

November 9, 2005

SUPREME COURT CLARIFIES SCOPE OF COMPENSABLE WORKDAY UNDER THE FAIR LABOR STANDARDS ACT

To Our Clients and Friends:

In its first decision of the new Term, the Supreme Court yesterday addressed the scope of an employee's compensable workday under the Fair Labor Standards Act of 1938 ("FLSA"), as amended by the Portal-to-Portal Act of 1947.

The FLSA requires, among other things, that employers pay non-exempt employees the minimum wage for every hour worked, and one and one half times the employees' regular rate for hours worked over 40 per workweek. The Portal-to-Portal Act permits employers to exclude as non-compensable: (1) time spent "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) time spent on "activities which are preliminary to or postliminary to said principal activity or activities."

In the companion cases of *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, the Court clarified the scope of these two provisions of the Portal-to-Portal Act. The Court noted that the plaintiffs, employees at poultry and meat plants, must be compensated not only for time spent "donning" and "doffing" on-the-job protective clothing (a determination by the courts below not challenged in the Supreme Court), but also for time spent walking to the production floor from the changing area after "donning" at the start of the day; walking from the production floor to the changing area prior to "doffing" at the end of the day; and waiting in the changing area to "doff." The Court concluded, however, that time spent waiting to "don" protective clothing prior to the official start of the workday was not compensable.

The Court had ruled in a 1956 case that "donning" and "doffing" protective clothing *necessitated* by a job is "integral and indispensable" to an employee's principal work activities, and therefore in those circumstances is a compensable "principal activity," not a preliminary or postliminary activity. In yesterday's companion cases, the Court addressed the intersection of this ruling with the Labor Department's continuous workday rule, which provides that the workday is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." Rejecting an interpretation under which "integral and indispensable" activities like donning and doffing would be compensable, but not sufficiently "principal" to constitute the "first principal activity" for purposes of triggering the continuous workday rule, the Court held instead that the workday began with the "donning," ended with the "doffing," and included not only the time spent on the production floor, but also the walking and waiting time in between "donning" at the start of the day and "doffing" at day's end. However, the Court held that compensable work did not include time spent waiting in line to "don," which it characterized as "two steps removed from the production activity on the assembly line." The Court's ruling did not determine when the compensable workday begins for purposes of compliance with state wage and hour laws.

The Court's decision will be important when analyzing the compensability of a variety of activities between the time employees make the initial preparations to commence work, and when their actual productive workday begins. The decision may have bearing, for instance, not only on donning and doffing practices in a variety of industries, but also on the compensability of employees' time after they perform a variety of on-the-job start-up activities in white collar jobs.

The Labor and Employment Practice Group of Gibson, Dunn & Crutcher LLP has extensive experience advising and litigating regarding the Fair Labor Standards Act, as well as state wage and hour requirements in California and elsewhere. William J. Kilberg, a senior partner in the firm's Washington, D.C. office, and Eugene Scalia, co-chair of the firm's Labor and Employment Practice Group resident in Washington, D.C., both served as Solicitor (General Counsel) of the U.S. Department of Labor. Mr. Scalia held that position at the time the Department's litigation position in the wage-hour "donning and doffing" cases was formulated. In California, William D. Claster, Pamela L. Hemminger and Practice Group Co-Chair Deborah J. Clarke have broad experience defending wage and hour class actions under state law; the firm has represented the employer in a number of the handful of California wage and hour cases in which class certification was denied.



If you would like to discuss these or other labor and employment law issues, please contact the Gibson Dunn attorney with whom you work or [Deborah J. Clarke](#) in Los Angeles (213/229-7903), [Eugene Scalia](#) (202/955-8206), [William J. Kilberg](#) (202/955-8573), or [Jason C. Schwartz](#) (202/955-8242) in Washington, D.C.

© 2005 Gibson, Dunn & Crutcher LLP

The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.