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Will the Supreme Court Make a Decision About Compensable Work?

Tyson Foods has petitioned the Court to resolve the fundamental question of whether compensable work must entail exertion

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An increasing number of wage and hour lawsuits raise the issue of what constitutes "compensable time" under the Fair Labor Standards Act, as employees seek pay for uncompensated work-related activities such as donning and doffing different kinds of safety or protective clothing, waiting to go through security and walking to work stations. The compensation at issue in these cases can add up quickly and be costly for employers.

Tyson Foods Inc. has recently petitioned the Supreme Court to resolve the fundamental question of whether compensable work must entail exertion. The dispute arose over Tyson's requirement that employees wear gear such as hairnets, earplugs and safety goggles, which they must don, doff and sanitize before and after each shift, and two unpaid meal breaks, taking employees more than 13 minutes per day. A group of over 540 Tyson employees at two poultry processing plants filed suit, alleging that time spent donning, doffing and sanitizing protective clothing should be compensable.

The case was tried, and a jury found in Tyson's favor. The employees appealed, and the 3rd Circuit reversed. The appeals court held that the activities in question were integral to the work performed and, therefore, must be compensated. *De Asencio et al. v. Tyson Foods Inc.*, 500 F.3d 361 (3d Cir. 2007).

The court held that the jury was incorrectly instructed that compensable "work" required some exertion or "cumbersome" activity. Instead, the court said the essential question was whether the activity was "integral and indispensable" to the principal activities for which the employees were hired. Focusing on the fact that Tyson required and controlled the activities, on its premises, for its own benefit, the court concluded that the activities were integral to the operation of the poultry plant.

The court also ordered the trial court to determine whether the employees' activities at issue were not compensable because they were de minimis, by considering

1. The practical administrative difficulty of recording the additional time;
2. The aggregate amount of compensable time; and
3. The regularity of the additional work.

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Questions about what employee activities are compensable under the FLSA are not new. The Portal-to-Portal Act of 1947 provided that travel time "to or from the place of performance of the principal activity" and "activities which are preliminary or postliminary to such principal activity" are not compensable.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court determined that, despite this language, the FLSA required compensation for any activities that are "integral and indispensable" to the principal work. In *Steiner*, the Court held that the time employees at a battery plant spent changing clothes and showering, which was required by the employer to protect employees from hazardous materials, must be compensated.

In 2005, the Supreme Court in *IBP Inc. v. Alvarez*, 546 U.S. 21 (2005), was asked to decide whether the time meatpacking plant employees spent walking to and from their work stations after donning and before doffing protective clothing was compensable. Assuming the donning and doffing time was compensable under

Steiner, which IBP did not contest, the Court held that the walking time was compensable because the compensable donning and doffing activities began the continuous work day. IBP did not, however, have to compensate employees for time spent waiting in line to receive the protective gear, because the Court viewed this as preliminary to the principal job activities.

While many hoped *Alvarez* would reduce questions about what constitutes compensable "work" under the FLSA, it appears to have only created further uncertainty, as other recent cases demonstrate.

In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), the 2nd Circuit held that nuclear power plant employees were not entitled to compensation for the approximately 10 to 30 minutes per day spent passing through layers of security and donning and doffing protective glasses, boots and helmets. In applying *Alvarez*, the court distinguished between whether the activities in question were "integral" as opposed to "indispensable" to the jobs and held that even though donning, doffing and security time may be "indispensable" or "necessary" to the jobs, they were not "integral" to the employees' principal activities. The court equated the security-related activities to a modern version of noncompensable "travel time." The court then held that, while employees were required by the employer or government regulation to don and doff protective gear, this did not render the tasks "integral" because they were "relatively effortless" and "preliminary." The court distinguished *Steiner* as being limited to "workplace dangers that transcend ordinary risks," where work was done in a lethal atmosphere and the workplace could not exist without the protective equipment. The *Gorman* court's focus on the type of protective gear involved and the danger from which it is meant to protect has been subject to criticism.

In *Spoerle et al. v. Kraft Foods Global Inc.*, Case No. 07-00300, 2007 U.S. Dist. LEXIS 95307 (W.D. Wisc., Dec. 31, 2007), employees at a Kraft/Oscar Meyer meat-processing plant sought compensation for donning and doffing steel-toed boots, hard hats, earplugs, hair- and beardnets, slickers and safety glasses. Denying Kraft's summary judgment motion, the court stated that it had "little doubt" that donning and doffing protective gear was compensable. The court rejected Kraft's reliance on Gorman, characterizing Gorman as "truly bizarre" because it "appears that the court is saying that unless the activity is necessary to prevent the employee from actually dying, it is not 'integral' to a principal activity."

Meanwhile, the 11th Circuit held in *Bonilla et al. v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), that the time employees spent at a security checkpoint and on employer-provided transportation from a remote parking lot is not compensable. In Bonilla, construction employees at the Miami International Airport were required to park several miles from their job site, ride employer-provided transportation and pass through a security checkpoint. The court determined that the travel and security time were not "integral and indispensable" to the principal work activities. The court also observed that the FAA (not the employer) required these pre-work activities, the employer did not particularly benefit from them and the security measure was not integral or necessary to the performance of construction work.

These cases are just a sample of similar lawsuits pending nationwide. Employers are on alert, as police officers, paper mill workers, call center employees, pork processors, aluminum and steel workers and others bring similar FLSA claims.

Settling these cases can also be extremely costly. BMW paid $629,000 in back wages to assembly plant employees for time spent donning and doffing. *Chao v. BMW Mfg. Co. LLC*, Case No. 06-CV-2174, (D.S.C. August 1, 2006). And Toyota recently offered $4.5 million in back pay to approximately 1,000 paint shop employees for time spent donning and doffing protective gear and walking to and from their work stations -- activities taking approximately eight minutes.

While the courts continue to grapple with what constitutes "compensable" time under the FLSA in increasing numbers of wage and hour cases brought by groups of employees with significant liability at stake, employers should carefully review whether they are requiring their employees to perform preliminary or postliminary, unpaid tasks. Particular attention should be given to any unpaid periods after the continuous work day has commenced and to time spent donning and doffing safety and protective gear. Employers should consider who is responsible for requiring that the time be spent, the employer or some third party, whether the employer benefits from the performance of the tasks and whether the tasks are necessary and integral to the employee's performance of the compensated work.

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