

HOT WAGE AND HOUR ISSUES
When Did Your Employees Start and Stop Working Today?

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By

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I. General Requirements of Wage Laws

A. Minimum Wage and Overtime

The federal Fair Labor Standards Act (“FLSA”) was one of the earliest federal efforts to regulate the work environment and became effective on June 25, 1938. The FLSA is administered and enforced by the Wage and Hour Division of the Employment Standards Administration within the United States Department of Labor. 29 U.S.C. § 204.

Among other things, the FLSA and many parallel state laws require the payment of a minimum wage for all hours worked. 29 U.S.C. § 206. On July 24, 2008, the federal minimum increased to \$6.55 per hour. Many states have requirements that exceed this level.

Under the FLSA, employers must also generally pay nonexempt employees overtime at a rate of at least one and one half times the regular rate of pay for all hours work in excess of 40 hours in a work week. 29 U.S.C. § 207. In contrast, the FLSA does not require an employer to provide premium pay for work beyond an employee’s normal daily shift, work on holidays, or work on weekends. 29 CFR § 778.102. For adults, there is no limit on overtime hours that employees may work and overtime may be mandatory. 29 CFR § 778.102. Some states have daily or other overtime requirements and other states place limits on mandatory overtime.

Overtime requirements focus on the work week. The work week can be any fixed and recurring 168 hour period. 29 CFR § 778.105. Because overtime requirements focus on the work week, hours cannot be averaged between work weeks. Thus, if an employee works 38 hours one week and 42 hours the next week, the employer must pay overtime for two hours in the second week even though the average number of hours worked during the two-week period is 40. 29 CFR § 778.104.

Employers found liable for violations of the FLSA may be assessed damages for the unpaid overtime or minimum wages, liquidated damages equal to the amount of unpaid overtime or minimum wages, and reasonable attorneys fees and costs. 29 U.S.C. § 216(b). Willful violations may carry criminal penalties upon conviction with fines of not more than \$10,000 or

imprisonment for not more than six months, or both. There are also civil money penalties (payable to the Secretary of Labor) for repeated and willful violations of minimum wage and overtime requirements. 29 U.S.C. § 216(e); 29 CFR Part 578.

Employers must use caution when evaluating whether they comply with minimum wage and overtime requirements. Compliance with the FLSA may not be sufficient. Many states have requirements and those requirements do not always mirror FLSA standards. Thus, employers must be certain that they are complying with the FLSA and state-law requirements in every state where they have employees. A review of each state's specific laws and requirements is beyond the scope of these materials.

B. Hours Worked

Under the FLSA, it is an absolute rule that employers must pay their employees for all hours the employees work. The question that has always caused confusion in the work place and that has recently resulted in a spate of class action lawsuits is “What constitutes hours worked?”

The FLSA does not define the term “work.” Thus, early Supreme Court cases defined the term broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), the Court found that time spent traveling from the entrance of ore mines to the underground working areas was work time and defined “work” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” Later in the same year, the Court clarified that “exertion” is not necessary for an activity to count as “work” and that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.” *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *see also Alvarez v. IBP, Inc.* 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (“‘exertion’ is not the sine qua non of ‘work’”). Two years later, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court defined “workweek” to include “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace” and held that time

employees spent walking from time clocks at a factory entrance to their workstations was compensable work time.

In response to the *Anderson* decision, Congress passed the Portal-to-Portal Act of 1947.¹ The Portal-to-Portal Act was specifically aimed at limiting the liability of employers for certain activities, such as (1) walking, riding and traveling to and from the actual place of work; (2) clothes changing in certain circumstances; and (3) other activities that are preliminary to or postliminary to principal work activities. *E.g., Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (the Act amended the FLSA “‘to delineate certain activities which did not constitute work,’ and which are therefore non-compensable”); 29 U.S.C. §§ 203(o), 254. However, the Portal-to-Portal Act did not change the Supreme Court’s earlier definitions of the term “work.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

Taking these legal interpretations into account, the U.S. Department of Labor has adopted regulations that help define what does and what does not count as time worked. Essentially, activities that are primarily for the benefit of the employer and that are suffered or permitted by an employer constitute compensable work time. 29 CFR § 785.11. In the litigation context, courts have fashioned a general rule that an employer is liable for off-the-clock work if the employer knew or should have known that the employee was working. *Id.*

In the *IBP* case, the Supreme Court reaffirmed the U.S. Department of Labor’s position in relation to two key concepts (integral and indispensable activities, and the continuous workday rule) that impact what counts as work and when work time starts and ends.

Initially, the Court concluded that work includes both an employee’s principal activities as well as activities that are “integral and indispensable” to the principal activities. *IBP*, 546 U.S. at 37; *see also Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (finding that changing into and

¹ Some states have never adopted a similar provision and, thus, activities that are not compensable work under the Portal-to-Portal Act may be compensable in those states. *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 995 P.2d 139 (2000) (no Portal-to-Portal Act under California law); *Anderson v. Dep’t of Soc. & Health Servs.*, 115 Wn. App. 452 (2003) (same under Washington law).

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out of old work clothes at a battery plant was an integral and indispensable part of the employees' work and, thus, compensable); *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (finding that time spent by workers in a meat packing plant sharpening knives was integral and indispensable and, thus, compensable). It then made clear that activities that are integral and indispensable to principal activities are themselves principal activities under 29 U.S.C. § 254(a) that start the work day. *IBP*, 546 U.S. at 37; USDOL Wage and Hour Advisory Memorandum No. 2006-2 at 2 (May 31, 2006) ("USDOL Memo No. 2006-2").

The Court then fully embraced the U.S. Department of Labor's interpretation of the continuous workday rule, stating: "[C]onsistent with our prior decisions interpreting the FLSA, the Department of Labor has adopted the continuous workday rule, which means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *IBP*, 546 U.S. at 29; *see also* 29 CFR § 790.6(b). Note, however, that the Court recognized that preliminary and postliminary activities, such as walking between a time clock and an employee's work area and waiting to punch a clock or receive gear, that occur outside of the continuous workday do not count as compensable work time. *IBP*, 546 U.S. at 37.

C. The *De Minimis* Doctrine

Even if activities constitute work, under some circumstances, the amount of time spent on such activities is so minimal or *de minimis* that they are not compensable. This *de minimis* doctrine was set forth by the Supreme Court in *Anderson*, 328 U.S. at 692:

The workweek contemplated . . . must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

See also De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007) (the doctrine "provides a limiting principle to compensation for trivial calculable quantities of work"). The U.S. Court of Appeals for the Ninth Circuit has subsequently set forth a three-pronged test for

when the doctrine should be applied: “we will consider (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.” *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Applying these factors, the Ninth Circuit then held that seven to eight minutes per day spent by employees in pre-shift activities was *de minimis* and not compensable because there was wide variance in the amount of pre-shift time spent on the activities, there were interwoven social activities, and the employer would have difficulty monitoring the pre-shift work. *Id.*; see also *Reich v. New York Transit Auth.*, 45 F.3d 646, 652-53 (2d Cir. 1995) (“time spent by handlers in dog-care duties during the commute” was *de minimis* and non-compensable because they were “neither substantial, nor regularly occurring” and it would be administratively difficult to track); 29 CFR § 785.47 (“[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded [S]uch trifles are *de minimis*.”); USDOL Opinion Letter FLSA2004-8NA at 1 (August 1, 2004).

The *de minimis* doctrine was recognized, but not clarified, in the Supreme Court’s *IBP* decision. The Court let stand a holding by the district court and Ninth Circuit in the *Alvarez* case that time spent donning and doffing safety hats and goggles was *de minimis* as it was insubstantial and difficult to monitor. See *Alvarez*, 339 F.3d at 904. Similarly, the Court discussed that the jury in a consolidated case, *Tum v. Barber Foods*, 331 F.3d 1 (1st Cir. 2004), found that time spent donning lab coats, hairnets, earplugs, and safety glasses was *de minimis*, but reversed and remanded that case so that the court (and, presumably, a new jury) could consider whether the time was *de minimis* when combined with post-donning walking and waiting time.

II. Work Time Issues at the Start and End of the Work Day

Although the Department of Labor and the courts have provided general guidance as to what activities constitute work and when the activities must be compensated, the application of the general concepts is often difficult. Moreover, special rules or interpretations sometimes

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apply. The following sections discuss a series of activities, often occurring between home and the employee's work station, that present typical work time issues at the start and end of the work day.

A. Potential Work at Home

Employees must be paid for all actions taken on behalf of their employers regardless of the location where the activities actually take place. 29 CFR § 785.12. Thus, if employees engage in work-related activities at home before they leave for work, those activities could be considered compensable work time. Such time could include time checking voicemail or emails; time developing a plan, schedule, or route for the day; time reading or completing required paperwork; or time loading or stocking equipment. *Cf. Karr v. City of Beaumont, Tex.*, 13 Lab. Case. (CCH) ¶ 33,511 (E.D. Tex. 1997) (employees who drive employer cars home have to be paid for all time spent cleaning and maintaining the vehicles). Whether such activities count as compensable work time depends on a number of factors.

First, the activities must be primarily for the benefit of the employer to count as hours worked. 29 CFR § 785.11. For instance, there is a difference between employees who are planning their day (including work) for their personal benefit and employees who are required to prepare detailed driving plans before they leave their homes.

Second, the activities must be principal activities or integral and indispensable to principal activities in order to count as work. They could otherwise be disregarded as preliminary or postliminary time. *Cf. IBP*, 546 U.S. at 37.

Third, even if activities at home could constitute work, such time is only compensable if the employer knew or should have known that an employee was engaged in such activities. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (“[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of [the

FLSA]”); 29 CFR § 785.12. Thus, a key question is whether an employer should have reasonably anticipated that its employees would have to engage in such activities at home.

Finally, if the activities at home are limited, isolated, and sporadic, any time spent on such activities may fall within the *de minimis* doctrine. *See Reich*, 45 F.3d at 652-53; *Lindow* 738 F.2d at 1063.

B. Commuting and Travel Time

Under the Portal-to-Portal Act, 29 U.S.C. § 254(a) was intended to make time spent commuting between an employee’s home and the workplace non-compensable. Thus, the U.S. Department of Labor adopted 29 CFR § 785.35, which states:

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

See Aiken, 190 F.3d at 758 (“The effect of these sections is to make ordinary commute time non-compensable under the FLSA.”); *Reich*, 45 F.3d at 650 (“Commuting and similar activities are generally not compensable.”).

Federal courts that have considered commuting time claims have emphasized that employees advancing such claims face a heavy burden of proof. *Adams v. United States*, 471 F.3d 1321, 1326 (Fed. Cir. 2006). Thus, the general rule that commuting time is not compensable holds true even though the employees:

- Spend hours each day commuting between their homes and their job sites. *E.g.*, *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1286 n.3 (10th Cir. 2006) (commute time that lasted as long as seven hours each day not compensable under the FLSA); *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 271-73 (2d Cir. 1999) (mechanic who commuted an average of seven to eight hours per day was not engaged in compensable work).
- Transport equipment from their homes to their job sites. *E.g.*, *Adams*, 471 F.3d at 1327; *Dooley v. Mutual Ins. Co.*, 307 F. Supp. 2d 234, 246-47 (D. Mass. 2004);
- Travel to different job sites each day. 29 CFR § 785.35 (commute not compensable

“whether [employee] works at a fixed location or at different job sites”); *e.g.*, *Kavanagh*, 192 F.3d at 271 (mechanic traveled to more than 50 stores throughout New York and Connecticut); *Imada v. City of Hercules, Cal.*, 138 F.3d 1294 (9th Cir. 1998).

- Travel with other employees to get to and from work. *E.g.*, *Smith*, 462 F.3d at 1291 (drilling rig employees who were encouraged or required to commute together).
- Discuss work-related issues during their commute. *E.g.*, *Smith*, 462 F.3d at 1291.
- Travel to and from work on company buses. *E.g.*, 29 CFR § 790.7(f); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1343 (11th Cir. 2007) (construction workers who were “required to ride authorized transportation after the security gate” at an airport construction project were not engaged in work); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (farm workers who took company buses to the fields were not engaged in work).

As the court in *Bolick v. Brevard County Sheriff’s Dep’t*, 937 F. Supp. 1560, 1565 (M.D. Fla. 1996), held: “[E]mployees should not be compensated for doing what they would have to do anyway – getting themselves to work.”

Because employees started to assert claims for time spent commuting in company cars, in 1996, Congress amended the Portal-to-Portal Act to add the following language:

For purposes of this subsection, the use of an employer’s vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee’s principal activities if the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a); Employee Commuting Flexibility Act of 1996 (“ECF Act”), § 2102 of Pub.L. 104-188, 110 Stat. 1755, 1928 (1996). This amendment made clear that commuting in a company-owned vehicle is not compensable work time unless employees are required to “perform additional legally cognizable work while driving to their workplace in order to compel compensation for the time spent driving.” *Adams*, 471 F.3d at 1325. Thus, as with commuting time in personal vehicles, federal courts have rejected claims for time spent commuting in an employer-provided car, even when employees travel to different work locations, talk about work,

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or transport equipment. *E.g.*, *Adams*, 471 F.3d at 1327 (travel time in government-issued vehicles was not compensable even though the officers were required to carry their weapons, transport law enforcement equipment, and monitor the vehicles' communication equipment); *Bobo v. United States*, 136 F.3d 1465, 1467 (Fed. Cir. 1998) (travel time in government-issued vehicle was not compensable even though plaintiffs monitored their radios, were on the lookout for suspicious activity, refrained from personal errands or detours, and stopped to walk their dogs); *see also* USDOL Field Operations Handbook §§ 31c01 & 31c02 (March 6, 1981); *id.* § 31c10 (May 22, 1995). In fact, the ECF Act expressly provides that activities “incidental” to use of a company vehicle for commuting are not principal activities that count as hours worked. *E.g.*, *Buzek v. Pepsi Bottling Group, Inc.*, 501 F. Supp. 2d 876, 886 (S.D. Tex. 2007) (“end-of-day reports and transportation of tools are activities incidental to his use of a company vehicle for commuting” and, thus, “[t]ime spent on these activities . . . is . . . not compensable under the FLSA”).

Despite the clear presumption against compensation for commuting time, plaintiffs continue to pursue such claims. Three areas of particular concern to employers should be:

- The need for a specific agreement between the employer and the employee (or employee representative) that governs the use of a company car for commuting. *See* 29 U.S.C. § 254(a). Absent such an agreement, the protections of the ECF Act are lost.
- The distinction between commuting time and travel to another city. Even though commuting time is not compensable (even when it takes hours each way), an employee must generally be paid for time traveling to work on special one-day assignments to a city other than where they regularly work. 29 CFR § 785.37 deals with such circumstances. This provision applies when employees regularly work “at a fixed location in one city” and are “given a special 1-day work assignment in another city.” This provision is aimed at “unusual” assignments and does not apply to employees who are regularly asked to travel to different job sites. *See* 29 CFR § 785.35; *e.g.*, *Kavanagh*, 192 F.3d at 271-73.

- The impact of the continuous workday rule on the general commuting time rules. The Supreme Court’s *IBP* decision highlights the importance of determining when an employee first engages in a work activity. The Court found that waiting and walking time that occurred *prior* to the first work activity was not compensable. In contrast, the Court held that waiting and walking time that occurred *after* the first work activity counted as hours worked and must be compensated. Following this same analysis, a number of recent cases have focused on the compensability of what would appear to be non-compensable commuting time because the commuting allegedly occurred after employees engaged in their first work activity. *E.g., Wisniewski v. Pacific Maritime Ass’n*, No. BC293134, Settlement Notice (Cal. Super. Ct. Aug. 29, 2006) (claim by casual employees for commuting time between dispatch halls and assigned worksites); *Lenahan v. Sears, Roebuck & Co.*, No. 02-0045, Settlement Approval Order (D.N.J. July 24, 2006) (claim by service technicians for time commuting to first worksite because their first work activity occurred at home when they checked the employer’s dispatch system).

C. Security Screening

In order to address security risks and enhance safety, some employers have employees pass through security checkpoints when they first arrive at the work site. In response, some employees have claimed that time spent passing through security checkpoints counts as time worked because the employees are subject to the control of the employer. In *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007), the Second Circuit rejected such claims, explaining:

The activities required to enter and exit Indian Point – from waiting in line at the vehicle entrance through the final car-swipe and handprint analysis – are necessary in the sense that they are required and serve essential purposes of security; but they are not integral to principal work activities. These security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.

The Court rejected the idea that the time-consuming nature of security measures makes them

compensable. *Id.* at 594. Drawing a parallel to lengthy commuting time, the Court explained that “security measures that are rigorous and that lengthen the trip to the job-site do not thereby become principal activities of the employment.” *Id.* (noting that “everyone entering the plant” was subject to such security measures regardless of their job and “including visitors”).

When considering a similar claim by construction workers who had to pass through airport security at the Miami International Airport, the Eleventh Circuit applied a three-factor test: “(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer.” *Bonilla*, 487 F.3d at 1344. The court found that the employer did not primarily benefit from the security regime and concluded that “the security screening mandated by the FAA in this case is not compensable work.” *Id.* at 1345.

D. Clothes Changing and Equipment Donning and Doffing

Whether clothes changing and donning and doffing of protective equipment count as work time can depend on a number of factors: What are they changing into or donning? Is it necessary or required? Where does the changing or donning and doffing activity occur? Is there a relevant bargaining agreement? Two key questions will help employers determine whether they need to pay for clothes changing or donning and doffing activities. First, is changing into or out of the clothing or protective equipment integral and indispensable to a principal activity so that it would normally fall within the definition of hours worked? Second, if changing would typically count as hours worked, does the activity fall within the scope of 29 U.S.C. § 203(o) so as to exclude it from compensable time?

An example of how changing activities can be integral and indispensable to a principal activities is provided in *Steiner v. Mitchell*, 350 U.S. 247 (1956). In that case, the Supreme Court addressed whether workers in a battery plant were entitled to compensation for time spent changing clothes at the beginning of the shift and showering at the end. The employees were required to “make extensive use of dangerously caustic and toxic materials” and were “compelled by circumstances, including vital considerations of health and hygiene, to change

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clothes and to shower in facilities which state law require[d] their employer to provide.” *Id.* at 248. The employees routinely worked with or near toxic chemicals that “permeated the entire plant and everything and everyone in it;” placed the workers’ families in danger; were discovered in the workers’ bodies at abnormal levels; and required the workers to engage in changing activities for 30 minutes each day. *Id.* at 249–50, 252. Under these facts, the Court held that the workers’ changing activities were an integral and indispensable part of their principal activity, the production of batteries, and therefore compensable work time under the FLSA. *Id.* at 256.

In *Steiner*, 350 U.S. at 249, the Supreme Court drew a distinction between the circumstances in that case and “the question of changing clothes and showering under normal conditions,” because the Government acknowledged that such activities “ordinarily constitute ‘preliminary’ or ‘postliminary’ activities excluded from compensable work time.” Thus, 29 CFR § 790.7(g) expressly states that normal clothes changing is preliminary time that is not compensable. Beyond this general standard, subsequent guidance suggests that changing time does not count as work time if employees have discretion whether to wear particular clothes or equipment and/or have the option to change at home.

Initially, the Department’s guidance and the relevant court decisions on changing time assume that any clothing or equipment is required by law, employer rules, or the nature of the work. *See* 29 CFR § 790.8(c). Optional clothing and equipment, which some employees choose to wear and others do not, are not integral and indispensable and, thus, time spent changing into such clothing does not count as work time. This is ordinary changing activity. *See Steiner*, 350 U.S. at 249; 29 CFR § 790.7(g).

Moreover, even if changing is required by law, rule, or the nature of the work, changing activities that occur at home do not count as work and are not compensable. The USDOL Field Operations Handbook § 31b13 (Sept. 19, 1996) explains:

Employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be

used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not working time.

See Reich v. IBP, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (“Requiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature.”). Similarly, if employees are free to change into required clothes or equipment at home but choose to change at their work site, the changing time still does not count as work: “It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.” USDOL Memo No. 2006-2 at 3.

In contrast to situations where employees have flexibility or a choice, 29 CFR § 790.8(c) provides: “where the changing of clothes on the employer’s premises is required by law, by rules of the employer, or by the nature of the work,” the changing activities are considered integral and indispensable to the employees’ principal activities. *See, e.g., De Asencio*, 500 F.3d at 373 (“the donning and doffing activity in this case constitutes ‘work’ as a matter of law”). Some courts hold that this is true regardless of how simple the equipment or donning and doffing activities are. *E.g., id.; Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910-11 (9th Cir. 2004) (“the ease of donning or ubiquity of use did not make the donning of such equipment any less integral and indispensable”). In contrast, other courts have concluded that donning and doffing of non-unique protective gear (which usually takes a small amount of time) is not integral and indispensable to a principal activity and, thus, is not work time. *E.g., Gorman*, 488 F.3d at 594 (“The donning and doffing of generic protective gear is not rendered integral by being required by the employer or by government regulation.”); *Reich*, 38 F.3d at 1126 (donning safety glasses, earplugs, hard hat, and safety shoes, “although essential to the job, and required by the employer” “can easily be carried or worn to and from work and can be placed, removed, or

replaced while on the move or while one's attention is focused on other things" and, thus, are preliminary activities that are not compensable).

If an employer has such requirements, the next question is whether the activity falls within the scope of 29 U.S.C. § 203(o) so as to exclude the activity from compensable time.

Section 203(o) states in pertinent part:

Hours Worked – in determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee.

The initial question that arises in relation to section 203(o) is whether the employees are subject to a bargaining agreement. If so, then a more detailed analysis is warranted. If not, then changing time that is integral and indispensable may need to be compensated.

If the employees are subject to a bargaining agreement, the next question is whether the agreement contains express provisions addressing the compensability of clothes changing time or whether the parties have a custom or practice on the subject. The Department of Labor interprets custom or practice to mean:

Where such clothes changing and washup activities are the only preshift and postshift activities performed by the employees on the premises of the employer, the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never resisted or opposed this policy in any manner although they apparently have been aware of it, there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time.

USDOL Field Operations Handbook § 31b01 (Sept. 19, 1996). For instance, in *Turner v. City of Philadelphia*, 262 F.3d 222, 227 (3d Cir. 2001), the Third Circuit applied this section to affirm the District Court's dismissal of clothes-changing time claims by city correctional officers. The plaintiffs' union had never formally requested collective bargaining over the city's policy, nor had it otherwise challenged the policy by grievance or arbitration demand. *See also Arcadi v. Nestle Food Corp*, 38 F.3d 672 (2d Cir. 1994); *Hoover v. Wyandotte Chems. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972) (bargaining history established custom or practice); *Anderson v.*

Pilgrim's Pride Corp., 147 F. Supp. 2d 556, 564-65 (E.D. Tex. 2001); *Bejil v. Ethicon, Inc.*, 125 F. Supp. 2d 192, 196-97 (N.D. Tex. 2000).

Finally, the most significant dispute that often arises in relation to section 203(o) is what activities are covered by the term “changing clothes.” Coveralls, shirts, pants, and common workplace uniforms clearly fall within this concept. In addition, the Department of Labor has found that “this clothing includes, among other items, heavy protective safety equipment worn in the meat packing industry such as mesh aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards.” USDOL Opinion Letter FLSA2007-10 at 1 (May 14, 2007); *see also* USDOL Opinion Letter FLSA2002-2 at 2 (June 6, 2002) (withdrawing opinion letters from 1997, 1998, and 2001 that provided a contrary conclusion).

In *Alvarez*, 339 F.3d at 904-05, the Ninth Circuit rejected the Department’s interpretation, explained that section 203(o) must be narrowly construed against employers, and found that the section did not apply to specialized protective gear because that gear was “different in kind from typical clothing.” Other courts have disagreed. *E.g., Anderson v. Cagle’s, Inc.* 488 F.3d 945, 955-58 (11th Cir. 2007) (finding that smocks, hair/beard nets, and gloves “fit squarely within the commonly understood definition of ‘clothes’ as that term is used in § 203(o)”). In *Anderson*, 488 F.3d at 957-58, the Eleventh Circuit took issue with the analytic approach used by the Ninth Circuit in its *Alvarez* decision, explaining: “construing § 203(o) narrowly against employers as an FLSA ‘exemption’ contravenes not only basic tenets of statutory construction but also the readily apparent intent of the legislators who approved the amendment’s language.” In its most recent pronouncement on the subject, the Department of Labor suggests that employers outside of the Ninth Circuit may interpret section 203(o) as applying broadly, whereas those employers within the Ninth Circuit must use greater caution. USDOL Opinion Letter FLSA2007-10 at 1 (May 14, 2007).

Because employees continue to pursue compensation claims in relation to clothes changing and donning and doffing time, employers should consider a few steps that may undercut any such claims:

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- Can the clothes, uniforms, or equipment be optional rather than required? This may not be possible with safety equipment, which is necessary to protect employees and minimize workplace injuries. Work clothes are another matter. Most employees would opt to use company-provided work clothes rather than having to provide their own work attire, thus the question is whether an employer can tolerate the few employees who decide not to wear company-provided work clothes. To minimize the impact of employee-selected attire, employers can adopt rules specifying what types of clothing are acceptable.
- Can the employees change at home? Again, this may not be possible (or preferable) with expensive safety equipment. Employers may also be concerned about the loss of uniforms and equipment. At the same time, if uniforms and equipment are checked out to employees and the employees are free to change at home or at work, any changing or donning and doffing claim is unlikely to succeed.
- Is the employer willing to provide a designated number of minutes for employees to change? The Department of Labor has endorsed such a formula approach:

An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

USDOL Field Operations Handbook § 31b01a (Sept. 19, 1996). If an employer decides to pursue this option, the employer should have a time study or other analysis that supports the reasonableness of the time it allows. Employers should also understand that this provision only applies to “clothes changing.” Thus, if donning and doffing protective equipment falls outside of that term (which some courts have held), then a formula approach may not preclude a subsequent lawsuit by employees who take longer to change.

E. Waiting and Walking Time

Whether employees must be paid for waiting and walking time depends on when those activities occur and what level of control employers exercise over the activities. The most basic

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rule is that employees must be paid for all time during which they are on duty, regardless of whether they are actually engaged in work. 29 CFR §§ 785.14 to .16. Thus, employees who are required to arrive at a location and then wait for assignments must be paid for their waiting time because they are engaged by their employer at that time. *See Preston v. Settle Down Enters., Inc.*, 90 F. Supp. 2d 1267 (N.D. Ga. 2000) (material issue of fact precluded summary judgment on issue of whether temporary workers had to be paid for the time they were waiting for job assignments). In contrast, an employer generally does not need to pay employees for waiting time if the employees are completely relieved from duty and are free to use the time for their own personal purposes. *See United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999). Applying these rules, one court found that police cadets, who were not in class or training but who nevertheless were required to remain at the police academy, were not entitled to waiting time compensation because they were free to engage in personal activities. *Banks v. City of Springfield*, 959 F. Supp. 972 (C.D. Ill. 1997). Similarly, in *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931 (9th Cir. 2004), the court found that electric utility workers who had to reside on their employer's remote premises did not have to be paid for waiting time when they were not performing actual duties. Moreover, another court found that a policy requiring police officers on sick or disability leave to remain at home unless they obtain permission to go elsewhere did not transform the time at home into hours worked. *Debraska v. City of Milwaukee*, 189 F.3d 650 (7th Cir. 1999).

In *IBP*, 546 U.S. at 39-41, the Supreme Court found that whether waiting and walking time counts as compensable work time depends on whether it falls within the continuous workday. Time employees spent waiting to receive equipment and waiting to put on their work clothes and equipment did not count as hours worked. *Id.* at 40-41; *see also Anderson*, 328 U.S. at 689 (time waiting at the time clock was not hours worked). In contrast, waiting and walking time that occurred after their first principal work activity (donning unique protective gear) did count as hours worked. *IBP*, 546 U.S. at 39-40.

F. Pass-Down Time and Employee Discussions

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When they arrive at work, some employees engage in discussions with other employees who are leaving work. Whether these discussions count as time worked depends on the purpose and nature of the discussions. On one extreme, employers do not have to pay for personal conversations between employees (unless, of course, the continuous workday has already started). On the other extreme, required discussions between employees at the end of their shift and their replacements (who are starting their shift) for the purpose of sharing operational information should be counted as time worked. *E.g., Carlsen v. United States*, 521 F.3d 1371 (Fed. Cir. 2008) (finding that “the exchange of pertinent information and equipment” constituted work, but finding the work was *de minimis* because it took an average of less than 10 minutes per day). In between these two extremes, employers must use judgment to assure that employees are properly recording time when they are conversing with other employees about business issues.

A more difficult issue is presented when the continuous workday rule is considered with personal conversations at the start or end of the workday. For instance, if an employee turns on a machine (as discussed below, which is seemingly an initial act of work) and then engages in a personal conversation with a co-worker, does the employer have to pay for the extended personal conversation because of the continuous workday rule? The answer is seemingly yes, at least if the discussion is relatively short in duration. If the discussion takes more than twenty minutes and especially if it occurs while the employees are getting coffee or breakfast, it may be possible (depending on the circumstances) to count this time as a meal period or extended non-compensable rest break. 29 CFR § 785.19; USDOL Field Operations Handbook § 31a01(b) (Dec. 15, 2000). Alternatively, if an employer adopts specific rules limiting the amount of time that can be used for such breaks and prohibiting rogue extensions of break time, the employer may be able to exclude such “unauthorized extensions” of breaks from its calculation of hours worked. USDOL Field Operations Handbook § 31a01(c) (Dec. 15, 2000).

G. Computers, Equipment, and Tools

When they arrive at work, employees must often take some preliminary steps with equipment to assure that they can perform their jobs. They might set up, lay out, turn on,

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prepare, or test computers, equipment, or tools. These activities almost certainly count as time worked. *E.g.*, *Anderson*, 328 U.S. at 692-93 (turning on switches for lights and machinery counts as hours worked); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 717-18 (2d Cir. 2001) (powering up and testing an x-ray machine is integral to taking x-rays and counts as work time); 29 CFR § 790.8(b)(1) (lathe workers who frequently oil, grease, clean, or install new parts on their machines are involved in “an integral part of the principal activity”); 29 CFR § 790.8(b)(2) (garment workers who arrive early to distribute clothing to workbenches or to get machines “in readiness for operation” are engaged in work); USDOL Field Operations Handbook § 31b07 (Sept. 19, 1996) (“[k]nife sharpening activities are an integral part of and indispensable to the various butchering activities . . . [and] time so spent is compensable”). Once employees engage in such activities, the workday has started and, under the continuous workday rule, any subsequent walking, waiting, or other time generally must be counted as time worked. *IBP*, 546 U.S. at 29; 29 CFR § 790.6(b).

One area of recent focus by the Department of Labor is time spent by employees turning on computers and pulling up computer applications, especially in call center operations. If employees turn computers on and then spend time getting coffee or visiting with co-workers while computer applications boot up, the Department’s position is that all such time is compensable under the continuous workday rule. If employees log into a time recording system after these initial activities, an employer could be systematically missing the first few minutes of its employees work time every day. Employers should thus be certain that their time recording systems are capable of capturing all time worked, including these initial start-up periods. As with time at the start of the day, employers must also be aware of and count work activities at the end of the day. Such activities might include putting away, rolling up, or turning off computers, equipment, or tools.

III. Time Recording Issues That Complicate Class Claims

The Department of Labor has adopted regulations that address recordkeeping requirements. *See* 29 CFR Part 516; 29 CFR §§ 785.46 to .48. When adopting time recording

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policies and procedures, employers should consider both what is legally permissible and what is necessary to minimize the likelihood and severity of class litigation.

A. The Need for Accurate Records

The types of records that must be maintained by employers are set forth in great detail in 29 CFR Part 516. These records include information regarding the employee, the work week, the hours worked each day, the basis of pay, the regular rate, straight time and overtime compensation, deductions and additions to wages, the applicable pay period, the wages paid each pay period, and the date of payment.

An employer has a duty to assure that these records are detailed and accurate. 29 CFR § 785.13. This duty may not be delegated to employees. Thus, policies regarding time entry, reporting of time, and following posted schedules are helpful but are not a defense to claims for uncompensated hours. Neither are policies that prohibit unauthorized work or overtime. Likewise, time cards or time records by themselves are not necessarily sufficient evidence of hours actually worked. 29 CFR § 785.48.

Under federal law, employers must maintain most records for three years, 29 CFR § 516.5, although some source documents and other basic information may be discarded after two years, 29 CFR § 516.6. Even though the FLSA allows employers to discard some source materials after two years, employers should maintain all records for three years if this is practicable. Because the statute of limitations may not run after the two-year period, it is important for employers to maintain source materials to defend against possible wage claims. These materials may include records created or signed by the employee that can be used for impeachment purposes.

If employers fail to maintain required (or accurate) records, then courts shift the burden of proof in subsequent litigation. Essentially, courts allow employees to provide generalized and unsubstantiated testimony as to the hours they believe they worked and require that employers disprove the testimony. *E.g., Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Thus,

a court or jury may award damages even though the measure of damages is imprecise. *E.g.*,
Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997).

B. The Use of Time Rounding Systems

The Department of Labor has adopted a regulation that generally allows time rounding practices. 29 CFR § 785.48(b) provides:

It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

Such rounding is acceptable as long as: the rounding works both ways (both for and against the employer); the rounding increments do not exceed a quarter of an hour (15 minutes); and the rounding "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.*

Although seemingly allowed, rounding presents certain risks in class action litigation. Initially, the regulation merely states that rounding will be accepted "for enforcement purposes." Nothing suggests that a rounding system automatically satisfies the requirements of the FLSA. Moreover, the design of the rounding system can be attacked. Some systems are set up so that employers obtain the sole or primary benefit. Such systems do not comply with the FLSA. Finally, the regulation makes clear that the final measure as to whether a rounding system is effective is that "over a period of time" the system will fully compensate employees for the time they work. Whether this occurs could presumably be determined by comparing the total work hours using actual punch times with the total work hours using the rounding system. Regardless, this issue is highly factual and could prevent summary judgment in any dispute.

C. The Impact of Attendance Policies

Many employers have strict attendance and tardiness policies. Although these policies may not appear to have any relationship with the measurement of work hours, they can impact the viability of an employer's rounding policies. For instance, if an employer has a seemingly neutral and acceptable rounding policy that rounds to the nearest quarter hour (7:53 through 8:07

counts as 8:00), a strict tardiness policy could render the rounding policy improper and expose the employer to claims for unpaid work. Under this example, if an employee is marked tardy if he or she punches in at any time after 8:00, then the rounding policy is no longer “neutral” because employees can punch in early but are punished if they punch in late. This is the type of systemic flaw that is especially susceptible to class claims. Employers must therefore consider the impact on their time reporting systems when they adopt attendance and tardiness policies.

IV. What Can an Employer Do To Minimize the Risks?

Although there may be nothing an employer can do to eliminate the possibility that some employees will work time that is not compensated, employers should consider a number of steps to minimize the likelihood of uncompensated work and subsequent wage claims.

Initially, employers should attempt to structure employee jobs and the start and end of their workday in light of the guidance provided by the Department of Labor and the courts. For instance, employers should minimize any work-related activities that employees are asked to handle away from their primary work location. In addition, employers should require that employees engage in personal activities (using the restroom, getting coffee, and talking to friends) before they start any potential work activities and prohibit such personal activities after the workday has started. By effectively structuring the workplace, employers can minimize the situations where employees may engage in uncompensated work time.

Moreover, employers should consider adopting broader policies and procedures that will encourage employees to report their time. For example:

- Employers should establish a policy requiring employees to accurately record all time worked and prohibiting any off-the-clock work. As part of that policy, the employer should create a direct avenue for complaints to a human resources or legal department separate and apart from immediate management.
- Employers should then establish an ongoing educational campaign. Employees should be trained as to what should be reported as work time and periodically reminded that federal law and company policy prohibit off-the-clock work.

- Employers should have employees verify their time entries and compensated time on a weekly basis. If employees sign off on the precise times or number of hours that they have reported, they may be estopped from challenging those factual representations in later litigation.
- If any errors or gaps in time records are discovered, employers should be certain to document employee participation in any changes that are made. Despite employer policies requiring the entry of starting and ending times, employees sometimes fail to properly record their time. For instance, employees may not punch out at the end of the day. Although supervisors may be tempted to correct employee time records to accurately reflect the time that they believe the employees worked, supervisors should refrain from doing so. Rather, any adjustments or corrections to time reported by a particular employee should be explicitly requested or acknowledged by that employee. Absent such participation by employees, employers make themselves susceptible to charges that they have improperly altered time records. Moreover, if employees fail to initially record their time accurately, an employer may wish to issue warning letters to the employees about the importance of proper time reporting.
- Employers should establish a procedure for randomly verifying the accuracy of time cards and time records. This is perhaps the most important step that an employer can take. Such random verification demonstrates that the employer is taking affirmative steps to assure full payment of its employees and limit uncompensated off-the-clock work. If necessary, an employer should hire someone to conduct compliance audits.
- Employers should have defined practices and procedures to assure that any claims or complaints of uncompensated work time are promptly investigated and resolved. It is important for employers to create a record of paying valid claims for time worked.
- Employers should discipline employees for working or allowing uncompensated work. There may be a concern about claims of retaliation by employees who are disciplined

after they felt compelled to work off the clock; however, a discipline policy that is evenly applied to managers who allow off-the-clock work should avoid this concern.

Finally, if an employer has a unique and particularly difficult work time issue, the employer may want to consider whether to seek an opinion on the subject. Employers can seek advice from counsel or the Department of Labor. Indeed, in some circumstances, a written request seeking a Department of Labor opinion letter may be appropriate. Reliance on advice may establish a lack of willfulness and reliance on a written interpretation by the Department may act as a bar to all liability. *E.g.*, *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 641 (5th Cir. 2001) (approving a finding of good faith where the employer consulted with the Department of Labor); *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1356 (9th Cir. 1994) (reversing an award of liquidated damages where the employer “relied on substantial legal authority” and “consult[ed] experts and the DOL in an attempt to comply with the law”); *Garcia v. Allsup’s Convenience Stores, Inc.*, 167 F. Supp. 2d 1308 (D.N.M. 2001) (granting summary judgment on liquidated damages claim because employer relied on the advice of qualified professionals); 29 U.S.C. § 259; USDOL Opinion Letter FLSA2007-10 at 1-2 (May 14, 2007).