No. 03-1238

In The Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID N. MARK
LAW OFFICE OF DAVID N. MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

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**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under Section 4(a) of the Portal-to-Portal Act of 1947, an employer need not pay wages under the Fair Labor Standards Act of 1938 ("FLSA") for time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . which occur[s] 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."

The question presented is:

(1) Whether walking is excluded from compensation under §4(a) where it occurs after the workday commences and before the workday ceases based on the performance of non-production principal activities under §4(a) as interpreted by *Steiner v. Mitchell,* 350 U.S. 247 (1956) and 29 C.F.R. §790.

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STATEMENT

A. Proceedings Below.

In 1998, Respondents (referred to herein as "plaintiffs") filed this class action in the United States District Court for the Eastern District of Washington complaining of unpaid pre-production, meal break and post-production work. *See* Pet. App. 35a, 42a & 75a; J.A. 17-27 (second amended complaint).[1] Plaintiffs alleged violations of the FLSA overtime requirement, 29 U.S.C. §207, state minimum wage and overtime law, and a failure to provide a second paid rest break on workdays of 8 hours or more in violation of state law. *Id.* The District Court certified an FLSA opt-in class, under 29 U.S.C. §216(b), and exercised supplemental jurisdiction over the 815 opt-in class members' state law claims. Pet. App. 44a-45a.

In 2000, the case was tried to the District Court, without a jury. The District Court heard testimony from over 40 production line workers. *See* Pet. App. 35a & 49a. The District Court admitted into evidence the specialized meatpacking equipment (including a metal mesh apron, a metal mesh apron with leggings, a metal mesh vest, metal mesh sleeves, a metal mesh glove, a plexiglas armguard, a Kevlar sleeve, a Kevlar glove and a variety of hand tools such as meat hooks and steels),[2] plant diagrams with job titles and

[1] Plaintiffs abbreviate the appendices as follows:

"J.A."	Joint Appendix
"Pet. App."	Appendix to Petition for a Writ of Certiorari
"Resp. App."	Appendix to Brief in Opposition to Petition for A Writ of Certiorari

[2] Plaintiffs' Exhibits ("Pl. Exhs.") 120 & 120A-120BB, Trial Transcript ("Trial Tr.") 187:25-188:11.

locations,[3] "Required Personal Protective Equipment" lists for each job,[4] and videotapes of pre-production, meal break and post-production work.[5] Time study experts testified for each side. *See* Pet. App. 50a. IBP was held liable under the FLSA and state law for failing to pay for pre-production, meal break and post-production work. *See* Pet. App. 47a-51a. Moreover, IBP was held liable under state law for not providing a second paid rest break. Pet. App. 76a.

The District Court held that "the donning, doffing, cleaning and storage of required equipment, safety and otherwise, are integral and indispensable to the workers' duties as meat processors." Pet. App. 58a; *see also* Pet. App. 53a. The walking time between the locker and the production floor for employees was held compensable because it occurred during the workday. Pet. App. 54a. As is discussed *infra,* the District Court awarded damages

[3] Defendant's Exhibits ("Def. Exhs.") 369 & 369A (slaughter floor chart and list of jobs), Trial Tr. 2860:20-24; Def. Exhs. 370 & 371A-D (processing floor chart, cooler department 715, bone department 765, and hamburger mezzanine), Trial Tr. 2998:16-17, 3000:25-3001:6 & 3133:22-3134:13, respectively.

[4] Pl. Exh. 90 (slaughter June 1994), Trial Tr. 1521; Pl. Exh. 91 (processing June 1994), Trial Tr. 3550:20-3551:2 & 3553:17-18; Pl. Exh. 92 (processing Dec. 1999), Trial Tr. 774; Pl. Exh. 93 (slaughter April 2000), Trial Tr. 1597:4-16 & 1600:13-19.

Plaintiffs also introduced with each testifying class member an exhibit listing his or her equipment and tools, for each job performed during the class period. Pl. Exh. 1000-1013, 1014-1021, 1023-1024, 1027-1031, 1033-34 & 1039-1047, Trial Tr. 187, 296, 378, 448, 538, 493, 578, 669, 630, 730, 859, 1042, 1073, 1097, 1201, 1232, 1455, 1484, 1518, 1536, 1579, 1602, 1698, 1741, 1784, 1816, 1838, 1880 & 1889, 1910 & 1923, 2264, 2290, 2443, 2466, 2508, 2542, 2578, 2611, and 2634, respectively.

[5] Pl. Exh. 174, Trial Tr. 1260:3-8, viewed and discussed *inter alia* at Trial Tr. 1237:20-1301:10 (Martinez pre-production and post-production in processing) & Trial Tr. 1602:21-1626:1 (Moreno, pre-production and post-production in slaughter); Pl. Exhs. 175A-F, Trial Tr. 1318:15-23, 1319:19-20 & 2048:22-2049:1.

based on time-studied equipment and activity minutes applicable to each specific job classification for each class member on a daily basis throughout the damages period. *See* Pet. App. 77a-78a. Damage reports were admitted by stipulation of the parties. Pl. Exhs. 1057-1068, Trial Tr. 4593:21-4594:16. The District Court entered judgment in favor of the workers for $3,098,517, including $1,751,126 in FLSA overtime damages. Resp. App. 1b. Both sides appealed.

The Court of Appeals affirmed on all issues, except for calculation of state law meal break damages. The Court of Appeals held that "the retrieval and donning of protective equipment [were] 'integral and indispensable' preliminary activities, and, as such, [were] 'embrace[d]' by plaintiffs' 'principal [work] activity.'" Pet. App. 18a (quoting *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956)). The Court of Appeals further held that walking time between the locker and work station was compensable because it occurred after the first principal activity of the workday and before the last principal activity of the workday. Pet. App. 18a-19a. The Court of Appeals reversed and remanded on state law meal break damages, holding that any meal break of less than 30 minutes had to be fully compensated, accepting arguments advanced by the Washington State Department of Labor & Industries as *amicus curiae.* Pet. App. 30a-32a & 34a. As a result, plaintiffs will recover $7.3 million on remand, all of it under state law. *See* Pet. App. 74a (District Court alternative damages findings).[6]

[6] Therefore, this Court's ruling will not affect the judgment in this case, but it is likely to have modest collateral estoppel effects in *Chavez v. IBP,* Case #01-5093 (U.S. Dist. Ct. Eastern District of Washington), a case in which judgment has been entered against IBP's successors, Tyson Foods and Tyson Fresh Meats, Inc., on similar claims.

B. Statement of Facts.

1. Cattle Slaughter and Processing.

Plaintiffs are 815 slaughter and processing line workers at IBP's Pasco, Washington plant. Pet. App. 45a; *see* Pet. App. 35a & 75a. In slaughter, cattle are killed and hoisted onto a chain. Trial Tr. 2730:5-2731:23; *see* Pet. App. 36a. They then move along a series of chains where they are disassembled into carcasses and byproducts. Pet. App. 36a; *see* Pl. Exh. 46 (page IBP #02566, Trial Tr. 3027:17-23). A typical slaughter crew includes 178 slaughter workers in 113 job classifications, each of whom performs one or two discrete operations in the disassembly line process. Pet. App. 36a. Approximately 110 of the 178 slaughter workers (62%) use straight knives[7] or other handheld cutting utensils. Trial Tr. 2730:5-2859:23; Def. Exhs. 369 & 369a, *supra*. The carcasses are sent into a cooler where they are stored for at least 24 hours. Pet. App. 36a. The slaughter division is hot, with workers exposed to wet conditions and animal fluids. Trial Tr. 2685:4-15 & 2703:7-9 & 18-21. The slaughter division works one shift daily. Pet. App. 36a.

In processing, the carcasses emerge from the cooler and move along a series of chains and belts. *See* Pet. App. 36a. There are two processing shifts, each with approximately 400 workers in 135 job classifications. Pet. App. 36a. Saw operators and knife users drop primal cuts onto eight processing floor lines, each of which is a separate department with 25 to 40 workers working side-by-side

[7] "Straight knives" is used to distinguish hand-held knives from mechanical air knives or whizard knives. *See, e.g.,* Trial Tr. 2766:12-17.

along a belt on each shift. *See* Pet. App. 36a; Exhibit 370, *supra*; Pl. Exh. 46, *supra* (IBP #2567-2571).[8]

There are 624 processing line workers between the cooler and the end of the belts – 312 on each of two shifts – and 98% of them use straight knives (578) or large power saws (32). Trial Tr. 3012:9-3104:8; 3012:9-3197:12; 3250:8-20 & 32; 3252:19-25; 3253:18-20 & 3254:13-3255:1 (processing superintendent) & Def. Exhs. 370 & 371A-D, *supra* (processing and cooler department 715 charts). At the end of the belts there are 34 packaging workers who grab the pieces of meat with their meat hooks and put them into bags. Pet. App. 36a.; Def. Exh. 370, *supra*; Trial Tr. 1337:3-8. Two lightly-staffed departments – bones and hamburger – were located to the side of the processing floor. Pet. App. 36a; Def. Exh. 370B-D, *supra*.

2. Dangerous Work In A Sanitation-Sensitive Industry.

Meatpacking work is dangerous work. *See* Trial Tr. 911:18-912:15; Pl. Exh. 40, Trial Tr. 913:7-914:11. Workers use razor-sharp knives, operate power saws and use a variety of cutting tools. *See* Pl. Exhs. 174 & 175A-F, *supra*. As a result, OSHA and IBP require workers to use a wide array of protective equipment. *See* Trial Tr. 3618:1-9; Pl. Exhs. 90-93; Trial Tr. 3589:8-3590:24 & 3618:1-21 (Lochner, IBP fresh meat operations head). Failure to use required mesh aprons and mesh aprons with leggings was viewed as "life threatening" by IBP, while failure to use a required mesh glove, Kevlar glove, plexiglas armguard or required arm protection was viewed as creating a risk of "serious injury." Trial Tr. 911:18-912:15; Pl. Exh. 40, *supra*.

[8] The lines are named chuck, arm, rib, brisket/flank, loin, strip, bottom butt and rounds. Exhibit 370, *supra*.

Meatpacking is also subject to strict food safety standards, particularly after the Jack-in-the-Box hamburger meat e-coli outbreak in 1993. Trial Tr. 3587:10-14 & 3607:3-3608:3 (Lochner). All class members were required by the United States Department of Agriculture and IBP policy to wear a clean outer sanitary garment (with frocks used in processing and a white shirt in slaughter). Trial Tr. 3587:10-14 & 3594:12-25 (Lochner). In addition, the protective equipment and tools were required to be clean when stored in the locker rooms. *See* Pl. Exh. 48 (IBP #02643), Trial Tr. 1867:10-12 & 1868:8-12.

3. Required Locker Room Usage.

IBP required workers to store equipment and tools in the company-provided locker rooms. Pet. App. 39a. There were four locker rooms, one each for men and women in the slaughter division and in the processing division. Pet. App. 39a. All locker rooms were located in non-production areas far away from the work stations. *See, e.g.,* Pl. Exh. 174, *supra.* The processing locker rooms were located up two flights of narrow, crowded stairways. *Id.*

4. Equipment Usage.

IBP promulgated minimum required equipment lists for each job classification. *See* Pet. App. 39a & Pl. Exhs. 90-93, *supra.* The District Court further held that there were additional integral and indispensable equipment items beyond those listed on the required safety equipment lists. *See* J.A. 34-39.

As a rule, processing knife users – all 578 of them – were covered from shoulder to knee or ankle with a metal mesh apron or a metal mesh apron with leggings, metal mesh sleeves or Kevlar sleeves, a Kevlar glove on the knife hand, a metal mesh or Kevlar glove on the non-knife hand, a plexiglas armguard, and a scabbard and chain. See Pet. App. 40a & Pl. Exhs. 91-92, *supra*. The metal mesh

equipment is made of chain mail, *i.e.,* interlocked metal rings similar to that worn by medieval knights. *See* Pl. Exhs. 120M-P & 120BB, *supra*. It is heavy. *Id.* Kevlar is a modern protective fiber that is puncture resistant. *See* Pet. App. 40a; Trial Tr. 3625:7-14 (Lochner). Slaughter knife users were also required to use mesh aprons, mesh or Kevlar gloves, and, often, Kevlar sleeves. Pl. Exhs. 90 & 93, *supra.* Many knife users were required to wear weight belts, also known as a "comp vest" or "kidney belt." *See* Pet. App. 40a; Pl. Exhs. 90-93, *supra*; Pl. Exhs. 120Y-Z, *supra.* Knife users had steels. *See* J.A. 36; Pl. Exhs. 120X & 120AA, *supra.*

Air knife users and whizard operators typically were required to use a combination of plexiglas armguards, a weight belt, rubber gloves, a rubber apron, and, depending on the particular position, protective gloves and sleeves. Pl. Exhs. 90-93, *supra*, J.A. 37-39. Any worker whose work station was next to a knife, air knife or whizard knife user was required to use 2 Kevlar sleeves and 2 Kevlar gloves. Pl. Exhs. 90 (IBP #04008), 92 (IBP #04032), 93 (IBP #04046). Indeed, clean up workers assigned to a line and squeegee workers were required to wear mesh aprons, Kevlar gloves, and Kevlar sleeves because they moved around the production lines. *See* Pl. Exhs. 90-93. Packaging workers who bagged meat at the end of the processing belts used plastic sleeves, as well as meat hooks. J.A. 37; Trial Tr. 1536:6-8.

Cloth gloves were integral and indispensable in processing. Pet. App. 59a & J.A. 36. Workers could not grip safely without *clean* gloves, *i.e.,* blood and fat made the grip more difficult and less secure. *See* Pet. App. 59a. Cold hands made it more dangerous to use knives, saws and other types of cutting equipment on the processing floor which was between 38 and 42 degrees Fahrenheit. Pet. App. 40a & n. 4 & 59a. Many workers changed their gloves

multiple times a day, using as many as 12 to 16 cotton gloves. Pet. App. 59a; *see* Trial Tr. 1269:22-25 (Martinez).

All workers were required to wear a sanitary outer garment provided by IBP. Pet. App. 39a. All workers, except for the slaughter gutter job, were required to wear either safety glasses or a face shield. Pet. App. 39a. All workers were required to use a hard hat, ear plugs, and a hair net. Pet. App. 39a. Many workers wore weight belts to prevent back injuries. Pet. App. 40a. Employees also wore liquid repelling sleeves, aprons, and leggings, including yellow plastic sleeves, clear plastic sleeves, clear plastic leggings and rubber gloves and aprons. Pet. App. 40a.

5. Pre-Production Activities.

Slaughter workers began their workday by picking up supplies at the supply room, (*e.g.*, clean white shirts, protective sleeves, plastic sleeves and leggings) and then went to the locker room, where they retrieved their assigned protective equipment, steels, and tools. Pet. App. 40a. Most slaughter employees donned most of their safety equipment in the locker room. Pet. App. 40a. Straight knife users retrieved their knives from the knife room or from several distribution points on the slaughter floor. Pet. App. 40a. Air knife users retrieved their air knives from the knife room and wiped and washed grease from the air knives prior to use. *See* Pet. App. 40a.

Processing workers lined up to get their frocks and went up to the locker rooms. *See* Pet. App. 41a. They obtained safety equipment and tools, which IBP required to be stored in the lockers. Pet. App. 41a. They also needed to search for and find their glove pin, a very large safety-type pin which contained their daily-laundered cotton gloves, Kevlar gloves and Kevlar sleeves. *See* Pet. App. 41a & Trial Tr. 1243:8-15, 1244:20-1243:15, 1246:19-21 & 1250:9-1251:6. In the first shift, the glove pins were

brought into the cafeteria on a line-by-line basis in large sacks which were dumped out on cafeteria tables. *See id.* (Martinez) & J.A. 40. The workers crowded around the dumped glove pins and sorted through piles to locate their pin, identified by scratched initials or similar markings. *See id.* (Martinez); Pet. App. 53a. During the second shift, sacks with glove pins were hung and dumped in various locations throughout the plant, with workers gathering nearby to sort through and find their glove pins. *See* J. A. 40.

Straight knife users needed to sand their steels, a tool used to straighten the knife edge. *See* Pet. App. 42a. IBP provided squares of sandpaper at the knife rooms for this purpose. *See* Pet. App. 40a (slaughter); Trial Tr. 1247:21-1248:13 (processing). Steel sanding averaged 1.829 minutes per day. Pet. App. 57a n. 10 & 58a.

Employees were required to be at their work stations and ready to work on the cow or meat as it arrived on the chain. Pet. App. 40a.

6. Post-Production Activities.

After their last piece of meat, workers were required to clean their equipment and return it to the supply room (*e.g.* air knives) and to their lockers. *See* Pet. App. 41a. Knife users returned the knives to collection boxes. *Id.* In slaughter, the workers proceeded to wash stations and equipment sinks located on the slaughter floor, where they hosed down and scrubbed aprons, sleeves, rubber gloves and boots. *Id.* Processing workers lined up at equipment sinks and washed off their equipment, including scabbards, chains, mesh gloves, steels, plastic sleeves, aprons, meat hooks, scissors and boots. Pet. App. 42a & 57a (waiting time and washing time). Slaughter workers returned soiled Kevlar gloves, Kevlar sleeves and cotton gloves to the supply window, while processing workers clipped these items together and deposited them in bins.

See id. Soiled cotton frocks and whites were also returned to bins. *See id.* Workers doffed their remaining equipment upon returning to the locker room. Pet. App. 42a.

7. Gang Time Pay and Time Clock Usage.

Workers were paid on a gang time basis, *i.e.,* the paid day began when the first cow or carcass started on the chain and ended when the last cow or carcass started on the chain. *See* Pet. App. 36a-37a. Prior to the filing of this lawsuit, all pre-production, meal break and post-production work was done without pay. In July 1998, IBP began paying production line workers for 4 minutes of "clothes" time. *See* Pet. App. 39a & 78a.

Workers were required to swipe a time card through an electronic reader prior to production work and at the end of production work. *See* Pet. App. 37a & 47a. IBP instructed workers to clock in "'no more than 7 minutes before your scheduled start time,'" and to clock-out "'as you leave your work area.'" *See* Pet. App. 47a. However, the workers were not paid based on the time clocks. Pet. App. 47a.

8. Quantifying Off-the-Clock Work.

Workers arrived 15 to 45 minutes prior to production in slaughter and 30 to 45 minutes prior to production in processing. Pet. App. 49a; *see* Pet. App. 51a. The swipe card data bolstered this testimony. Pet. App. 51a; Pl. Exh. 179, Trial Tr. 2399:5-2400:12 (clocked in on average 30 to 50 minutes beyond paid workday). Based on this evidence, the District Court concluded it "could have determined that the evidence was sufficient to permit a more generalized damages calculation," but opted instead for individualized calculations "because the evidence and testimony permitted a more discrete determination as to timing by job description, equipment list, and activities testified to."

Pet. App. 45a-46a. It did this "in an overabundance of caution to the Defendant." Pet. App. 45a. The District Court found credible the donning, doffing and activity times testified to by plaintiffs' time study expert, Dr. Mericle, who time studied the most commonly used pieces of equipment and common activities. Pet. App. 49a-51a & 55a-58a. IBP had its own time study expert, Dr. Radwin, whose time study was called off after 3 days. Pet. App. 50a. The District Court also had before it other industrial engineers' time studies for the Pasco plant and two other IBP plants. Pet. App. 50a; *see also* Trial Tr. 3488:10-16 & 3497:4-3498:22 (IBP internal pre-production and post-production audits).

The District Court awarded the following pre-production and post-production donning and doffing minutes:

Equipment	**put on:**	**take off:**
mesh apron	.351	.172
mesh legging apron	.897	.233
scabbard	.264	.172
steel	.186	
mesh glove	.372	.113
polar sleeve [Kevlar]	.364	.081
plexiglas armguard	.091	.047
one mesh sleeve	.307	.095
double mesh sleeve	.473	.170
rubber apron	.492	.157
yellow plastic sleeve	.171	.071
clear plastic sleeve	.382	.109
rubber glove	.196	.077
clean cut glove [Kevlar]	.123	.165
cloth glove	.202	.070
weight belt	.279	.173
clear plastic legging	.586	.146

Pet. App. 56a-57a.[9] In addition, the District Court awarded the following pre-production and post-production walking and other activity minutes:

	kill:	**process:**
locker to work station (each way)	.962	1.653
walk to cafeteria to get gloves	1.061	
wait and dip scabbard and steel	.179	.179
wait for wash	.036	.571
wash and clean equipment	1.085	.853
clean and wash knives	.307	.307
clean saw	.482	.482
sand steel	1.829	1.829
wait and obtain gloves	.843	
handle equipment	.562	.562

Pet. App. 57a-58a.[10]

Processing division knife users – **the largest segment of the workforce** – recovered between approximately 12 and 14 pre-production and post-production minutes, including either 3.3 or 4.4 minutes of walking.[11] *See* Pet. App. 57a-58a; Pl. Exhs. 90-93, *supra* & J.A. 36-42. Processing saw operators recovered approximately 8 to 10 minutes, including 3.3 or 4.4 minutes of walking. The

[9] The District Court held non-compensable pre-production and post-production donning and doffing of hard hats, safety glasses, hair nets, ear plugs, rubber or safety boots, frocks, and whites. *See* Pet. App. 54a & 56a-57a. These pieces of equipment were held "not integral and indispensable to the job," involving *de minimis* time and/or subject to the FLSA §3(o), 29 U.S.C. §203(o) exclusion for "clothes changing" at union plants. *Id.*

[10] Getting and obtaining gloves was for processing, not slaughter. *See* J.A. 36 & 40. Additional walking to and from the cafeteria to get gloves was for first shift processing workers only. J.A. 40.

[11] All workers with pre-production and post-production minutes also had unpaid meal break donning and doffing.

various non-knife users – principally in hamburger and in packaging – recovered between 6 to 8 minutes, including 3.3 or 4.4 minutes of walking. *Id.* The relatively few processing workers who did not have compensable equipment, but who were required to go through the glove pin distribution procedure, recovered between either 1.387 minutes with zero walking time, or 2.448 minutes with 1.061 minutes of walking if they were on the first shift. J.A. 39 & 40; Pet. App. 57a-58a.

Slaughter straight knife users – 62% of slaughter workers – recovered between 9 and 10 minutes in pre-production and post-production damages, including 1.9 minutes of walking time. *See* Pl. Exhs. 90 & 93, *supra* & J.A. 38-39. Air knife and whizard operators recovered approximately 5½ to 6½ minutes pre-production and post-production, including 1.9 minutes of walking time. *See* Pl. Exhs. 90 & 93, *supra* & J.A. 38-39. Slaughter workers did not recover damages unless they had compensable pieces of equipment, *i.e.,* required equipment beyond the white shirt, hard hat, hair net, safety glasses, earplugs and boots. *See* J.A. 39-41, *see* Pet. App. 60a. Approximately 30 of 113 job classifications did not recover damages. *See* Exhibits 90 & 93 & J.A. 36-42 (additional equipment findings); Pet. App. 69a (citing Salter memo).

SUMMARY OF ARGUMENT

Section 4 of the Portal-to-Portal Act ("Portal Act"), reads very differently than Section 2 of the Act. Section 2 of the Act eliminated an employer's liabilities for claims prior to May 14, 1947, except for activities compensable by either contract or certain customs or practices. 29 U.S.C. §252(a). It was those claims which, had they not been

"outlawed," would have created "wholly unexpected liabilities, immense in amount, and retroactive in operation." *Steiner v. Mitchell,* 350 U.S. 247, 253, 255 (1956).

Section 4 of the Portal Act is a different and far more nuanced provision.[12] Section 4 only applies to 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) (emphasis added). Congress was thus (a) necessarily contemplating there being more than one principal activity, and (b) excluding from the reach of Section 4 all activities within the boundaries created by that provision. In *Steiner*, 350 U.S. at 252-53, 256, this Court construed what is "embraced" within the term "principal activity or activities." The combined result of the language and construction is that post-1947 walking, riding, or traveling occurring between principal activities is not covered by the Portal Act.

In *Steiner,* the Court defined the issue to be decided as "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the beginning of the shift." 350 U.S. at 248. By giving an affirmative answer to this question, *Steiner* established that the clothes changing was a "'principal' activit[y]" because it was integral and indispensable to a principal activity.

Plaintiffs' arguments are buttressed by the interpretive regulations of the Portal Act issued by the Administrator of the Wage and Hour Division, which were

[12] In the context of this case, if Section 2 were analogized to splitting a carcass in half, Section 4 would be more analogous to trimming the fat off of a piece of meat.

published in the Federal Register on November 18, 1947 shortly after the adoption of the Act. All parties to this appeal agree that Congress in 1949 "ratified" those regulations. The interpretive regulations explain that "workday" in the Portal Act generally means "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *See* 29 C.F.R. §790.6(b). Moreover, that same subsection explains that the workday "includes all time within the period whether or not the employee engages in work throughout all of that period." *Id.* Another interpretive provision establishes that walking, riding or traveling (as well as preliminary or postliminary activities not specified in §254(a)) are not covered by the Portal Act unless they take place before or after the performance of *all* of the employee's principal activities in the workday. 29 C.F.R. §790.4. Yet another interpretive provision makes clear that walking, riding or traveling in §4(a) does not include "travel from the place of performance of one principal activity to the place of performance of another" such activity. 29 C.F.R. §790.7(c). Each of those provisions directly supports the Ninth Circuit's opinion in this case.

The history and purpose of the Portal Act demonstrates that for work done after the passage of the Act, Congress intended to exclude only walking and some other pre- and post-shift activities that take place before and after the workday. It is therefore consistent with the purposes of the Portal Act for walking time during the workday to be compensable. The Senate Report of the bill, which largely became Section 4 of the Portal Act, defined the statutory term "workday":

> to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity

> or activities which such employee was employed to perform.

S. Rep. No. 80-48, p. 47.

Contrary to petitioner's argument, the Ninth Circuit's interpretation of §254 does not create new liabilities or windfall payments to employees. Ten years before plaintiffs filed this lawsuit, IBP was already in litigation with the Secretary of Labor in other meat packing facilities on issues including walking time during the workday. Nor can paying workers consistently with the plain meaning of the Portal Act and the Secretary of Labor's interpretation of the Portal Act be construed as providing them with a windfall. To the contrary, including this work as a cost of business, as Congress intended, brings economic efficiency and rationality to such activities.

ARGUMENT

A. Plain Meaning Supports Plaintiffs' Position.

1. §4(a) of the Portal Act.

The plain terms of §4(a) of the Portal Act only exclude from compensable time those activities which occur before an employee begins his or her *first* principal activity or after the employee ends his or her *last* principal activity. Section 4(a) excludes from compensable hours worked *only* those 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" his or her principal activities. It follows, therefore, that any activity occurring between the employee's first and last principal activities, including walking time, is unaffected by the Portal Act.

Plaintiffs' reading of the "plain meaning" of that language is shared by the Secretary of Labor who, after quoting it, reasoned:

> Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application.

29 C.F.R. §790.6(a).

Several other relevant conclusions can be gleaned from the plain meaning of 29 U.S.C. §254(a). First, since that section repeatedly refers to "principal activity *or activities*", Congress necessarily contemplated that there may be more than one principal activity. Plaintiffs cannot improve on the Secretary of Labor's analysis:

> The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday.

29 C.F.R. §790.8(a). This Court should reject any interpretation of §254, which ignores the phrase "or activities" or would render it superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (judges should hesitate to treat as superfluous statutory terms in any setting).

Secondly, the grammar and structure of §4(a) of the Portal Act demonstrate that the phrase "which occurs either prior to the time on any particular workday at

which such employee commences, or subsequent to the time on which he ceases *such principal activity or activities,*" modifies both subsection (a)(1) and (a)(2) of that section. That too is how the Secretary of Labor has construed the "walking, riding, or traveling" portion of the statute. 29 C.F.R. §790.4(b)(1), (2). *See also Ralph v. Tidewater Construction Corp.*, 361 F.2d 806, 808-09 (4th Cir. 1966).[13] Thus, the interpretation of "principal activity or activities" set forth in *Steiner v. Mitchell*, 350 U.S. 247, 252, 256 (1955), applies *whenever* that phrase is used in §254. *See NCUA v. First National Bank*, 522 U.S. 479, 501 (1998) (similar language within the same section of a statute, must be accorded similar meaning); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) (same).

2. "Principal Activity Or Activities."

This Court's interpretation of the term "principal activity or activities" in *Steiner v. Mitchell*,[14] *supra*, conflicts with both IBP's argument that donning and doffing cannot be a principal activity and its argument that plain meaning precludes analysis of legislative history. *Steiner* defined the issue decided therein as "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the

[13] While it argued to the Court of Appeals that §254(a)(1) is a "stand alone" provision (Pet. App. at 18a), IBP now appears to acknowledge that the §254(a)(1) walking time exclusion is limited to walking "'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.'" Pet. Br. 15-16 (quoting statute).

[14] As held in *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994), "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (Footnote omitted).

beginning of the shift." 350 U.S. at 248. By giving an affirmative answer to this question, *Steiner* establishes that the clothes changing was "'principal' activit[y]."

While IBP claims that the meaning of "principal activity" is plain, *Steiner* held that "[t]he language of Section 4 is not free from ambiguity and the legislative history of the Portal-to-Portal Act becomes of importance." 350 U.S. at 254. The Court not only considered, but appended to its opinion, excerpts from the legislative history of the Portal Act which showed that "'[t]he term "principal activity or activities" includes all activities which are an integral part thereof.'" *Steiner*, 350 U.S. at 257 (quoting Senator Cooper reading from page 48 of Senate Report). The Supreme Court in *Steiner*, using that legislative history and interpretive regulations of the Portal Act by the Secretary of Labor, agreed that "the term 'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities.'" 350 U.S. at 252-53.

IBP's "plain meaning" argument focuses entirely on the word "activity" and ignores "or activities." It cites *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993), which interpreted a statute referring to "'*the principal place* of business for any trade or business of the taxpayer.'" 506 U.S. at 173 (emphasis added). Since "the principal place" is singular, this Court looked to the dictionary definition of "principal" and concluded that the "term 'principal' typically means 'most important, consequential or influential.'" 506 U.S. at 174. IBP argues from *Soliman*:

> Thus, an employee's "principal activity" is the most important or consequential task (or tasks) the employee was hired to accomplish. As applicable here, the "principal activity" respondents are "employed to perform" is processing meat, not changing clothes.

Pet. Br. 15. That argument does not work in the present case even if the term had not been defined in *Steiner* because §254 expressly contemplates several "principal activities." There is little point in determining what is the "most important" activity, when there are several principal activities. Moreover, this Court has already unanimously defined the term "principal activity or activities" as including "integral and indispensable parts of such activities." The meaning of that term has not changed in the past 50 years.

3. The Fair Labor Standards Amendments of 1949, §16(c).

In 1949, Congress "hear[d] from the [Wage and Hour] Administrator [about] his outstanding interpretation of the coverage of certain preparatory activities closely related to the principal activity and indispensable to its performance." *Steiner*, 350 U.S. at 255. Congress then expressly ratified the Administrator's then-existing regulations, including the Portal Act §4(a) interpretation. Fair Labor Standards Amendments of 1949, ch. 736, §16(c), 63 Stat. 920.[15]

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[15] Section 16(c), as quoted in *Steiner*, 350 U.S. at 255, n. 8, states:

"Any order, regulations, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or any from time to time be amended, modified, or rescinded by the Administrator or

(Continued on following page)

The Secretary of Labor argued to the Court of Appeals herein that its position, *i.e.*, that the pre-production and post-production donning, doffing, cleaning and storing were compensable "integral and necessary" activities, was "compelled" by "the Secretary's longstanding, published interpretations of section 4(a) of the Portal Act, which were ratified by Congress in 1949," citing *Steiner,* 350 U.S. at 255 nn. 8-9 and 63 Stat. 920 (1949). Secretary of Labor *Alvarez v. IBP* Court of Appeals *Amicus* Brief at 8. IBP also agrees that the Secretary's interpretive regulations were "adopted shortly after passage of the Portal Act *and subsequently ratified by Congress*." Pet. Br. 31 (emphasis added). *See also* Pet. Br. 30. "Ratify" means "to approve or confirm; especially, to give formal sanction to." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1496 (2d ed. 1983). As defined in BLACK'S LAW DICTIONARY 1268 (7th ed. 1999), "ratification" means "confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done."

Congress had known since at least this Court's decision in *Skidmore v. Swift & Co.*, 328 U.S. 134, 140 (1944), that, even without Congressional approval, interpretations by the Wage and Hour Administrator "while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." The significance of the Administrator's 1947 interpretive regulations is heightened because of the 1949 legislation in which the regulations were ratified by Congress.[16] In

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the Secretary, as the case may be, in accordance with the provisions of this Act." 63 Stat. 920.

See also, 29 U.S.C.A. §208 (1998) (Historical and Statutory Notes).

[16] All of the interpretive language quoted by plaintiffs was published in the Federal Register on November 18, 1947 at 12 Federal

(Continued on following page)

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969), this Court held that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *See also Loving v. United States*, 517 U.S. 748, 770 (1996) (same). Here, Congress, in 1949, after being advised about the Administrator's Portal Act regulations, ratified those then-existing Portal Act regulations. It is hardly surprising, therefore, that this Court specifically relied on 29 C.F.R. §790.8 in *Steiner*. 350 U.S. at 255 & n. 9. This Court should be loath to interpret §4(a) of the Portal Act in a way inconsistent with those congressionally-sanctioned interpretive regulations.

B. The Administrative Interpretation Of §4 of the Portal Act Supports Plaintiffs' Position.

1. The Lower Courts In This Case Correctly Applied the Portal Act Regulations in Holding Compensable Post-Donning and Pre-Doffing Walking.

Both the District Court and the Ninth Circuit relied on the agency's interpretive regulations in concluding that

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Register, pp. 7655-7699. At §790.1, the Secretary cites *Skidmore*, *supra*, and goes on to explain that:

> The interpretations expressed herein are based on studies of the intent, purpose and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

29 C.F.R. §790.1, n. 5. The operative provisions of 29 C.F.R. §790, as it was published in 1947, are appended to this Brief.

walking time after donning and before doffing was part of the workday and thus not subject to §4(a) of the Portal Act. For example, the Ninth Circuit cited 29 C.F.R. §790.6(b) as "noting that the 'workday' includes 'all time within that period whether or not the employee engages in work throughout all of that period.'" Pet. App. 18a. The District Court reasoned:

> The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. §790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy.

Pet. App. 54a. 29 C.F.R. §790.6(b) begins by explaining what the "workday" means in the Portal Act, stating:

> "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. *It includes all time within that period whether or not the employee engages in work throughout all of that period*.

(Emphasis added.) That directly supports plaintiffs' and the Ninth Circuit's position.

IBP's Brief, at page 31, ignores this more complete definition of "workday" in 790.6(b) and instead relies only on what the Secretary characterizes in §790.6(a) as a *rough* definition, to wit: "Section 4 of the Portal Act does not affect the compilation of hours worked within the 'workday' proper, *roughly described* as the period 'from whistle to whistle.'" (Emphasis added.) IBP's only

quotation of §790.6(b) in its "Agency Interpretive Guidance . . . " section is from a sentence in the middle of that paragraph that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there." Pet. Br. 31. That sentence is only a refinement of the general rule enunciated in the first two sentences of §790.6(b) quoted above.

IBP backhandedly acknowledges the general rule in the course of criticizing what it describes as an internal inconsistency in the Ninth Circuit's logic:

> As a result [of compensating for only "reasonable" walking time], the judgment effectively does provide compensation for "discrete periods," and is therefore flatly inconsistent with the notion, embodied in the regulation the lower court cited, *id*. at 18a, that the workday actually commences with the first integral and indispensable act, since employees must be paid for all time "within that [workday] whether or not the employee engages in work throughout all of that period." 29 C.F.R. §790.6(b).

Pet. Br. 38.

IBP is in effect arguing that the Ninth Circuit followed §790.6(b) in concluding that walking time after the first principal activity is not subject to the Portal Act, but failed to follow that same section by affirming the payment only of "reasonable" walking time. If IBP were correct, the logic of its argument would be to increase plaintiffs' damages, *i.e.,* reject the inconsistent portion of the opinion, rather than to reject the part which follows the regulation. *See* Pet. App. 18a. That of course is opposite to the result IBP is seeking. However, the Ninth Circuit affirmed "reasonable" walking time not as the standard of "hours worked," but as an appropriate reasonable approximation of damages under

Anderson v. Mt. Clemens Pottery, 38 U.S. 680, 688 (1946) and its progeny:

> Rather, the district court adopted – as the Tenth Circuit did in *Reich* [*v. IBP,* 38 F.3d at 1127] – a compensation measure based on a "reasonable" quantification of plaintiffs' work time, thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damage measure to the extent possible nevertheless.

Pet. App. 33a. The Ninth Circuit thus rejected plaintiffs' cross-appeal argument that "reasonable" time-studied segments were an improper measurement of damages because it failed to compensate for activities that were not time studied and for inefficiencies in the pre-production and post-production. *See, id.*

2. Additional Portions Of The 1947 Regulations, Ratified by Congress, Support Plaintiffs' and the Secretary of Labor's Workday Arguments.

The "Principal activities" subsection of the regulations, states: *"The term 'principal activities' includes all activities which are an integral part of a principal activity."* 29 C.F.R. §790.8(b) (emphasis added). Thus, the District Court's unchallenged findings that "donning, doffing, cleaning, and storage of required equipment, safety and otherwise, [was] integral and indispensable to the workers' duties as meat processors" (Pet. App. 58a) means that these activities were "principal activities" under §790.8(b).

To be excluded by §4(a) " 'walking, riding, or traveling' of the kind described in the statute" must "take place before or after the performance of all the employee's 'principal activities' in the workday." 29 C.F.R. §790.4(b). In the present case, however, the District Court made unchallenged findings that the walking between the locker

and the work station "occurs during the 'work day.'" Pet. App. 54a; *see id.* 40a, 58a & 59a.

Walking is defined as preliminary or postliminary activity. 29 C.F.R. §790.7(b); *see* 29 C.F.R. §790.7(f) (walking would "normally be considered preliminary or postliminary activities.") Thus, the limitations on what constitute "preliminary" or "postliminary" activities also apply to walking, riding or traveling, which are also treated as preliminary or postliminary activities. *See, e.g.*, 29 C.F.R. §790, n. 44. IBP's contrary argument in the last paragraph on page 31 of its brief conflicts with 29 C.F.R. §790.7(b).

Petitioner's Brief, at page 31, quotes part of 29 C.F.R. §790.7(c), but ignores the language underlined below which excludes from §4(a) all walking between the first and last principal activity.

> The statutory language and the legislative history indicate that the "walking, riding, or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. *It does not, however, include travel from the place of performance of one principal activity to the place of performance of another,* nor does it include travel during the employee's regular working hours. . . .

29 C.F.R. §790.7(c) (emphasis added). Thus, IBP's argument fails because it ignores the rule that travel between principal activities is compensable.

The sole ambiguity in the regulations comes in §790.7(g), footnote 49, which states that when clothes changing and washing is compensable,

> [t]his does not necessarily mean, however, that travel between the . . . clothes-changing place

> and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

This footnote recognizes a possibility that some travel incidental to clothes changing might be within the §4(a) exclusion. Correspondingly, it also means that other travel incidental to clothes changing is **not** subject to §4(a). The footnote offers no guidance or explanation.

The United States' *amicus* brief in *Tum*, at page 18, discusses the ambiguity in footnote 49 and concludes:

> At most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. . . .

The United States updates the agency's 58-year experience under 29 C.F.R. §790 and footnote 49, as follows:

> in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which such walking would be excluded from compensation under the Portal Act. . . .

Id. 20. The District Court in its findings, the Secretary in her Ninth Circuit *amicus* brief, and the Ninth Circuit saw no reason to treat the present case as an exception to basic §4(a) principles set forth in the statute, *Steiner* and the regulations.

Footnote 49 is ambiguous and should be analyzed within the context of 29 C.F.R. §790 as a whole. Courts

"must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulations as set forth in an amicus brief). Even apart from the weight of 29 C.F.R. §790, which supports plaintiffs' position herein, affirmance is also called for if the Secretary's interpretation is given any deference.

IBP and *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280 (1st Cir. 2004) ignore the full scope of the regulations and do not give the Secretary's interpretation of this ambiguous footnote any deference.

3. The FLSA "Hours Worked" Regulations Support Treating The Walking In This Case As Compensable.

As explained in the 1947 regulations, there is a close relation between the Portal Act and the Fair Labor Standards Act. 29 C.F.R. §790.2. The Secretary of Labor has also issued hours worked regulations at 29 C.F.R. §785. Subsections 785.33-.41 discuss the compensability of travel time. These regulations were drafted to accommodate and be consistent with the Portal Act. *See* 29 C.F.R. §785.34. Subsection 785.38 is of particular relevance to this appeal, stating, in part:

> Where an employee is required to report at a *meeting place* to receive instructions or to perform other work there, *or to pick up and to carry tools*, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom or practice. . . .

(Emphasis added). Here, the findings of fact establish that the workers were required by IBP to report to their locker

room to pick up and to carry tools, and to obtain required protective equipment. *See* Pet. App. 40a, 41a, 54a, 58a & 59a. Under this regulation, their travel from the locker room to the processing or slaughter floor "is part of the day's work, and must be counted as hours worked."

C. The Ninth Circuit Properly Applied *Steiner*.

The District Court found that IBP requires employees to "store equipment and tools in a company-provided locker at the end of each shift." Pet. App. 39a. It found that slaughter employees "go to the locker room, where they retrieve their assigned protective equipment, steels, and tools." *Id.* 40a. The District Court also found that processing employees go to their locker room where they "obtain safety equipment and tools, which IBP requires be stored in the lockers, and then proceed to the processing floor." *Id.* 41a. Based on those findings of fact, the District Court found and concluded, in light of 29 U.S.C. §254(a) and 29 C.F.R. §790.6(b), that:

> The work day begins with the commencement of an employee's principal activity or activities and ends with the completion of the employee's activity; thus, the inclusion of Dr. Mericle's walking time as compensable time. 29 C.F.R. §790.6(b). Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. . . .

Id. 54a; *see also id.* 58a (concluding that "donning, doffing, cleaning and storage of required equipment, safety and

otherwise, are integral and indispensable to the workers' duties as meat processors") & *id.* 53a (quoting §4(a)).

The Ninth Circuit affirmed the District Court's analysis:

> The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring *thereafter* in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Pet. App. 18a (emphasis added.) In so doing, the Ninth Circuit relied on this Court's decision in *Steiner* as well as 29 U.S.C. §254 and 29 C.F.R. §790.6(b). The Ninth Circuit properly reasoned:

> *Steiner's* "principal activity" term expressly "embraces all activities . . . integral and indispensable" thereto, preliminary or otherwise, 350 U.S. at 252-53, 76 S.Ct. 330 (internal quotation marks omitted); the retrieval and donning of protective equipment are "integral and indispensable" preliminary activities, and, as such, are "embrace[d]" by plaintiffs' "principal [work] activity." *Id.* All activities performed thereafter – such as "walking" – thus occur during the "principal" workday and are compensable. *Id.; see also* 29 C.F.R. §790.6(b) (1999).

Pet. App. 18a. IBP asserts that the Ninth Circuit incorrectly reads *Steiner* as "equating 'integral and indispensable' activities with 'principal activities.'" Pet. Br. 18. IBP,

however, fails to acknowledge that this Court expressly agreed with this equation in *Steiner*:

> The Court of Appeals affirmed, likewise holding that the *term "principal activity or activities"* in Section 4 *embraces all activities which are "an integral and indispensable part of the principal activities*," and that the activities in question fall within this category.
>
> *With this conclusion, we agree*.

350 U.S. at 252-53 (emphasis added; footnote omitted).

IBP makes several arguments as to why this Court could not have meant what it said. None is persuasive. IBP first argues that by:

> employing the concept of an "integral and indispensable" activity – a concept that does not appear in Section 4(a) itself – the Court necessarily recognized that the clothes-changing was not itself a principal activity.

Pet. Br. 18. Both parts of that argument are wrong. First, while the words "integral and indispensable" do not appear in §4(a), the concept that something which is integral and indispensable to an activity is part of the activity follows logically. For example, if batting a baseball is one of an employee's principal activities, it follows logically that batting embraces the activity of picking up a bat since that is an integral and indispensable activity for a batter. Secondly, the phrase "integral and indispensable" repeatedly appears in both the legislative history which this Court in *Steiner* appended to its opinion and in the Secretary of Labor's interpretive regulations which Congress ratified in 1949. This Court recognized the clothes changing in *Steiner* as a principal activity.

IBP next argues that if this Court, in *Steiner,* equated integral and indispensable activities with principal

activities, it would have been required to decide such questions as whether an activity could be an employee's principal activity even though it occurred in a locker room rather than on the production line. *Id.* at 18-19. However, both this Court and Congress in the legislative history attached to this Court's opinion, knew full well that an activity could be a principal activity even if not done on the "production floor."[17] Thus, there would have been no need to answer such a question in *Steiner*.

Third, IBP refers to this Court's language in *Steiner* that:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and are not specifically excluded by §4(a)(1)*.

350 U.S. at 256 (emphasis added). IBP argues that the emphasized portion of the quote means that the *Steiner* Court recognized:

> that Section 4(a)(1) continues to place pre- and post-shift walking time outside the FLSA's mandatory compensation requirements even when such walking occurs between other pre- and post-shift activities that are subject to mandatory compensation.

Pet. Br. 19 (footnote omitted). However, that argument is based on an incorrect reading of §4(a)(1) and *Steiner*. It

[17] *See*, for example, the question and answer between Senators Barkley and Cooper involving an employee spending half an hour sharpening and preparing tools prior to the start of production. 350 U.S. at 258-59.

assumes that §4(a)(1) covers *all* walking time between *all* principal activities. Section 4(a)(1) says no such thing. Rather, §4(a)(1), like §4(a)(2), is limited to certain activities (walking, riding or traveling), 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). This Court's reference to §4(a)(1) in *Steiner* only underscores that a party can no longer successfully contend that walking, riding or traveling to the first principal activity is itself integral and indispensable to performing that first principal activity. *Accord,* 29 C.F.R. §790.4(b)(1) and §790.7(b); *see also* A.F.L-C.I.O *Tum/Alvarez Amicus* Brief 14-15.

At the same time, both the statute and the Secretary's regulations do not exclude from compensation a "preliminary" or "postliminary" activity *unless* such activity occurs "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); 29 C.F.R. §§790.6-790.8. Thus, the issue of whether the walking itself is integral and indispensable is irrelevant.[18]

Plaintiffs' position can be illustrated by *Mitchell v. King Packing Co.*, 350 U.S. 260 (1955). IBP acknowledges that the holding in *King Packing* was that "knife sharpening is a compensable '*principal*' activity of butchers in [a]

[18] Plaintiffs succeed in this appeal even if walking from one principal activity to another principal activity is *not itself a principal activity*. Neither the District Court nor the Ninth Circuit characterized the walking itself as a principal activity. Plaintiffs are aware that the petitioner in *Tum* has argued in the alternative that the walking in that case was itself a principal activity. While the *Alvarez* plaintiffs do not make that argument, if it is accepted, that would provide a separate basis for affirming the Ninth Circuit's decision.

meatpacking plant." Pet. Br. 17 n. 7 (emphasis added). In *King Packing,* knife sharpening was done by production workers in a separate "room, equipped by respondent with an emery wheel and grind stone" prior to or after their production work. 350 U.S. at 262. Since knife sharpening was, *as IBP admits*, a "principal activity," walking from the knife sharpening room to the room where the sharpened knives were used to cut meat would not fall within the confines of 29 U.S.C. §254(a).

D. The Legislative History And Purpose Of The Portal Act Show That Congress Was Legislating About Activities Outside Of The Workday And Was Not Legislating About Periods Within The Workday, Which The Legislative History Defines.

The Portal Act was prompted by this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and the onslaught of litigation following it. *See Carter v. Panama Canal Co.*, 150 U.S. App. D.C. 198, 463 F.2d 1289 (D.C. Cir. 1972); S. Rep. No. 48, 80th Cong. 1st Sess. 47 (1947). As this Court recognized in *Steiner*, Congress responded very differently to past liabilities referenced in §2 of the Portal Act, than it did to future liabilities referenced in §4 of the Portal Act:

> On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities. Had Congress intended the result urged by petitioner, the very different provisions of §§2 and 4 would have been unnecessary; §2 could

> have been given prospective as well as retroactive effect.

350 U.S. at 255-56.

As to future liabilities, the legislative history strongly supports the conclusion that Congress was carefully and clearly (a) excluding from the Portal Act activities within the workday, (b) defining the workday as beginning with the first principal activity and ending with the last principal activity, and (c) defining principal activities as including all activities which are an integral and indispensable part of a principal activity.

Senate Report No. 48, 80th Cong. 1st Sess. 47 (1947), is particularly instructive because §4 of the Portal Act largely followed the Senate Bill. *Steiner*, 350 U.S. at 254. The Senate Report explained that the rules laid down in §4(a) related to activities taking place prior to or subsequent to the employee's principal activity or activities. It also explained that "workday" means:

> That period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform. Section 4 relieves an employer from liability or punishment under the FLSA on account of the failure of such employer to pay an employee minimum wages or overtime compensation, for activities of an employee engaged on or after 1947, *if such activities take place outside of the hours of the employee's workday*.

Id. at 46-47 (emphasis added). The Report further explained that "'principal activity or activities' include all activities which are an integral part thereof," and reiterates that "the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[ ] the beginning

and the end of his workday." S. Rep. No. 48, p. 48. The Senate Report also pointed out that:

> Activities of an employee which take place during the workday are . . . not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section.

S. Rep. 80-48, p. 47. Consequently:

> Any activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act.

Id. at 48. The Report was supplemented by remarks from the bill's sponsors. For example, Senator Cooper, a principal sponsor of the bill, explained,

> The rules which have already been developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof.

93 Cong. Rec. 2297 (1947). As aptly summarized in the A.F.L.-C.I.O.'s *Tum/Alvarez* Amicus Brief at page 11:

> In sum, as Senator Wiley put it, "[a]ctivities performed by an employee during the workday are not affected in any manner by [§4(a)]," 93 Cong. Rec. 4269, and as the Senate Report explained, the statutory term "workday" is defined "to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform," S. Rep. No. 48, p. 47.

The Administrator's contemporaneous reading of the legislative history and statutory language convinced the

Administrator that one of the two primary Congressional objectives in enacting Section 4 of the Portal Act was:

> (2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

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[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270.

29 C.F.R. §790.4(a).

IBP's Brief cites relatively little of this history while making the unsupported argument that "Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice." Pet. Br. 21 (emphasis in original).[19] Thus, IBP is arguing that Congressional purpose was to exclude all time spent walking from one principal activity to another principal activity so long as such walking was not within the "shift" as defined unilaterally by the employer. As demonstrated by the above-quoted legislative history, Congress intended no such result.

It is also inaccurate to argue, as does IBP, that:

> The Portal Act Superseded This Court's Interpretations Of The FLSA, Including The Court's

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[19] Apparently, by pre-shift and post-shift walking, IBP is referring to *all* time when the workers are not cutting meat.

> Conclusion That Walking And Traveling Time Are Compensable.

Pet. Br. 21. As the Court recognized in *Steiner*, Congress dealt with pre-1947 liabilities far differently in §2 than with post-1947 liabilities in §4 of the Portal Act.[20] IBP incorrectly equates "shift" with "activities." It quotes Senator Cooper as stating:

> that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. at 2297 (statement of Sen. Cooper) (emphasis added). . . .

Pet. Br. 24. However, that statement was accompanied by Senator Cooper's explanation that "'[t]he term' 'principal activity or activities' 'includes all activities which are an integral part thereof'" (giving examples that included pre-shift activities). 350 U.S. at 257 (legislative history).[21]

IBP argues:

> The purpose and history of the Portal Act foreclose any claim that Congress mandated compensation for walking that follows compensable clothes-donning or precedes compensable clothes-doffing.

Pet. Br. 26. This argument suffers from the same defect. The touchstone of the non-compensability of walking or traveling is whether it precedes the first principal activity or follows the last principal activity. *See* remarks of

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[20] Surprisingly, IBP does not discuss §2 of the Portal Act or how it differs from §4 of the same Act.

[21] IBP at pages 25-26 of its Brief also cites earlier legislative history in which Senator Cooper proposed language that was not adopted. That is, of course, less persuasive than his later explanation of the language that was adopted.

Senator Cooper, 93 Cong. Rec. at 2297. In the context of this case, walking to the locker room where the first principal activity takes place is excluded under the Portal Act, but that exclusion does not apply to walking from one principal activity (at the locker room) to a second principal activity. Indeed, the Senate Report gives an example which necessarily includes compensable walking after the worker begins his or her first principal activity *prior to* the start of "shift," *i.e.,* production, work:

> " '2. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.' "

Steiner, 350 U.S. at 257 (quoting Senator Cooper reading the Report in the floor debate). The Report, and Senator Cooper, in quoting the Report, necessarily understood that the employee's walking from bench-to-bench and machine-to-machine would be beyond the reach of the §4(a)(1) Portal Act exclusion, even though the walking occurs prior to start of production work.

E. Lower Court Authority Supports Compensation For Walking and Travel Time Between the First and Last Principal Activities, Even If Not Production Activity.

IBP relies on two lower court cases in which the trial courts held that walking and travel time did **not** take place between the first and last principal activities. Pet. Br. 15 (citing *Ralph v. Tidewater Construction Corp.,* 361 F.2d 806, 808 (4th Cir. 1966), and *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), *aff'g*, 314 F.Supp. 386

(D.D.C. 1970)). *Carter v. Panama Canal Co.* involved locomotive operators who paused to check an assignment board on the way to their locomotive. 463 F.2d at 1291. The trial court concluded that:

> passing an assignment board and walking 2 to 15 minutes to a locomotive is not an "integral part of and indispensable to" the principal activity of operating the locomotive.

314 F.Supp. 386, 391 (D.D.C. 1970). *Ralph v. Tidewater Construction Corp.* involved bridge tunnel construction workers who did *no work* before "transportation from the shore to their places of work in the Bay." 361 F.2d at 808. Travel prior to the first principal activity and after the last principal activity is non-compensable under §4(a)(1). Far more pertinent, however, are lower court cases in which the walking or travel occurred between the first and last principal activity, even though non-production activity.

Reich v. Monfort, Inc., 3 BNA Wage & Hour Cases 2d 1229 (D. Colo. 1996), *aff'd,* 144 F.3d 1329 (10th Cir. 1998), is directly on point. It involved unpaid donning, doffing, and cleaning work by cattle slaughter and processing employees. *The trial court distinguished Carter and held that walking from the locker room to the work stations and back was not subject to §4(a)(1) where it occurred between the first and last principal activities of the workday*, stating:

> The defendant contends that walk time should be excluded under the Portal-to-Portal Act, 29 U.S.C. §254(a)(1), *citing Carter v. Panama Canal Company*, 463 F.2d 1289 (D.C. Cir. 1972). That exclusion is not applicable here. The walk time from locker room to work stations is not separable from the time required for waiting in line at the knife room and the waiting and washing done at the wash stations on the way back to the locker rooms. . . .

3 BNA Wage & Hour Cases 2d at 1231. The Tenth Circuit affirmed, with the sole disputed issue being whether the pre-production and post-production work – with walking time included – was *de minimis*. *See* 144 F.3d at 1333.

In *Reich v. IBP,* 820 F.Supp. 1315 (D.Kan. 1993) (liability) ("*IBP I*"), *aff'd,* 38 F.3d 1123 (10th Cir. 1994) ("*IBP II*"), *on remand* 3 BNA Wage & Hour Cases 2d 324 (D.Kan. 1996) (damages) ("*IBP III*"), 3 BNA Wage & Hour Cases 2d 632 (D.Kan. 1996) (injunction) ("*IBP IV*"), *aff'd sub nom. Metzler v. IBP,* 127 F.3d 959 (10th Cir. 1997) (damages and injunction) ("*IBP V*"), the trial court held that walking time between the knife room and production floor was **not** excluded by §4(a)(1) because it occurred between the first and last principal activities of pre-production obtaining knives and post-production returning knives, stating:

> [T]he first principal activity for these employees was to pick up sharpened knives with which to perform their job on the production line. Therefore, the knife carrying employees' workday began and ended at the knife room because that was where the first and last principal activity occurred.
>
> We thus conclude that the time spent walking from the knife room to the work station and back to the knife room was compensable because it occurred during the workday. For clarity, we stress that the walk time was not compensable because the employees were carrying hand tools. *See* 29 C.F.R. §790.7(d) (carrying ordinary hand tools does not transform preliminary activity into a principle [*sic*] activity). Rather, the walk time is compensable because the workday was already underway. *See* 29 U.S.C. §254(a), 29 C.F.R. §§790.6, 790.7. . . .

Id. at 1325 (footnote omitted).[22] In *IBP V*, the Tenth Circuit characterized *IBP I* as follows:

> In phase one, the district court found that most of the activities performed by knife-wielding workers that related to the donning, doffing and cleaning of the specialized protective gear, the exchanging of dull knives for sharp ones, *and the time needed to walk to these activities, were compensable work under the Portal-to-Portal Act* of 1947, 29 U.S.C. §§216(b), 251-262. *Reich v. IBP*, 820 F.Supp. 1315, 1324-28 (D.Kan. 1993). . . . We affirmed the district court in all respects relevant to this appeal. *Reich I*, 38 F.3d at 1127-28. . . .

127 F.3d at 962 (emphasis added). The workers recovered 14 minutes of pre-production and post-production time, including "three minutes of pre-shift and post-shift compensable walk time." *Id.* at 962-63.

The Secretary of Labor's 1992 trial brief in *IBP I* is an exhibit herein. Pl. Exh. 1056 (Trial Tr. 4046:11-16). The Secretary argued:

> Because putting on and taking off work clothing and personal protective equipment are part of the employee's principal activity, (*see Steiner v. Mitchell, supra*; *Apperson v. Exxon Corporation*, 87 L.C. 48,932 (E.D. CA 1979, copy attached); all walking and waiting performed in between are also compensable. *See, Apperson v. Exxon Corporation, supra*; *Amos v. the United States*, 107 L.C. 45,255 . . . (Ct. Cl. 1987); *Dole v. Enduro Plumbing, Inc.*, 117 L.C. 47,058 (C.D. Cal. 1990) (copies attached);

[22] On the facts presented in that trial, the court found that the workday started at the knife room, rather than the locker room. The District Court here made a different factual finding. But both courts agreed that walking is compensable where it occurs between the first and last non-production principal activity.

> 29 CFR §§785.38, 790.6, 790.7. Furthermore this walking and waiting time are an integral and indispensable time of the employee's work activities.

Id.

In *Amos v. United States,* 13 Cl. Ct. 442, 449-50 (1987), prison cook foremen had to retrieve keys, a radio and a body alarm from a control room before going to the kitchen. The court held that retrieving these items was the first principal activity under §4(a) and that walking to the kitchen was therefore not subject to the §4(a)(1) exclusion, stating:

> [T]he walking time was more than a "preliminary" or "postliminary" activity under the regulations, 29 CFR §790.7(b), because it was closely related to and indispensable to the performance of their principal activity. 29 CFR §790.8(c).
>
> *Baylor* [*v. United States*, 198 Ct. Cl. 331 (1972)]*, Whelan Security* [*Co. v. United States*, 7 Cl. Ct. 496 (1985)]*,* and *International Business Investments,* [*Inc. v. United States*, 11 Cl. Ct. 588 (1987)] although factually distinguishable from the instant case, in principle support the conclusion reached here. In each of those three cases, the plaintiffs first had to report to a location other than their duty stations in order to obtain weapons, which were items necessary to their function as guards, prior to proceeding to their active duty stations. They were not free to take a route directly to their work places. Similarly, these plaintiffs must first go to the control room to obtain items necessary to performance of their job as cook foremen. . . .

Id. at 449-50; *see also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) ("principal activities" is to be construed broadly); *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) (same); *Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234, 242 (D. Mass. 2004) (same).

As in *Monfort* and *IBP I* – and unlike *Ralph* or *Carter* – the present case involves District Court findings that the workers engaged in compensable principal activities prior to and after the walking time at issue. Lower court authority supports treating walking time between the first and last principal activities (even for non-production activities) as not being subject to the §4(a)(1) Portal Act exclusion.

F. The District Court and Court of Appeals Walking Time Ruling Is a Reasonable and Practical Analysis of the Paid Workday.

IBP argues that an "automatic rule" that any "integral and indispensable" activity starts the workday would lead to a host of anomalous results. Pet. Br. 32-39. IBP's "chief anomaly" is that walking time "would depend on the fortuity of where compensable gear happens to be located." Pet. Br. 32. However, the location of gear and other stations of "integral and indispensable" pre-production and post-production activities is not fortuitous, *i.e.,* left to chance.

IBP knows how to achieve efficiencies when it has to pay for the workers' time. It became the world's largest supplier of premium beef and pork by creating highly-efficient disassembly plants that started with cattle and finished with boxed beef. *See* Pl. Exh. 47 (IBP #0285-0286),

Trial Tr. 1870:20-25 & 1873:14-19.[23] Yet, prior to its extended FLSA litigation with the United States Secretary of Labor in the late 1980s and through the 1990s, *see* citations *supra,* IBP failed to apply principles of efficiency to pre-production and post-production activities at its plants. Thus, for the 1986-1988 period, IBP was held liable for knife users at 11 plants for having to wait in lines at the knife room, walk to and from the knife room with their knives pre- and post-shift, walk to equipment sinks post-production, and then wait in lines at the equipment sinks. *IBP I,* 820 F.Supp. at 1325; *IBP III,* 3 BNA Wage & Hour Cases 2d at 328; *IBP IV,* 3 BNA Wage & Hour Cases 2d at 632-33 & n. 1; *IBP V,* 127 F.3d at 965. These employees recovered 14 minutes, including 3 minutes of compensable walking from the knife room to the production floor and from the production floor to equipment sinks and the knife room. *IBP III,* 3 BNA Wage & Hour Cases 2d at 329; *IBP IV,* 3 BNA Wage & Hour Cases 2d at 632-33 n. 1; *IBP V,* 127 F.3d at 962-963. Following the liability findings in *Reich v. IBP,* the company "re-engineered" these 11 plants to eliminate or reduce certain inefficiencies, *i.e.,* changes in knife distribution and additional equipment washing sinks. *See, IBP III,* 3 BNA Wage & Hour Cases 2d at 328; *IBP V,* 127 F.3d at 964-65.

This demonstrates that when IBP had to pay for pre-production and post-production inefficiencies, it applied its industrial engineering skills to the pre-production and post-production process and made it more efficient. Pre- and post-production "integral and indispensable" activities

[23] IBP describes its success as "Mastering Fractions" – "a fraction of money here, a fraction there and a fraction elsewhere – small differences which add up to the BIG DIFFERENCE. . . ." Pl. Exh. 47 (IBP #02586), *supra*. That same mastery can be applied to reduce compensable pre-production and post-production time.

can be efficiently organized and not left to happenstance. IBP and other employers can apply their industrial engineering skills to reduce the amount of the necessary time to their benefit and the workers' benefit. *See also, Reich v. Monfort, supra,* 3 BNA Wage & Hour Cases 2d at 1231 (cattle plant compensable wait-to-wash time reduced during litigation by addition of equipment sinks).

By the time *Alvarez* was filed, knife distribution had been somewhat improved at the Pasco plant.[24] IBP also added some processing equipment wash sinks in 1998 or 1999.[25] These changes were the result of applying industrial engineering principles to pre-production and post-production work. However, there were other inefficiencies that could also have been easily eliminated, *e.g.*, dumping large bags of glove pins in the cafeteria. By paying a small group of workers to deliver glove pins to the work stations, IBP could eliminate 1.061 minutes of walking time and 0.843 minutes of rooting around through bags and piles of glove pins for the larger group of processing workers. Other efficiencies are undoubtedly possible.[26] Eventually, IBP may be able to bring full efficiencies to the pre-production, meal break and post-production activities, leaving it to pay for only basic donning and doffing of equipment. Market forces will drive these changes in the same manner as they have driven the method by which IBP starts with a cow and ends up with boxed beef and marketable byproducts.

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[24] Workers could obtain their knives from the knife room or from 4 or 5 bins brought out to the production floor. *See* Pet. App. 40a.

[25] Trial Tr. 2998:23-2999:22 (processing superintendent).

[26] At the time of trial, IBP was working on implementing alternatives to the steels that required maintenance. Trial Tr. 3159:6-3162:20.

IBP requires employees to store equipment and tools in the locker rooms. Pet. App. 54a. The location of the locker room is not fortuitous, but rather is part of the building's design. Processing shift workers spend several minutes each day walking up and down two narrow and crowded flights of stairs to retrieve and store equipment. While IBP does not have to pay for the walking time to the locker at the start of the workday and from the locker at the end of the workday, donning and doffing of substantial amounts of equipment and retrieval of tools occurs in these lockers by the direction of IBP and is part of the workday. The donning and doffing is integral and indispensable to the employee's work and thus starts the workday. If IBP can "reengineer" the location of the locker rooms or equipment and tool storage, that will shorten the employee's workday for the benefit of the employees and IBP. Neither the amount of work nor the reduction will be fortuitous.

IBP criticizes the lower court rulings for making pre-shift and post-shift walking time dependant on a single piece of equipment, using as its example a plexiglas armguard that takes 5½ seconds to don. Pet. Br. 35. This example only highlights the weakness in IBP's argument. There is not a single job classification in which a plexiglas armguard user does not also have substantial additional protective equipment and tools. *See* Pl. Exhs. 90-93, *supra* (minimum safety equipment requirements). The overwhelming majority of plexiglas armguard users were the hundreds of knife users who had the full complement of shoulder to knee or ankle mesh aprons, mesh or Kevlar sleeves, mesh and/or Kevlar gloves, and related gear. *See id.* Thus, the example chosen by IBP bears no relation to the realities of this litigation.

Equally important, the plexiglas armguard hypothetical illustrates why compensation is necessary. A plexiglas

armguard reduces the risk of serious injury to the arm and wrist from an errant razor-sharp knife, a powerful saw or some other cutting utensil. There could be serious consequences from not using a necessary plexiglas armguard. Necessary plexiglas armguard use is fairly characterized as integral and indispensable to principal activity. Moreover, there are time consequences that naturally flow from use, *e.g.*, needing to go to and from the locker to retrieve and store the equipment and waiting in line to wash it at shift's end.

While it is true that the District Court engaged in line drawing between compensable and non-compensable activity, its decision was carefully tailored and did not produce anomalous situations as IBP contends. All of the workers started off with required safety/sanitation equipment that must be stored in the lockers – the hard hats, safety glasses, ear plugs and hair nets. Virtually all of the workers had tools stored in their lockers without which they could not do their work (such as meat hooks, scissors and locks & tags).[27] Meanwhile, while several dozen workers in a workforce of slightly less than 1000 may have had relatively few pieces of equipment held compensable, the overwhelming majority of slaughter and processing workers had large amounts of compensable equipment due to their using or working in proximity to sharp knives and other dangerous cutting utensils and machinery.

IBP also argues that the District Court and Court of Appeals rulings will result in undue recordkeeping. Pet. Br. 36. However, this argument is not supported in the record and fails to recognize modern options available to employers. IBP could position swipe card readers or badge scanners at the points where the first and last principal

[27] *See*, *e.g.*, Pl. Exhs. 1000-1021 & 1023-1024 & 1027-1031, 1033-34 & 1039-1047, *supra* (witness equipment lists); *see also* Pl. Exhs. 90-93, *supra*.

activities occur. It could exercise additional controls to make sure the paid pre-production and post-production work is performed as efficiently as the paid production work. The burden of recordkeeping is far less in the 21st century.[28]

IBP argues that the variation in work routines produce an "incongruous disparate effect." Pet. Br. 34. It uses the example of employees who go first to their lockers and then to the supply window and employees who first go to the supply window and then to their lockers. *Id.* IBP argues employees who first go to their lockers "are compensated for traversing the distance between the locker room and the supply window, even if picking up only non-compensable items at the supply window, whereas walking the same distance in the reverse order is not compensable even if employees pick up compensable items at the supply window." *Id.* These examples have no applicability to the present case. Workers who are required to get compensable equipment from their lockers are paid for a straight-line, crow-flies walk from the locker to production floor, regardless of the manner in which they actually work, under the reasonable time damage calculations used herein. *See* Pet. App. 33a. In essence, the workers herein are being paid for irreducible core activities. Every worker with compensable equipment is required to retrieve and store it in his or her locker and, therefore, in some manner must walk from the locker to the work station prior to production and from the work station to the locker after production. They do not receive *extra* minutes even if their path or additional activities would support additional minutes. Employers who want to comply with the law and

[28] *See Saunders v. John Morrell & Co.,* 1 BNA Wage & Hour Cases 2d 879, 883 (N.D. Iowa 1991) ("sophisticated computerized time-keeping system makes it possible to keep track of small amounts of time" spent donning, doffing and washing equipment at slaughter plant).

remain competitive can obtain the same benefit as the District Court's damage award gave IBP by exercising control over the timing and sequence of pre-production and post-production compensable activities in the same manner that they control other compensable work time, *i.e.,* structure it as efficiently as possible.

The Court of Appeals ruling does not threaten to inundate industry with enormous or unforeseen liabilities. Indeed, the litigation over the past 15 years has been concentrated in the meatpacking industry because of the combination of two factors – (1) compensation based on gang time and (2) substantial pre- and post-production work due to safety and sanitation exigencies. The meat packing industry has been aware of these issues for more than 15 years and, therefore, it is not facing unforeseen liabilities. The issue before this Court – walking time between the first and last principal activity – is a manageable matter even in the context of the meatpacking industry and involves liabilities within the control of the employers to reduce or even eliminate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM RUTZICK*
KATHRYN GOATER
SCHROETER, GOLDMARK & BENDER
810 Third Avenue #500
Seattle, WA 98104
(206) 622-8000

DAVID N. MARK
LAW OFFICE OF DAVID N. MARK
810 Third Avenue #500
Seattle, WA 98104
(206) 340-1840

Counsel for Respondents

August 1, 2005

**Counsel of Record*

APPENDIX A

26 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 –

> (1) 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, and
>
> (2) activities which are preliminary to or postliminary to said 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. 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.

APPENDIX B

Part 790, General Statement As To The Portal-To-Portal Act Of 1947 On The Fair Labor Standards Act Of 1938, Signed By Administrator, Wage And Hour Division, On November 12, 1947 And Published In The Federal Register On November 18, 1947. 12 Fed. Reg., pp. 7655-7669 (1947)

GENERAL

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 14, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,[2] the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these acts.

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[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes. Public Law No. 49, 80th Cong., chapter 52, 1st sess.

[2] 52 Stat. 1060; as amended; 29 U.S.C. 201 et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this act, see footnote 17.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length herein,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he make these conclusions

[3] Sections 790.23 through 790.29 of this part discuss briefly those provisions of the Portal Act which affect the operation or enforcement of the Fair Labor Standards Act only with respect to activities engaged in by employees before May 14, 1947. Since the so-called "good faith defense" against past claims is considered incidentally in the discussion of the similar provision for the future, no separate discussion of this provision is included in these sections.

known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administrator believes to be correct[5] and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.[6] As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained herein.

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[4] See Skidmore v. Swift & Co., 323 U.S. 134; Kirschbaum Co. v. Walling, 316 U. S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

[6] Skidmore v. Swift & Co., 323 U.S. 134. See also Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. American Trucking Assn., 310 U.S. 534; Overnight Motor Transp. Co. v. Missel, 316 U.S. 572.

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.[9] The Congressional declaration of

[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provisions of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, "employer," "employee," and "wage", when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12.

Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 1947 Cong. Rec. 2168; colloquy between Senators Donnell and Ferguson, 1947 Cong. Rec. 2198; statement of Representative Gwynne, 1947 Cong. Rec. 1614.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in

(Continued on following page)

policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act"[11] that it "protects the legitimate claims" under that act,[12] and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act.[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are

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statement of Senator Donnell, 1947 Cong. Rec. 2251; see also statement of Senator Morse, 1947 Cong. Rec. 2349; statement of Representative Walter, 1947 Cong. Rec. 4514.

[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 1947 Cong. Rec. 4516; statement of Senator Wiley, 1947 Cong. Rec. 4398; statement of Representative Gwynne, 1947 Cong. Rec. 1629; statements of Senator Donnell, 1947 Cong. Rec. 2204-2206; 2251-2252; statement of Representative Robsion, 1947 Cong. Rec. 1553; Message of the President to Congress, May 14, 1947 on approval of the act.

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 and 4501. See also statement of Senator Cooper, 1947 Cong. Rec. 2373; statement of Representative Robsion, 1947 Cong. Rec. 1553.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4516. See also statement of Representative Keating, 1947 Cong. Rec. 1566.

[13] Statement of Senator Cooper, 1947 Cong. Rec. 2378; see also statements of Senator Donnell, 1947 Cong. Rec. 2439, 2440, 2442, statements of Representatives Walter and Robsion, 1947 Cong. Rec. 1550, 1552.

to be given a liberal interpretation[14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is effected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in herein in connection with the discussion of specific provisions of the 1947 Act.

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[14] Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. Rosenwasser, 323 U.S. 360; Brooklyn Savings Bank v. O'Neil, 324 U.S. 697.

[15] See A.H. Phillips Co. v. Walling, 324 U.S. 490; Walling v. General Industries Co., 67 S. Ct. 883.

§ 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1947, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances, such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were: (1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in

[16] The Fair Labor Standards Act requires payment of a minimum wage of not less than 40 cents an hour for all hours worked (except to certain learners, apprentices, handicapped workers, and messengers, and in certain industries in Puerto Rico and the Virgin Islands), and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employee's regular rate of pay.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation, together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the act); and, if his act or omission is willful, subjects him to criminal penalties (section 16(a) of the act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the act).

the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or practice;[19] and (2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in "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" (Tennessee Coal Iron & R.R. Co. v. Muscoda Local, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323, U.S. 134, 136-137).

[19] Portal Act, section 1; Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 1947 Cong. Rec. 4154, 4398; statements of Senator Donnell, 1947 Cong. Rec. 2159, 2192, 2193, 2255, 2256, 2440, 2441; statements of Senator Cooper, 1947 Cong Rec. 2370-2377.

[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374, 2375, 2376-2377, 2378; statement of Representative Gwynne, 1947 Cong. Rec. 4513; statements of Senator Wiley, 1947, Cong. Rec. 2154, 4398.

therefor if, and only if, such activities meet the following three tests:

(1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's "principal activities" in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that "the employer shall not be so relieved" if such activities are so compensable;[21] it does not matter in such a situation that they are so-called "portal-to-portal" activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an

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[21] Section 4(b) of the act (quoted in § 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2255-2256; colloquy between Senators Cooper and Mcrath, 1947 Cong. Rec. 2376; Cf. colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;[23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, "preliminary" or "postliminary" activities which take place outside the workday "before the morning whistle" or "after the evening whistle" are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

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[23] Statements of Senator Donnell, 1947, Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376.

[24] Statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256.

[25] Conference Report, pp. 12, 13. See also § 790.12.

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

* * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4(b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of

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[26] The full text of section 4 of the act is set forth in § 790.3.

[27] See § 709.6.

Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel

[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

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§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the

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[32] Cf. colloquies between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253, 2255, 2256; colloquy between Senators Ellender and Cooper, 1947 Cong. Rec. 2374; colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2376. See also Senate Report, p. 48.

[33] See §§ 790.3 and 790.12; Conference Report pp. 12, 13. See also Senate Report, p. 48.

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they "occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 (also 2154, 2155); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440.

[36] See, in this connection, statements of Senator Cooper, 1947 Cong. Rec. 2373-2374, 2376-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255-2256, 2440; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also footnote 18.

(Continued on following page)

concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the

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The determination of hours worked under the Fair Labor Standards Act is the subject of a separate interpretative bulletin, No. 13, which will be republished in revised from as Part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statements of Senator Donnell, 1947 Cong. Rec. 2440; statements of Senator Cooper, 1947 Cong. Rec. 2375-76.

workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregard [sic], and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary"

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[39] Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375, 2376.

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376. See also §§ 790.4 and 790.5.

activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on

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[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 1947 Cong. Rec. 2255, 2440.

or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection, the statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2256, 2441; statement of Senator Cooper, 1947 Cong. Rec. 2374. See also Senate Report, pp. 47, 48.

[45] The Report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language the many thousands of situations that do not readily fall within the pattern of the ordinary workday."

situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or

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[46] These principles will be discussed in Part 785 of this chapter, which will replace Interpretative Bulletin No. 13.

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employed." (Emphasis supplied.) 1947 Cong. Rec. 2377.

other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However, where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has no significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2441.

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

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§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to

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[51] Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375-6.

[52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

[53] See §§ 790.4 through 790.6; also Part 785 of this chapter, which will replace Interpretative Bulletin No. 13 as a statement of the principles for determining hours worked under the Fair Labor Standards Act.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "Principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee

[55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 1947 Cong. Rec. 2374.

[58] Remarks of Representatives Walter, 1947 Cong. Rec. 4515. See also statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377.

[59] See statements of Senator Cooper, 1947 Cong. Rec. 2374-2377. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947.

which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

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[60] See statement of Senator Cooper, 1947 Cong. Rec. 2377.

[61] Senate Report, p. 48; statements of Senator Cooper, 1947 Cong. Rec. 2375-2377.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (1947 Cong. Rec. 4513) and by Senator Wiley in the Senate (1947 Cong. Rec. 4501), the language of the provision here involved follows that of the Senate bill.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity

[63] Statement of Senator Cooper, 1947 Cong. Rec. 2375; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2375, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428.

[65] Such a situation may exist 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. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375.

rather than a principal part of the activity.[66] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[67] See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2383, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2375.

APPENDIX C

Part 785 and Title 29 of the Code of Federal Regulations provides, in relevant part:

Subpart B – Principles For Determination Of Hours Worked

§ 785.9 Statutory exemptions.

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his "principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity

in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin v. National Biscuit Co.*, 82 F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) Section 3(o) of the Fair Labor Standards Act. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

Subpart C – Application Of Principles

§ 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8(b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of

his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

Traveltime

§ 785.33 General.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. The subject is discussed in §§ 785.35 to 785.41, which are preceded by a brief discussion in § 785.34 of the Portal-to-Portal Act as it applies to traveltime.

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§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "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 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." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in

computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co. v. Muscoda Local*, 321 U.S. 590 (1946); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling v. Anaconda Copper Mining Co.*, 66 F. Supp. 913 (D. Mont. (1946).)

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§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C. A. 10, 1944))
