

NOTES

IBP, INC. v. ALVAREZ: HAS THE SUPREME COURT PLACED EMPLOYERS ON THE CUTTING BLOCK?

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INTRODUCTION

According to the U.S. Supreme Court's recent decision in *IBP, Inc. v. Alvarez*,¹ walking that takes place during the workday may not only be good for employees' health, but may also be good for their paychecks as any time employees spend walking after the donning of and prior to the doffing of required safety equipment must now be compensated under the Fair Labor Standards Act. While this is good news for employees, it is not good news to numerous employers for a several reasons. Based on the Supreme Court's decision, employers are likely to face increases in liability and expenditures; increases in expenditures are most likely to take the form of litigation, labor, and restructuring costs, and will also include costs associated with implementing new workplace rules and policies regarding the donning and doffing of protective equipment and any related walking, and new time-keeping policies. Additionally, while not employer-specific problems, the application of the decision to the reality of the workplace creates opportunities for different compensation treatment of relatively similarly situated employees.

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1. *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005).

This note will begin with a review of the United States Supreme Court's decision in *IBP, Inc. v. Alvarez*.² This will include a review of the Fair Labor Standards Act,³ as amended by the Portal-to-Portal Act of 1947,⁴ the facts of the *Alvarez v. IBP, Inc.*⁵ and *Tum v. Barber Foods*⁶ cases, the resolution of each case at the intermediate appellate court level, and the Supreme Court's ultimate resolution of the consolidated cases. The note will then look at whether the Court, through its decision, has undermined the Congressional intent behind the Portal-to-Portal Act,⁷ discuss the differential treatment of relatively similarly situated workers resulting from the application of this decision, and look into the substantial expenditures that employers may now face in the form of litigation, labor, plant restructuring, and workplace policy development costs.

I. *IBP, INC. v. ALVAREZ*

A. Introduction

Congress enacted the Fair Labor Standards Act⁸ ("FLSA") in 1938 to end labor practices adversely affecting "the health, efficiency, and general well-being of workers."⁹ The act requires employers to "compensate employees for all of the time which the employer requires or permits employees to work."¹⁰ In response to the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*,¹¹ where the Court held that the time employees spent walking to and from their workstations and engaging in preliminary activities¹² was compensable under the FLSA, Congress passed the Portal-to-Portal Act of

2. *Id.*

3. 29 U.S.C. §§ 201-262 (2000).

4. 29 U.S.C. § 254 (1947).

5. *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003).

6. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004).

7. 29 U.S.C. § 254 (1947).

8. 29 U.S.C. §§ 201-262 (2000).

9. Brief for National Employment Lawyers Ass'n et al. as Amici Curiae Supporting Petitioner at 3, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 29 (2005) (No. 04-66) (citing 29 U.S.C. § 202).

10. *Tum*, 360 F.3d at 279 (1st Cir. 2004) (citing 29 U.S.C. § 201).

11. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

12. The employees' preliminary activities included "putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Anderson*, 328 U.S. at 683.

1947.¹³ The Portal-to-Portal Act served to limit the Court's broad interpretation of compensable activities under the FLSA, and provides in relevant part

(a) Except as provided in subsection (b), no employer shall be subject to liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . 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 the date of the enactment of this Act—

- (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.¹⁴

The employees of IBP and Barber Foods brought separate actions against their respective employers, and these actions were later consolidated by the Supreme Court. The employees alleged that the employers' failure to compensate employees for time spent donning and doffing protective equipment, time spent walking between donning and doffing areas and workstations, and time spent waiting to don and doff protective gear violated the FLSA. The issues presented to the Supreme Court for determination were whether the time spent walking between donning and doffing areas and workstations, and the time spent waiting to don protective equipment were compensable under the FLSA as amended by the Portal-to-Portal Act.¹⁵

B. Facts

Barber Foods, a processor of poultry-based products, requires all of its employees to wear a lab coat, hairnet, ear plugs, and safety glasses; depending on the job classification, it requires the additional wearing of safety boots, bump hats, back belts, vinyl aprons, vinyl gloves, cotton glove liners, and sleeve covers.¹⁶ All of the above items of clothing and equipment, except for safety glasses, aprons, gloves, and sleeve covers are donned before punching in and doffed after punching out.¹⁷ As for required equipment, the lab coats

13. Brief for Petitioner at 5, *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005) (No. 03-1238).

14. 29 U.S.C. § 254(a) (2005).

15. *IBP, Inc.*, 126 S. Ct. at 518.

16. Brief for Respondent at 1-2, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 29 (2005) (No. 04-66).

17. *Id.*

are retrieved by employees at a location “between the entrance and the equipment cage,”¹⁸ and hairnets, earplugs, gloves, sleeve covers and aprons are gathered at the equipment cage.¹⁹ At the end of the shift, employees place lab coats and glove liners in bins, which are located between the production floor and the plant exits, to be laundered; gloves, sleeve covers and aprons are thrown away, and “bump hats, back belts, safety goggles, safety boots and reusable earplugs” can either be stored in the employees’ locker or taken home.²⁰ Employees are paid from the time they punch in, and time clocks are located at the entrances of the production floor and on the production floor.²¹

IBP, a supplier of beef and pork, requires all of the employees at its Pasco, Washington meat processing facility to wear designated general clothing and equipment, and additional unique clothing and equipment dependent upon job classification.²² All employees must wear sanitary outer garments, hair nets, ear plugs, hardhats, gloves, “liquid-repelling sleeves, aprons, and leggings,”²³ and safety boots. Knife-using employees may wear additional protective equipment including metal mesh vests, sleeves, gloves, and aprons.²⁴

In general, slaughter workers gather their supplies at the supply room and then go to the locker room where they retrieve protective equipment and don the clothing and equipment.²⁵ Slaughter workers then proceed to get knives in the knife-room or at “several distribution points.”²⁶ Processing workers retrieve frocks at one station, proceed to the locker room to gather additional equipment and clothing, and then don the equipment.²⁷ The Washington plant has four locker rooms.²⁸ After production, employees are required to clean their equipment, and return it to its respective location.²⁹ While a time card system is in place at the plant, employees are paid according to a “gang time” model under which compensation begins with processing of the first piece of meat, and ends with the processing of the last piece of meat.³⁰

18. *Id.* at 2.

19. *Id.*

20. *Id.* at 3.

21. Brief for Respondent at 3, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 29 (2005) (No. 04-66).

22. *Alvarez*, 339 F.3d at 898.

23. *Id.* at 898 n.2.

24. *Id.*

25. Brief for Respondent at 17, *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005) (No. 03-1238).

26. *Id.*

27. *Id.* at 18.

28. *Alvarez*, 339 F.3d at 898.

29. Brief for Respondent, *supra* note 25, at 19.

30. *Id.* at 20.

C. Case History

In *Tum v. Barber Foods, Inc.*,³¹ the First Circuit followed the reasoning of *Steiner v. Mitchell*³² to hold that the time spent donning and doffing required protective equipment was compensable as such activities were “integral to the principal activity” of processing poultry-based products.³³ The court held, however, that the time spent walking subsequent to donning and prior to doffing (when traveling between donning and doffing areas and production stations) was not compensable because the Portal-to-Portal Act generally exempts walking “to and from the actual place of performance of the principal activity and activities which such employee is employed to perform,” and “activities which are preliminary and postliminary to an employee’s principal activity or activities”³⁴ from compensation. The court rejected the arguments that the Portal-to-Portal Act excludes only walking that occurs before an employee’s commencement of a principal activity,³⁵ and that the donning and doffing activities, as integral and indispensable activities, marked the start and end of the workday.³⁶

It should also be noted that the court found the time employees spent waiting in line to receive the required protective equipment non-compensable because “waiting time would qualify as a preliminary or postliminary activity under the Portal-to-Portal Act.”³⁷

In *Alvarez v. IBP, Inc.*,³⁸ the Ninth Circuit also found that the time spent donning and doffing unique protective equipment was compensable as it was “integral and indispensable” to the principal activity of meat processing.

31. 360 F.3d 274 (1st Cir. 2004).

32. 350 U.S. 247 (1956) (holding “principal activity or activities” includes activities “integral and indispensable” to principal activities).

33. *Tum*, 360 F.3d at 279.

34. *Id.* at 280 (quoting 29 U.S.C. § 254(a)).

35. *Id.* n.49. As evidence for rejecting this contention, the court relied on 29 C.F.R. § 790.7(g) n.49 which states,

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.” 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.

36. *Id.*

37. *Id.* at 282.

38. *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003).

Hence, the donning and doffing fell under “*Steiner*’s exception to the Portal-to-Portal Act’s bar to compensation of preliminary or postliminary activities.”³⁹ The court then diverged from the reasoning of the First Circuit to find that the time spent walking to and from production stations after donning or doffing unique protective equipment was compensable.⁴⁰ Unlike the First Circuit, the court reasoned that workday began with the donning of unique protective equipment because donning was a “preliminary activity that was ‘integral and indispensable’ to the work.”⁴¹ Thus, all activities occurring thereafter were part of the workday and compensable.⁴²

The question of whether employees should be compensated for the time they spent waiting in line to receive required protective equipment or clothing was not before the Ninth Circuit.

D. Arguments Before the Supreme Court

Employees and their amici argued that the Supreme Court’s decision in *Steiner*⁴³ mandated a finding that donning and doffing required by IBP and Barber Foods constituted principal activities under the Portal-to-Portal Act as the donning and doffing were an “integral part of and indispensable to” the principal activity of meat slaughtering and processing.⁴⁴ Given donning and doffing’s status as principal activities, the Portal-to-Portal Act’s exclusion of time spent walking “to and from the actual place of performance of the principal activity or activities which such employee is employed to perform” from compensation was inapplicable; 29 U.S.C. § 254(a) only applies to walking and preliminary or postliminary activities “which occur either prior to the time . . . such employee commences, or subsequent to the time . . . at which he ceases, such principal activity or activities.”⁴⁵ Because the walking took place after a principal activity, donning, and prior to a principal activity, doffing, it should be exempt from the Portal-to-Portal Act.

Moreover, to support their claim that principal activities begin the workday, and that the Portal-to-Portal Act did not alter the compensability of acts performed within the workday, the employees and their *amici* relied on

39. *Id.* at 903.

40. *Id.* at 906.

41. *Id.*

42. *Id.*

43. *Steiner v. Mitchell*, 350 U.S. 247 (1956).

44. Brief for Respondent, *supra* note 16, at 14.

45. 29 U.S.C. § 254(a) (2005).

the bill's Senate Report⁴⁶ and administrative regulations.⁴⁷ For example, Senate Report No. 48, 89th Cong., 1st Sess. 47 (1947) states that "workday" as used in the Portal-to-Portal Act 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." In regard to the argument that the Portal-to-Portal Act did not alter the compensability of acts performed within the workday, the Senate Report provides that "activities which take place during the workday . . . are not affected by [29 U.S.C. § 254(a)] and such activities will continue to be compensable. . . ."⁴⁸

In the alternative, the employees argued that if the walking did take place outside of the workday, the time spent walking was still compensable as an activity that is an "integral part of and indispensable to" the principal activity of donning and doffing.⁴⁹ The employees put forth the same argument in regards to time spent waiting to don and doff required protective equipment.⁵⁰

Employers and their *amici* agreed that the donning and doffing of required protective equipment was an "integral part of and indispensable to" the principal activity of meat processing, and therefore, compensable under *Steiner*. The employers then diverged from the employees' argument in two ways. First, the employers argued that an activity that was integral and indispensable to a principal activity was not necessarily a principal activity in and of itself, and therefore, the activity was insufficient to trigger the start of the working day.⁵¹ Second, the employers argued that "principal activity or activities" as used in section 4(a)(1) [29 U.S.C. § 254(a)(1)] referred to the "specific work" the employee is employed to perform," and that "actual

46. Brief for American Federation of Labor and Congress of Industrial Organizations as Amici Curiae Supporting Petitioners, *Tum v. Barber Foods* (No. 04-66) and Brief for Respondent, *supra* note 25 (quoting S. REP. NO. 48, at 48, 89th Cong., 1st Sess. 47 (1947), "[T]he 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. Activities of an employee which take place during the workday are . . . not affected by [section 4(a)] and such activities will continue to be compensable or not without regard to the provisions of this section.").

47. 29 C.F.R. § 790.4(b)(2) (2006) (stating that the Portal-to-Portal Act only applies to activities that "take place before or after the performance of all the employee's principal activities in the workday."); 29 C.F.R. § 790.6(a) (2006) (stating "Periods of time between 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 has not been enacted.").

48. S. REP. NO. 48, at 47, 89th Cong., 1st Sess. 47 (1947).

49. Brief for Petitioner at 36, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 514 (2005) (No. 04-66).

50. *Id.* at 4.

51. Brief for Petitioner, *supra* note 13, at 31-32.

place of performance' in [section 4(a)(1)] is the place where the employee performs the specific work he is employed to perform. . . ."⁵² In short, the principal activity referred to in 4(a)(1) in was the processing or slaughtering of meat, and the place of the principal activity was the production floor.⁵³ In other words, an activity could be integral and indispensable to a principal activity under section 4(a)(2) [29 U.S.C. § 254(a)(2)], and hence be compensable, but not be a principal activity that triggered the beginning or end of a workday.⁵⁴ Under both arguments, any time spent walking or waiting would occur before the commencement of the principal activity or after the principal activity. Therefore, any time spent walking and waiting would be excluded from compensation by the express language of the Portal-to-Portal Act.⁵⁵

The employers further argued that compensating employees for time spent donning and doffing, but not for any walking that occurred subsequent to donning and prior to doffing was not incongruent with the continuous workday rule as activities that were integral and indispensable to the principal activity, but not a principal activity in and of themselves, did not start or end the workday. The principal activity that began the workday was the processing or slaughtering of meat on the production floor.

Moreover, the employers and their amici argued that interpretive regulations,⁵⁶ the history and purpose of the Portal-to-Portal, and the possibility of "incongruous treatment of similar situations"⁵⁷ mandated a

52. Brief for Respondent, *supra* note 16, at 18.

53. *Id.* at 7. The donning and doffing is not the principal activity to which section 4(a)(1) refers even though the donning and doffing are integral and indispensable to the principal activity of processing and slaughtering meat.

54. In oral argument employers' counsel argued that *Steiner* created "a third category of activities—'integral and indispensable' activities—which were entitled to compensation as activities beyond 4(a)(2) preliminary or postliminary status but that did not constitute primary activities' under 4(a)(1) and the continuous workday rule such that they triggered the beginning of the compensable workday." In support of their contention, employers relied on 29 C.F.R. § 790.7(g) n.49. Neville F. Dastoor & Shane T. Muñoz, *Labor and Employment Law: IBP v. Alvarez*, 80 FLA. B.J. 37 (2006).

55. Employees, and later the Supreme Court, categorized the employers' position as creating "an intermediate category of activities that would be sufficiently 'principal' to be compensable, but not sufficiently principal to commence the workday." *Alvarez*, 126 S. Ct. at 524.

56. For example, "workday" is defined "as the period 'from whistle to whistle,'" 29 C.F.R. § 790.6(a), and "[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." 29 C.F.R. § 790.6(b). Brief for Respondent, *supra* note 16, at 16.

57. Brief of the Chamber of Commerce et al. as Amici Curiae in Support of Respondent at 13, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 514 (2005) (No. 04-66).

finding that walking subsequent to donning and prior to doffing was not compensable.

E. Decision

The Supreme Court held that time spent walking subsequent to donning protective equipment and prior to doffing protective equipment was compensable under the FLSA as amended by the Portal-to-Portal Act.⁵⁸ To reach this conclusion, the Court held that any activity that “is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under section 4(a) of the Portal-to-Portal Act.”⁵⁹ Therefore, donning and doffing were principal activities.⁶⁰ The Court then relied on the continuous workday rule,⁶¹ and other regulations promulgated by the Secretary of Labor⁶² to determine that since the donning of required protective equipment was a principal activity, it began the continuous workday, and the Portal-to-Portal Act’s exclusion of walking time from compensation was not applicable.⁶³ In short, since the donning, as a principal activity, commenced the workday, and doffing, as a principal activity, ended the workday, walking that took place in between was compensable as part of the continuous workday.

More specifically, the Supreme Court relied on the regulations promulgated by the Secretary of Labor shortly after the passage of the Portal-to-Portal Act to determine that the act did not change the Court’s earlier descriptions of “work” or “workday,”⁶⁴ except in regard to preliminary or postliminary activities, and travel to and from the “actual place of performance of the principal activity.”⁶⁵ The act neither affected activities

58. *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 525 (2005).

59. *Id.*

60. Donning and doffing’s status as “integral and indispensable” to the principal activity was not contested by the employers.

61. *Id.* The continuous work day rule “defines the workday as ‘the period between the commencement and completion on the same workday of an employee’s principal activity or activities.’ 29 C.F.R. § 790.6(b).”

62. 29 C.F.R. § 790.6(a) states “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 [§ 4] have no application.”

63. *Alvarez*, 126 S. Ct. at 525.

64. *See supra* note 62.

65. *Alvarez*, 126 S. Ct. at 520.

occurring after the first principal activity and before the last principal activity of the day⁶⁶ nor the definition of workday.⁶⁷

In addition, the Court rejected the employer's contention that an activity could be compensable under section 4(a)(2) because it was "integral and indispensable" to the principal activity, but that the same activity was not necessarily the principal activity referred to in section 4(a)(1), and was not a principal activity for the purposes of starting the workday.⁶⁸ The court stated that activities which are "integral and indispensable" to principal activities, "are themselves 'principal activities,'" and that "there is no plausible argument that [principal activity or activities] mean something different in section 4(a)(2) than they do in section 4(a)(1)."⁶⁹

Finally, the Court determined that the time employees spent waiting to don the unique protective equipment was not compensable as such waiting qualified as a preliminary activity under the Portal-to-Portal Act.⁷⁰ The argument that such waiting was "integral and indispensable" to the principal activity of donning was rejected.⁷¹ While the Court recognized that such waiting may be necessary at times, it is not always essential for the worker to do his job.⁷² The waiting time associated with donning and doffing the protective equipment will be compensable, however, if it falls within the continuous workday.

II. ANALYSIS

Like other decisions, the fact that *Alvarez* was unanimously decided does not save the case from scrutiny. First, while characterizing this decision as inconsistent with the purpose of the Portal-to-Portal Act⁷³ is somewhat of a

66. *Id.* ("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 [§ 4] have no application." (quoting 29 C.F.R. § 790.6(a)(2005))).

67. *Id.* ("Workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." (quoting 29 C.F.R. § 790.6(b))).

68. *Alvarez*, 126 S. Ct. at 523. As the Court stated, "IBP asks us to create a third category of activities—those that are 'integral and indispensable' to a 'principal activity' and thus not excluded from coverage by § 4(a)(2), but that are not themselves 'principal activities' as that term is defined by § 4(a)(1)."

69. *Id.* "[N]ormal rule of statutory interpretation that words in different parts of the same statute are generally presumed to have the same meaning."

70. *Id.* at 527.

71. *Id.*

72. *Id.*

73. 29 U.S.C. § 251 (2005).

stretch, the claim is not entirely without merit, especially when viewing the Court's resolution of this case with the *Anderson v. Mt. Clemens Pottery Co.*⁷⁴ decision, which prompted the enactment of the Portal-to-Portal Act.⁷⁵ Second, the application of the decision to the reality of the workplace leads to the inconsistent and incongruent treatment of relatively similarly situated workers.

In addition, while the Court down-played employers' potential liability arising from this decision,⁷⁶ the decision expands employers' liability by drawing a fine line between compensable and non-compensable time. Moreover, as a result of the decision, additional costs will be imposed on employers; employers may face increases in litigation, restructuring and labor costs, and will face added costs associated with developing new workplace policies and time-keeping systems.⁷⁷

A. Undermining the Portal-to-Portal Act

The FLSA does not define "work" or "workweek."⁷⁸ In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*,⁷⁹ the Supreme Court defined work as "meaning 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."⁸⁰ Under this definition of work, the Court held⁸¹ that the time iron ore miners spent traveling underground in the mines to and from the location where the miners were drilling and loading ore was compensable.⁸²

In *Anderson v. Mt. Clemens Pottery Co.*,⁸³ the Supreme Court defined "workweek" as including "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed

74. 328 U.S. 680, 691 (1946).

75. *Alvarez*, 126 S. Ct. at 519.

76. *Id.* at 524.

77. Brief of the National Chicken Council and American Meat Institute as Amici Curiae Supporting Respondent at 2, *Tum v. Barber Foods, Inc.*, 126 S. Ct. 514 (2005) (No. 04-66).

78. *Alvarez*, 126 S. Ct. 514, 518 (2005).

79. 321 U.S. 590 (1944).

80. *Id.* at 598. It should also be noted that the Court later ruled that exertion was not necessary for work. *Armour & Co. v. Watoock*, 323 U.S. 126 (1944).

81. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

82. The miners also spent time at the surface of the mine "obtaining and returning tools, lamps and carbide and checking in and out." The question of whether these activities were compensable was not before the Court. *Id.* at 593.

83. 328 U.S. 680 (1946).

workplace.”⁸⁴ In that case, employees at the company, a large percentage of whom were compensated upon a piece work basis, punched in at the time clocks, walked approximately 30 seconds to 8 minutes to their workstations, and then “performed various preliminary duties, such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools.”⁸⁵ The Court found that the time employees spent walking from the time clock to their respective workstations, and the time spent engaged in preliminary activities was compensable since it met the definition of work established in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local*.⁸⁶

In response to this broad definition of work, and Congress’s perception of an “existing emergency” resulting from claims, which if allowed in accordance with *Anderson v. Mt. Clemens Pottery Co.*, would have created “wholly unexpected liabilities, immense in amount and retroactive in operation,” the Portal-to-Portal Act was passed to remove such walking and preliminary activities from compensation under the FLSA.⁸⁷

In *Steiner v. Mitchell*,⁸⁸ which was decided after the enactment of the Portal-to-Portal Act, the Supreme Court held that “‘principal activity or activities’ in section 4 embraces all activities which are ‘an integral and indispensable part of the principal activities.’”⁸⁹ At issue in the case was whether battery plant employees had to be compensated for the time spent changing clothes at the start of their shifts and showering at the end.⁹⁰ The Court found the time to be compensable as the activities were “integral and indispensable” to the principal activity of battery making. Therefore, they were not excluded from compensation under section 4(a)(1).⁹¹ The Court made certain to point out that the showering and clothes changing undertaken by employees did not take place under normal conditions.⁹² Employees were

84. *Id.* at 690-91.

85. *Anderson*, 328 U.S. at 683.

86. 321 U.S. 590, 598 (1944) (defining work as “involving 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.”).

87. *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956).

88. 350 U.S. 247 (1956).

89. *Id.* at 253.

90. *Id.* at 248.

91. *Id.* at 256.

92. “Nor is the question of changing clothes and showering under normal conditions involved because the Government concedes that these activities ordinarily constitute ‘preliminary’ or ‘postliminary’ activities excluded from compensable work time as contemplated in the Act.” *Id.* at 249.

regularly exposed to chemicals which are “toxic to human beings”⁹³ and pose a “very great”⁹⁴ risk to employees and even family members. The time spent by the employees changing clothes and showering was estimated to be around 30 minutes each day.⁹⁵

By finding donning and doffing of required protective equipment that is more ordinary in nature, and that takes place in a work environment that more closely resembles the working environment of blue-collared workers than the workplace in *Steiner*,⁹⁶ these two cases expand the scope of activities that will be considered “principal activities” due to their “integral and indispensable” relationship to the principal activity.⁹⁷ While perhaps not problematic in and of itself, a broader definition of “integral and indispensable” activities, combined with the Supreme Court’s decision that such activities will mark the boundaries of compensable time, threatens to undermine the Congressional intent behind the Portal-to-Portal Act.⁹⁸

There are two possible routes to undermine Congressional intent. First, as what constitutes an activity “integral and indispensable” to the principal activity grows, what constitutes a preliminary or postliminary activity that is exempt from compensation shrinks, and the congressionally created exception in 29 U.S.C. § 254(a)(2) is narrowed. Second, under the reasoning of *Alvarez*,⁹⁹ “integral and indispensable” activities start and end the compensable workday, which will narrow the congressionally created exception in 29 U.S.C. § 254(a)(2) that excludes certain walking, riding and traveling time from compensation.

A look back at the *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*,¹⁰⁰ and *Anderson v. Mt. Clemens Pottery Co.*¹⁰¹ decisions shows how the Portal-to-Portal Act can be circumvented. In *Tennessee Coal, Iron & Railroad Co.*, the ore miners spent time at the surface of the mine “obtaining and returning tools, lamps and carbide,” and then traveled into the

93. *Steiner*, 350 U.S. at 250.

94. *Id.*

95. *Id.* at 251.

96. 350 U.S. 247 (1956).

97. *Steiner v. Mitchell*, 350 U.S. 247 (1956). The question of whether the donning and doffing of required protective equipment was not before the Supreme Court. Therefore this analysis includes the First and Ninth Circuit decisions.

98. 29 U.S.C. § 254 (1947).

99. *IBP, Inc. v. Alvarez*, 126 U.S. 514 (2005).

100. 321 U.S. 590 (1944).

101. 328 U.S. 680 (1946).

mine.¹⁰² In *Anderson*, the employees were allowed to change into their work clothes, walk to their stations, and then perform various activities, “such as putting on aprons and overalls, removing shirts, taping or greasing their arms,” and putting on finger cots.¹⁰³ In either case, if the employees had to perform an activity that was “integral and indispensable” to their principal activities before walking to the face of the mine or to their workstations, the time spent walking would be compensable; this is the same outcome that the Court reached in both of these cases only via a different legal route.

This is not to say that the Supreme Court’s decision in *IBP, Inc. v. Alvarez*¹⁰⁴ has effectively undermined the congressional intent behind the Portal-to-Portal Act, but it does show that judicial boundaries are necessary with regard to defining “integral and indispensable” activities.¹⁰⁵ Such boundaries are even more necessary given the fact that engagement in “integral and indispensable” activities will now start the compensable workday.

B. Differential Treatment of Relatively Similarly Situated Employees

A more pressing issue is that this decision leads to the “incongruous treatment of similar situations”¹⁰⁶ when applied to the reality of employees’ workdays. More specifically, the decision will result in differential treatment of employees in terms of compensation based on whether the individual employees are required to wear protective equipment, and where that protective equipment is donned. An argument can be made that the differences in what an employee is required to don and doff, where he does so, and in what order he does so, destroys the similar situation of employees (even though they are doing like jobs in the same plant), and justifies varying

102. *Tennessee Coal, Iron & R.R.*, 321 U.S. at 593.

103. *Anderson*, 328 U.S. at 682-83.

104. 126 S. Ct. 514 (2005).

105. In determining whether an activity is “integral and indispensable,” courts have looked at state and federal laws, safety concerns, and whether employers derive benefits from the activity. In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court found that the clothes changing and showering activities served to further health and hygiene considerations, directly benefited the employer, and that the employers were required by state law to have clothes changing areas and shower facilities. In *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), the court stated “[t]o be ‘integral and indispensable,’ an activity must be necessary to the principal work performed and done for the benefit of the employer.” In addition, the court found the donning and doffing to satisfy the “integral and indispensable” test because the donning and doffing was required by state law, the employer and the nature of the work. In addition, they benefited the employer. *Id.* at 903.

106. Brief of the Chamber of Commerce, *supra* note 57, at 13.

compensation time. However, while this may be acceptable to those in the legal field, employees and companies that face the implementation of the decision are unlikely to consider these substantial differences that justify differences in compensation time.

As applied, the seemingly arbitrary and incongruent differences in compensation between employees resulting from this decision can be seen from several comparisons between two hypothetical employees beginning their workday. Beginning with a simple example, Employee A may enter the plant, have an eight minute walk to his workstation, and not have to gather and don any compensable gear before arriving at his work station. His walk to the workstation, and the time he spends waiting to punch in will not be compensated. Employee B may enter the plant, have to stop for a minute or two to gather and don a piece of compensable protective equipment, and have a similar eight minute walk to a workstation near Employee A. After leaving the changing area, the remainder of his walk will be compensated, and the time Employee B spends waiting to punch in that will be compensated as well.¹⁰⁷

Differential treatment based on small differences in the gathering and donning of required protective gear may not only result when two employees walk similar paths to their workstations with one stopping to don a piece of compensable equipment and the other not, but differential treatment may also arise between employees who both gather compensable equipment. Suppose Employee A and Employee B both walk to their lockers to drop off personal belongings before beginning their work. Employee A has a piece of compensable equipment in his locker which he dons, while Employee B has only equipment whose donning is not compensable in his locker. Employee A and B then walk to an equipment station, where they both gather and don a compensable piece of equipment. Employee A has been compensated for his walk from the locker room to the equipment station, but Employee B has not been compensated for his same walk.¹⁰⁸ Moreover, if there is a line at the equipment station, Employee A will be compensated for the wait, but Employee B will not. Both, however, will be compensated for the subsequent walk to their stations and the time they spend waiting to punch in. Adding a further variation to the hypothetical above, including a stop for equipment whose donning is not compensable highlights this decision's disparate effects

107. Employees are generally not compensated for time spent waiting to punch in. 29 C.F.R. § 790.8(c) (1947) states that “[a]ctivities such as checking and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.”

108. Brief for Petitioner, *supra* note 13, at 34.

on employee compensation. Suppose that after leaving the locker room, Employee A and Employee B both stop at an equipment station where they gather and don equipment that has been determined to be non-compensable, and then go to a second equipment station at which they gather and don equipment that is compensable. Employee A has been compensated for the entire time including the walk, the time spent waiting to gather the non-compensable equipment, the time spent donning that equipment, and the walk to the second station. Employee B has received no compensation for the entire time up to donning the compensable equipment at the second work station.

By allowing compensation for the walking and wait time subsequent to the donning of compensable equipment, employees may manipulate and maximize their compensation, especially considering that employers may leave the order of gathering and place of donning to the discretion employees.¹⁰⁹ Employee A, who has a piece of compensable equipment in his locker, may first go to his locker and don that equipment and then be compensated for his subsequent walk to and wait at a station where non-compensable equipment is gathered and donned. Employee A may have the choice of first stopping at the equipment station to pick up and don the non-compensable equipment and then walk to his locker and don the compensable equipment, but this will not maximize his economic interest as his walk and wait time will not be compensated. Employee B may prefer to stop at the equipment station or stations that his job requires, and to then go the locker room to don the equipment, but it is now in his interest to don the protective equipment which triggers compensation as soon as possible, and to then get paid for all of his subsequent walking and waiting time. In addition, if Employee B has to make two stops, one where equipment that is not compensable is gathered and one where equipment that is compensable is gathered, it might be in the best interest of his own efficiency to stop where the non-compensable equipment is distributed first; however, his economic interest will promote him to first gather and don the compensable equipment, even if such donning requires an out-of-the way trip to the locker room. In

109. Barber Foods, Inc., for instance, allows much employee discretion. Some associates arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, some don them in the cafeteria, others don them right before entering the production floor, others don them along the way.

Brief for Respondent, *supra* note 16, at 3. In *Alvarez v. IBP, Inc.*, the “district court found ‘considerable differences’ in how and where employees donned their clothing.” Brief for Petitioner, *supra* note 13, at 34.

short, the above examples show that there is much room for employees to ignore efficiency, and to instead gather and don their equipment in a way to maximize their compensation.

This differential treatment and possible manipulation creates immediate difficulties for employers. First, the possibility that the time spent gathering and donning compensable and non-compensable gear may be manipulated imposes additional compensation costs on the employer. Second, the aforementioned variations in the way that individuals choose to gather and don or return and doff the protective equipment will create difficulties in the employer's time-keeping system.¹¹⁰ While these issues can be addressed through court decisions regarding how much time employers should be compensated for or by the employers themselves, these two processes are not without costs to employers. Finally, the different treatment of employees, based on possible slight variations in their employment situations, may create hostility between workers as some employees are being compensated for walking and wait time and others are not.¹¹¹

While it is true that employers will be able to restructure their plants and employ new, stricter workplace rules for when, where, and in what order equipment shall be gathered and donned, a cost is still going to be imposed on employers. Such restructuring and the development of new workplace rules takes time. This means that in the short-term employers face increased labor costs, and in the long-term employers face costs associated with restructuring and designing and implementing new workplace rules. It should also be noted that while the above examples deal with employees beginning their workday, different treatment and manipulation of compensation based on the order in which equipment is doffed and returned may also take place at the end of the workday.

C. Employer Liability

The resolution of these two cases increases employer liability. First, while it appears that the line regarding "integral and indispensable" to the principal activity is being drawn at equipment required for work safety, the decisions of the First and Ninth Circuit arguably broaden the scope of what is considered an "integral and indispensable" activity. The equipment worn by employees in the meat packing industry and the safety hazards faced by such

110. Brief of the National Chicken Council, *supra* note 77, at 2.

111. Brief for Petitioner, *supra* note 13, at 34-36.

employees are more akin to common industrial and construction work environments than battery making. As the National Chicken Council and American Meat Institute succulently argued in their *Amici Curiae* Brief, “[t]he sanitary and protective gear at issue in this case is common to many types of employment. Any employer that employs individuals who wear common types of sanitary and protective attire would be subject to claims for waiting, walking and travel associated with obtaining, donning, doffing or disposing of such attire.”¹¹² Moreover, the Supreme’s Court decision that any walking time occurring subsequent to and prior to engagement in a principal activity is compensable may also increase the number of lawsuits filed against employers by their employees. The opportunity to recover compensation not only for engagement in a principal activity, but also for any subsequent walking or travel time, provides employees with additional motivation to file suit.

Employers not only face a possible increase in lawsuits related to compensation claims for the donning and doffing of equipment, and any subsequent or prior walking or travel, but will also be required to analyze their workplace practices and policies, and to consult counsel regarding possible lawsuits. While claims regarding the compensability of donning and doffing required equipment and subsequent walking have been “pervasive in meat and poultry processing,”¹¹³ similar claims have also been filed “against a wide variety of public and private employers.”¹¹⁴ Claims for compensation have been filed by police officers, engineers, truck drivers and a variety of manufacturing employees including those manufacturing medical supplies, chlorine and automobiles.¹¹⁵ This decision is likely to increase the number of suits filed by employees and to increase the variety of employees filing such suits.¹¹⁶ This may lead to increased costs for employers in the form of increased litigation, and studies undertaken through company initiative to determine whether donning and doffing in its employment setting and any subsequent walking or driving is likely to be compensable.

112. Brief of the National Chicken Council, *supra* note 77, at 7.

113. *Id.* at 8.

114. *Id.*

115. *Id.* at 8-9.

116. “Employers in the medical, dental, engineering, scientific research, waste disposal, food services, bottling and packing, and certain retail industries may also be affected by this decision.” Greenberg Traurig, LLP, *An Employer Must Compensate Employees for Time Spent Donning And Doffing Protective Gear But Not For Pre-Donning Waiting Time* (2005), <http://www.gtlaw.com/pub/alerts/2005/1105.asp> (last visited Nov. 19, 2006).

D. Increased Costs for Employer

Along with increased litigation costs, employers may face an immediate “substantial”¹¹⁷ increase in labor costs. This can be demonstrated by taking a close look at what was awarded to IBP employees by the United States District Court for the Eastern District of Washington. IBP employs 41,000 workers nationwide;¹¹⁸ the Washington plant employs 178 workers in the slaughter division and 815 workers in the processing division.¹¹⁹ In the slaughter division, 110 straight-knife users recovered wages for approximately 9 to 10 minutes of pre-production and post-production time.¹²⁰ Air knife users and wizard knife users recovered wages for approximately 5.5 to 6.5 minutes of pre-production and post-production time.¹²¹ While the exact number of employees using air and wizard knives is not given, this paper will assume a reasonable number of 8 employees.¹²² No other positions in the slaughtering division recovered damages.¹²³ Based on the above figures, 1,093 minutes of pre-production and post-production time per day, for a total of 5,465 minutes per week, was awarded slaughtering division employees.¹²⁴ Assuming an average wage rate of \$10 per hour, the resulting cost to IBP is \$911 per week.

As stated above, approximately 800 workers are employed in IBP’s processing division.¹²⁵ Knife users, which include 624 of the employees, recovered wages for between 12 and 14 minutes of pre-production and post-production time.¹²⁶ Packaging workers, of which there are 34,¹²⁷ recovered

117. Mayer, Brown, Rowe & Maw, LLP, *Supreme Court Docket Report—2004 Term, No. 7* (2005), <http://www.mondaq.com> (last visited Nov. 19, 2006).

118. Brief for Petitioner, *supra* note 13, at 7.

119. Brief for Respondent, *supra* note 25, at 4.

120. *Id.* at 13.

121. *Id.*

122. Eight employees is a reasonable estimate. There are 113 job classifications in the slaughtering division, and 30 job classifications did not recover damages. *Id.* Assuming that there are 2 employees in each job classification that failed to recover damages, 60 employees recovered no damages. Adding the 110 employees who use straight knives to this figure leaves 8 remaining employees in the slaughtering division.

123. *Id.*

124. The total number of minutes for pre- and post-production time awarded to employees per day was calculated by using the mean of the time awarded for each position. For example, air and wizard knife users recovered 5.5 to 6.5 minutes per day. Six minutes was used to compute daily increase in compensable time.

125. Brief for Respondent, *supra* note 25, at 4.

126. *Id.* at 12.

127. *Id.* at 5.

between 6 to 8 minutes of pre-production and post-production time.¹²⁸ Employees in the lightly-staffed hamburger department were also awarded wages for between 6 to 8 minutes.¹²⁹ Processing saw operators recovered wages for 8 to 10 minutes of pre-production and post-production time,¹³⁰ and the remainder of the processing employees were awarded between 1.387 and 2.448 minutes of pre-production and post-production time.¹³¹ Assuming that there are 5 employees in the hamburger department, 33 saw operators and a remainder of 104 employees in the processing division, 8,881 minutes of pre-production and post-production time per day, for a total of 44,405 minutes per week, was awarded to employees in the processing division.¹³² Assuming an average wage rate of \$10 an hour, the resulting cost to IBP is \$7,400 per week. The increase in labor costs for both the slaughtering and processing division employees at the Washington plant totals \$8,311 per week or \$432,172 per year. In addition to these labor costs, IBP will also face “costs associated with developing and implementing new timekeeping systems and practices.”¹³³

In an effort to avoid what will be a marked increase in labor costs over the life of a company,¹³⁴ it is likely that companies will restructure their plants to minimize compensable walking and wait times. Based on the *Alvarez*¹³⁵ decision, it is clear that employers will want to minimize any walking that takes place after the donning of or before the doffing of any required safety equipment; this can be done most effectively, in theory, by placing the locker room or changing station as close as possible to the production floor and requiring that any donning of required safety equipment take place there.¹³⁶ In addition, employers should establish one location at which employees

128. *Id.* at 13.

129. *Id.*

130. Brief for Respondent, *supra* note 25, at 12.

131. *Id.* at 24.

132. The total number of minutes for pre-production and post-production time awarded to employees per day was calculated by using the mean of the time awarded for each position. For example, air and wizard knife users recovered 5.5 to 6.5 minutes per day. Six minutes was used to compute daily increase in compensable time.

133. Brief of the National Chicken Council, *supra* note 77, at 2.

134. For example, an increase in employee compensation of \$432,172 per year amounts to a \$6,482,580 increase over a 15-year period.

135. *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2006).

136. A company policy requiring all gear to be donned and doffed in the locker room or changing station would eliminate any compensability for the time employees spend walking from equipment station to equipment station after the donning of compensable safety equipment. In addition, it would eliminate the possibility of any compensation for waiting time at an equipment station after the donning of compensable safety equipment. Also, such a policy would eliminate the need for a single equipment station at which employees gather all of their required safety equipment.

gather all of their respective required safety equipment as this would eliminate any possible compensation for walking time between equipment stations after the donning of required safety equipment, and compensation for any possible wait time at the second equipment station.¹³⁷ Lastly, as employees will be compensated for the walk from the locker room or changing station to the production floor subsequent to the donning of required safety equipment, it is in the employer's best interests to minimize wait times at the time-clocks that are located at the entrance of the production floor. Alternatively, employers may choose to have the time clocks located inside of the locker room or changing station where the donning and doffing takes place.

As employers attempt to restructure their plants to "avoid or minimize compensable walking time"¹³⁸ and compensable wait time, they will face construction and renovation costs. Employers will have to undertake a cost-benefit analysis to weigh where equipment stations and locker rooms can feasibly be located and the costs of those relocations against labor costs. While there is little doubt that employers will plan relocations to minimize their overall costs, the fact still exists that employers are going to see increases in expenditures because of the *Alvarez* decision.

Since employers have the ability to restructure their plants to minimize the compensation employees will receive for walking and wait time subsequent to the donning of and prior to the doffing of required safety equipment, employees will see a increased compensation in the short-term. In the long-term, however, as companies work to minimize donning, doffing and walking time, the compensation employees receive is likely to go down again, and employees may see little benefits from this decision. In addition, employers may revise wage rates or benefit packages to offset some of the increased costs.¹³⁹ Employers, on the other hand, will face both short-term and long-term costs, whether in the form of labor or restructuring costs. In short, there is little doubt that this decision will impose both short- and long-term costs on employers, but whether employees will truly gain a long-term benefit is questionable.

137. A company policy requiring that all required safety equipment be donned in the locker room or changing station, whose location is close to the production floor, would further allow the company to reduce compensable walking time. It may be in the best interests of the employer to have the equipment station located in the locker room or changing station.

138. Brief of Petitioner, *supra* note 13, at 33.

139. Brief of National Chicken Council, *supra* note 77, at 24.

CONCLUSION

In summary, the Supreme Court's decision in *Alvarez*¹⁴⁰ raises several concerns. While the question of whether the precedent set by the courts' resolution of these two cases creates the possibility of undermining the congressional intent behind the Portal-to-Portal Act needs to be kept in mind, there are more prominent concerns relating to the differential treatment of relatively similarly situated employees and increased costs for employers. As this note has explored, small differences in what employees don and doff, where employees don and doff, and in what order employees don and doff protective equipment, will create differences in employee compensation. While this make sense in legal theory, the application of *Alvarez*¹⁴¹ to the reality of the workplace is likely to be perceived as irrational by employees and their employers.

As employers attempt to minimize their new labor costs and to create a more uniform compensation time among their employees, the employers may face costs associated with restructuring the workplace, and developing and implementing new workplace rules and time-keeping policies. Moreover, employers may also be exposed to increased litigation costs, and will have to consult counsel regarding their potential liability.

Finally, while employers are certain to face increased expenditures as a result of the *Alvarez*¹⁴² decision, over the course of time, they should be able to eventually minimize the associated costs. Given this ability, any long-term employee benefits are questionable.

140. 126 S. Ct. 514 (2005).

141. *Id.*

142. *Id.*