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November 2005

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United States Supreme Court Holds that "WalkingTime" Can Be "Integral and Indispensible" to a "Principal Activity" and Compensable Under the FLSA

By Leslie Abbott and Kirby Wilcox

On November 8, 2005, the Supreme Court issued a unanimous opinion holding that, under the federal Fair Labor Standards Act ("FLSA"), as amended by the Portal-to-Portal Act, "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity'" for which non-exempt employees must be compensated. *IBP, Inc. v. Alvarez,* No. 03-1238 (U.S. Nov. 8, 2005) (slip op.). According to the Court, an employee's compensable workday commences when the employee begins engaging in a principal activity, and the workday is completed when the employee finishes engaging in a principal activity.

Based on this "continuous workday rule," 29 C.F.R. § 790.6(b), and IBP's failure to challenge the lower court's holding that donning and doffing (i.e., putting on and taking off) of unique or elaborate protective gear are "principal activities," the Court concluded:

- Time that an employee spends *walking* between a clothes changing area and the employee's work station is compensable because it occurs after the principal activity of donning unique or elaborate protective gear that commences the workday and before the principal activity of doffing such gear that ends the workday.

- Time that an employee spends *waiting* to don unique or elaborate protective gear is not compensable because it occurs prior to the principal activity of donning that commences the workday. In contrast, time that an employee spends waiting to doff such clothing is compensable because it occurs before the principal activity of doffing that completes the workday.

BACKGROUND

Under the Portal-to-Portal Act, "activities which are preliminary to or postliminary to [the principal activity or activities that such employee is employed to perform]" are not compensable. However, if the preliminary/postliminary activity is an "integral and indispensable part" of a principal work activity, it is compensable.

In *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956), employees in a battery plant were required to work with dangerously caustic and toxic materials and were compelled by vital considerations of health and safety to spend time donning and doffing specialized protective gear at the beginning and end of their shifts. The Court held that under such circumstances, the time spent donning and doffing the specialized protective gear was compensable because it was an integral and indispensable part of the principal activities for which the workers were employed. *Id.* at 256. In contrast, "changing clothes and showering under normal conditions" is not compensable under the Portal-to-Portal Act because it is merely a "preliminary" or "postliminary" activity rather than a principal part of the activity. *Id.* at 249.

IBP did not ask the Supreme Court to overrule *Steiner*.

THE SUPREME COURT'S DECISION IN IBP V. ALVAREZ

Forty-seven years after *Steiner*, the Ninth Circuit and the First Circuit, respectively, considered the compensability of two issues related to the donning and doffing of unique protective clothing: walking time between a clothes changing area and an employee's work station, and waiting time before the donning or doffing occurs. In *Alvarez v. IBP,* Inc., 339 F.3d 894 (9th Cir. 2003), the Ninth Circuit affirmed the trial court's conclusion that plaintiff meat packing employees must be compensated not only for the time they spent donning and doffing certain burdensome and elaborate protective gear, a holding that IBP elected not to contest on appeal, but also for the time the employees spent walking between the donning and doffing changing area and the production area. In *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), the First Circuit reached the opposite conclusion on the compensability of such walking time, and also held that time an employee spends waiting to don or doff protective gear is not compensable. The United States Supreme Court consolidated the two cases and granted certiorari to resolve these issues.

The Supreme Court agreed with the Ninth Circuit. The Court held that when the donning and doffing are so integral and indispensable to the employee's principal activity that they are themselves principal activities, then the time an employee spends walking between the clothes changing area and the work production area is compensable. The Court reached this conclusion by finding that under these circumstances, the "place of performance" of an employee's principal activity that commences and completes the workday is the clothes chang-

ing area where the principal activity of donning and doffing takes place, not the production area. Therefore, because the employee's continuous workday starts and stops in the clothes changing area, the time the employee spends walking between the changing area and the production area is compensable.

Applying these same rules to waiting time, the Court held that pre-*donning* waiting time is not compensable but pre-*doffing* waiting time is compensable. The Court reasoned that doffing protective gear which is "integral and indispensable" to an employee's principal activity marks the outer limits of an employee's workday for which compensation is due. In contrast, the time an employee spends waiting to don the specialized gear, *before* the principal activity of actually putting the clothing on begins, is a noncompensable "preliminary" activity under the Portal-to-Portal Act.

Because IBP did not challenge the Ninth Circuit's holding regarding the compensability of donning and doffing time, the Supreme Court did not specifically rule on the types of gear or clothing that are integral and indispensable to an employee's principal activity. Nonetheless, the Court repeatedly contrasted "nonunique" or "ordinary" gear with "burdensome," "elaborate," "specialized" and "unique" gear. Further, in dicta, the Court agreed with the Ninth Circuit that no recovery should be allowed for time spent on "ordinary clothes changing and washing, or for the 'donning and doffing of hardhats, ear plugs, safety glasses, boots [or] hairnet[s],'" as compared to "the burdensome donning and doffing of elaborate protective gear" such as the chain link metal aprons, vests, plexiglass armguards and special gloves worn by certain of the meat processing employees who were entitled to compensation. Notably, however, the Supreme Court commented that the Ninth Circuit reached this result "not because donning and doffing nonunique gear are categorically excluded from being 'principal activities' as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique gear was '*de minimus* as a matter of law.'"

RECOMMENDATIONS FOR EMPLOYERS

Employers should review the time that it takes to don and doff the clothing or other gear they require employees to wear in light of the Supreme Court's holding in *IBP v. Alvarez*. If the clothing or other gear appears burdensome or unique and takes more than a *de minimus* amount of time to don or doff, then employers should carefully consider whether the circumstances warrant compensation for the time non-exempt employees spend donning and doffing the gear as well as the walking time and pre-doffing waiting time associated with such activities.

Employers that provide such compensation should affirm that their policies require affected employees to "clock in" as soon as they begin donning the burdensome or unique gear and to "clock out" immediately after doffing the gear.

Note that the Supreme Court's decision does not change the principle that time spent by employees donning and doffing required work uniforms while at home is not compensable "work" time under federal law. *See* Department of Labor Wage and Hour Division's Field Operations Handbook at Section 31b13 ("Changing clothes at home. Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time."). Thus, where the gear is nonunique or not so elaborate as to preclude donning and doffing at home, employers should require employees to change at home, and periodically monitor compliance.

Finally, the Supreme Court had no need to address section 203(o) of the FLSA, 29 U.S.C. § 203(o), which provides that "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee" may be excluded from the calculation of hours worked. Employers whose organized employees wear uniforms and protective clothing that takes more than a *de minimis* amount of time to don and doff should consult counsel regarding the implications of the Supreme Court's holding for such employees.

If you have any questions regarding this alert, please contact:

Atlanta: Weyman T. Johnson (404) 815-2209
weymanjohnson@paulhastings.com

Los Angeles: Leslie Abbott (213) 683-6310
leslieabbott@paulhastings.com

New York: Allan S. Bloom (212) 318-6377
allanbloom@paulhastings.com

Orange County: Stephen L. Berry (714) 668-6246
stephenberry@paulhastings.com

Palo Alto: Bradford K. Newman (650) 320-1827
bradnewman@paulhastings.com

San Diego: Mary Dollarhide (858) 720-2660
marydollarhide@paulhastings.com

San Francisco: Kirby Wilcox (415) 856-7002
kirbywilcox@paulhastings.com

Stamford: Patrick W. Shea (203) 961-7403
patrickshea@paulhastings.com