FLSA “Preliminary and Postliminary Work” Issues –
Still Developing After All These Years

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>i</td>
</tr>
<tr>
<td>1. ORIGINS OF THE DISPUTE</td>
<td>1</td>
</tr>
<tr>
<td>2. DONNING AND DOFFING</td>
<td>2</td>
</tr>
<tr>
<td>3. WALKING AND WAITING TIME</td>
<td>6</td>
</tr>
<tr>
<td>4. DE MINIMIS EXCEPTION</td>
<td>7</td>
</tr>
<tr>
<td>5. APPLICATION OF THE “3(o)” EXCEPTION</td>
<td>11</td>
</tr>
<tr>
<td>a. CLOTHES</td>
<td>12</td>
</tr>
<tr>
<td>b. CUSTOM AND PRACTICE</td>
<td>13</td>
</tr>
<tr>
<td>6. RECORDKEEPING</td>
<td>13</td>
</tr>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>15</td>
</tr>
</tbody>
</table>
FLSA “Preliminary and Postliminary Work” Issues – Still Developing After All These Years

1. Origins of the Dispute

From 1938, when the FLSA was enacted, through the present, employers, workers and the courts have struggled over the definition of compensable “work,” a term which remains not completely defined to this day despite statutory revisions and innumerable court decisions. Prior to the 1947 passage of the Portal-to-Portal Act, 29 U.S.C. §254(a), the courts defined the term broadly, finding compensable most all time the worker spent for the employer’s benefit, including for example such preliminary activities as walking from the plant gate to required workstations. \textit{E.g., Anderson v. Mt. Clemens Pottery Co.}, 328 U.S. 668, 690-91 (1946).\textsuperscript{2} Employers continued to press for a narrower definition limiting compensable “work” to time spent on the actual production of whatever product or service the employer produced. And when employers had the political capital to obtain legislation in their favor, they obtained the Portal-to-Portal amendments, which purported to exclude payment under the FLSA for time employees spend on activities which are “preliminary and postliminary” to their “principle activity.” 29 U.S.C. §254(a).

However, employers who thought their problem was solved by Portal-to-Portal soon found that not to be the case, as regulations and subsequent court cases engaged in often

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formalistic parsing of the terms “preliminary and postliminary” and “principle activity,” sometimes in the employer’s favor, but often not. And nowhere has that dynamic played out more actively than in the meat (beef, pork and poultry) slaughter and processing industries in what have been called the “donning and doffing” cases.

2. “Donning and Doffing”

Meat slaughter and processing plants typically use a production system whereby the animal is hoisted onto a chain which then passes by a series of workers who use knives and other tools to dissect the animal into various parts for sale and consumption. Workers traditionally were paid on “gang” or “line” time, which means they were paid from the time the first animal was placed on the chain for their shift until the last animal was processed for that shift. Time spent on duties (such as changing clothes) prior to the workers’ arrival at their station on the line, or after leaving the line, were considered, at least by the employer, to be non-compensable time.

Over time, and in response to OSHA and other laws and regulations, employers required workers to wear increasing amounts of protective and sanitary equipment. For example, production workers in meat processing facilities typically wear outer garments, hard hats, hairnets, earplugs, gloves, sleeves, aprons, leggings and boots. Workers who use knives and saws may also wear more elaborate equipment, such as chain link metal aprons and vests, Kevlar gloves, and plexiglass armguards. All of this equipment must be cleaned at least daily. See, e.g., Alvarez v. IBP, Inc., 339 F.3d 894, 898 n.2 (9th Cir. 2003) (describing equipment). Putting on, taking off (“donning and doffing”), and cleaning this equipment takes substantial

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time and workers understandably expected to be paid for it, which employers resisted, and which has resulted in much litigation.

Meat processing workers were fortunate to have the 1956 Supreme Court decision, *Steiner v. Mitchell*, 350 U.S. 247, 248, where the Court found compensable, and not “preliminary or postliminary” under the Portal-to-Portal amendments, time spent by chemical workers “changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide.” Lower courts, analogizing to *Steiner*, found to varying degrees that the time spent by workers donning, doffing and cleaning required protective and sanitation equipment was compensable “work” and not “preliminary or postliminary” under the Portal-to-Portal amendments.

For example, in *Alvarez*, *supra*, the trial court found that the knife-job workers in a beef processing plant, whose equipment included the chain link metal aprons and vests, Kevlar gloves and plexiglas armguards, were entitled to compensation for donning, doffing and cleaning that equipment. However, the lower court denied compensation to those workers who wore only outer garments, hard hats, hairnets, earplugs, gloves, sleeves, aprons, leggings and boots. The basis for the trial court’s distinction was that the knife workers wore “unique” protective gear, while the other workers’ protective gear was “non-unique.” 339 F.3d at 903. On appeal, the Ninth Circuit rejected the distinction between “unique” and “non-unique” protective gear as a basis for determining compensability, finding both “integral and indispensable” to the employees’ “principal” activities, and thus compensable work. *Id.* However, the court affirmed,
finding that the time spent donning, doffing and cleaning the “non-unique” gear was “de minimis as a matter of law.” Id.

The Third Circuit took a similar approach in a case involving poultry processing workers who sought compensation for time spent donning, doffing and cleaning required safety and sanitary equipment. *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3rd Cir. 2007). Like beef and pork processing workers, most poultry workers wear smocks, hair nets, earplugs and safety glasses, and some workers wear extra protective gear, such as plastic aprons and sleeves, rubber and mess gloves and rubber boots. Rather than using the “unique v. non-unique” distinction to determine compensable work based on the type of equipment worn, the trial court ruled that, for the donning and doffing to constitute compensable “work”, the equipment had to be sufficiently “heavy” or “cumbersome” that a substantial degree of laborious “exertion” was involved in the donning and doffing. 500 F.3d at 373. The court of appeals rejected this reasoning, holding that the appropriate standard was whether the donning and doffing activity was “an integral and indispensable part of the principal activities”, which turned on whether the activity was “controlled or required by the employer and pursued for the benefit of the employer . . . exertion is not in fact, required for activity to constitute ‘work’.” Id. The court of appeals did hold that the type of equipment worn might be relevant to compensability because the time spent donning, doffing and cleaning the equipment may be *de minimis*. Id. at 373-74 (remanding that issue to the trial court for determination).

In its certiorari petition, the employer argued that the Third’s Circuit’s ruling in *De Asencio* conflicted with the Tenth Circuit’s decision in *Reich v. IBP, Inc.*, 38 F.3d 1123, 4

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4 The Supreme Court affirmed, but without reaching the donning and doffing issue, which was not appealed. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). However, the Court found that, assuming the donning and doffing was “integral and indispensable,” then associated waiting time was also compensable. Id. at 22-23 (the waiting time issue is discussed in Part 3, below).
1126-27 (10th Cir. 1994), which held that donning and doffing unique protective gear “require[d] physical exertion, time, and a modicum of concentration to put them on securely and properly,” and was thus compensable, but that donning and doffing non-unique protective gear “takes all of a few seconds and requires little or no concentration,” and thus was not compensable. The Court denied certiorari, ___ S.Ct. ____, 2008 WL 336308, 76 USLW 3417, 3644 (U.S. June 9, 2008) (No. 07-1014), which could be interpreted as leaving the matter unresolved. However, it is more likely that the Court believes the matter is resolved by its holding in *Alvarez*, *supra*, which came after *Reich*, and which cited as still good law an earlier decision holding “that ‘exertion’ was not in fact necessary for an activity to constitute ‘work’ under the FLSA.” 546 U.S. at 25, *citing, Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). This view is bolstered by decisions from the Second, Seventh and Ninth Circuits and numerous federal district courts, which have held that exertion is not a prerequisite for compensability.5 Indeed, it’s likely that the Supreme Court agrees with the courts in *De Asencio*, 500 F.3d at 370-71, and *Garcia v. Tyson Foods, Inc.*, 474 F.Supp.2d 1240, 1246 (D. Kan. 2007), *appeal dismissed*, 2008 WL 2880345 (10th Cir. 2008), that the Tenth Circuit, if given the opportunity to revisit the issues in *Reich*, would rule differently in light of *Alvarez*.

Harder to reconcile is the Second Circuit’s decision in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2nd Cir. 2007), involving nuclear power plant workers who were required to wear “generic” protective gear, including helmet, safety glasses and steel toe boots.

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5 *Singh v. City of New York*, 524 F.3d 361, 367 (2d Cir. 2008) (“exertion is not necessarily required for an activity to be compensable”); *Sehie v. City of Aurora*, 432 F.3d 749, 751 (7th Cir. 2005) (“the Supreme Court ruled [in Armour] that there need be no exertion at all”); *Alvarez, supra*, 339 F.3d at 902 (work includes “even non-exertional acts”); *Jordan v. IBP, Inc.*, 542 F.Supp.2d 790, 803-05 (M.D. Tenn. 2008) (“exertion is not required;” “persuasive effect” of *Reich* “extremely limited” as it was issued before the Supreme Court’s decision in *Alvarez*); *Alford v. Perdue Farms, Inc.*, 2008 WL 879413, *4* (M.D. Ga. 2008) (reasoning in *Reich* was flawed); *Chao v. Tyson Foods, Inc.*, 2008 WL 2020323, *9* (N.D. Ala. 2008) (Supreme Court has made it clear that exertion is not a required element for an activity to be considered work); *see also Spoerle v. Kraft Foods Global, Inc.*, 527 F.Supp.2d 860, 865 (W.D.Wis. 2007) (“After *Alvarez*, there can be little doubt that donning and doffing protective gear . . . are ‘principal activities’ under the Portal-to-Portal Act.”); *See also 29 CFR §785.7.*
The court found the time not compensable by parsing the term “integral and indispensable” to create a distinction between equipment which is “an integral and indispensable part of the principal activities” and equipment which is “indispensable” but not “integral.” Id. at 592-95. Applying this distinction, the court found that the non-unique gear worn by the power plant workers was “indispensable” to their principal work (in the sense it was “necessary”), but was not “integral” to their work (in the sense that it was “essential to completeness” or “organically joined or linked” to the work). Id., citing Webster’s Third New International Dictionary (Unabridged) 1152, 1510-11 (1986). Again, the Supreme Court denied certiorari, _____ S.Ct. _____, 2008 WL 347689, 76 USLW 3418, 3643, 3644 (U.S. June 9, 2008)(No. 07-1019).6

While these decisions leave the law in a confused state, as a practical matter it is probably safe to say that donning, doffing and washing “unique” equipment is compensable, whereas donning, doffing and washing “non-unique” equipment may be compensable depending upon how much time it, along with associated activities, takes over the course of a workday. If the amount of time is slight, a court might find it either de minimis (following the Ninth Circuit’s Alvarez analysis)7 or “indispensable” but not “integral” (following the Gorman analysis), or both.8

3. Walking and Waiting Time

Less controversial is the compensability of time workers spend (a) waiting to don protective gear at the beginning of a workday; (b) walking from locker rooms to production

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6  See also, Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340, 1344 (11th Cir. 2007), cert. denied, 128 S.Ct. 813 (2007) (construction workers’ time spent clearing airport security “necessary” but not “integral and indispensable” because not for primary benefit of employer).

7  The de minimis exception is discussed in detail in Part 3, below.

8  Also, payment may be denied in situations where employees may do the donning and doffing at home before reporting for work. See Bamonte v. City of Mesa, 2008 WL 1746168*3 (D. Ariz. 2008), citing, Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006).
lines after donning protective gear; (c) walking from production lines to locker rooms to doff protective gear at the end of a shift; and (d) waiting to doff protective gear at the end of a shift or workday. These issues were decided by the Supreme Court in Alvarez, supra 546 U.S. at 22-23, in which the Court held that, assuming the protective gear is “integral and indispensable” to the worker’s primary activity, than the time spent on all but the first of these activities is not “preliminary or postliminary” and is thus compensable (assuming the walking and waiting time, along with the donning and doffing, is not de minimis). Id.

In so holding, the Court relied upon the “continuous workday rule,” which requires that, “during a continuous workday, any walking or waiting time that occurs after the beginning of the employee’s first principle activity and before the end of the employee’s last principle activity” is compensable and not “preliminary or postliminary” activity excluded from compensability by the Portal-to-Portal Act. Id. at 29, 36-37; 29 CFR §790.6(b). The Court also held that “any activity that is ‘integral and indispensable’ to a ‘principle activity’ is itself a ‘principle activity’ under” the Portal-to-Portal Act. Id. Accordingly, the waiting to don protective gear at the beginning of a workday was not compensable because it occurred before the day’s first “primary activity,” which was the donning of the required protective gear. However, the waiting and walking that occurred after the donning and before the doffing was compensable because it followed the first “primary activity” and preceded the last “primary activity.” Id.

4. De minimis Exception

Although the courts agree that an otherwise compensable activity is not compensable if it is “de minimis,” the Supreme Court has not yet defined the term in a post Portal-to-Portal decision, and the lower courts have defined it differently and not always consistently with the Department of Labor’s regulatory definition.
In *Anderson v. Mt. Clemens Pottery Co.*, supra, 328 U.S. at 692, a pre Portal-to-Portal case, the Court stated:

“When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.”

The regulation defines the term as follows (29 CFR §785.47):

“In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*. (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.”

The Ninth Circuit in *Lindow v. United States*, 738 F.2d 1057, 1062-63 (1984), citing these authorities, held that the guiding principles are “(1) the practical administrative difficulty in recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.” The court noted prior *de minimis* decisions which (according to the court) indicated a view that “daily periods of approximately 10 minutes [are] *de minimis* even though otherwise compensable.” *Id.* at 1062. However, the court appeared to reject that view, stating that “[t]here is no precise amount of time that may be denied compensation as *de minimis*” and employers “must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.” *Id.* at 1062-63.
In *Lindow*, power plant workers claimed payment for pre-shift time spent on required reading of a log book and exchange of information with other employees. Although the court found that the time associated with performing these duties was 7-8 minutes, the court found that the workers “did not always perform these duties before their shifts,” there was “a wide variance in the amount of pre-shift time spent on compensable activities as opposed to social activities” and “[a]s administrative matter, [the employer] would have had difficulty recording” this time. *Id.* at 1063-64. Accordingly, the court concluded that the time was *de minimis* “because of the administrative difficulty of recording the time and the irregularity of the additional pre-shift work.” *Id.* at 1064.

However, in *Alvarez v. IBP, Inc.*, supra, the Ninth Circuit found *de minimis* “as a matter of law” time packinghouse workers spent donning and doffing “non-unique protective gear such as hardhats and safety goggles,” tasks which the court found were otherwise compensable in that they were “integral and indispensable” to the employees’ primary work.9 The court found that the amount of time involved in completing these tasks, while not “trifling”, was not deserving of compensation because “neither FLSA policy nor ‘the actualities’ of plaintiffs’ working conditions justify compensation for the time spent performing these tasks.” *Id.*, quoting *Anderson v. Mt. Clemens Pottery Co.*, supra, 328 U.S. at 692.

The Ninth Circuit’s *Alvarez* holding is difficult to reconcile with the standards articulated in *Anderson* and *Lindow*, which the court purports to apply. *Anderson* indicates that work which is not “trifl[ing]” cannot be considered too insignificant to be *de minimis*. *Anderson v. Mt. Clemens Pottery Co.*, supra, 328 U.S. at 692. Yet the *Alvarez* court held that work could

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9 339 F.3d at 903-04, *affirmed on other grounds*, 546 U.S. 21 (2005). The trial court found that the donning, doffing and related activities involving the “unique” gear involved 12-14 minutes; the reported decisions do not state the amount of time involved in the “non-unique” gear. 546 U.S. at 31-32.
be both not “trifl[ing]” yet too insignificant to warrant compensation. And *Lindow* states that work which is significant and measurable and incurred on a regular basis is not *de minimis*. Yet the *Alvarez* court found that the work was significant (in that it was not a “trifle”) and incurred on a regular basis (and thus was presumably “measurable”), but was still not compensable.

Also troublesome is that the *Alvarez* court did not rely upon any findings as to the amount of time involved in completing the “*de minimis*” work.¹⁰ Nor did the court aggregate the time spent on donning, doffing and related activities in making its determination, which appears inconsistent with *Lindow*.

On review of *Alvarez*, the Supreme Court did not reach the *de minimis* issue. However, after *Alvarez*, the DOL issued a Wage and Hour Advisory Memorandum (No. 2006-2) (May 31, 2006), criticizing the circuit court’s *de minimis* ruling and stating that the Supreme Court’s “continuous workday” ruling in the case “renders the Ninth Circuit’s ‘*de minimis* as a matter of law’ discussion untenable.” According to the DOL, the Supreme Court’s ruling in *Alvarez* means “that where the aggregate time spent on donning, doffing and related activities exceeds the *de minimis* standard, it is compensable.” *Id.*

The Third Circuit’s decision in *De Asencio v. Tyson Foods, Inc.*, *supra*, 500 F.3d at 374-75, involving poultry processing workers, also concerned the compensability of the donning, doffing and cleaning of non-unique protective gear, and associated walking time. The jury below had ruled that the activity was not compensable work and therefore did not reach the *de minimis* issue. *Id.* The court of appeals reversed and remanded for a *de minimis* determination, and instructed the trial court to follow the *Lindow* standard. *Id.* It is noteworthy

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¹⁰ At least one court has held that an employer must adduce “evidence regarding the amount of time it takes to perform the activities at issue” as a prerequisite to claiming the *de minimis* exception. *Spoerle v. Kraft Foods Global, Inc.*, *supra*, 527 F.Supp.2d at 868-69.
that the court ignored the Ninth Circuit’s decision in *Alvarez*, which involved substantially the same type of non-unique protective equipment.

The Tenth Circuit in *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333-34 (10th Cir. 1998), adopted the Ninth Circuit’s reasoning in *Lindow* to find that ten minutes per day spent by beef processing workers donning, doffing and cleaning required safety and sanitary equipment was not *de minimis* because, even though the time would be difficult to record, the time was substantial and measurable, and the work was performed on a regular basis. *Id.* at 1333. The court rejected defendant’s assertion that *Lindow* established a guideline that ten minutes or less is *de minimis* per se. *Id.* Accord *Spoerle v. Kraft Foods Global, Inc.*, supra, 527 F.Supp.2d at 868-69 (“even if the total time at issue is only a few minutes” it is not necessarily *de minimis*); *Chao v. Tyson Foods, Inc.*, supra, 2008 WL at 2020323*11 (rejecting employer’s contention that measuring donning and doffing time is not practical; noting that employer’s time-keeping system “can track increments as small as one-one-hundredth of an hour”).

To summarize, the law concerning application of the *de minimis* exception is unsettled and still developing. Most courts seem to accept that the time spent donning, doffing and cleaning unique protective and sanitary equipment is substantial and not *de minimis*. However, some courts are struggling with the notion that workers should be paid for donning, doffing and cleaning non-unique gear and, foreclosed by various rulings defining this activity as otherwise compensable work, might apply the *de minimis* exception to deny payment.

5. Application of the “3(o)” Exception

Also unsettled is the law concerning Portal-to-Portal Act, 29 U.S.C. §203(o), which applies in the union context to exclude from FLSA coverage “any time spent in changing...”

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11 But see *Lemmon v. City of San Leandro*, 538 F.Supp.2d 1200, 1204 (N.D.Cal. 2007)(donning and doffing police uniforms and equipment, although otherwise compensable, may be *de minimis*, citing *Lindow*'s observation (738 F.2d at 1062-63) that “[m]ost court’s have found daily periods of approximately 10 minutes *de minimis*”).
clothes or washing at the beginning or end of each workday which was excluded . . . by the express terms of or by custom and practice under a bona fide collective bargaining agreement applicable to the particular employee.”

a. “Clothes”

In Alvarez v. IBP, Inc., supra, the Ninth Circuit held that both unique and non-unique protective equipment worn by union packing plant workers did not constitute “clothes” as that term is used in §203(o). 339 F.3d at 904-05, affirmed on other grounds, 546 U.S. 21 (2005). The court held that the term “clothes” was not to be read to cover “materials worn by an individual to provide a barrier against workplace hazards.” Id. at 905.

In Anderson v. Cagle’s, Inc., the Eleventh Circuit held that non-unique protective gear worn by union poultry plant workers did constitute “clothes” as that term is used in §203(o). 488 F.3d 945, 956 (2007). In doing so it relied in part on a Wage and Hour Division Opinion Letter that interpreted the word “clothes” to include items worn on the body for covering, protection, or sanitation. Id. Citing Wage and Hour Div. Advisory Op. Ltr No. FLSA2002-2 (June 6, 2002). The court acknowledged that its decision conflicted with the Ninth Circuit’s decision in Alvarez, which had rejected the validity of the 2002 Advisory Opinion Letter. Yet the Supreme Court declined to resolve that conflict, denying certiorari in Cagle, ____ S.Ct. ____, 2008 WL 112189, 76 USLW 3393, 3642, 3644 (U.S. June 9, 2008), thereby assuring that the appropriate application of §203(o) will remain unsettled for the foreseeable future.13

12 Because §203(o) is expressly limited to the beginning and end of the workday, it does not exclude payment for donning and doffing during the workday.

13 E.g., Spoerle v. Kraft Foods Global, Inc., supra, 527 F.Supp.2d at 866-67 (rejecting Cagle and following Alvarez in holding that protective gear worn by meat processing plant workers was not “clothes” within the meaning of §203(o)); Perez v. Mountaire Farms, Inc., 2008 WL 2389798*4-5 (D.Md. 2008)(same); Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1065-67 (D.Minn. 2007)(“non-unique” protective gear are “clothes” under §203(o)).
b. “Custom and Practice”

The law is still developing as to what constitutes a “custom and practice” of non-payment under a collective bargaining agreement (“CBA”), as there are few appellate decisions on the issue. The courts have variously stated that a custom and practice is established by proof that (a) the union “raised and abandoned” the issue in CBA negotiations; (b) there exists “an ongoing understanding with some continuity” of nonpayment; (c) the union and employer negotiated over the issue of payment and “have an understanding that resolves it”; (d) there is a “history of non-payment” and “the issue of non-payment was raised regularly in CBA negotiations” without an agreement requiring payment, even though in negotiations the union protested the non-payment policy; and (e) there exists “a long-standing practice [of nonpayment] even if the issue . . . has not been raised in [negotiations] provided that . . . the practice of nonpayment was sufficiently long in duration and that its employees knew of and acquiesced in the practice.” See Kassa v. Kerry, Inc., supra, 487 F.Supp.2d at 1067-71 (cataloguing cases). And, at least one court has held that “[m]ere silence alone cannot confer on a particular practice the status of a ‘custom [or] practice’”. Fox v. Tyson Foods, Inc., 2002 WL 32987224, at *8 (N.D. Ala. 2002); contra Kassa v. Kerry, Inc., supra, 487 F.Supp.2d at 1068.

6. Recordkeeping

The FLSA and applicable regulations require employers to maintain for a period of two years accurate records showing all hours worked for each non-exempt employee for each work day and each work week. 29 U.S.C. §211(c)(authorizing regulations requiring employers to “make, keep, and preserve” records of “wages, hours, and other conditions and practices of

14 In Kassa, the court found that the employer’s “six-year history of nonpayment for clothes-changing time, together with evidence that the union never complained,” was insufficient to establish a “custom or practice” absent evidence that the employees “knowingly acquiesce[d]” in the nonpayment. 487 F.Supp.2d at 1071.
employment”); 29 CFR §516.2(a)(7). The requirement is enforced by the DOL and there is no private right of action.

In the reported donning and doffing decisions, typically the employers have not maintained records showing the time spent on donning, doffing and related activities. E.g., De Asencio v. Tyson Foods, Inc., supra, 500 F.3d at 364; Alvarez v. IBP, Inc., supra, 339 F.3d at 899-900. As the courts increasingly find this time compensable “work”, employers have little good-faith basis for not recording this time if it is practical to measure. Although currently there are no civil penalties for failure to maintain records, there are potentially serious consequences for failure to record this time.15 Absent such records, a court will accept an employee’s estimate of the amount of time spent on such work, and the burden then shifts to the employer to disprove the employee’s estimate.16 Further, if the employer claims that the amount of time involved is de minimis, the employer may be obligated to provide “evidence regarding the amount of time it takes to perform the activities at issue.” Spoerle v. Kraft Foods Global, Inc., supra, 527 F.Supp.2d at 868-69.

15 29 USC §215(a)(5) provides that it is unlawful to violate §211(c); penalties for willful violations are up to $10,000 in fines and six months imprisonment, 29 USC §216(a). Criminal prosecutions are rare for FLSA violations. However, failure to maintain records could support a finding that the employer willfully violated overtime or minimum wage provisions, thereby subjecting the employer to civil penalties. 29 CFR part 578.

# TABLE OF AUTHORITIES

## CASES

<table>
<thead>
<tr>
<th>CASES</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Alvarez v. IBP, Inc.</em>, 339 F.3d 894 (9th Cir. 2003), aff’d, 546 U.S. 21 (2005)</td>
<td>2, passim</td>
</tr>
<tr>
<td><em>Anderson v. Cagle’s, Inc.</em>, 488 F.3d 945 (2007)</td>
<td>12</td>
</tr>
<tr>
<td><em>Anderson v. Mt. Clemens Pottery Co.</em>, 328 U.S. 668 (1946)</td>
<td>1, 8, 9, 14</td>
</tr>
<tr>
<td><em>Armour &amp; Co. v. Wantock</em>, 323 U.S. 126 (1944)</td>
<td>5</td>
</tr>
<tr>
<td><em>Bonilla v. Baker Concrete Constr., Inc.</em>, 487 F.3d 1340 (11th Cir. 2007)</td>
<td>6</td>
</tr>
<tr>
<td><em>Coal, Iron and R.W. v. Muscoda Local No. 123</em>, 321 U.S. 590 (1944)</td>
<td>1</td>
</tr>
<tr>
<td><em>De Asencio v. Tyson Foods, Inc.</em>, 500 F.3d 361 (3rd Cir. 2007), <em>cert. denied</em>, WL 336308, 76 USLW 3417, 3644 (U.S. June 9, 2008)</td>
<td>4, 5, 10, 14</td>
</tr>
<tr>
<td><em>Lemmon v. City of San Leandro</em>, 538 F.Supp.2d 1200 (N.D.Cal. 2007)</td>
<td>11</td>
</tr>
<tr>
<td><em>Lindow v. United States</em>, 738 F.2d 1057 (1984)</td>
<td>8, 9, 10, 11</td>
</tr>
<tr>
<td><em>Reich v. IBP, Inc.</em>, 38 F.3d 1123 (10th Cir. 1994)</td>
<td>5</td>
</tr>
<tr>
<td><em>Reich v. Monfort, Inc.</em>, 144 F.3d 1329 (10th Cir. 1998)</td>
<td>11</td>
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<tr>
<td><em>Sehie v. City of Aurora</em>, 432 F.3d 749 (7th Cir. 2005)</td>
<td>5</td>
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<tr>
<td><em>Singh v. City of New York</em>, 524 F.3d 361 (2d Cir. 2008)</td>
<td>5</td>
</tr>
<tr>
<td><em>Spoerle v. Kraft Foods Global, Inc.</em>, 527 F.Supp.2d 860 (W.D.Wis. 2007)</td>
<td>5, 10, 11, 12, 14</td>
</tr>
</tbody>
</table>
STATUTES

29 U.S.C. §203(o) ................................................................................................................... 11, 12
29 U.S.C. §211(c) ................................................................................................................... 13, 14
29 U.S.C. §215(a)(5) ..................................................................................................................... 14
29 U.S.C. §216(a) ......................................................................................................................... 14
29 U.S.C. §254(a) ........................................................................................................................... 1, 5, 7, 8, 12

REGULATIONS

29 CFR §516.2(a)(7) ..................................................................................................................... 14
29 CFR §785.47 .............................................................................................................................. 8
29 CFR §785.7 ................................................................................................................................ 5
29 CFR §790.6(b) ........................................................................................................................... 7
29 CFR part 578 ............................................................................................................................ 14

MISCELLANEOUS

Wage and Hour Advisory Memorandum (May 31, 2006) (No. 2006-2) ..................................... 6, 10
Webster’s Third New International Dictionary 1152 (1986) ........................................................... 6