COMPENSABLE WORKING TIME UNDER THE FAIR LABOR STANDARDS ACT*

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Practical application of the Fair Labor Standards Act[1] immediately raises the basic question of what time constitutes hours of employment, for which payment must be made in compliance with the minimum-wage and overtime requirements. The original statute did not define compensable time, although Section 3(g) states broadly that to employ "includes to suffer or permit to work." Much controversy developed when employees began to claim compensation for activities preliminary or postliminary to their principal duties, such as changing clothes, washing up, or traveling to and from their usual workplace.

A. What Are Hours of Employment?

Some wide judicial definitions of "hours worked" created unexpected liabilities on the part of employers. In decisions of 1944 and 1945, the Supreme Court held that time spent by iron-ore and coal miners in going from the mine portal to the working face and returning to the portal was time for which pay was due under the Act, notwithstanding the fact that neither contract nor custom recognized such time as compensable.[2] Work, said the Court, includes "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." The next year, this principle was extended to a manufacturing plant in *Anderson v. Mt. Clemens Pottery Co.*[3] There

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[1] 29 U. S. C. §§201-219 (1938); Act of June 25, 1938, c. 676, P. L. 718, 75th Cong., 3d Sess., 52 STAT. 1060; as amended by Act of Aug. 9, 1939, c. 605, P. L. 344, 76th Cong., 1st Sess., 53 STAT. 1266; by Act of June 26, 1940, *c.* 432, Pub. Res. 88, 76th Cong., 3d Sess., 54 STAT. 611; by Act of Oct. 29, 1941, c. 461, P. L. 283, 77th Cong., 1st Sess., 55 STAT. 756; by Reorganization Plan No. 2, 60 STAT. 1095, effective July 16, 1946; by Act of May 14, 1947, c. 52, P. L. 49, 80th Cong., 1st Sess., 61 STAT. 84; by Act of Oct. 26, 1949, c. 736, P. L. 393, 81st Cong., 1st Sess., 63 STAT. 910; and by Reorganization Plan No. 6, 15 F. R. 3174, effective May 24, 1950.

The present basic wage-hour standards of the Act require that each employee who is engaged in interstate or foreign commerce, or in the production of goods therefor, shall be paid a minimum wage equivalent to 75¢ per hour and shall receive compensation for all hours worked in excess of 40 per week at a rate not less than 1½ times the "regular rate at which he is employed." Sections 6(a), 7(a).

[2] Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U. S. 590 (1944), *rehearing denied*, 322 U. S. 771 (1944); Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161 (1945).

[3] 328 U. S. 680 (1946).

the Supreme Court held that the minimum time necessarily spent in walking between the time-clock and the employee's regular workplace, as well as in various make-ready activities (such as putting on overalls, taping or greasing arms, preparing equipment, turning switches, laying out tools, and opening windows) must be included in the compensable workweek.

These decisions provoked a flood of law-suits demanding "portal to portal" pay, and these in turn led to enactment of the Portal-to-Portal Act of 1947.[4] To a large extent, determination of time worked is now governed by Section 4 of the latter statute, supplemented by Section 3(o) of the Fair Labor Standards Act as amended in 1949. However, many of the older working time tests developed by the Wage-Hour Administrator and the courts remain controlling. Neither the Portal-to-Portal Act nor the 1949 Amendments affect the compensability of employees' time during their regular working hours; in defining working time, both relate solely to incidental activities before or after the regular workday.[5]

B. "Principal" vs. "Fringe" Activities

In brief, Section 4 of the Portal-to-Portal Act excludes from the concept of "hours worked" those functions "preliminary" or "postliminary" to the employee's "principal" duties, unless such functions are compensable by contract, custom or practice. This necessitates a distinction between principal and fringe activities, for neither the presence nor the absence of a contract, custom or practice can affect the compensable status under the Fair Labor Standards Act of the employee's principal activities, although established compensation practices may help to determine what is a "principal" activity.

1. *Principal Activities.*

One of the federal courts has said that the phrase "principal activity or activities" used in Section 4 of the Portal-to-Portal Act clearly refers to the productive work which is the object of the employment.[6] The Administrator, relying upon the legislative history as well as the language of the statute, seems to go somewhat further. He notes in his Interpretative Bulletin that use of the plural "activities" indicates that an activity need not be predominant in order to be "principal," and that an employee may be engaged in several "principal" activities during the workday. He defines "principal activities" to include those activities which the employee is "employed to perform," "any work of consequence" no matter when performed, "such activities as are indispensable

[4] 61 STAT. 84 (1947), 29 U. S. C. §§251-263 (Supp. III, 1950).
[5] 29 CODE FED. REGS. §790.6 (1947). Sec. 2 of the Portal-to-Portal Act limits the concept of working time even within the regular workday, but that section applies only to activities performed prior to May 14, 1947.
[6] McComb v. Swanson & Sons, 77 F. Supp. 716 (D. Neb. 1948).

to the performance of productive work," and "all activities which are an integral part of a principal activity."[7]

The Administrator offers several examples, based upon Congressional comments on the Portal Bill, to illustrate what is "indispensable to" or "an integral part of" an employee's principal activities. Thus, if an operator frequently cleans or greases his machine at the beginning of the workday, or if an employee is required to report early to lay out work for other employees and prepare equipment, these make-ready operations are among the principal activities of the employee and must be counted and paid for in accordance with the minimum-wage and overtime standards, regardless of contrary custom or contract. Similarly, changing clothes on the employer's premises at the beginning and end of the workday is an integral part of principal activity when required by the nature of the work, by the employer's rules, or by law. But if clothes-changing is merely a convenience to the employee, it will be considered a preliminary or postliminary rather than a principal activity.

The 1949 Amendments added a new rule with respect to clothes-changing and washing-up at the start and finish of the employee's workday. Under Section 3(o) of the Fair Labor Standards Act as amended, time so spent need not be counted as hours worked if "excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee." This provision was apparently intended to permit union contracts to change the working-time status of clothes-changing and washing-up when they would otherwise be compensable because necessitated by statute, plant rules, or the nature of the job.

2. *Preliminary and Postliminary Activities.*

In the absence of a contract, custom or practice to the contrary, as described hereafter, Section 4 of the Portal-to-Portal Act provides that preliminary and postliminary activities need not be counted as time worked. Such activities do not include any which occur *after* the employee begins his first principal activity on a given workday and *before* he ends his last principal activity on that day. In other words, the Portal-to-Portal Act does not affect computation of hours worked within the workday proper—roughly the period from whistle to whistle. Time spent by the employee during that period must be counted and paid for in accordance with rules developed by the courts. In general, as indi-

[7] 29 CODE FED. REGS. §790.8 (1947). In Culkin v. Glenn L. Martin Nebraska Co., 10 WH Cas. (BNA) 225 (D. Neb. 1951) the court held that guards and firemen who remained at their regular posts during their lunch periods were engaged in their "principal activities" within the meaning of the Portal Act, and were therefore entitled to have such periods counted as hours worked irrespective of contract, custom or practice. *Accord:* Biggs v. Joshua Hendy Corp., 183 F. 2d 515 (C. C. A. 9th, 1950).

cated above, time spent by the employee during the ordinary workday must be paid for if it involves physical or mental exertion which is controlled or required by the employer, and which is for the employer's benefit.

As noted in the Wage-Hour Administrator's relevant Interpretative Bulletin, no comprehensive listing of preliminary and postliminary activities is possible. What is a fringe activity in one situation may be an integral part of the employee's principal activities in another. However, the Portal Act itself mentions as preliminary or postliminary activities of an employee "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," prior or subsequent to the workday. The Administrator warns that the travel so described in Section 4 of the Portal-to-Portal Act is the ordinary daily travel between home and workplace. He does not consider travel between workplaces, or during regular working hours, or outside such hours at the direction and on the business of the employer, to be the kind of "walking, riding, or traveling" referred to in Section 4. On the other hand, he cites as examples of preliminary or postliminary activities (a) walking from plant gate to workbench, (b) riding from camp to logging site, (c) washing up and changing clothes when for the employee's own convenience and not directly related to his job, (d) waiting in line for pay checks, (e) checking in and out of the plant and waiting to do so, and (f) waiting for work after early arrival not required or expected.[8]

3. *Effect of Contract, Custom or Practice.*

Even though activities are preliminary or postliminary, it may be necessary to count them as time worked under the Fair Labor Standards Act if they are "compensable" by an applicable contract, custom or practice. Section 4 of the Portal-to-Portal Act uses the word "compensable" without qualification and presumably means compensable in any amount.

If an action for restitution is based upon non-payment of minimum wages or overtime compensation through failure to count time spent in preliminary or postliminary activities, the plaintiff should affirmatively plead the contract or custom or practice upon which he is relying, and be prepared to carry the burden of proof on that issue.[9]

[8] 29 CODE FED. REGS. §790.7 (1947).

[9] Bumpus v. Remington Arms Co., 183 F. 2d 507 (C. C. A. 8th, 1950); Bonner v. Elizabeth Arden, Inc., 177 F. 2d 703 (C. C. A. 2d, 1949); U. S. Cartridge Co. v. Powell, 185 F. 2d 67 (C. C. A. 8th, 1950), s. c. 186 F. 2d 611 (C. C. A. 8th, 1951), *cert. denied*, 10 WH Cas. (BNA) 225 (USSC, 1951). *But cf.* Central Missouri Telephone Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8th, 1948). It should be noted that most of the reported cases were decided under section 2 of the Portal Act, and that section applies only to activities performed prior to May 14, 1947. Somewhat different results may be reached under section 4, covering activities since

If a contract is relied upon to support a back-pay claim for fringe activities, it may be either written or oral. But it must "by an express provision" show that payment was intended for the particular activity. Moreover, the contract must have been in effect at the establishment or other place of employment when the activity was performed.[10] It must be a contract between the employer and the employee affected, or his agent or collective bargaining representative. A contract between the employer and a government agency, for example, will not suffice.[11]

When there is no express contract requiring payment for a specific fringe activity, the employee may still be entitled to have it counted as working time under the Fair Labor Standards Act if he can establish a custom or practice by which the employer has paid employees for this activity. Such a custom or practice must exist at the particular place of employment—merely showing a custom or practice in the industry is not enough.[12] The custom or practice must not be inconsistent with a pertinent contract, and it must have been in effect as to the particular form of activity when the employee engaged in it. Moreover, a custom or practice of paying for an activity when carried on during one portion of the day will not sustain a claim based upon the same activity during a wholly different part of the day.[13]

4. *The De Minimis Doctrine and Proof of Time Worked.*

In the *Mt. Clemens* case,[14] the Supreme Court held that the maxim *de minimis non curat lex* applies to preliminary and postliminary activities. On remand of the case, the district court concluded that two or three minutes of walking or make-ready work should be disregarded as *de minimis,* but that as much as twelve minutes of walking should not be.[15] Apparently the *de minimis* doctrine is not affected by the Portal-to-Portal Act. Thus, in *Frank v. Wilson & Co.,*[16] the doctrine was held to make five minutes of pre-shift work noncompensable.

In the *Mt. Clemens* case, the Supreme Court also ruled that the employee will have carried his burden of proof as to time worked "if

that date, because its application is limited to preliminary and postliminary activities and because it contains no jurisdictional clause comparable to subsection (d) of section 2. *Cf.* Welsh v. W. J. Dillner Transfer Co., 91 F. Supp. 685 (W. D. Pa. 1950); Coyle v. Philadelphia Macaroni Co., 9 F. R. D. 331 (E. D. Pa. 1949).

[10] Joshua Hendy Corp. v. Mills, 169 F. 2d 898 (C. C. A. 9th, 1948); *In re* Kellett Aircraft Corp., 85 F. Supp. 525 (E. D. Pa. 1949); 29 CODE FED. REGS. §790.9 (1947).

[11] Fisch v. General Motors Corp., 169 F. 2d 266 (C. C. A. 6th, 1948), *cert. denied,* 335 U. S. 902 (1949).

[12] Bonner v. Elizabeth Arden, Inc., 177 F. 2d 703 (C. C. A. 2d, 1949).

[13] 29 CODE FED. REGS. §§790.10-790.12 (1947).

[14] Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680 (1946).

[15] 69 F. Supp. 710 (E. D. Mich. 1947), *appeal dismissed,* 162 F. 2d 200 (C. C. A. 6th, 1947).

[16] 172 F. 2d 712 (C. C. A. 7th, 1949), *cert. denied,* 337 U. S. 918 (1949). See also Tully v. Joshua Hendy Corp., 79 F. Supp. 709 (S. D. Calif. 1948).

he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." The Court based this ruling upon the proposition that it is the duty of the employer under the Fair Labor Standards Act to keep proper records, and his breach of this duty should not be allowed to defeat the claim of an employee who cannot prove with precision the exact hours worked. The Court also noted that in such cases as this the time-clock records could not be used to calculate working time, since they did not accurately reflect it. Nothing in the Portal-to-Portal Act or the 1949 Amendments appears to change these rules as to form of evidence and certainty of proof.

C. Some Specific Problems

The 1949 Amendments as well as the Portal-to-Poral Act fail to provide any definition of "hours worked" with respect to (a) nonproductive time spent by the employee during the regular workday, and (b) activities outside the regular workday which are an integral part of (rather than just preliminary or postliminary to) the employee's principal activities. This poses questions for which answers must be sought in past and future interpretations by the Wage-Hour Administrator and the courts. A few of the most common problems are here described.

It is quite possible, of course, that at least some of the courts may construe the Portal-to-Portal Act more loosely than the Administrator. In that event, some of the earlier opinions referred to below may not be followed. However, it must be borne in mind that judges have generally accorded substantial weight to interpretations by the official with day-to-day experience in practical administration of the statute.[17]

1. *Waiting Time and Interruptions of Work.*

It has been the Administrator's position that periods of inactivity during the workday are time worked if caused by interruptions beyond the employee's control and if he must stand by because work may at any time be resumed.[18] The result may be the same even when the employer tells him he is free to leave the premises, if the interval is too short to be used effectively for his own interests. Typical situations involve machinery breakdowns, power failures, and delay of materials.

Similarly, if the nature of the employee's job involves idle time while on duty—as is often the case with drivers, messengers, guards, sales-

[17] See U. S. v. American Trucking Assn's., Inc., 310 U. S. 534, 549 (1940); Skidmore v. Swift & Co., 323 U. S. 134, 140 (1944); Mabee v. White Plains Publishing Co., 327 U. S. 178, 182 (1946).

[18] W-H Div. Interp. Bull. No. 13, §§4-8 (1940); *cf.* Cameron v. Bendix Aviation Corp., 65 F. Supp. 510 (E. D. Pa. 1946).

clerks and the like—the idle time must ordinarily be counted. In other words, if he is employed to wait, and not merely waiting to be employed, his working hours normally extend from the time he is required to be in readiness until he is relieved of all responsibility.[19] However, idle time on duty in some occupations need not be counted, depending upon (a) the extent to which the employee is free for personal affairs and (b) the frequency with which he must perform active work. Thus the night operator of a small telephone exchange, who has the switchboard installed in her own home and who has very few calls, is not entitled to have sleeping time counted as hours worked; but if the employee has little consecutive time for normal sleep, the result may be opposite.[20]

2. Time Spent on Call.

Time on call after hours need not be counted merely because the employee is required to leave word where he can be reached in emergency. But if he is required to stand by at the employer's place of business it may be necessary to count time so spent—at least if his availability is found to be a "principal activity" so as not to be within the contract-or-custom requirement of the Portal-to-Portal Act. In cases decided prior to that statute, the Supreme Court ruled that the time spent by employees serving as fire guards on company premises several nights a week should be counted, except for time spent eating and sleeping, even though (a) the parties had agreed otherwise, (b) active work was less than half an hour per week, and (c) recreational facilities were available and used.[21]

Troublesome questions have arisen as to jobs which require the employee to be on call 24 hours a day. In some cases, as where a pump-tender must remain near an oil well with substantial and frequent duties, it may be necessary to count *all* hours.[22] But, in a pre-Portal-Act bulletin, the Administrator said he would accept a "reasonable" computation of working time, when an inference that the employee is not working for all 24 hours is justifiable.[23] And two courts of appeal agreed that firemen on 24-hour duty at the plant were not "working" during 8-hour sleeping shifts except while responding to infrequent emergency calls.[24]

[19] Armour & Co. v. Wantock, 323 U. S. 126 (1944).

[20] *Compare* Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943), *with* Bicanic v. J. C. Campbell Co., 220 Minn. 107, 19 N. W. 2d 7 (1945), *cert. denied*, 327 U. S. 787 (1946).

[21] Armour & Co. v. Wantock, 323 U. S. 126 (1944); Skidmore v. Swift & Co., 323 U. S. 134 (1944). See also Dumas v. King, 157 F. 2d 463 (C. C. A. 8th, 1946); Super-Cold Southwest Co. v. McBride, 124 F. 2d 90 (C. C. A. 5th 1941).

[22] Fleming v. Rex Oil & Gas Co., 43 F. Supp. 950 (W. D. Mich. 1941).

[23] W-H Div. Interp. Bull. No. 13, §7 (1940).

[24] Bell v. Porter, 159 F. 2d 117 (C. C. A. 7th, 1946), *cert. denied*, 330 U. S. 813 (1947); Rokey v. Day & Zimmermann, Inc., 157 F. 2d 734 (C. C. A. 8th, 1946).

3. *Recesses and Meal Periods.*

Ordinarily, regular meal periods in which the employee is relieved of all responsibility need not be counted as working hours, even if he must remain on the premises. However, if the employer's practice is to pay for meal periods, this may be some evidence that they are time worked.[25] In any event, the meal period or other recess must be counted if the employee cannot effectively use the time in his own interest, either because the period is too short or because of continuing responsibility or frequent interruptions for duty.[26]

As to both meal periods and rest periods, the Administrator has adopted the rule of thumb that anything less than 20 minutes is too brief for true personal use and is time worked. Whether longer rest periods are working time depends upon circumstances, such as the fact that the employee can use the period for something more than improving his productive efficiency.[27]

4. *Meetings, Grievance Time and Training Programs.*

If meetings, lectures, fire drills, safety programs, instruction courses and the like are held outside normal working hours, the custom-or-contract requirements of the Portal Act may govern. But if meetings or programs are conducted during the regular workday, exclusion of such time from hours worked would apparently require at least (a) that attendance be purely voluntary, (b) that the employee produce no goods during the period, and (c) that the meeting not be for the purpose of improving the employee's skill or similarly related directly to his job.[28]

It has been the Division's policy that time properly spent by employees in grievance conferences during the workday should be recognized as working time, since it furthers the employer's interest in harmonious industrial relations, but that time voluntarily so spent after normal hours may be ignored unless there is an understanding that the time is compensable.[29]

Liabilities may arise from failure to perceive that health programs, required physical examinations, and treatment for job injuries all may tend to benefit the employer and may therefore constitute hours worked —at least when the time consumed involves part of the ordinary workday.[30]

[25] 29 CODE FED. REGS. §778.17 (1950).
[26] Biggs v. Joshua Hendy Corp., 183 F. 2d 515 (C. C. A. 9th, 1950); Culkin v. Glenn L. Martin Nebraska Co., 10 WH Cas. (BNA) 225 (D. Neb. 1951).
[27] W-H Div. Release No. R-837 (June 10, 1940).
[28] W-H Div. Interp. Bull. No. 13, §15 (1940).
[29] W-H Div. Spec. Opins. (Dec. 26, 1945; July 29, 1948).
[30] W-H Div. Spec. Opins. (Jan. 6, 1942; Mar. 6, 1942; July 23, 1945; Mar. 19, 1946).

5. *Overtime "Voluntarily" Worked.*

If an "eager beaver" takes his ledgers home, or returns to the plant after hours to correct errors, does the Fair Labor Standards Act impose any liability on the employer? Quite possibly. The Act requires payment in accordance with the specified standards for "employment," and defines "employ" to include "to suffer or permit to work."[31] If the employer has actual or constructive knowledge that after-hours work is being done (at least when it is an integral part of "principal" activities so as not to be affected by the Portal-to-Portal Act), he may be responsible for compliance with the statutory standards of compensation with reference to the time involved.[32] Merely instructing the employee to desist might not protect the employer, so long as the after-hours work continues and the employer fails to discipline the employee for disobedience.

On the other hand, the courts have regarded with disfavor claims for back-pay based upon time which the employee worked but concealed from the employer. Estoppel is not a very reliable defense for the employer in this connection, but it has been recognized; and the employee's failure to report the time, and his acceptance of pay for shorter hours, may cast doubt on his credibility.[33]

6. *Travel Time.*

Time spent commuting to and from the place of employment is subject to the Portal-to-Portal Act. But other travel time may be hours worked despite contract, custom or practice to the contrary. For example, travel from one job to another during the regular workday must normally be deemed working time. The same is true of travel after hours at the direction and on the business of the employer. Such travel may be said to be indispensable to, and an integral part of, the "principal" activities for which the worker is hired.[34]

When an employee who normally has a regular workday is sent on an extended business trip, the Division's enforcement policy has been that the travel time outside usual working hours need not be counted—but in this connection travel time on holidays and weekends, and other days not usually worked, is to be counted to the same extent as though it had occurred on a regular workday. As to occupations requiring relatively continuous travel, the Division has been disposed to recognize

[31] Act §§3(g), 7(a).

[32] Mabee Oil & Gas Co. v. Thomas, 195 Okla. 437, 158 P. 2d 713 (1945). *But cf.* Bowman v. Pace Co., 119 F. 2d 858 (C. C. A. 5th, 1941).

[33] Mortenson v. Western Light & Telephone Co., 42 F. Supp. 319 (S. D. Iowa, 1941); Cotton v. Weyerhaeuser Timber Co., 20 Wash. 2d 300, 147 P. 2d 299 (1944); Gale v. Fruehauf Trailer Co., 158 Kan. 30, 145 P. 2d 125 (1944).

[34] 29 CODE FED. REGS. §790.7 (1947). *But cf.* Dollar v. Caddo River Lbr. Co., 43 F. Supp. 822 (D. Ark. 1941).

any "reasonable" employer-employee agreement or practice as to the proportion of travel time to be considered hours worked, so long as it takes equitable account of the proportion of the time subjected to call or spent in active work.[35]

D. Conclusion

From what has been said, it will be apparent that the courts, as well as the Administrator, have shown a fairly consistent inclination to construe the concept of working time rather liberally in favor of the employee. This may or may not be palatable, depending upon your point of view. In any event, it is a factor which merits consideration in determining a wage policy or advising a client as to potential liabilities under the Fair Labor Standards Act.[36]

[35] W-H Div. Interp. Bull. No. 13, §§12-14 (1940). *Caveat:* the reliability of such pre-Portal-Act enforcement policies is limited. See 29 CODE FED. REGS. Part 775, 12 F. R. 3915 (1947), rescinding as of June 30, 1947, all administrative instructions and statements inconsistent with the policy that employers should be held responsible for strict compliance with the Act.

[36] The following general references may be of interest in connection with some of the problems discussed in this article: Christensen, *"De Minimis" in Portal Pay Suits,* 26 MICH. S. B. J. 5 (1947); Cotter, *Portal to Portal Pay,* 32 VA. L. REV. 44 (1947); D'Amico, *"Working Time" and the Portal to Portal Act of 1947,* 9 FED. B. J. 375 (1948); Note, *Constitutional Law—Retrospective Laws—Portal to Portal Act,* 33 MINN. L. REV. 68 (1948); Note, *Fair Labor Standards under the Portal to Portal Act,* 15 U. OF CHI. L. REV. 352 (1948).