

CASE COMMENTS

Employment Law—Fair Labor Standards Act Requires Compensation for Employees Walking To and From Workstations—*IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005)

The Fair Labor Standards Act of 1938 (FLSA) is a federal statute governing overtime, minimum wages, recordkeeping, and child labor standards that affect workers in both the public and private sectors.¹ The FLSA requires employee compensation for activities performed during the workday.² The Portal-to-Portal Act of 1947 (Portal Act) amended the FLSA by narrowing the scope of the workday to exempt compensation for travel to and from the location of the employee's principal and non-principal activities.³ In *IBP, Inc. v. Alvarez*,⁴ the United States Supreme Court considered whether the Portal Act specifically excludes time spent walking from a changing area, where employees don and doff required protective equipment, to a production area.⁵ The Court held that the time employees spend walking from the locker room to their workstation is

1. See 29 U.S.C. § 207(a)(1) (2000) (mandating overtime compensation when employees exceed forty hours per week); 29 U.S.C. § 206 (2000) (establishing minimum wage limits for employee compensation); 29 U.S.C. § 212 (2000) (restricting manufacturers' rights to ship goods if production includes oppressive child labor); 29 U.S.C. § 203(d) (2000) (extending application of FLSA to public agencies); see also Joseph E. Tilson, et al., *Litigating Lawsuits Under the FLSA—The Fastest Growing Area of Employment Litigation*, 697 PLL/LIT 649, 657-60 (2003) (discussing scope and application of FLSA).

2. 29 U.S.C. §§ 201-219 (2000) (outlining national responsibilities employers have to employees); see also 29 U.S.C. §§ 206-207 (2000) (discussing employer obligation to compensate employees for regular and overtime work); 29 C.F.R. § 790.6(b) (2006) (defining "workday" as time between commencement and completion of principal activity). A workday includes all time from the commencement to the completion of the activity, regardless of whether the employee is actively engaged in work during that time. 29 C.F.R. § 790.6(b) (2006). The original FLSA failed to define "work." See generally 29 U.S.C. § 203 (2000). In most cases, a workday will be defined by the beginning and ending of the primary productive activity. 29 C.F.R. § 790.6(a) (2006).

3. 29 U.S.C. § 254(a)(1)(2) (2000) (detailing non-compensable activities). In 1946, the Court ruled that walking from time clocks to a workstation is a compensable part of the workday. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-92 (1946). The Portal Act exempts compensating time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity" and "activities which are preliminary or postliminary to said principal activity or activities." 29 U.S.C. § 254(a) (2000); see also 29 C.F.R. § 790.6 (2006) (identifying periods within workday exempt from Portal Act); 29 C.F.R. § 790.7 (2006) (attempting to define preliminary and postliminary activities); *supra* note 2 (defining workday).

4. 126 S. Ct. 514 (2005).

5. *Id.* at 518, 521 (addressing whether time spent walking between stations is compensable). The Court focused on instances where employees are required by their employer, statute, or both to "don" special protective gear prior to engaging in any work activity. *Id.* at 521; see also *Tum v. Barber Foods, Inc.*, No. 00-371-P-C, 2002 WL 89399, at *8 (D. Me. Jan. 23, 2002) (defining "don" as obtaining and putting item on and "doff" as undressing and storing item), *aff'd* 360 F.3d 274 (1st Cir. 2004), *aff'd in part, rev'd in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005).

part of their workday, is not barred by the Portal Act exemption, and is therefore compensable under the FLSA.⁶

In 2002, employees at Barber Foods poultry processing plant sued their employer for alleged violations of the FLSA.⁷ The hourly-wage employees, who are required to change into protective gear prior to working, sought compensation for time spent walking from the changing area to the production area where workers then clock in.⁸ The district court granted, and the First Circuit Court of Appeals affirmed, summary judgment for the employer, holding that the company was not required to compensate employees for time spent walking to stations where required safety gear is distributed or returned.⁹ Both courts concluded that these tasks were *de minimis*, non-principal activities, and as a matter of law, the Portal Act excludes “preliminary and postliminary” activities from FLSA coverage.¹⁰

6. 126 S. Ct. at 525 (stating holding). The Court held that time spent walking between locker rooms and production areas after donning special safety gear in locker rooms was covered by the FLSA because locker rooms were relevant places for employees to perform principal activities. *Id.*; see also 29 U.S.C. § 254(a) (2000) (relieving employers from compensating employees for activities preliminary or postliminary to principal activities); 29 C.F.R. § 790.6 (2006) (explaining significance of preliminary and postliminary activities); 29 C.F.R. 790.7(g) (2006) (noting traditional “locker room” activity compensable under certain circumstances).

7. See 126 S. Ct. at 526 (stating grounds for employees’ complaint). The employees claimed that Barber violated the FLSA when it failed to pay them for donning and doffing required protective gear and the attendant walking. *Id.* Barber employees argued that the Portal Act only excludes walking time before an employee begins his principal activity. *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005). Forty-four employees filed suit against Barber; thirty-seven of them were former employees at the time suit was brought in 2003. *Id.* at 278. Barber Foods, Inc. operates a poultry plant and employs about 300 production workers. 126 S. Ct. at 525.

8. 126 S. Ct. at 526 (setting forth employees’ claim). Employees working in set-up, rotating, meatroom, or shipping and receiving were required to don and doff protective gear at the beginning and end of their shifts. *Id.* Required protective gear consisted of lab coats, hairnets, steel-toed boots, back belts, metal aprons, steel-mesh gloves, and vinyl gloves. *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 277 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005). Workers obtained and returned these items at various bins, cage windows, and coat racks throughout the plant. *Id.* Employees often walked to several locations to get the required equipment. *Id.* Employees usually donned these items prior to punching in and doffed them prior to punching out. *Id.* At the beginning of their shift, employees were required to punch into a computerized time clock closest to the area they worked and were paid from the moment they punched in. *Id.* at 278. Employees claimed that it typically takes ten to fifteen minutes to walk from the entrance of the building to the locker area, where they don the gear and proceed to their workstations. *Tum v. Barber Foods, Inc.*, No. 00-371-P-C, 2002 WL 89399, at *8 (D. Me. Jan. 23, 2002), *aff’d* 360 F.3d 274 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005).

9. See *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280-83 (1st Cir. 2004) (affirming district court decision), *aff’d in part, rev’d in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005). The First Circuit held that time spent donning and doffing required safety gear constituted work for which compensation must be paid under the FLSA. *Id.* at 279-80.

10. See 126 S. Ct. at 527 (discussing First Circuit’s holding); *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004) (excluding preliminary and postliminary walking time from compensation), *aff’d in part, rev’d in part sub nom. IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005); see also 29 U.S.C. 254(a)(2) (2000) (precluding preliminary and postliminary activities from FLSA protection); 29 C.F.R. § 790.7 (2006) (noting instances of preliminary, compensable activities). Some activities that qualify as work under § 7 of the FLSA may not be compensable because they require such little time that courts deem them *de minimis*. *Dunlop v.*

In a factually similar case, hourly employees at the IBP, Inc. (IBP) meat processing plant filed a class action lawsuit in the Eastern District of Washington seeking compensation for time spent walking from the locker rooms to the production floor after donning required work gear.¹¹ IBP paid its workers from the time the first piece of meat passed onto the production line until the last piece of meat was processed.¹² Reasoning that the workday commenced when employees put on the required protective equipment, the district court determined, and the Ninth Circuit Court of Appeals affirmed, that any non-trivial activity occurring after the employees donned the required gear is within the course of the continuous workday and thus compensable under the FLSA.¹³

In 2005, the United States Supreme Court granted certiorari to resolve the circuit split and to address whether the FLSA requires an employer to compensate employees for time spent walking from changing areas to production areas.¹⁴ Expanding on a 1956 decision granting employees

City Elec. Inc., 527 F.2d 394, 400-01 (5th Cir. 1976). Under the de minimis doctrine, insubstantial and insignificant periods of time spent in preliminary activities by employees need not be included in the compensable work week under the FLSA. See *Singh v. City of New York*, 418 F. Supp. 2d 390, 399-400 (S.D.N.Y. 2005). “[A] few seconds or minutes of work beyond the scheduled working hours . . . may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the [FLSA].” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). When an activity is designated “work,” the Portal Act exempts from compensation activities that are preliminary or postliminary to an employee’s principal activity unless they are an “integral and indispensable part of the principal activities . . .” *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) and recognizing important relationship between questioned and principal activities). Another court noted that the FLSA intended to exclude compensation of “preliminar[y activities] . . . thought to fall outside conventional expectations . . .” *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995).

11. See *Alvarez v. IBP, Inc.*, 339 F.3d 894, 90-92 (9th Cir. 2003) (detailing employees’ claim and procedural history), *aff’d* 126 S. Ct. 514 (2005). The district court broadly addressed whether time employees spend donning, doffing, waiting, and walking constitutes work under the FLSA. *Id.*; see also *supra* note 8 and accompanying text (detailing employee requirements prior to clocking in). Since 1994, IBP paid its employees four minutes of clothes-changing time at non-unionized plants only. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 899 n.4 (9th Cir. 2003), *aff’d* 126 S. Ct. 514 (2005).

12. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003), *aff’d* 126 S. Ct. 514 (2005) (defining scope of compensation). IBP argued that the employees’ compensable work begins with the processing of the first piece of meat, thereby excluding any time spent walking from the locker rooms to the workstations. *Id.*

13. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 906 (9th Cir. 2003) (tracking appellate level reasoning), *aff’d* 126 S. Ct. 514 (2005). The Ninth Circuit reasoned that donning required equipment was integral and indispensable to work and is therefore compensable activity. *Id.*; see also 29 U.S.C. 254(a)(2) (2000) (declaring preliminary or postliminary activities non-compensable); *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding preliminary activities compensable if integral and indispensable to principal employment activity); *Lindow v. United States*, 738 F.2d 1057, 1063-64 (9th Cir. 1984) (excluding de minimis activities from compensation). De minimis activities include actions that are not unique in nature, not required, and typically take only a few seconds to perform, such as putting on a hard hat or goggles. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 901 n.6, 903-04 (9th Cir. 2003), *aff’d* 126 S. Ct. 514 (2005); see also *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (explaining de minimis rule).

14. 126 S. Ct. at 518 (setting forth issues addressed in decision). The Court granted certiorari because the scope of the FLSA, in light of the Portal Act amendment, remained ambiguous. *Id.* (noting circuit court split regarding walking issue). Compare *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280-83 (1st Cir. 2004) (explaining walking time as non-compensable), *aff’d in part, rev’d in part sub nom.* *IBP, Inc. v. Alvarez*, 126

compensation for actual “changing” time, the Court held that any activity taking place immediately after changing into protective gear, construed as the first compensable activity of the workday, is on the clock and should be compensated.¹⁵ The Court’s determination that the attendant walking was part of the workday rendered the Portal Act compensation exemptions moot because they do not apply to activities within the workday.¹⁶

Congress adopted the FLSA as a means of economic recovery from the Great Depression.¹⁷ It ensured a minimum living standard for workers by creating both minimum wage and overtime pay rates, as well as requiring employee compensation for all hours worked.¹⁸ While the FLSA does not define “work,” the Supreme Court considers “work” to encompass any “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”¹⁹ The Court interpreted this standard broadly, holding that “work” included the time employees spend walking to and from their

S. Ct. 514 (2005), with *Alvarez v. IBP, Inc.*, 339 F.3d 894, 906 (9th Cir. 2003) (declaring walking compensable activity), *aff’d* 126 S. Ct. 514 (2005). See generally Samuel Estreicher & Ben Walther, *Outside Counsel*, 234 N.Y.L.J. 4 (Nov. 29, 2005) (discussing Court’s decision and consequences thereof); James Petrie, *U.S. Supreme Court Grants Employees More Compensable Time*, LAB. L. NEWSLETTER (Mondaq, Ltd., New York, N.Y.), Jan. 11, 2006, available at 2006 WLNR 582578 (summarizing importance of employee travel compensation).

15. 126 S. Ct. at 525 (noting IBP’s reliance on continuous workday rule). The Department of Labor includes as part of the “continuous workday” any activity between the beginning and end of an employee’s principal activity. 29 C.F.R. § 790.6(b) (2006); see also *infra* notes 25-26 and accompanying text (detailing Supreme Court decision rendering clothes-changing time compensable).

16. See 126 S. Ct. at 520-21 (2005) (recognizing limited scope of Portal Act to activities before and after workday); see also 29 C.F.R. § 790.6(a) (2006) (stressing Portal Act exemption during workday).

17. See 29 U.S.C. § 202(a)(b) (2000) (listing various purposes for FLSA’s enactment); see also Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL’s Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 123-24 (2004) (explaining reasons underlying FLSA legislation). One of Congress’s primary concerns in passing the FLSA was to protect employers by abolishing subcontracting relationships that fostered unfair competition. See 29 U.S.C. § 202(a) (2000) (indicating regulation of workers’ well-being affects methods of competition); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36-37 (1987) (recognizing Congress’s desire to eliminate any competitive advantage gained from cheap, substandard working conditions); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948) (indicating FLSA’s purpose to compensate employees laboring in excess of the maximum statutory number of hours).

18. See 29 U.S.C. § 202 (2000) (proffering FLSA rationale); see also 29 U.S.C. §§ 206-207 (2000) (setting forth mandatory minimum wages for regular and overtime pay). The overtime provisions of the FLSA attempted to stimulate job growth by creating a monetary penalty against employers unwilling to spread their existing work among a greater number of employees. 29 U.S.C. § 216 (2000); cf. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 33 (2001) (discussing provisional differences between white and blue collar workers for overtime compensation); Deborah Thompson Eisenberg, *On the Clock-Compensable Time under FLSA*, 38 MD. B.J. 11, 12 (2005) (declaring FLSA ensures standard of living).

19. *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (including non-exertional acts in “work” category); see also 29 U.S.C. § 203 (2000) (illuminating Congress’s failure to define work); 29 U.S.C. § 203(g) (2000) (defining “employ” as “to suffer or permit to work”); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (clarifying exertion as non-essential work element); *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995); Eisenberg, *supra* note 18, at 12 (listing factors determining whether employee’s time constitutes compensable work under FLSA).

workstations in preparation for work.²⁰ Expressing concern with the Court's expansive reading of the FLSA and its potential to generate a flood of litigation, Congress passed the Portal Act in 1947.²¹

The Portal Act relieves employers from compensating employees for "activities which are preliminary to or postliminary to the principal activity."²² If the preliminary or postliminary activities "are an integral and indispensable part of the principal activities," however, they are nevertheless to be compensated.²³ Complications in determining whether an activity is integral and indispensable to an employee's principal activity have caused inconsistency amongst appellate courts.²⁴

20. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946) (deeming time spent walking from time clocks at factory gate to workstations FLSA compensable).

21. *See* 29 U.S.C. § 251(a) (2000) (listing failed interpretations of 1938 FLSA bringing about new statutory scheme). Congress claimed the Court's interpretation in *Anderson* would lead to unanticipated and excessive litigation, financial ruin among employers, and a disintegration of collective bargaining. 29 U.S.C. § 251(a) (2000); *supra* note 20 and accompanying text (highlighting Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). Congress concluded the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, [and] thereby created wholly unexpected liabilities, immense in amount and retroactive in operation . . ." 29 U.S.C. § 251(a) (2000); *see also* 29 U.S.C. § 254(a) (2000) (removing employers' liability to compensate employees in certain instances).

22. *See* 29 U.S.C. § 254(a)(2) (2000); *see also* 29 C.F.R. § 790.7 (2006) (considering types of preliminary or postliminary activities); Tilson, *supra* note 1, at 700 (discussing Portal Act's bar on workers' compensation for time beginning or ending principal activities). The FLSA does not require compensation for tasks that are "preliminary to or postliminary to [the] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2) (2000). Principal activities embrace all activities that are "an integral and indispensable part of the principal activities[.]" including the donning and doffing of specialized protective gear "before or after the regular work shift, on or off the production line." *Steiner v. Mitchell*, 350 U.S. 247, 253, 256 (1956).

23. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding certain integral and indispensable activities require compensation); *see also* *Mitchell v. King Packing Co.*, 350 U.S. 260, 261-63 (1956) (declaring butchers' preliminary knife-sharpening was integral to butchering activities, therefore a principal activity); 29 C.F.R. § 790.7(h) (2006) (noting preliminary or postliminary activities could be principal activity). *But see* *Lindow v. United States*, 738 F.2d 1057, 1060-62 (9th Cir. 1984) (declaring integral and indispensable activities non-compensable if *de minimis*); *supra* note 10 (explaining *de minimis* doctrine).

24. *See* *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946) (deeming time spent walking from time clocks at factory gate to workstations FLSA compensable); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) (holding donning, doffing, and cleaning special protective gear compensable). *But see* *Lindow v. United States*, 738 F.2d 1057, 1062-65 (9th Cir. 1984) (declaring integral and indispensable activities non-compensable when *de minimis*). Some courts agree that compensability depends on the type of equipment and the time it takes to put on and take off. *See* *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 928-29 (N.D. Ill. 2003) (reviewing relatively minor daily activities in the aggregate). To be integral and indispensable, an activity must be necessary to the principal work performed and done for the benefit of the employer. *See* *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) (examining relationship of employee's activity to employer's business) (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944)).

In *Steiner v. Mitchell*,²⁵ decided almost a decade after the Portal Act's enactment, the Supreme Court addressed whether an employee should be compensated for work performed before or after regular shift hours.²⁶ The workers in *Steiner* were not paid for the nearly thirty minutes a day spent changing into protective gear or showering, as required, at the end of the shift.²⁷ Reasoning that the activities prior to and after the workers' shift were so closely related to their other duties so as to render them an integral part of their work, the Supreme Court concluded that the activities were compensable.²⁸ *Steiner's* liberal interpretation of principal activities—defined as any activity integral and indispensable to the principal activity after the beginning of the workday—has been widely accepted, and serves as the post-Portal Act framework for many subsequent cases involving disputes over worker compensation.²⁹

In *IBP, Inc. v. Alvarez*, the Supreme Court considered whether walking occurring between compensable clothes-changing time and the time employees arrive at or depart from their actual workstations constitutes non-compensable travel within the meaning of the Portal Act.³⁰ Relying on *Steiner*, the Court found that the locker rooms—where the safety gear is donned and doffed—are relevant places of performance of the employees' principal activity.³¹ The

25. 350 U.S. 247 (1956).

26. *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956) (discussing preliminary nature of walking time). Specifically, the Court contemplated whether time the employees spent changing in and out of protective gear at the beginning and end of their shift was either compensable as part of their principal activities or non-compensable due to the preliminary or postliminary exclusion in the Portal Act. *Id.*

27. *See Steiner v. Mitchell*, 350 U.S. 247, 251 (1956) (detailing workers' daily preliminary and post-work routine).

28. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding changing and showering compensable because they are integral to principal activity). Several factors are weighed in determining if activities are integral and indispensable: (1) whether they "are made necessary by the nature of the work performed"; (2) whether "they fulfill 'mutual obligations' between [employers] and their employees"; (3) whether "they 'directly benefit' [employers] in the operation of their business"; and (4) whether "they are so closely related to other duties performed by [employers'] employees as to be an integral part thereof and are, therefore, included among the principal activities of said employees." *Id.* at 252.

29. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (creating test to determine compensable activities); *see also Mitchell v. King Packing Co.*, 350 U.S. 260, 261 (1956) (noting preliminary activities can change to principal activities under certain circumstances); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) (recognizing preparatory activities can be compensable); *supra* note 28 (outlining and discussing factors to determine integral and indispensable). *Steiner* also distinguished routine showering and clothes-changing from such activities necessitated by working with hazardous chemicals. *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956).

30. 126 S. Ct. at 518 (reiterating case issue and noting the circuit split on compensating walking time); *see also supra* note 9 and accompanying text (noting First Circuit's decision holding walking time non-compensable); *supra* note 13 and accompanying text (reviewing Ninth Circuit decision declaring walking a compensable activity and distinguishing traditional FLSA interpretation from de minimis analysis); *supra* note 3 and accompanying text (outlining Portal Act exemptions); *supra* text accompanying note 15 (stating clothes-changing time compensable).

31. 126 S. Ct. at 524 (highlighting portion of Court's reasoning). *IMP, Inc.* argued that just because donning and doffing may be integral and indispensable to the job, it is not necessarily a principal activity that

Court ruled that because the employer required employees to put on and take off protective equipment in a certain place, that process constituted the beginning of their actual workday and triggered the obligation to pay the workers.³² The Court, relying on the continuous workday rule, concluded that any activity that takes place immediately after the employee changes into protective gear occurs within the workday, thereby rendering the Portal Act exemptions inapplicable.³³ While walking to the locker rooms before work is excluded from FLSA coverage, the Court held that the FLSA does cover walking from the locker rooms to another work area.³⁴

In a unanimous decision, the Supreme Court properly held that relevant case law and regulations demand employee compensation for time spent walking between changing areas and workstations after donning and before doffing specialized gear.³⁵ The Court resourcefully coupled the relevant “place of performance” holding in *Steiner* with the Department of Labor’s “continuous workday” rule to provide a functional definition of a compensable workday.³⁶ Although the Court correctly concluded that attendant walking is part of the compensable workday, the Court failed to adequately define the *boundaries* of the workday.³⁷ The workday definition provided by the Court, although useful, should have also addressed limitations in instances when employees complete a principal activity off-site, which begins the compensable workday, but then participate in some other non-principal, non-compensable activity.³⁸

In addition, the Court should have expounded on the breadth of the de

triggers the workday under *Steiner*; it is instead simply compensable time. *Id.* at 523-24.

32. *Id.* (rejecting employer’s argument that donning gear not principal activity starting the workday).

33. *Id.* at 525 (holding Portal Act exemption inapplicable to activities occurring between employee’s first and last principal activity); *see also* 29 C.F.R. § 790.6 (2006) (acknowledging Portal Act’s non-applicability to activities occurring inside workday); *supra* text accompanying note 13 (reviewing continuous workday rule); *supra* note 15 (defining continuous workday rule).

34. 126 S. Ct. at 525 (highlighting limitations of decision). The Court acknowledged that the FLSA does not cover walking to locker rooms before starting work, assuming the employee had not performed any work prior to reaching the locker rooms. *Id.* The Court’s decision to include walking between locker rooms and workstations under the FLSA relies on *Steiner*, which held that changing into necessary protective gear triggers the beginning of the workday, and therefore anything occurring between the beginning and end of an employee’s principal activities is compensable. *Id.* at 524-25; *see also* Estreicher & Walther, *supra* note 14 (pointing out statutory inconsistencies regarding off-premises principal activities).

35. *See* 126 S. Ct. at 520-24 (recognizing regulatory definition of workday per 29 C.F.R. § 790.6 (2006) and declaring locker rooms relevant places of performance); *see also* *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (detailing integral and indispensable test to determine compensable activities); 29 C.F.R. § 790.6(b) (2006) (defining workday as period between commencement and completion of principal activities).

36. 126 S. Ct. at 524-25 (combining case law and interpretive regulation to support holding). The Court concluded that all activities occurring after employees change into the mandatory protective gear are within the workday and must be compensated. *Id.*

37. *See* Estreicher & Walther, *supra* note 14 (pointing out scenarios unaddressed in opinion).

38. *See* Estreicher & Walther, *supra* note 14 (noting inconsistencies within regulations of off-premises activities); *cf.* 29 C.F.R. § 790.7(c) (2006) (excluding trips between home and place of employment from FLSA compensation). *But see* 29 C.F.R. § 790.7(c) (2006) (including travel between places of principal activity as FLSA compensable and attempting to define limitations for off-site compensation).

minimis rule as used to limit the scope of the employer's compensation liability.³⁹ Significantly, the Court failed to make an exception for de minimis activities despite having the perfect forum to identify the necessary criteria for a de minimis finding.⁴⁰ Had the Court addressed this rule in detail, claims failing the bright-line rule would be eliminated, thus preserving judicial resources for credible claims.⁴¹

While the Court's decision rightly protects employees from uncompensated work, it exposes employers to significant financial liability and could severely handicap the domestic economy.⁴² Employers are now mandated to pay employees for time spent on activities previously considered non-compensable, thereby resulting in higher payroll and production costs.⁴³ Consequently, many employers will outsource the work because it allows the company to produce the same product for less money.⁴⁴ While an increase in outsourcing leads to a less expensive product for consumers, domestic jobs will be sacrificed in the process, and the stability of the national economy will be threatened.⁴⁵

In *IBP, Inc. v. Alvarez*, the Court properly concluded that the FLSA requires employers to compensate employees for travel between a changing area and workstation. The Court, however, failed to fully define the scope of the workday and the de minimis rule. The Court's failure to address these two areas could result in an onslaught of employment litigation to determine the actual limitations of these concepts. Additionally, the Court's decision will substantially increase employers' costs, likely increase outsourcing, and ultimately produce a less stable domestic economy—all unfortunate by-products of a well-reasoned decision. Still, the Court successfully provided a

39. See 126 S. Ct. at 523, 526 (limiting de minimis discussion to lower courts); 29 C.F.R. § 785.47 (2006) (defining de minimis rule); see also *supra* note 10 and accompanying text (declaring de minimis activities non-compensable under FLSA); Petrie, *supra* note 14 (suggesting Supreme Court impliedly agreed with lower court's determination of de minimis).

40. See 126 S. Ct. at 523, 526 (warning employers about compensation claims for de minimis activities). The de minimis rule attempts to avoid the administrative problems of recording insignificant amounts of time. *Id.*

41. See Estreicher & Walther, *supra* note 14 (discussing potential increase in litigation in cases relying on IBP's workday interpretation).

42. See *supra* text accompanying note 35 (declaring Court's pro-employee stance on walking issue); see also 29 U.S.C. § 251(a) (2000) (enumerating reasons for enacting the Portal Act). Congress enacted the Portal Act as a result of the Court's liberal interpretation of "work." 29 U.S.C. § 251(a) (2000); *supra* note 21 (explaining congressional concern regarding *Anderson* decision); see also Shelby Silverman, Note, *Outsourcing and Collective Bargaining: A "Win-Win" for Employers and Employees*, 13 CARDOZO J. INT'L & COMP. L. 601, 625-58 (2005) (identifying outsourcing as common action taken by employers to counter high production costs).

43. See Petrie, *supra* note 14 (warning employers of potential litigation regarding activities previously considered de minimis); see also text accompanying note 14 (considering compensation of time employees spend walking to and from workstations).

44. See Silverman, *supra* note 42, at 601-02 (explaining outsourcing and its affect on United States economy). Since 2004, nearly two million jobs have been outsourced, changing the structure of the workplace and threatening job security nationwide. Silverman, *supra* note 42, at 602.

45. See Silverman, *supra* note 42, at 601-02 (linking outsourcing to declining job security).

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much needed functional definition of the compensable workday consistent with Congressional statutory interpretation and relevant case law.

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