

U.S. SUPREME COURT RULES EMPLOYEES MUST BE PAID FOR SOME WALKING AND WAITING TIME IN CONNECTION WITH PUTTING ON AND TAKING OFF PROTECTIVE GEAR

On November 8, 2005, the U.S. Supreme Court issued a unanimous decision in two consolidated overtime pay class action lawsuits, *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.* The Court ruled employers must pay employees who walk from and to changing areas at the beginning and end of their shift and “don and doff” (*i.e.*, put on and take off) protective clothing and equipment needed for their jobs. The Court further ruled that the time employees spent waiting to take off gear at the end of their shift was compensable, but time spent waiting to receive and put on gear at the beginning of a shift was not compensable.

The Fair Labor Standards Act and Portal-to-Portal Act

The Court's ruling resolved conflicting decisions from the First and Ninth Circuit Courts of Appeal and clarified potentially conflicting language in two federal statutes:

- The 1938 Fair Labor Standards Act (FLSA), which requires employers to pay employees for all hours worked, and
- The 1947 Portal-to-Portal Act (PPA), which amended the FLSA by excluding from compensation time spent (1) “walking, riding, or traveling to and from the actual place of performance of the [employee’s] principal activity,” and (2) activities that are “preliminary to or postliminary to [*i.e.*, prior to and after] said principal activity.”

In a 1956 case, *Steiner v. Mitchell*, the Court analyzed the FLSA and PPA and concluded that donning and doffing safety gear at the beginning and end of an employee's shift can constitute a compensable “principal activity”—as opposed to a noncompensable “preliminary and postliminary activity.” The Court explained that “the term ‘principal activity’ ... embraces all activities which are an ‘integral and indispensable part of the principal activities’” even if they are performed “before and after the regular work shift.”

Circuit Split

Turning to *IBP* and *Barber Foods*, both employers operated meat-processing plants and required employees to wear protective gear while working. The gear included sanitary outer garments, hardhats, hairnets, ear plugs, gloves, and boots. Some employees also had to put on chain-link metal aprons, vests, plexiglass armguards, and special gloves to perform their jobs safely.

In both cases, the district courts had decided that the time employees spent donning and doffing gear before and after their shifts was compensable because it was integral and indispensable to their principal activity. The employers did not appeal that aspect of the lower court rulings.

In the *IBP* case, the Ninth Circuit agreed with the employees that if donning and doffing were integral and indispensable to their principal activity, walking from their locker rooms to

the production floor and back was also integral and indispensable to their principal activity—and was therefore compensable.

The total amount of walking time at issue in the case was 3.3 to 4.4 minutes per day. But the case was brought on behalf of almost 1,000 employees seeking liquidated (*i.e.*, double) damages for a three-year period, plus attorney's fees. Accordingly, the district court had entered judgment for the IBP employees of \$3.1 million.

In the *Barber Foods* case, however, the First Circuit agreed with the employer that the time spent walking to and from the production floor after donning and before doffing was preliminary and postliminary and therefore not compensable. The First Circuit also concluded that waiting time related to donning and doffing was preliminary and postliminary.

Walking Time

In the consolidated case, the Supreme Court sided with the employees on the walking time issue. It found, based on *Steiner*, that “the locker rooms where the specialty safety gear is donned and doffed are the relevant ‘place of performance’ of the principal activity that the employee was employed to perform.” Thus, “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 [the PPA], and as a result is covered by the FLSA” and is therefore compensable.

Waiting Time

The Court applied the same analysis to time spent waiting to take off gear at the end of a shift, concluding the time was compensable. The Court explained: “Because doffing gear that is ‘integral and indispensable’ to employees’ work is a ‘principal activity,’ ... the continuous workday rule mandates that time spent waiting to doff is not affected by the [PPA] and is instead covered by the FLSA.”

However, the Court reasoned that time spent waiting to receive and put on gear at the *beginning* of a shift was not compensable under the PPA because it was too far removed from the employees’ principal activity. The Court stated that time spent “waiting to don” was more like the time employees spend “waiting to check in [to work] or waiting to receive their paychecks,” which are generally considered “preliminary” activities. But the Court cautioned that its “analysis would be different if Barber [Foods] required its employees to arrive at a particular time in order to begin waiting.”

Practical Impact

After *IBP/Barber Foods*, the compensability of time employees spend performing pre-start and post-quitting time activities will depend on the nature of the activity and whether it occurs before or after the employee engages in his or her first “principal activity” of the day. Employers should review their pay practices, as well as the location of locker rooms in relation to time clocks and production areas, to make sure they are appropriately calculating and paying employees for all compensable time.

The new ruling also serves as a reminder to employers that under the FLSA, employees may recover significant sums in wages, penalties, and attorney’s fees over disputes involving only a few minutes each day.

NORTH CAROLINA ALERT: WAGE & HOUR ACT AMENDED

Several changes to the wage payment provisions of the North Carolina Wage and Hour Act went into effect on October 1, 2005, including the following:

- Employers are required to provide employees at least 24 hours notice prior to making changes in promised wages.
- Employers may make deductions from wages if an employee has been charged, indicted, or arrested for damaging company property or illegally causing inventory or cash shortages; if the employee is found not guilty of the charges, the employer must repay the amounts deducted.
- Employers may deduct from paychecks advances of wages and principal amounts of employer-provided loans.

While these changes are helpful, employers should continue to be cautious about making deductions from employee wages and also consider FLSA implications.

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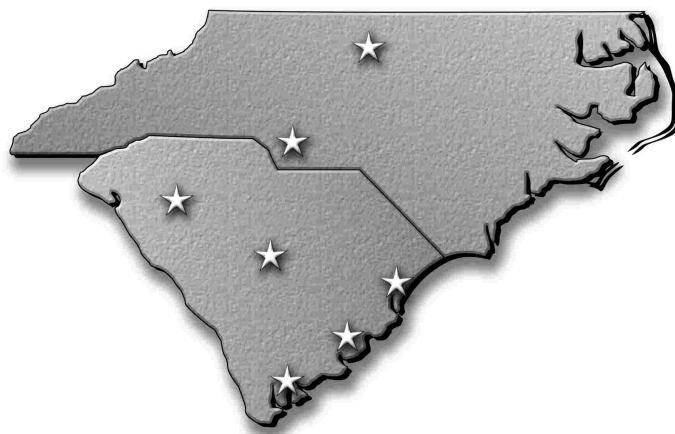
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