

Compensable Time Under the FLSA

Recent Developments and Special Challenges
Facing Employers in the Construction Industry

Diane Apa Hauser, Esq.
Paisner-Litvin LLP

AGENDA

- ▶ The FLSA and its basic requirements.
- ▶ Recent Supreme Court decision re: “preliminary and postliminary” activities.
- ▶ Special challenges facing the employers in the construction industry.

COVERAGE UNDER THE FLSA

- ▶ Businesses in the construction industry are subject to the FLSA if they have:
 - ▶ Two or more employees, and
 - ▶ An annual gross sales volume of \$500,000.
- ▶ Coverage for individuals under the FLSA applies to any person who:
 - ▶ Works on or otherwise handles goods that are moving in interstate commerce, or
 - ▶ Work on the expansion of existing facilities of commerce, or
 - ▶ Perform duties which are closely related and directly essential to such interstate activities including guards, janitors and maintenance employees.
 - ▶ In other words, pretty much EVERYONE!

FAIR LABOR STANDARDS ACT

- ▶ Establishes requirements for minimum wage and overtime compensation in the payment of wages
- ▶ Includes recordkeeping requirements:
 - ▶ Employer must establish a SET workweek (7 consecutive 24-hour periods).
 - ▶ Must pay overtime when employees exceed the 40 hour workweek.
- ▶ For non-exempt employees:
 - ▶ Must pay federal minimum wage.
 - ▶ Must pay employees for all working time.
 - ▶ Must pay time and one half the regular rate (NOT the hourly rate!) of pay for each hour worked over 40 hours.

PORTAL-TO-PORTAL ACT

- ▶ Amendment passed by Congress in 1947
- ▶ Clarifies that certain acts are not compensable under the GLSA including:
 - ▶ Time spent commuting, and
 - ▶ Preliminary or postliminary activities.

PRELIMINARY OR POSTLIMINARY ACTIVITIES

- ▶ Activities that are preliminary or postliminary to the principal activity an employee is employed to perform
- ▶ Principal activity has been consistently interpreted by the Supreme Court as:
 - ▶ Embracing all activities that are an “integral and indispensable part of the principal activities”.

“INTEGRAL AND INDISPENSABLE”

- ▶ Prior to recent decision, Supreme Court never articulated a uniform test or definition to determine what constitutes “integral and indispensable”.
- ▶ Lower courts traditionally have explored the relationship between preliminary and postliminary activities with the principal activity using a variety of factors:
 - ▶ Whether the activity is required by the employer,
 - ▶ Whether the activity is necessary for the employee to perform his or her duties, and
 - ▶ Whether the activity primarily benefits the employer.
- ▶ Supreme Court has now articulated new test in *Integrity Staffing Solutions, Inc. v. Busk*.

INTEGRITY STAFFING SOLUTIONS, INC. V. BUSK

- ▶ The facts:
 - ▶ Warehouse staffing company that provides services to Amazon.com.
 - ▶ Busk and Castro were hourly employees of Integrity as warehouse employees.
 - ▶ Job duty was to pick up products from shelves and package the products for delivery.

THE SCREENING PROCEDURE

- ▶ Integrity required all employees to pass a security screening before they could leave the warehouse each day.
- ▶ Screening procedure consisted of walking through a metal detector after removing all items including keys, belt, and wallets.

BUSK AND CASTRO FILE CLASS ACTION

▶ Argument

- ▶ Busk and Castro argued that they were entitled to compensation for the time spent waiting to undergo and actually complete the screening procedure each day.
- ▶ Procedure took about 25 minutes each day and argued the time could have been reduced if Integrity added more screeners or staggers the end of shifts.
- ▶ Also claimed the screenings were only for the benefit of the employer – to prevent employee theft.

PROCEDURAL HISTORY

- ▶ District Court dismissed the complaint because the screenings were not an “integral and indispensable” part of the principal activities the employees were employed to perform.
 - ▶ Therefore, under the FLSA the screenings were not preliminary or postliminary activities and not compensable.
- ▶ U.S. Court of Appeals for the Ninth Circuit reversed stating since the screenings were required by Integrity, they were “necessary” to the employees’ primary work and done for Integrity’s benefit.
 - ▶ Therefore, the screenings were preliminary or postliminary activities and were compensable.

THE SUPREME COURT'S DECISION

- ▶ On December 9, 2014 the Supreme Court issued a unanimous decision to limit preliminary and postliminary activities under the FLSA.
- ▶ Closely examined the terms “integral” and “indispensable”.
- ▶ Holding:
 - ▶ An activity is “integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”

SCREENING PROCEDURE IS NOT INTEGRAL AND INDISPENSABLE

- ▶ Integrity employed its warehouse workers for retrieving products from shelves and packaging the products for shipment.
 - ▶ Integrity did not employ its warehouse workers for the purpose of undergoing security screenings.
- ▶ Security screenings could be eliminated and warehouse workers would still be able to complete their work.

FOR EMPLOYERS

- ▶ Significant win.
 - ▶ Narrowly defined test for activities that are “integral and indispensable” and therefore compensable.
 - ▶ Employees can no longer claim activities that are compensable simply because they are required or for the benefit of the employer.
 - ▶ Instead, employees must show that they were not compensated for activities that they cannot “dispense” with in performing their work tasks.
- 

CHALLENGES IN CONSTRUCTION INDUSTRY

- ▶ Failure to record all hours worked to include time spent working before or after shift.
 - ▶ New test defined by the Supreme Court.
 - ▶ Revisit your practices.
 - ▶ Determination may vary by job
- ▶ Shorting of hours by using “down time” or “rain delays”.
 - ▶ Compensable time so long as required to be on employer’s premises, on duty, or at a job site.

CHALLENGES IN CONSTRUCTION INDUSTRY

- ▶ Failure to properly compensate for breaks.
 - ▶ Meal breaks are NOT compensable, so long as at least 30 minutes long AND employee is completely relieved of all duties.
 - ▶ Breaks of 20 minutes or less ARE compensable.
- ▶ Improperly “banking” of overtime hours or payment of overtime in the form of “comp time”.

CHALLENGES IN CONSTRUCTION INDUSTRY

- ▶ Failure to combine the hours worked for overtime purposes by an employee in more than one job classification for the same employer in the same workweek.
- ▶ Failure to segregate and pay overtime hours on a workweek basis when employees are paid on a bi-weekly or semi-monthly basis.
 - ▶ Doesn't matter if work less than 80 hours in two weeks!
- ▶ Failure to pay for travel from shop to work-site and back.
 - ▶ Different than commuting time from home to job site!

QUESTIONS?

