

## PRACTICE FOCUS

### EFFECTS OF THE U.S. SUPREME COURT'S DON-DOFF RULING

BY AUDREY MROSS

*These boots are made for walkin',  
And that's just what they'll do,  
One of these days, these boots are gonna  
walk all over you.*

— Nancy Sinatra

Who knew that Nancy Sinatra, in all her legal wisdom, would foretell a U.S. Supreme Court decision?

Employers are feeling those work boots in their wallets. Toyota recently agreed to a \$4.5 million settlement and retroactive 401(k) plan contributions for 1,000 current and former workers over unpaid employee walking and uniform donning-doffing time, according to a Feb. 17 article in *The Courier-Journal* of Louisville, Ky. The settlement stemmed from issues at the nearby Georgetown, Ky., Toyota plant.

That settlement, according to the same article, was prompted by a unanimous U.S. Supreme Court decision last November in the consolidated case of *IBP Inc. v. Alvarez*, which held that employees' walks between the locker room (where work-related protective gear is donned and doffed) and the production lines in a beef slaughterhouse and a chicken processing plant were compensable.

Before general counsel and their outside labor and employment lawyers wishfully limit this decision's application to chicken or beef, or perhaps Toyotas, they should consider analogies that lurk in other workplaces.

First, a look back: The federal Fair Labor Standards Act (FLSA) became law in 1938, on the heels of the Great Depression. Its purpose was to offer

an improved standard of living, via the minimum wage, and to encourage the hiring of more workers, via the disincentive of overtime pay. The law covers all employees of subject employers, unless employers can prove an exemption applies.

The law states that employers must pay workers for all time "suffered or permitted" to work, but fails to define "work."

In 1946, the U.S. Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.* that the statutory workweek includes all time during which an employee is required to be on the employer's premises, on duty or at a prescribed workplace. Congress reacted in 1947 by passing the Portal-to-Portal Act, excluding from compensable time "walking, riding or traveling" to and from the actual place of performance of the employee's principal activities and "preliminary and postliminary" activities.

In 1956, the U.S. Supreme Court expanded the scope of "principal activities" with its ruling in *Steiner v. Mitchell* to include activities that are "an integral and indispensable part of the principal activities." In that ruling, changing into protective clothes before work and showering off toxic accumulations from toiling in a lead-battery plant at the end of the shift were deemed integral and indispensable to the work and, therefore, compensable.

Flash forward nearly half a century. In 2003, the 9th U.S. Circuit Court of Appeals reviewed *Alvarez v. IBP* (the beef case mentioned above),

holding that in addition to donning and doffing, the time spent walking between the locker room and the production line and any waiting time



between the don-doff and walks are all compensable, except for the don-doff of non-unique protective gear such as goggles and hard hats.

In 2004, the 1st Circuit reviewed *Tum v. Barber Foods* (the chicken case mentioned above), holding that none of the walking and waiting time is compensable, applying the FLSA's *de minimis* standard (i.e., generally, nonprincipal activity of less than 10 minutes' duration is not compensable) and the "preliminary and postliminary" activity exclusion.

The Supreme Court consolidated the cases, heard oral arguments in October 2005 and released its opinion in November 2005. The high court endorsed the continuous-workday concept, finding that all time between the first principal activity (or an integral or indispensable part of a principal activity) and the last one is compensable. Only waiting time to don gear is not

compensable since it is “two steps removed” from the principal activity of work on the production line. If, however, employees must wait to don due to the employer’s failure to provide gear, that waiting time is compensable.

To sum it up, time spent donning gear, walking to the production line, working, walking back to the locker room, and waiting to doff is compensable, as is an employer-caused wait to don.

## WALKING ORDERS

So, meat-processing plants have their walking orders, but what about others? GCs representing public or private organizations that use workers whose jobs involve protective gear — such as jobs in medicine, dentistry, waste disposal, laboratories, food services, construction and emergency services — should take notice.

Employers also should identify other activities that are necessary to the job. Employers have paid to settle several suits brought by call-center employees who lost wages for time spent booting up computers and loading software each day before they took their first customer calls. Between 2003 and early 2005, three suits totaling \$10.9 million were settled by the U.S. Department of Labor for call-center workers, according to an article in the July 15, 2005, *Workplace Report*,

published by the Bureau of National Affairs.

Also, employers and their counsel should consider whether employees are performing activities on the road or at home, which could expand the workday and turn their commutes into compensable time.

When evaluating whether activities should come under compensable time, ask these questions:

- *Who’s non-exempt?* Review job classifications for exempt vs. non-exempt status under federal and state law. At least 18 states’ exemption definitions differ from the FLSA; the Texas definitions closely match the FLSA’s.

- *When and where is work being done?* Perform a “continuous workday” audit. Ask workers what they do, when and where.

- *Is the work compensable?* Are employees performing duties that are principal activities, activities that are integral and indispensable to principal activities, or two or more steps removed from principal activities? Does the *de minimis* exclusion apply? Is there a collective bargaining agreement that carves out certain duties from compensable time? Meal and rest breaks of more than 20 minutes and certain training and travel time can be unpaid, per the FLSA regulations.

- *Is the policy or practice wrong?* Be wary of automatic start-stop times

that do not reflect when work actually begins and ends. Do supervisors understand and correctly apply the start-stop policies? Does the handbook expressly ban off-the-clock work?

- *What’s the work worth?* Weigh the value of the compensable work being performed off the clock, if any, against the cost of expanding the workday. If the off-the-clock work has low value, prohibit the performance of that work (e.g., taking work home). If the value is high, consider reconfiguring the workplace to reduce unproductive time (e.g., move the locker room closer to where people do the work).

Incorrect handling of this issue can be expensive: two years of back pay for all affected workers (three years, for willful violations; and possibly longer, if state law applies), liquidated damages, attorneys’ fees, injunctive relief, even imprisonment.

Feeling queasy? Walk it off. **HR**

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