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Special Report

FLSA

Attorneys Say 'Continuous Work Day' Ruling Prompts Questions Over When Work Begins

The U.S. Supreme Court's unanimous ruling on the "continuous work day" under the Portal-to-Portal Act will likely open the door to new litigation defining how far the beginning and end of the workday can be extended, a panel of attorneys said Dec. 14 during an American Bar Association teleconference. The panelists, including lawyers representing both parties in the Supreme Court's IBP Inc. v. Alvarez decision, said the unanimous ruling sent a strong signal to employers and employees about what is compensable time.

The Supreme Court Nov. 8 ruled that time an employee spends walking after the first primary work activity and before the last primary work activity of the workday is compensable under the Fair Labor Standards Act, even when the work activity involves donning and doffing required safety gear (126 S. Ct. 514, 74 USLW 4001, 10 WH Cases 2d. 1825; 216 DLR AA-1, 11/9/05).

"This was an easy case for the Supreme Court because there was already a firm precedent," said Thomas C. Goldstein, who represented the workers. Goldstein, of Goldstein & Howe in Washington, D.C., said that making the time spent after dressing and before undressing compensable "was more like walking from station to station than walking from the plant floor" and that the Supreme Court had long held walking from station to station was compensable.

Role of Precedent

Joel M. Cohn--who represented IBP at an earlier stage of the case before the U.S. Court of Appeals for the Ninth Circuit--said that the justices' reliance on Steiner v. Mitchell, 350 U.S. 247 (1956), which was the precedent that said employees should be compensated for any activity that is "integral and indispensable" to the "principal activity"
of the workplace, had been foreshadowed during the confirmation hearings for Chief Justice John G. Roberts. "During the confirmation hearings, Roberts said he would rely strongly on Supreme Court precedent," said Cohn, of Akin Gump Strauss Hauer & Feld in Washington, D.C. Because the Alvarez case was the first case heard by the new Roberts court, precedent was "fresh on his mind and it received a lot of attention."

Cohn said that during oral arguments, Justice Antonin Scalia made the point that the employers had not asked the Supreme Court to overturn Steiner, which allowed the justices to "tether the opinion and result to the rationale of Steiner."

Although the 9-0 decision appeared to be a complete victory for the workers, moderator Ellen C. Kearns of Foley & Lardner in Boston said the court did refuse to find the time spent by workers waiting--prior to clothes changing--at the beginning of the day was compensable, an argument made by the plaintiffs.

"When you lose 9-0, it's hard to see positive outcomes,"
Cohn quipped, but Goldstein responded back that Cohn "underestimated the success" achieved for management by convincing the court that the law does not require the compensation of waiting time.

'Eroding Portal-to-Portal Act.'

But Cohn was less enthusiastic about the result, saying the decision is "illustrative of a broader principle" that plaintiffs' attorneys and the Labor Department are "consistently trying to erode the Portal-to-Portal Act" and that soon the exceptions within the act will "swallow the rule."
Recoiling at the suggestion that there is "a conspiracy by plaintiffs' attorneys to capture the Bush-appointed Labor Department and a pro-business Supreme Court," Goldstein argued that the case reflected employers who were trying to read the Portal-to-Portal Act "much more broadly than Congress ever intended."

Goldstein added that the justices were "very concerned about coming up with a balanced outcome of the case." He said the workers' case was "helped dramatically" by the support of the Labor Department, which had filed briefs on behalf of the workers at both the appeals court level and before the Supreme Court, and that the justices were likely impressed by the backing of DOL.

More Work Shifting to Home

In terms of the impact of the decision, plaintiffs' attorney David Borgen agreed with the other panelists that the decision opened the door to new litigation on what other kinds of activity will be compensable. He predicted that the next wave of cases brought by workers would be in the call-center context and in cases questioning the compensability of "drive time." "More and more employers are shifting work to the beginning of the day," said Borgen, of Goldstein, Demchak, Baller, Borgen & Dardarian in Oakland, Calif. "When the work begins at home, does that mean the drive to work is now compensable?"

Using the example of field technicians and construction employees, Borgen said many workers are expected to download work-tickets, check e-mail, and send information to the office at home before they leave for their worksite. In those situations, Borgen questioned whether those tasks are "integral and indispensable" to the "principal activity"

of their jobs and therefore both the tasks at home and the drive to the first job would be compensable.

"I think these kinds of jobs are impacted by, and their legal arguments strengthened by, the decision," Borgen said.

Both Goldstein and Cohn agreed that this is likely the next area of litigation, but questioned whether the claims would be successful.

Cohn explained that the "general rule" is that commuting time is not compensable and that the Labor Department agrees with that approach under the theory that the activity is not occurring on the employer's premises.

"I think the same rationale would apply to checking e-mail,"
Cohn explained. "It is an issue that was not addressed by Supreme Court, and in some respects it is in its infancy."

Clothes Changing

Goldstein agreed that it is unclear about the extent of the ruling, adding that the decision tracked the conclusions in Steiner about clothes changing and protective gear. While other things may be integral and indispensable, the court's decision focused on protective gear, and it is uncertain whether general clothes changing and the walking connected to it would be compensable. Borgen argued that while commuting time is not compensable under the Portal-to-Portal Act, it is possible that if other required activities rise to the level of being a principal activity and integral and indispensable, that drive time could be compensable based on other parts of the Fair Labor Standards Act.

"If employees have to connect a laptop, download, read alerts, and load material at home, the drive time may well be compensable," he argued.

Another open question, according to the attorneys, is the future of "de minimis" time under the FLSA. In the past, Kearns said that if a task was de minimis, the employee need not be paid for the time since it was so small that it was difficult to quantify.

De Minimis Activity

The current ruling, Borgen theorized, opens the door to arguments that even though the activity may be de minimis and the walking following or preceding the activity may be de minimis, the time could be compensable when the activity and walking are added together. Cohn agreed, saying that "an activity can be so slight that a federal jury would find no obligation to pay for it under the de minimis doctrine, but all of a sudden, a significant block of time becomes compensable."

Calling such a finding an "anomalous and perhaps an unintended result" of the decision, Cohn said that aggregating the time could suddenly create significant amounts of time that employers will now have to pay out.

Goldstein questioned whether it was an anomaly and said he believes that the Supreme Court has said that walking time had to be compensated and that the time did not necessarily contradict the de minimis doctrine.

By Michael R. Triplett

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