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Lawyer Insights

Employer Trial Tips For Fighting Worker PPE Pay Claims

By Michael Mueller and Evangeline Paschal
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Which types of pre- and post-shift activities are compensable under the Fair Labor Standards Act has been a hotly debated issue for over 60 years, with the question turning on whether the activity at issue is integral and indispensable to an employee's productive work.

The secretary of labor continues to pursue enforcement actions against employers on this issue, as do many private plaintiffs counsel seeking collective action treatment under the FLSA.[1]

The federal courts have examined a host of pre- and post-shift activities to determine if they meet this standard for compensability, often with conflicting results. This is especially so with respect to the time spent donning and doffing standard personal protective equipment, or PPE, such as the hard hats, ear plugs, safety boots and eye protection worn by hourly employees in a variety of workplaces.

In a recent example of this type of suit, coal miners in November 2023 filed Moore v. Consol Energy Inc. in the U.S. District Court for the Western District of Pennsylvania, claiming they were not paid overtime for donning and doffing safety clothing and other protective equipment, including, but not limited to, reflective uniforms, helmets and boots.[2]

Tracing the crooked path of case law addressing the time spent donning and doffing standard PPE items reveals some practical tips for convincing the trier of fact at trial that this time is noncompensable.

The State of the Law

In 1946, the U.S. Supreme Court ruled in Anderson v. Mt. Clemens Pottery Co. that the FLSA requires employers to pay overtime for employees' preliminary and postliminary activities on the work site, such as walking to their work station and changing into work clothes.[3]

Soon thereafter, so many lawsuits were filed seeking compensation for such claims that it threatened the financial ruin of much of the economy.[4] In 1947, Congress swiftly enacted the Portal-to-Portal Act amendments to the FLSA, which explicitly rendered such preliminary and postliminary activities, including walking time, noncompensable.[5]

In 1956, the Supreme Court in Steiner v. Mitchell carved out a judicial exception to the Portal-to-Portal Act amendment that had rendered such time noncompensable.[6] Pursuant to Steiner, preliminary and postliminary activities that are integral and indispensable to an employee's principal work duties are compensable despite the statutory language to the contrary.

In that case, the Supreme Court held that changing into and out of a uniform and showering after working

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in a lead-acid battery manufacturing plant were integral and indispensable activities. However, Steiner did not address whether donning and doffing other personal protective equipment worn by workers likewise qualify as integral and indispensable activities.

The Steiner ruling spawned confusion and much litigation over the meaning of "integral and indispensable," especially in the context of donning and doffing work uniforms and PPE used by workers in a wide variety of industries. The words "integral and indispensable" do not appear in the Portal-to-Portal Act, and the congressional record is sparse as to how this concept is supposed to delimit which types of pre- and post-shift activities are compensable. Thus, courts have had to wrestle with how to define these imprecise and slippery terms.

For example, in Gorman v. Consolidated Edison Corp. in 2007, the U.S. Court of Appeals for the Second Circuit found that "indispensable" means necessary or required, while integral means "essential to completeness" or "organically joined or linked."[7] The Second Circuit held that to be integral and indispensable, PPE must guard against workplace dangers that transcend ordinary risks.

Thus, in Gorman, the Second Circuit concluded that donning and doffing standard PPE items such as hard hats, safety glasses and steel-toed boots were not compensable because, while such activities were necessary and thus indispensable, they were not integral to the employees' jobs at a nuclear power station.[8]

Many other courts have similarly recognized that the time spent donning and doffing nonunique items such as boots, safety glasses and earplugs is not compensable under the FLSA.[9] Other courts, however, have found such activities to be integral and indispensable, and thus compensable.[10]

In addition to determining whether such items are required and necessary for workers to perform their jobs, another factor considered in some of these cases is whether employees can wear the PPE items at issue from and to home. In such analysis, the inability to do so weighs in favor of finding the items integral and indispensable.[11]

Some courts also have included as a factor weighing in favor of compensability whether the activity primarily benefits the employer, rather than the employee.[12]

In 2014, the Supreme Court weighed in again on the meaning of "integral and indispensable" in Integrity Staffing Solutions Inc. v. Busk, which considered whether time spent by warehouse employees going through a security check was integral and indispensable.[13]

The Supreme Court rejected the proposition that an activity is integral and indispensable merely if it is required by or benefits the employer.[14] Instead, the Supreme Court held that "an activity is not integral and indispensable to an employee's principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities."[15]

The Supreme Court thus concluded that time spent going through a security check was not integral and indispensable, as it was not an intrinsic element of the warehouse employees' jobs, notwithstanding that the checks were required and benefited the employer.

More recently, in Tyger v. Precision Drilling Corp., the U.S. Court of Appeals for the Third Circuit considered both Gorman and Busk when analyzing the compensability of standard PPE items

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worn by oil rig workers, such as flame-retardant coveralls, gloves, earplugs, hard hat, safety glasses and steel-toed boots.[16]

The U.S. District Court for the Middle District of Pennsylvania, relying on Gorman, had granted summary judgment to the employer and held that such items did not protect against "transcendent risks" and thus were not compensable. In August 2023, the Third Circuit reversed, rejecting the test used by the Second Circuit.

Instead, the Third Circuit synthesized Busk with the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Sixth Circuit's respective opinions in Perez v. Mountaire Farms Inc. in 2011 and Franklin v. Kellogg Co. in 2010.

Drawing on these cases, the Third Circuit ruled that determining whether activities are integral and indispensable is a matter for the trier of fact that should include consideration of the following factors: (1) whether employees can don and doff at home instead of the work site; (2) whether the items are required by regulation or industry custom; (3) how specialized the PPE is; and (4) whether the PPE is reasonably necessary to perform the work safely and well.[17]

Thus, the Third Circuit remanded the case to the district court for trial to determine whether the time spent donning and doffing was integral and indispensable to the employees' job in light of the factors it set forth.

These cases show how the term "integral and indispensable" remains a moving target more than 60 years after the Supreme Court adopted the concept in Steiner. With no consensus among all circuits as to whether the time spent donning and doffing standard PPE is compensable, preparing for trial on this issue may seem daunting. This is especially so as you will likely not learn how the court will instruct the jury — or resolve the legal standard to be applied in a bench trial — until the trial is well underway.

But regardless of how the court formulates the "integral and indispensable" test, there are strategies that you can use to persuade the trier of fact that the standard PPE items at issue are not compensable. Below are three such strategies that can help you elicit the testimony you need to prove your case.

1. Have Hostile Employee Witnesses Make Your Case

An effective overarching strategy for disputing that activities are integral and indispensable is to use your cross-examination of hostile employee witnesses called by the plaintiff to prove the employer's case. This may include asking employee witnesses to affirm that certain items can be worn from home at the start of the shift and back home after the shift, even if the employee chooses to change at the worksite.

It can also include establishing through employee testimony that they would still be able to perform their jobs absent a particular item of PPE, which helps establish that the item is not intrinsic to the job. If an employee witness has worked for other employers in the industry, you may be able to establish that certain PPE is not customarily required in the industry. Both points can help tip in your favor the balance of factors recognized by various courts as relevant to the "integral and indispensable" determination.

You can also bolster your case by eliciting testimony supporting your position that your client is a fair and reasonable employer, such as by pointing out the high hourly rate of pay received by employees.

While not specific to the question of whether activities are integral and indispensable, testimony about

high pay rates can help rebut the common implication that the employer is not paying for donning and doffing standard PPE because it is trying to maximize profits by cheating employees out of pay for time spent on these activities. It can also signal to the trier of fact that the plaintiffs are overreaching by challenging the compensability of these items, given the employer's overall standing as a responsible and reasonable employer.

2. Emphasize PPE As Standard and Common

At a commonsense level, a PPE item is less likely to be seen by a trier of fact as intrinsically part of a job, and thus integral and indispensable, if it is an item widely used in a variety of contexts. This is true even if the item is required or customarily worn in a particular industry to promote safety, such as a hard hat in the construction industry. Thus, one particularly fruitful line of questioning is to make the point that the PPE at issue is not specialized to the employee's job, but rather is a generic safety item.

You can do this by analogizing to the wide range of contexts in which certain items of PPE can be used. For example, safety glasses are worn in a wide variety of industrial and factory settings, as well as in high school chemistry labs and woodworking studios. Many people wear earplugs at concerts, while doing yard work or to enhance their ability to sleep. Hard hats are worn in a variety of construction and factory settings.

Management witnesses, especially those tasked with setting or enforcing safety policies, can make many of these points when you examine them. But so too can employee witnesses on cross-examination. Asking employee witnesses to agree that PPE items are used in a variety of contexts is a low-risk question for cross-examination, as many will readily agree to these points, which are largely self-evident. And many jurors are likely to have had experience wearing these same items in their own current or prior jobs, often without special pay, or while doing household or recreational activities.

Another line of helpful questioning to pursue is to establish through management witnesses, and in particular a witness responsible for employee safety, that certain items of PPE are not explicitly required by the Occupational Safety and Health Act or other laws.

Jurors in particular may not be familiar with the fact that the Occupational Safety and Health Administration's hazard assessment regulation directs employers to provide PPE as necessary to protect against workplace hazards, but does not specifically require what that PPE may be.[18]

Explaining this feature of OSHA regulations can help the trier of fact understand that certain types of standard PPE are not specifically required by law, in contrast to some types of specialized gear, such as respirators, that are the subject of specific regulatory requirements. In turn, such testimony speaks to the relevant factor of whether the standard PPE at issue is required by regulation.

By emphasizing the commonplace nature of the PPE at issue, this line of questioning helps rebut the plaintiff's claim that such items are integral and indispensable to a particular type of job or industry, regardless of the test applied by the trial court.

In particular, such testimony can allow you to argue that the items in question are so ubiquitous as to not be specialized for or reasonably necessary to do the job and thus are not intrinsic to the productive work performed by the employees. This in turn will enable you to address relevant factors set forth in case law such as Busk and Tyger.

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3. Focus On De Minimis Time

The small amount of time needed to don and doff PPE items is not one of the factors recognized by courts as directly relevant to whether the activity is integral and indispensable. However, it is a key element in evaluating whether the time at issue is de minimis and thus not compensable.[19]

Both the "integral and indispensable" and de minimis tests apply to whether pre- and post-shift activities are compensable, and the trier of fact will usually be asked to decide both in tandem. This gives the employer two shots at defeating compensability. Indeed, the Third Circuit in Tyger recognized that the de minimis doctrine may serve as a brake on finding that all types of safety items are compensable as integral and indispensable.[20]

One tactic that has been used in some trials is to bring the PPE into the courtroom. At a minimum, the trier of fact should be allowed to see the items, and preferably touch them — if not during publication of the exhibits to the jury, then at least during deliberation.

You might also consider asking a hostile witness to show how the items are put on and taken off, which will certainly take little time — although there is always the risk of allowing an unrehearsed witness to do so. If you do not want to take the risk of asking for such a demonstration during cross-examination, then at least consider asking one of your own prepared witnesses to do the demonstrations.

By establishing not only the commonplace nature of certain PPE items, but also the minimal time needed to don and doff them, you can paint a thematic picture that these activities are not the type of activities that should be considered part of the compensable work day. Indeed, some courts have found that de minimis activities cannot start and stop the compensable continuous workday.[21] Thus, tying together the concepts of "integral and indispensable" and de minimis can maximize your chances of defeating the compensability of standard PPE items.

Conclusion

In the 60-plus years since the Supreme Court created the concept of "integral and indispensable" activities in Steiner v. Mitchell, courts have wrestled with how to delineate which types of pre- and post-shift activities are compensable, and which are not. The compensability of donning and doffing standard PPE items continues to be a subject of FLSA litigation involving a host of workplace settings.

By focusing your witness examinations on key themes that cut across the various court-formulations of what "integral and indispensable" means, you can increase the likelihood of persuading the trier of fact that donning and doffing of generic safety items are not compensable activities. This could help employers counsel win the next action brought by the secretary of labor or by private plaintiff' counsel representing employees.

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Notes

1. 29 U.S.C. § 216(b).
2. Moore v. Consol Energy Inc., Civ. No. 2:23-cv-01991 (W.D. Pa.).
3. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
4. See 29 U.S.C. § 251(a).
5. See 29 U.S.C. § 254(a)(1)-(2).
6. See Steiner v. Mitchell, 350 U.S. 247 (1956).
7. 488 F.3d 586, 593 (2d Cir. 2007).
8. See id. at 594.
9. See, e.g., IBP Inc. v. Alvarez, 546 U.S. 21, 31-32 (2005) (describing case history where the district court found PPE items such as earplugs, safety glasses and boots noncompensable, and the Ninth Circuit affirmed on the alternative ground that donning and doffing such items was de minimis); Anderson v. Cagle's Inc., 488 F.3d 945, 958 (11th Cir. 2007) (affirming the district court's grant of summary judgment for the employer on ground that donning and doffing smocks, hairnets and beardnets, gloves, and hearing protection was not compensable work); Guyton v. Tyson Foods Inc., 767 F.3d 754 (8th Cir. 2014) (upholding the jury's verdict that donning and doffing PPE, including standard items such as frocks, hard hats, and earplugs, were not integral and indispensable activities); Isreal v. Raeford Farms of Louisiana LLC, 784 F. Supp. 2d 653, 662-63, 664 (W.D. La. 2011) (granting the employer's motion for summary judgment because donning and doffing items such as boots, smock, hairnets and beardnets, and hearing protection were not compensable activities); Alford v. Perdue Farms Inc., No. 5:07-cv-87, 2008 WL 879413, at *6 (M.D. Ga. Mar. 28, 2008) (holding as a matter of law that donning and doffing boots, safety goggles, bump caps, hairnets and beardnets, and earplugs were noncompensable preliminary and postliminary activities, and alternatively were de minimis).
10. See, e.g., Perez v. Mountaire Farms Inc., 650 F.3d 350, 366-68 (4th Cir. 2011) (safety items such as safety glasses, earplugs and bump caps, as well as smocks, aprons and hairnets, were integral and indispensable); Franklin v. Kellogg Co., 619 F.3d 604, 620 (6th Cir. 2010) (safety glasses, earplugs, bump caps, and hairnets and beardnets, worn in a food processing context were integral and indispensable); Hoyt v. Ellsworth Co-op. Creamery, 579 F. Supp. 2d 1132, 1140-41 (W.D. Wis. 2008) (sanitary/safety uniforms in dairy production facility were integral and indispensable); Jordan v. IBP Inc., 542 F. Supp. 2d 790, 807 (M.D. Tenn. 2008) (frocks, hard hats and sanitary hairnets worn at a beef and pork processing plant were integral and indispensable).
11. See, e.g., Mountaire Farms, 650 F.3d at 368.

12. See, e.g., Bonilla v. Baker Concrete Construction Inc., 487 F.3d 1340, 1344 (11th Cir.2007) (concluding that time spent going through security screening made mandatory by the FAA was not integral and indispensable because it was not for the benefit of the employer).

13. 574 U.S 27 (2014).

14. See id. at 36.

15. Id. at 35.

16. Tyger v. Precision Drilling Corp., 78 F.4th 587 (3d Cir. 2023).

17. See id. at 595

18. 29 C.F.R. § 1910.132(d).

19. See Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984) (seminal case articulating three factors relevant to whether an activity is de minimis, including the small amount of time at issue).

20. See Tyger, 78 F.4th at 594 ("[Precision Drilling] and its amicus fear that our decision will require paying all industrial workers for changing into any safety gear. Its fears are overblown; the de minimis doctrine stems the tide."); see also Alvarez v. IBP Inc., 339 F.3d 894, 903 (9th Cir. 2003) (time spent donning and doffing standard items such as hard hats, earplugs, and safety glasses was noncompensable because it was de minimis, despite finding items integral and indispensable); aff'd, on other grounds, 546 U.S. 21 (2005); Reich v. IBP, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (finding donning and doffing hard hats, safety glasses, and earplugs did not constitute work but noting alternatively time spent on such activities could be considered de minimis as a matter of law); Alford, 2008 WL 879413, at *6 (donning and doffing boots, safety goggles, bump caps, hairnets/beardnets, and earplugs were non-compensable preliminary and postliminary activities, and alternatively were de minimis).

21. See Singh v. City of New York, 524 F.3d 361, 372 n.8 (2d Cir. 2008); see also Alvarez, 546 U.S. at 32, 37 (2005) (holding donning and doffing "unique" safety gear were integral and indispensable activities that started and stopped the compensable workday, but leaving undisturbed the Ninth Circuit's upholding district court's conclusion that donning and doffing "standard" PPE items were de minimis activities that were not compensable).

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