

CLIENT ALERT

Employment & Labor

November 2005

Volume VII No. 7

Supreme Court to Employees: Walk Slowly. Travel Between Changing and Work Areas is Compensable

The U.S. Supreme Court has clarified when the workday begins and ends under the Fair Labor Standards Act (“FLSA”). In the consolidated case of *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, the Court held that employees whose jobs require protective clothing are entitled to compensation for time they spend changing and walking between their changing and work areas. The Court also held that time employees spend waiting to remove protective clothing at the end of the workday is compensable, although time spent waiting to put on the clothing before the shift starts is not.

The Facts

IBP and Barber Foods were meat and poultry processing companies employing large numbers of employees required to wear protective clothing such as hardhats, aprons, earplugs, boots, leggings, vests, plexiglass armguards, and chain link metal aprons. Both companies paid employees only for time they spent on the production floor. In separate FLSA lawsuits, employees contended that they were entitled to compensation for the time they spent “donning and doffing” protective gear and walking to and from company locker rooms.

The FLSA

The FLSA generally requires employers to pay workers a minimum hourly wage, and one and a half times their wage for hours worked over forty hours per week. The FLSA does not define the term “work.” Section 4(a)(1) of the Portal-to-Portal Act (“PPA”), which amended the FLSA, exempts from the FLSA’s requirements: “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 Section 4(a)(2) exempts activities that “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.”

Regulations

Regulations issued by the Secretary of Labor dictate that (a) “to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [§4] have no application”; and (b) an employee’s “workday” is typically “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.

Steiner v. Mitchell

In addition to the statutes and regulations, the *IBP/Barber Foods* Court considered its 1995 *Steiner v. Mitchell* decision, in which it had concluded that employees in a battery plant were entitled to compensation for the “time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide.” In *Steiner*, the Court expressly stated that “the term ‘principal activity or

activities' in Section 4 [of the PPA] embraces all activities which are an 'integral and indispensable part of the principal activities,' and that the activities in question fall within this category."

Reasoning

Because the district courts in *IBP* and *Barber Foods* had found that the protective gear was integral and indispensable to the employees' work, the Supreme Court held that the time spent putting on and taking off such gear was compensable. The Court identified the next question as whether "postdonning and predoffing walking time" was compensable.

IBP argued that "the walking that occurs immediately after donning and immediately before doffing is not compensable." The Court rejected this argument, explaining that it was contrary to *Steiner*. The Court stated that an activity that is "integral and indispensable" to a

"principal activity" is a "principal activity" under the PPA. Thus, changing into and out of protective gear is a principal activity under the PPA, and the workday starts when that activity begins. The Court concluded 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."

With respect to *Barber Foods*, the Court considered the additional issue of whether time that employees spent waiting to put on their protective clothing is compensable under the FLSA. The employees argued that such time was "integral and indispensable" to the "principal activity" of putting on the protective clothing and was, therefore, itself a principal activity. The employer argued that such "predonning waiting time is explicitly covered by §4(a)(2)

of the Portal-to-Portal Act," which excludes "activities which are preliminary to or postliminary to [a] principal activity or activities" from the scope of the FLSA.

The Court agreed with the employer, explaining that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*. The Court further stated that such waiting, which is "two steps removed from the production activity on the assembly line," is not integral and indispensable to a principal activity that identifies the time when the continuous workday begins.

Conclusion

Employers should periodically review their practices with regard to the payment of wages and overtime compensation to ensure that they are in full compliance with the FLSA. Meritorious FLSA claims can be extremely costly, particularly for a company employing a large workforce.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

Additional Developments: Disability Notices and Minimum Wage

A recent amendment to New Jersey Statute § 43:21-49(1)(a)(1), requires New Jersey employers to place conspicuous notices around the workplace that inform employees of their temporary disability insurance ("TDI") benefits rights. The notices must state whether the employer is permitted or required to participate in a temporary disability benefits program and whether the employer does or does not participate.

If the employer does participate in a temporary disability benefits program, the notice must describe the benefits available and prominently disclose that pregnancy is a disability and pregnant employees are entitled to TDI benefits to the same extent as other disabled employees. Each employer that participates in the State plan or a private plan must give a printed copy of benefit instructions to any disabled employee as soon as the employer becomes aware of the disability.

The New Jersey Department of Labor and Workforce Development has published a notice that complies with the new amendment. Upon request, we can provide a copy or PDF of the TDI notice, or you may contact the agency directly. Employers should post the notices in prominent locations where employees will see them. The notices should be posted as soon as possible.

In addition, please note that the New Jersey minimum wage increased from \$5.15 per hour to \$6.15 per hour effective October 1, 2005. Further, it is scheduled to increase to \$7.15 per hour effective October 1, 2006.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973.643.6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973.643.5795
laron@sillscummis.com

New Jersey

One Riverfront Plaza
Newark, NJ 07102
Tel: 973-643-7000
Fax: 973-643-6500

www.sillscummis.com

New York

30 Rockefeller Plaza
New York, NY 10112
Tel: 212-643-7000
Fax: 212-643-6500