

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

March 20, 2014

The webinar will begin shortly. Please stand by.
You will not hear any audio until we begin.

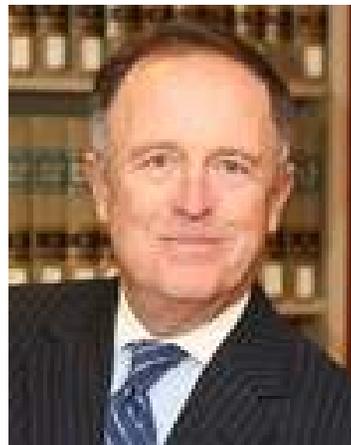
Today's Presenters



Chris Calsyn



Andrew Bagley



Tom Gies

Today's Discussion

- Defining the Work Day – Still a Challenge
- Compensation for Waiting in Line? – *Busk*
- The *De Minimis* Rule and Other Recurring Headaches
- DOL Overtime Initiative

Defining the Work Day – Still A Challenge

What is “work” ?

Defining the Work Day – Still A Challenge

- Key Historical Dates
 - FLSA 1938 – no definition of “work”
 - *Mt. Clemens Pottery* 1946
 - Portal to Portal Act 1947
 - *Mitchell v. Steiner* 1956 – the “indispensable and integral” test

Statutory Provisions

- Section 4 Portal to Portal Act

“[N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . for or on account of any of the following activities of such employee . . . —

- (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.”

29 U.S.C. § 254

Principal Terms and Concepts

- Principal activity
- Preliminary
- Postliminary
- Continuous workday rule
- Custom and practice

Relevant Regulations

- 29 CFR Part 790
 - Interprets Section 4
 - 790.7 ‘preliminary’ and ‘postliminary’
 - 790.8 ‘principal’ activities
 - 790.12 ‘Portion of the day’

Next Up at the Supreme Court

- *Integrity Staffing Solutions v. Busk*
 - Case No. 13-433, *cert* granted March 3
 - Question presented: is waiting in line for a security check compensable?
 - Ninth Circuit found the activity “for the benefit of” the employer

Next Up at the Supreme Court

- Questions for the Court
 - Is *Steiner v. Mitchell* still the test?
 - Regulatory requirements v. the employer's convenience
 - The 'copy cat litigation' argument

Next Up at the Supreme Court

- Other Issues
 - 30 minute lunch break
 - State law claims
- Prediction
- Implications

Latest on the *De Minimis* Rule

- First articulated in *Anderson v. Mt. Clemens Pottery*
- O.K. to disregard a few seconds or minutes beyond scheduled working hours
- *Lindow* factors:
 - Amount of time spent on the activity
 - Administrative difficulty of recording the time
 - Aggregate amount of otherwise-compensable time
 - Frequency/regularity of the activity

Latest on the *De Minimis* Rule

- Regulation: 29 C.F.R. §785.47
- Cases are fact-specific, sometimes difficult to reconcile
- *Sandifer v. USX* – Supreme Court Jan. 2014
 - Holding
 - Ruminations on *de minimis*
 - Implications of the decision

Recurring Issues

- Delays in clocking in/out
- Email/texting off hours
- Completing reports before/after hours
- Delays in opening store/starting up computer
- The multitasking employee

Best Practices for Recurring Issues

- Adopt accurate clock in/clock out procedures
- Limit access to email/text where possible
- Ensure policies minimize continuous workday
- TME
 - Train, monitor, and enforce timekeeping and work time policies

DOL Overtime Initiative

- From the President's Memorandum

Therefore, I hereby direct you to propose revisions to modernize and streamline the existing overtime regulations. In doing so, you shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply.

DOL Overtime Initiative

- Likely areas of regulation
 - Increase the minimum salary requirement
 - Modify the “duties” test
 - The computer professional exemption
 - Auditors/mortgage bankers

DOL Overtime Initiative

- Affected Industries
 - Banking and financial services
 - IT
 - Service sector
 - Restaurants/hospitality/hotels
 - Retail
 - Hospitals and other healthcare

DOL Overtime Initiative

- Process and Timing
 - APA rulemaking
 - 12 months?
 - Legal challenge?
- Public Policy and Political Context

Citations

- *Steiner v. Mitchell*, 350 U.S. 247 (1956)
- *Busk v. Integrity Staffing*, 713 F.3d 525 (9th Cir. 2013)
- *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007)
- *IBP v. Alvarez*, 546 U.S. 21 (2005)
- *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007)
- *Brown v. Scriptpro, Inc.*, 700 F.3d 1222 (10th Cir. 2012)

More Citations

- *Sandifer v. USX*, No. 12-417 (Jan. 27, 2014) (de minimis)
- *Rutti v. Lojack Corp.*, 578 F3d 1084 (9th Cir. 2009) (de minimis)
- *Haight v. Wackenhut Corp.*, 692 F.Supp.2d 339 (SDNY 2010) (de minimis)
- 2004 amendments to 29 CFR Part 541 69 Fed. Reg. 22121 April 23, 2004
<http://www.dol.gov/whd/overtime/preamble.pdf>

More Citations

- President's Memorandum:
<http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>
- White House Fact Sheet:
<http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr>

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