

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

... in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).²⁶

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday²⁷ must be included or excluded in computing time worked.²⁸ If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,²⁹ then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.³⁰ Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an

employee engages in such activities thus compensable by contract, custom, or practice.³¹ But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.³² But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,³³ if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

³¹ Conference Report, p. 10.

³² Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

³³ See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

²⁶ The full text of section 4 of the Act is set forth in § 790.3.

²⁷ See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

²⁸ Conference Report, p. 13.

²⁹ See footnote 18.

³⁰ See Conference Report, pp. 10, 13.