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Client Alert

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Supreme Court Holds Walking Time Associated With Donning and Doffing of Protective Gear Is Compensable Under FLSA

On November 8th, the United States Supreme Court in *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, Nos. 03-1238 and 04-66, held that time spent by employees walking between required protective gear changing areas and the production line was compensable work time under the FLSA. The Court also held that time spent waiting to remove that gear at the end of the workday was compensable, but that time spent waiting to receive gear before the work shift began was not compensable work time.

Background

The Supreme Court granted certiorari in these consolidated cases to resolve a conflict between the First and Ninth Circuits over the compensability of time spent by food processing employees walking to and from required protective gear changing areas before and after reporting to the production line. The Court also considered the compensability of waiting time associated with the donning and doffing of protective gear.

In *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), employees at a meat processing plant in Pasco, Washington brought an action under the FLSA and the Washington Minimum Wage Act. The Ninth Circuit held that time walking to and from protective gear changing areas was compensable under the FLSA, reasoning that an employee should be compensated for all employment activities occurring in the course of the workday, commencing with the donning of protective gear.

In *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), a group of current and former employees at a poultry processing company in Portland, Maine claimed that Barber Foods violated the FLSA by failing to compensate them for time related to donning and doffing required protective gear. The First Circuit held that while the time spent donning and doffing the gear was itself compensable, time spent by employees walking to and from, and waiting at, gear distribution stations was not compensable work time. The First Circuit reasoned that this travel time was excluded from FLSA coverage by the Portal-to-Portal Act.

The Portal-to-Portal Act

The FLSA generally requires employers to compensate employees for all time spent performing "work." However, § 4(a) of the Portal-to-Portal Act exempts from this requirement

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities 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.

Reasoning

The Supreme Court affirmed the Ninth Circuit's holding in *IBP*, and affirmed in part and reversed in part the First Circuit's judgment in *Tum*. Writing for a unanimous court, Justice Stevens explained 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 . . . covered by the FLSA."

IBP did not challenge the lower court's holding that the donning and doffing of unique protective gear were compensable as "integral and indispensable" to the employees' "principal activities." Instead, IBP argued that walking time associated with such donning and doffing was specifically excluded under § 4(a)(1) of the Portal-to-Portal Act.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court had held that activities that are "an integral and indispensable part of the principal activities" of the employee do not fall within the Portal-to-Portal Act exceptions and must be compensated. IBP argued that, while "integral and indispensable activities," including donning and doffing of required protective gear, could be compensable under *Steiner*, they were not the same as "principal activities" for the purposes of § 4(a)(1).

The Court rejected IBP's theory, reasoning that IBP's interpretation would "create an intermediate category of activities that would be sufficiently 'principal' to be compensable, but not sufficiently principal to commence the workday." Instead, the Court held 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." The Court also relied on the "continuous workday rule" in the Department of Labor's regulations, defining the workday as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b) (2005).

In addition, the Court held that time spent waiting to doff protective gear at the end of the workday was compensable, because it was part of the continuous workday. However, the Court held that time spent waiting to don the first piece of protective gear was not compensable, reasoning that waiting time was not "integral and indispensable," and was excluded from FLSA coverage by § 4(a)(2). The Court cautioned, however, that its "analysis would be different if [the employer] required its employees to arrive at a particular time in order to begin waiting."

Significance

The total amount of walking time in the IBP plant for both post-donning and pre-doffing was 3.3 to 4.4 minutes per day, which was less than actual donning and doffing time. Therefore, it is only when this time is added up week after week, year after year, that the financial impact of the decision will become substantial.

The real significance of this decision is simply the fact that these two cases worked their way through the federal court system and were eventually decided by the Supreme Court. That fact is a direct result of the statutory scheme under the FLSA that allows successful plaintiffs to recover attorney's fees for taking cases to the Supreme Court over a three to four minute dispute. While these cases have clarified the law and resolved a split in the Circuit Courts of Appeals, which is good for all concerned, the publicity of the ruling also sends a message to plaintiffs' lawyers that suing Corporate America can be a lucrative business even when the alleged violation is de minimis on its face. That message should also serve as a warning to employers that they are vulnerable to FLSA collective and state law class actions for minor infractions that carry major attorney fee penalties.

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