

the statutory description.<sup>72</sup> The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words “compensable by an express provision” indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee’s performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not “compensable by \* \* \* a written or nonwritten contract” within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one “between such employee,<sup>72</sup> his agent, or collective-bargaining representative and his employer.”<sup>73</sup> Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor’s employees, would not in itself establish the compensability by “contract” of an activity, for purposes of section 4.

**§ 790.10 “Compensable \* \* \* by a custom or practice.”**

(a) A “preliminary” or “postliminary” activity of the type described in section 4(a) of the Portal Act may be “compensable” within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,<sup>74</sup> and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair Labor Standards Act.<sup>75</sup> Accordingly, in the event that no “express provision of a written or nonwritten contract” makes com-

pensable the activity in question, it is necessary to determine whether the activity is made compensable by a custom or practice, not inconsistent with such a contract, in effect at the establishment or other place where the employee was employed.<sup>76</sup>

(b) The meaning of the word “compensable” is the same, for purposes of the statute, whether a contract or a custom or practice is involved.<sup>77</sup>

(c) The phrase, “custom or practice,” is one which, in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the Congressional intent, with such aid as may be had from the many judicial decisions interpreting the words “custom” and “practice” as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the Congressional reference to contract, custom or practice was a deliberate use of non-technical words which are commonly understood and broad enough to cover every normal situation under which an employee works or an employer for compensation.<sup>78</sup> Accordingly, “custom” and “practice,” as used in section 4(b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only “to protect every collective bargaining agreement about these activities” but “to protect the agreement

<sup>76</sup> See Senate Report, p. 49.

The same is true with respect to the activities referred to in section 2 of the Portal Act in an action or proceeding relating to activities performed before May 14, 1947. See Senate Report, p. 45. See also § 790.23.

<sup>77</sup> See § 790.9(b).

<sup>78</sup> See colloquy between Senators Donnell and Tydings, 93 Cong. Rec. 2125, 2126; colloquy between Senators Donnell, Lodge, and Hawkes, 93 Cong. Rec. 2178, 2179; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2181, 2182. Statements of Senator Cooper, 93 Cong. Rec. 2293.

<sup>72</sup> See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181-2182.

<sup>73</sup> The terms “employee” and “employer” have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

<sup>74</sup> See § 790.4.

<sup>75</sup> See §§ 790.5 and 790.7.

## Wage and Hour Division, Labor

## § 790.12

between one workman and his employer” and “every practice or custom which we assume must have entered into the minds of the people when they made the contract.”<sup>79</sup>

(d) The words, “custom or practice,” as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase “in effect \* \* \* at the establishment or other place where such employee was employed.” The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the “particular place of business,” “plant,” “mine,” “factory,” “forest,” etc.<sup>80</sup>

(e) “The custom or practice” by which compensability of an activity is tested under the statute is one “covering such activity.” Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering “such activity”; there is no provision, as there is with regard to contracts, that the custom or practice be one “between such employee, his agent, or collective-bargaining representative, and his employer.”<sup>81</sup>

(f) Another qualification of the “custom or practice” referred to in the statute is that it be “not inconsistent with a written or non-written contract” of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.<sup>82</sup> However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account

in determining whether such an activity is compensable.<sup>83</sup>

### § 790.11 Contract, custom or practice in effect “at the time of such activity.”

The “contract,” “custom” or “practice” on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect “at the time of such activity.” Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

### § 790.12 “Portion of the day.”

A “preliminary” or “postliminary” activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section “only when it is engaged in during the portion of the day with respect to which it is so made compensable.”<sup>84</sup> This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;<sup>85</sup> the provision is applicable only to walking, riding, traveling or other “preliminary” or “postliminary” activities of the kind described in section 4(a) of the Portal Act,<sup>86</sup> which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.<sup>87</sup>

<sup>79</sup> Statements of Representative Gwynne, 93 Cong. Rec. 1566.

<sup>80</sup> Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

<sup>81</sup> See § 790.9(d).

<sup>82</sup> Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

<sup>83</sup> Senate Report, pp. 45, 49.

<sup>84</sup> Section 4(c) of the Portal Act (set out in full in § 790.3).

<sup>85</sup> See §§ 790.4–790.6.

<sup>86</sup> Conference Report, pp. 12, 13.

<sup>87</sup> See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

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