2005

Time is Money--But is it Compensable Work? An Analysis of IBP, Inc. v. Alvarez

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EMPLOYMENT LAW

Time Is Money—But Is It Compensable Work?

by Barbara J. Fick

PREVIEW of United States Supreme Court Cases, pages 18-22 © 2005 American Bar Association.

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In response to these Court rulings, Congress passed the Portal-to-Portal Act in 1947, amending the FLSA to clarify that employers are not required to pay employees for time spent “walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employees are employed to perform” or for “activities which are preliminary or postliminary to such activity or activities,” when such walking or activity occurs before the employee commences, or after the employee ceases, the principal activity or activities.

Subsequently, in Steiner v. Mitchell, 350 U.S. 247 (1956), the Court, interpreting the Portal-to-Portal Act, held that activities performed before the regular shift, which are an integral and indispensable part of the principal activities, must be compensated. In Steiner, battery plant employees who worked with dangerous toxic materials were required by their employer to change into protective clothing before beginning their workday.

The Fair Labor Standards Act (FLSA), enacted by Congress in 1938, established standards for wages and hours of work. The statute requires, among other things, that employers compensate employees for the time the employer requires them to work. Soon after the passage of the FLSA, the Supreme Court decided several cases that defined the concept of compensable work. In these cases, the Court concluded that time spent by employees traveling and walking in work settings constituted compensable work.

For example, in a case involving an iron-ore mine, the Court held that the miners must be compensated for the time spent traveling down the mine shafts to the working faces of the mine. Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590 (1944). In a second case, the Court held that a pottery plant was required to pay its employees for the time spent walking from the time clocks at the plant entrance to their work stations. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
work and to shower and change clothes after ceasing work. The Court found that donning and doffing the required safety clothing was an indispensable part of the principal activity of making batteries and therefore was considered compensable work.

**ISSUES**

Does the Portal-to-Portal Act exclude from compensation the time employees spend walking to and from required health and safety equipment distribution stations?

Does the Act exclude from compensation the time employees spend waiting to receive their health and safety equipment at required health and safety equipment distribution stations?

**FACTS**

The Supreme Court consolidated for argument and decision two separate cases involving the same legal issue. The first case involves slaughter-and-processing employees at IBP's meat processing plant in Pasco, Washington. The employees filed a class-action lawsuit in federal district court under the FLSA seeking compensation for the time spent donning and doffing required safety equipment before and after their work shifts, as well as for the attendant time they spent walking and waiting.

Both federal regulations and IBP policy require these employees to wear certain safety clothing and sanitary equipment. IBP requires employees to store certain clothing and tools in company lockers. Before beginning work, the employees in the IBP case went to the locker room, donned the required clothing, proceeded to distribution points at other locations to retrieve additional tools or equipment, and then proceeded to their work stations. At the end of their shift, employees left their work stations, cleaned and returned equipment at required locations, and then proceeded to the locker room to remove and store the remaining safety clothing and tools. The time spent in the actual process of donning and doffing the required clothing ranged from three to 10 minutes per day depending on the type of job the worker performed; the time spent walking from the locker room to the distribution points, waiting in line, and then walking to the work station ranged from two to four minutes per day. The employees were not compensated for any of this time.

The district court concluded that, under the FLSA, the employer was required to pay for the donning, doffing, and cleaning of required protective gear and equipment because such work was an integral and indispensable part of the employees' “principal activities” under the Steiner rule. Furthermore, the court also held that the walking and waiting time that occurred after the employees' first compensable work activity (donning equipment in the locker room) and before the last compensable work activity (doffing such equipment at that end of their shift) also constituted compensable work time.

IBP appealed the district court's finding to the federal court of appeals for the Ninth Circuit. The court upheld the district court's conclusions. It agreed that the protective gear was required by law and the employer's rules, and that it was therefore necessary to the principal work performed and thus compensable under Steiner. Moreover, the Ninth Circuit found, the district court had properly reasoned that the workday began with the performance of the activity (donning of equipment) that was integral and indispensable to the work performed and therefore that any subsequent activity (such as walking and waiting) was in the course of employment and also compensable. Similarly, the doffing of gear marked the end of the workday and any previous activity was in the course of employment. *Alvares v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003). IBP filed a petition for writ of certiorari, which the Supreme Court granted on the question of the compensability of the walking and waiting time. *IBP, Inc. v. Alvares*, 125 S.Ct. 1291 (2005).

The second case concerns Barber Foods, a secondary processor of poultry-based products that has a plant in Portland, Maine. Its employees process boneless chicken breasts into finished products such as chicken fingers and chicken nuggets. The employees are paid from the time they punch in at time clocks located at the entrance to the production floor until they punch out when they leave the production floor.

Employees are required by the employer and government regulations to wear certain safety clothing and sanitary garments. This clothing must be on before the employees can punch in and cannot be removed until they punch out. The employees filed a class action lawsuit in federal district court under the FLSA seeking compensation for the time spent donning and doffing required clothing. The district court held as a matter of law that the time actually spent changing clothes was an integral part of the employees' work under the Steiner case, but that any walking or waiting time in connection with changing clothes was excluded from compensation by the Portal-to-Portal Act. The case proceeded to trial, and the jury was presented with the question whether the employer was required

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to compensate its employees for
time spent donning and doffing. The
jury found that since the amount of
time spent donning and doffing was
“de minimis,” it was not compensable (under the legal principle that
the law does not recognize trifles).

The employees appealed the district
court’s finding that the walking and
waiting time attendant to changing
clothes, was not compensable. They
argued that if that time were added
to the actual time spent changing
clothes it would no longer be de
minimis and the employees would
be entitled to compensation. On
review, the U.S. Court of Appeals for
the First Circuit upheld the decision
of the district court. It found that
the Portal-to-Portal Act generally
exempts walking time from compensa-
tion when it is preliminary or
“postliminary” activity. While
Steiner intended to compensate
employees for activity so integral to
a principal activity that it cannot be
separated, walking is neither inte-
gral to nor inseparable from the
principal activity. As such it is pre-
liminary and postliminary to the
principal activity and not compensa-
360 F.3d 274 (1st Cir. 2004).* The
employees filed a petition for writ of
certiorari, which the Supreme Court
granted, on the question of the com-
ponsability of the walking and wait-
125 S.Ct. 1295 (2005).*

**CASE ANALYSIS**

In these cases, the parties’ argu-
ments are focused on the meaning of the exemption language con-
tained in the Portal-to-Portal Act.
Specifically, the Act contains two
exemptions. It excludes from com-
penration time spent (1) walking to
and from the place where the
employees perform their principal
activity or activities, and (2) on any
activity that is preliminary or
postliminary to the principal activi-

The employers argue that the plain
language of the Act excludes the
walking and waiting time in these
cases. The employees’ principal
activity is processing meat and poul-
try, not changing clothes. The actual
place of performance of that activity
is on the plant floors, not in the
locker rooms. Thus, the walking and
waiting occurs before the employees
begin work and after the employees
cease work and therefore, by the
express language of the Act, this
time is not compensable.

The decision in the Steiner case
does not require a different conclu-
sion. The Court in Steiner did not
address the issue of when the prin-
cipal activity commences or ceases
for purposes of defining the com-
penstantial workday. Rather, the Court
held only that preliminary activities
that are integral and indispensable
to the principal activity are them-
selves compensable.

According to the employers, the
Ninth Circuit’s interpretation of
Steiner is too expansive. It equated
integral activities with principal
activities and thus held that the
employees’ performance of integral
activities begins the workday and
that any subsequent walking is
therefore outside the Portal-to-
Portal Act’s exemption. However,
the Steiner case involved the second
exemption concerning the exclusion
of preliminary activity and did not
affect the scope of the first exemp-
tion. The Court specifically held
that preliminary work is compensa-
able only if it is integral and indispensable to the principal activity
and not specifically excluded by the
first exemption. Thus the Court rec-
ognized that pre-shift and post-shift
walking is still exempt even when it
occurs between other activities that
are compensable.

The history behind the passage of
the Act makes clear that Congress
intended travel time before work to
be outside the scope of mandatory
compensation under the FLSA.
Congress chose the language for
defining the beginning of the work-
day—occurring at the “actual place
of performance of the principal
activity” to ensure that time spent
getting to the actual place of perfor-
manence would not be considered
compensable. The legislative history
reveals the congressional intent to
exclude from compensation all time
spent walking to and from the actual
place where the employees per-
form their principal activity.

Moreover, the interpretive guidance
issued by the Department of Labor
(DOL), the federal agency charged
with enforcement of the FLSA,
indicates that walking time is excluded
from compensation. Specifically, the
DOL noted that even if changing
clothes is compensable as integral
to the principal activity, “this does
not necessarily mean ... that travel
between the ... clothes-changing
place and the actual place of perfor-
manence ... would be excluded from
the type of travel to which the first
exemption refers.”

The employers also say that the
Ninth Circuit’s contrary interpreta-
tion—that activity that is integral to
the principal activity starts the
workday—would lead to absurd
results. Compensation for walking
would depend on the fortuity of
where the compensable gear is
located. It could even depend on the
order in which employees retrieve
their gear. An employee who first
dons compensable gear and then
retrieves and dons noncompensable
gear (that is, gear that the employee
wears for his or her own conve-
The Ninth Circuit's finding that the workday commences with the first compensable activity is not compelled by either Steiner or the Portal-to-Portal Act. As noted by the First Circuit, the workday begins at the actual place of performance of the principal activity, not with the performance of activity integral to the principal activity. A more expansive definition of the workday would undermine the purpose behind the Act of excluding from compensation travel time to the place of work.

Finally, the employers contend, the walking and waiting is not itself integral and indispensable to the employees' principal activities and thus does not fit within the Steiner Court's definition of compensable activity.

The employees' arguments also rely on the clear language of the Portal-to-Portal Act, the Steiner case, DOL regulations, and legislative history. The employees argue that the Act only exempts walking and activities that occur before the employees begin their first principal activity of the day and after they perform their last principal activity. The DOL shares this interpretation in its guidelines, which note that activities engaged in by an employee "after" the employee commences the first principal activity are not within the Act's exemptions. The guidelines state that the compensable workday is the period between the commencement and completion of the employee's principal activity. The Act does not interrupt the compensability of the continuous workday. The employees say the First Circuit therefore erred in Barber Foods when it created a discontinuous workday. Having found that the donning and doffing was compensable, that court subsequently held that compensation ceases during intervening periods of walking and waiting, only to resume when the employees arrive at the production floor. The First Circuit failed to recognize that the Act's exemption for walking is not absolute but only applies when the walking occurs prior to the commencement of the employees' principal activity or activities.

Moreover, the Act repeatedly refers to "principal activity or activities," clearly indicating that Congress contemplated that there may be more than one principal activity. The Steiner case adopted this view. The Court held that the term "principal activity or activities" includes all activities that are an integral part of the principal activity, and thus clothes changing was a principal activity. There is no distinction between "principal activities" and an activity that is integral and indispensable to the principal activities. Thus, once the courts of appeals found that the donning and doffing at IBP and Barber Foods were integral and indispensable to the workers' duties (which findings were unchallenged), those activities were necessarily also found to be principal activities. To be excluded from compensation under the Act, the walking must take place before or after the principal activities, whereas in these cases the walking occurred after the principal activity of donning the safety gear and is therefore compensable.

The DOL guidelines specifically indicate that the exemption does not include "travel from the place of performance of one principal activity to the place of performance of another." The section of the guidelines relied on by the employers is found in a footnote and merely recognizes the possibility that some travel incidental to clothes changing may be exempt but does not state that such travel is always exempt. The Secretary of Labor, in regulations issued pursuant to the FLSA, has defined hours of work, noting that "[w]here an employee is required to report to a meeting place to receive instructions or to perform work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day's work...."

The legislative history of the Portal-to-Portal Act indicates that the exemptions contained in the statute related only to activities that take place prior to or subsequent to the employees' principal activity or activities. However, the employees say, activities that occur during the workday were not to be affected by the Act's exemptions. Thus, the touchstone for the compensability or noncompensability of walking or waiting is whether these activities procede the first principal activity or follow the last principal activity.

The employees at Barber Foods also argue that, under Steiner, any activity that is integral and indispensable to the principal activity is compensable regardless of whether it occurs outside the workday. They say that the walking and waiting activities in these cases are integral and indispensable to the employees' principal activities and therefore are compensable. Because federal regulations require that employees wear safety and sanitary equipment whenever they are on the production floor, these regulations require that the gear be donned and doffed away from the production floor, thus necessitating the walk from the place of donning and doffing to the production floor. The method chosen by the employer to arrange for the distribution of the gear also

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necessitates walking and waiting in line. Thus the walking and waiting time are closely related to other duties performed by the employees and are therefore compensable.

Lastly, the absurd results decried by the employers can easily be avoided by the employers themselves. They can regulate the means and manner in which employees don and doff the required gear to prevent the predicted incongruities.

**SIGNIFICANCE**

Although these cases specifically deal with food processing employees, the Court's decision will affect types of work in other industries. In many other types of industries, employees are required to don protective clothing prior to beginning their productive work, including high tech industries in which equipment must be manufactured in so-called "clean rooms" and jobs that involve employees working with dangerous solvents, chemicals, or sprays. In other types of work, employers may need to provide information or distribute materials that are integral to the principal activity prior to the beginning of productive work. Should the Court determine that the walking and waiting time at issue is compensable, employers in these other types of industries will have to pay their employees for any walking and waiting that occurs after the integral activity begins. This may lead employers to reconfigure work schedules or production activity to minimize the "downtime" between integral and principal activity.

If, however, the Court determines that such time is not compensable, then the "cost" of waiting will be shifted to employees and there will be no incentive for employers to minimize such lost time or to be more efficient with employee downtime. If time is money, then the way in which the Court answers the question presented in these cases will determine from whose pocket the money will come.

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