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U.S. Supreme Court clarifies that employers must compensate employees for time spent between donning or doffing unique protective gear and their arrival or departure from the work floor.

To Pay or Not to Pay: Supreme Court Holds that Time Spent Traveling to and from Work Areas to "Don and Doff" Protective Gear Is Compensable

By Maria Perugini Baechli and Gary D. Shapiro

In a recent consolidated opinion, *IBP, Inc., v. Alvarez,* No. 03-1238, and *Tum v. Barber Foods, Inc.,* No. 04-66 (Nov. 8, 2005), a unanimous U.S. Supreme Court held that employees must be compensated under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act of 1947, for time spent walking from their employer's locker room to the work floor after "donning," or putting on, unique protective gear, as well as time spent waiting to "doff," or take off, unique protective gear. The Court also held that time spent waiting to don protective gear is excluded from FLSA coverage by the Portal-to-Portal Act, and that employers are not required to compensate employees for that waiting time.

Do We Really Have to Pay You for That?

At IBP, Inc., a large producer of fresh meat products in Washington state, all production workers were required to wear outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings and boots. Many of them, particularly those who used knives, also had to wear a variety of protective equipment for their hands, arms, torsos and legs. This gear included chain link metal aprons, vests, plexiglass armguards, and special gloves. The company required its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear.

Under IBP policy, production employees were compensated only from the time they cut and bagged their first piece of meat of the day until the time they cut and bagged their last piece of meat of the day. IBP also paid production employees for four minutes of clothes-changing time. IBP employees filed a collective action under the FLSA to recover compensation for pre-production and post-production work, including the time spent donning and doffing protective gear and walking between the locker rooms and production floor before and after their assigned shifts. Similarly, Barber Foods, Inc., a poultry processor in Maine, required production employees to wear different combinations of protective clothing. Under Barber Foods' policy, the official workday for production employees started from the time they punched in at computerized time clocks near the production floor entrance. Barber employees and former employees brought an action claiming that Barber's failure to compensate them for time spent donning and doffing the required protective gear and the attendant walking and waiting time violated the FLSA.

Why Can't We All Agree? Differences in Reasoning Lead to a Circuit Split

In *IBP*, the U.S. District Court for the Eastern District of Washington held that only the employees required to don and doff "unique" protective gear should be compensated for time spent donning and doffing because the time these employees spent changing was integral and indispensable to their work. Moreover, consistent with the continuous workday rule, the district court concluded that employees required to don and doff unique protective gear should also be compensated for walking time between the locker room and production floor because it occurred during the workday. The court did not, however, allow any recovery for ordinary clothes changing and washing, or for the donning and doffing of hard hats, ear plugs,

safety glasses, boots or hairnets. In pertinent part, the Ninth Circuit Court of Appeal affirmed the district court, but on different grounds. The Ninth Circuit noted that the question of whether an activity is "an integral and indispensable part of the principal activities" is "context specific." The Ninth Circuit endorsed the distinction between the burdensome donning and doffing of elaborate protective gear, and the time spent donning and doffing non-unique gear, such as hard hats and safety goggles.

In *Barber Foods,* the U.S. District Court for Maine held that the donning and doffing of clothing and equipment required by the company or by government regulation was compensable, because it was an integral part of the employee's work. The district court also held that any time spent waiting to change into or out of such clothing or equipment was not compensable. The First Circuit Court of Appeals subsequently affirmed the district court, holding that walking time before donning and after doffing, as well as waiting time associated with donning and doffing, were excluded from coverage of the FLSA.

Portal-to-Portal Act at Issue

Congress originally enacted the Portal-to-Portal Act, a significant amendment to the FLSA, in response to a controversial U.S. Supreme Court decision. The Portal-to-Portal Act defines the "workday" and makes certain "preliminary or postliminary" work non-compensable. The U.S. Supreme Court's decision in *IBP* and *Barber Foods* turned upon the Court's interpretation of Sections 4(a)(1) and (2) of the Portal-to-Portal Act.

The Portal-to-Portal Act excludes certain activities from the coverage of the FLSA. In particular, Section 4(a)(2) excludes "[a]ctivities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Barber Foods argued that the waiting time associated with both donning and doffing of protective gear was "preliminary or postliminary activity," and therefore not compensable under the FLSA.

U.S. Department of Labor regulations implementing the Portal-to-Portal Act affirm the FLSA's definition of a "workday" as "the period between the commencement and completion" of the "principal activity or activities." In *Steiner v. Mitchell*, 350 U.S. 247, 256 (1955), the Supreme Court held that "the term 'principal activity or activities'. . . embraces all activities which are 'an integral and indispensable part of the principal activities,'" including the donning and doffing of protective clothing "before or after the regular work shift, on or off of the production line." IBP argued in its case before the Supreme Court, that although the donning and doffing of protective gear was "sufficiently principal" to be compensable, those actions did not qualify as a "principal activity." Therefore, IBP argued, employees should not be paid for the post-don and pre-doff walking time.

A Unanimous Court Decision

The U.S. Supreme Court held, in a unanimous decision, that time spent walking to or from the work floor after donning or before doffing unique gear was compensable because the donning and doffing was "sufficiently principal." The Court stated that IBP's employee locker rooms, where the special gear was donned and doffed, were the relevant "places of performance" of the principal activity. Importantly, the U.S. Supreme Court determined that the walking in *IBP* was fundamentally different from walking to a place of performance *before* starting work — an act expressly excluded from FLSA coverage by the Portal-to Portal Act. Instead, the Court analogized the facts of *IBP* to time spent walking between two different positions on an assembly line, which is compensable under the Act. Ultimately, the Court held that any activity that is "integral and indispensable" to a "principal activity," like donning and doffing unique protective gear, is itself a "principal activity" under Section 4(a) of the Portal-to-Portal Act. Moreover, the Court held that, 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 compensable under the FLSA.

A unanimous U.S. Supreme Court also ruled against Barber Foods, holding that because doffing required gear that is "integral and indispensable" to an employee's work is a "principal activity," time spent waiting to doff is also compensable. However, time spent waiting to don protective gear was deemed not "integral and indispensable," but rather "preliminary." Therefore, the Court held that time spent waiting to don protective gear was not compensable under the FLSA.

Analyzing an Employee's Workday

In the past, many employers dismissed the notion that employees should be paid for time spent donning and doffing, presuming that the time devoted to changing was unproductive, preliminary or postliminary, and therefore non-compensable under the FLSA. However, as a result of the U.S. Supreme Court's resolution of the broad issue of what activities are properly included in a workday, employers in the production sector must now carefully reconsider their company's compensation practices. Because the donning and doffing of "unique" gear is what starts and stops the clock on the workday, employers should re-assess whether the gear their employees are required to wear may be considered "unique" in light of recent U.S. Supreme Court guidance. If the gear is, in fact, "unique," employers must compensate their employees for time spent changing into and out of the gear, as well as time spent waiting to doff the gear and walking from the changing area to the work site.

Although the liability to individual employees for misclassifying walking time may not be substantial enough to create a financial crisis, the collective amount owed to a large group of employees, particularly when calculated over the weeks and months of non-compliance, may create a significant negative impact on the employer's bottom line. Because of the anticipated increase in collective action lawsuits in this area, employers should consult with counsel to determine whether their compensation practices are compliant with the FLSA and the IBP decision.

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