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## “These Boots are made for Walkin’...”. U.S. Supreme Court Holds That Time Spent Walking to Work Station After Putting on Protective Clothing is Compensable

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In a unanimous decision in two consolidated cases, *Alvarez v. IBP, Inc.* and *Tum v. Barber Foods*, the United State Supreme Court held, on November 8, 2005, that where workers have to don and doff protective gear in order to do their work, the time that they have to spend walking from the changing room to their work stations is compensable work time under the federal Fair Labor Standards Act (FLSA), 29 U.S. Code §201, et seq.

Both cases involved food processing facilities in which the employees had to wear a variety of what the Court described as “elaborate” and “unique” safety gear, such as cut-proof gloves and arm guards. The Supreme Court noted that it was *not* deciding the issue of whether the time spent by the workers changing into and out of such special protective clothing was compensable. Lower courts, following a 1955 U.S. Supreme Court case (*Steiner v. Mitchell*), had already decided that donning and doffing of unique protective gear was compensable time under the FLSA because it was “integral and indispensable to the employees’ work.”

The issue before the Supreme Court in the *IBP* and *Barber Foods* cases involved the compensability of time employees spent walking to their work stations after donning protective gear. The Portal-to-Portal Act, a 1947 amendment to the FLSA, among other things, excludes from compensable worktime two types of activities: walking on the employer’s premises to and from the actual place of performance of the “principal activity” of the employee, and activities that are “preliminary or postliminary” to that “principal activity.” The Portal-to-Portal Act was clearly intended to exclude from compensable worktime any time that could be characterized as commuting time to or from an employee’s home to the worksite. On the other hand, it provides that travel that is from one worksite to another worksite within the workday is considered “all in a day’s work” and is compensable time under the FLSA (the “continuous workday rule”).

The Supreme Court reasoned that because the time spent donning and doffing unique protective gear was a “principal activity,” time for donning/doffing started and ended the



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employees' workday. Thus, under the "continuous workday rule," the time the employees spent walking from the locker room to the employees' workstations at the beginning of the shift, and back again at the end of the day, was travel "all in a day's work" and therefore compensable time under the FLSA.

The Supreme Court also addressed when time spent waiting to obtain special protective gear is compensable. The Court held that it is not compensable time if it is done before any "principal activity" performed during the day and is so removed from the production process that it is not "integral and indispensable" to a "principal activity." However, if an employee is required to report for work at a particular time and reports, ready and willing to work, but cannot start work because required protective gear is not available until after some time has elapsed, the waiting time "would be an integral part of the employee's principal activities" and therefore compensable under a Department of Labor regulation (29 CFR §790.7(h)).

### What Will Happen Next?

On first impression, it may seem simple, and common sense, that if changing time is compensable, the time to travel from the changing room to the work station should also be compensable. However, there are a number of complexities here.

As an example, the determination of when donning and doffing becomes an "integral and indispensable" part of the principal activities and thus starts and stops the work day -- as opposed to *de minimis* time to put on hard hats, ear plugs or safety goggles -- is *context specific* and thus subject to interpretation.

Even less clear is how this decision will affect other employment situations. For example, if an employee (such as a traveling technician or an insurance claims adjuster) does not have a fixed office, but has to call in or log in to a computer at home at the start of the workday in order to obtain assignments for the day and then travel to the worksite, is his or her travel from home to the first worksite compensable travel "all in a day's work" or an ordinary non-compensable commute? Should it make a difference if it's a five-minute walk or a ten-mile drive? What about a fifty-mile drive? If that worker injures someone on the road on the way to that first worksite of the day, is the company liable because the worker was traveling on company time and within the course and scope of employment, or is the company not liable because the travel was an ordinary commute?

Employers with operations in states that have their own wage and hour laws should also note that the *IBP* and *Barber Foods* decision is *not* the final word on the compensability of in-plant walking and other travel time. The FLSA specifically provides that states can have wage and hour laws with stricter standards than federal law. In California, for example, the state Industrial Welfare Commission (IWC) Orders have a broader definition of "hours worked" than does the FLSA, in that "time during which an employee is subject to the control of the employer" is counted as hours worked, in addition to "time the employee is suffered or permitted to work." Thus, in *Morillion v. Royal Packing Co.* (1998), the California Supreme Court held that where farmworkers were required to report to a certain site to wait

for a bus to take them to the fields, and could not go to the fields in any other manner, their time spent waiting for and traveling on the bus was compensable worktime under the California IWC Orders. Under the *Morillion* case, even a short wait for required protective gear to be distributed could be considered to be compensable worktime under California law.

### What Should Employers Do Now?

- If employees spend any time changing clothes or donning and doffing protective gear to perform their duties, employers should evaluate whether that changing time is integral and indispensable to the employee's work. As a cautionary note, it is hard to even argue that donning required safety equipment is not integral and indispensable unless the time involved is *de minimis*.
- If employees must wait to obtain special gear, employers should also evaluate whether that time is compensable.
- All employers must be vigilant regarding the "continuous workday" rule. If employees commence a principal activity, subsequent activities which would otherwise be considered non-compensable preliminary or postliminary activities can be held to be part of the employee's workday – and compensable time.

For more information regarding this issue or other employment law issues, please contact Marjorie Fochtman at (415) 984-8443, or your Nixon Peabody Labor and Employment attorney.

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