such activities are integral and indispensable to those principal activities: (1) time spent by an employee "walking, riding, traveling to and from the actual place of performance of the principal activity or activities" of the employee's job; and (2) time spent by an employee on activities performed before or after the principal activities in a workday. Such activities are often called "preliminary" and "postliminary." Additionally, the Portal-to-Portal Act provides that some activities that might otherwise be work need not be compensated if the time spent on them is *de minimis*.

#### PER REGULATION, THE WORKDAY IS "WHISTLE TO WHISTLE"

Shortly after the Portal-to-Portal Act was enacted, the Department of Labor promulgated regulations defining a workday. Briefly stated, a workday consists

of all time between the start and finish of an employee's principal activities. In other words, the workday is continuous, extending from "whistle to whistle." The workday is, by definition then, not necessarily a worker's scheduled shift or hours. It can vary on any given day depending on when an employee begins or finishes his or her principal activities, even if those activities may be preliminary or postliminary to scheduled work periods.

### **THE SUPREME COURT RESOLVES A CIRCUIT SPLIT**

There is some tension between the Portal-to-Portal Act and the workday regulations, and that tension resulted in a split in the Circuit Courts of Appeal. The United States Court of Appeals for the Ninth Circuit confronted the issue in the context of a producer of meat-related products. In addition to standard safety equipment like hardhats, hairnets, earplugs and gloves, some of the employees wore special protective equipment, including chain link metal aprons and plexiglass armguards. The employer required that the equipment be stored in company locker rooms, where the gear was typically donned. It paid employees from the first piece of meat handled to the last, as well as four minutes of clothes-changing time. The Ninth Circuit held that the donning and doffing of special protective equipment were principal activities for which the employees should be compensated. Moreover, the Ninth Circuit determined that time spent walking to the production area after donning the protective gear and time spent walking to the locker room to doff the protective gear was compensable work.

The United States Court of Appeals for the First Circuit confronted a similar issue. The employer operated a poultry processing plant. Employees were required to don and doff mandatory safety gear before and after their shifts. However, the employer only paid employees by the hour from the time they punched in to the time they punched out. They were not compensated for time spent walking to work stations after donning protective gear, nor were they compensated for time spent walking from work stations to changing areas. The First Circuit concluded that such walking time was a

noncompensable preliminary/postliminary activity. It also decided that the employees were not entitled to compensation for time spent waiting to change into and out of protective gear.

In its two-part decision, the Supreme Court resolved the Circuit split. Specifically, the Court was asked to determine: (1) whether walking time by employees both after donning and prior to doffing unique protective gear was compensable time and (2) whether time spent waiting to don and doff such gear was compensable time.

### **IS POST-DOFFING AND PRE-DONNING WALKING COMPENSABLE TIME?**

Underpinning the Court's decision was its agreement with the decisions below that the donning and doffing of unique protective gear was compensable work because these activities were integral and indispensable to the work of the employees who wore the equipment. In other words, they were principal activities under the Portal-to-Portal Act. None of the litigants disputed this point.

The primary question addressed by the Court was whether time spent walking between the changing area and the production area is compensable time under the FLSA. The unanimous Court, relying on prior precedent from the 1950s, the specific language of the Portal-to-Portal Act, and the workday regulations, had little trouble deciding that walking time was compensable under the FLSA and not excepted by the Portal-to-Portal Act.

Thus, an employee's workday started when putting on the protective equipment and ended when taking off the protective equipment. Time spent walking from and to the locker room after the workday started and before it ended was compensable work under the FLSA. The Court did confirm, however, that walking to the locker room before donning the protective gear and walking from the locker room after doffing the protective gear was preliminary/postliminary work excluded from the coverage of the FLSA by the Portal-to-Portal Act.

In short, an employee's compensable workday begins the moment he or she dons unique, integral, and

indispensable gear or when he or she performs an integral and indispensable task or activity associated with his or her employment. Any walking time, waiting time, or other time spent by the employee after that donning or performance is compensable time under the FLSA.

### **IS PRE-DOFFING AND PRE-DONNING WAITING COMPENSABLE TIME?**

With respect to waiting time, the Supreme Court concluded that time spent waiting to take off special protective gear was a compensable part of the workday. “Because doffing gear that is ‘integral and indispensable’ to employees’ work is a ‘principal activity’ under the statute, the continuous workday rule mandates that time spent waiting to doff is not affected by the Portal-to-Portal Act and is instead covered by the FLSA.”

However, the Court ruled that time spent waiting to don gear, even if that gear is unique, integral, and indispensable, does not count as compensable time under the FLSA. Unless the employer required its employees to report at a particular time, and because of that mandate the employees had to wait to don their gear, the Court said such waiting time “always comfortably qualify[ies] as a ‘preliminary’ activity,” something excluded from compensable time under the FLSA.

To summarize, an employee’s compensable workday begins the moment he or she dons unique, integral, and indispensable gear or when he or she performs an integral and indispensable task or activity associated with his or her employment. Any walking time, waiting time, or other time spent by the employee after that donning or performance, and before the last compensable activity of the day, is compensable time under the FLSA. The Portal-to-Portal Act still operates to exclude certain time as compensable work, but not when the employee begins his or her principal activity.

### **IMPLICATIONS FOR EMPLOYERS**

Read as a whole, the Supreme Court, by its decision in *IBP, Inc.*, has clarified the compensable workday for employees. While that clarification may put some employers at ease, the decision also places several burdens on the employers, not the least of which is payment for additional compensable time. However, a perhaps larger initial burden being placed on employers is the task of reviewing its work flow, position requirements, and employee customs to determine when each employee’s workday actually begins.

It may not be enough to rely on the standard 9-5 schedule or punch times from a time clock when adding up hours of work. Under the newly clarified regimen, the moment an employee dons his or her first piece of unique, integral, and indispensable gear or the moment an employee performs his or her first unique, integral, and indispensable task or activity, that employee’s workday has begun and the employer’s responsibility to pay that employee also has begun. Further, once begun, that employee’s workday and that employer’s payment responsibility do not end until the last piece of unique, integral, and indispensable gear is doffed or the last unique, integral, and indispensable task or activity has been completed. The Supreme Court’s decision, while specific to the donning and doffing of protective gear, would most likely apply to other activities such as the gathering of work tools or equipment, the cleaning of work stations or equipment, and so forth.

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