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

Barbara J. Fick
*Notre Dame Law School*, barbara.j.fick.1@nd.edu

# Case at a Glance

The Fair Labor Standards Act requires employers to pay employees for all hours worked. These two cases, consolidated for review by the Supreme Court, raise the same legal issue in similar factual contexts: Is the time that employees spend walking and waiting in line during the process of donning and doffing required safety equipment considered compensable work such that employers must pay employees for that time?

EMPLOYMENT LAW

# Time Is Money–But Is It Compensable Work?

*by Barbara J. Fick*

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Barbara J. Fick is an associate professor of law at Notre Dame Law School in Notre Dame, Ind. She can be reached at fick.1@nd.edu or (574) 631-5864.

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).

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

*IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*
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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. *Alvarez 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. Alvarez,* 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 compensation 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 integral to nor inseparable from the principal activity. As such it is preliminary and postliminary to the principal activity and not compensable. *Tum v. Barber Foods, Inc.*, 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 compensability of the walking and waiting time. *Tum v. Barber Foods, Inc.*, 125 S.Ct. 1295 (2005).

## Case Analysis

In these cases, the parties' arguments are focused on the meaning of the exemption language contained in the Portal-to-Portal Act. Specifically, the Act contains two exemptions. It excludes from compensation 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 activity or activities, when such walking or other activity occurs before the employee commences or after the employees ceases the principal activity or activities.

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 poultry, 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 conclusion. The Court in *Steiner* did not address the issue of when the principal activity commences or ceases for purposes of defining the compensable workday. Rather, the Court held only that preliminary activities that are integral and indispensable to the principal activity are themselves 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 exemption. The Court specifically held that preliminary work is compensable only if it is integral and indispensable to the principal activity *and not specifically excluded by the first exemption.* Thus the Court recognized 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 workday as occurring at the "actual place of performance of the principal activity" to ensure that time spent getting to the actual place of performance 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 perform 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 performance ... would be excluded from the type of travel to which the first exemption refers."

The employers also say that the Ninth Circuit's contrary interpretation—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-

nience but is not required by the employer) would be paid for walking and waiting whereas an employee who does the reverse would not.

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 precede 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.

## ATTORNEYS FOR THE PARTIES

**For IBP, Inc.** (Carter G. Phillips (202) 736-8000)

**For Gabriel Alvarez** (William Rutzick (206) 622-8000)

**For Abdela Tum** (Thomas C. Goldstein (202) 237-7543)

**For Barber Foods, Inc.** (Graydon Stevens (207) 775-1020)

## AMICUS BRIEFS

**In Support of IBP, Inc. or Barber Foods, Inc.**

Chamber of Commerce of the United States et al. (Samuel Estreicher (212) 326-3939)

National Chicken Council and American Meat Institute (David R. Wylie (864) 271-7410)

**In Support of Gabriel Alvarez or Abdela Tum**

AFL-CIO (James B. Coppess (202) 637-5337)

National Employment Lawyers Association et al. (Sandra Thourot Krider (713) 339-3233)

United States (Paul D. Clement (202) 514-2217)