

the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.⁶⁶ On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.⁶⁷ However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.⁶⁷

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§ 790.9 "Compensable * * * by an express provision of a written or non-written contract."

(a) Where an employee engages in a "preliminary" or "postliminary" activity of the kind described in section 4(a) of the Portal Act and this activity is "compensable * * * by an express provision of a written or nonwritten contract" applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,⁶⁸ and does not relieve the employer of any obligation he would otherwise have under that Act to include time spent in such activity in computing hours worked.⁶⁹

(b) The word "compensable," is used in subsections (b), (c), and (d) of section 4 without qualification.⁷⁰ It is apparent from these provisions that "compensable" as used in the statute, means compensable in any amount.⁷¹

(c) The phrase "compensable by an express provision of a written or non-

written contract" in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.⁷² 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,⁷² his agent, or collective-bargaining representative and his employer."⁷³ 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

⁶⁶ See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

⁶⁷ See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

⁶⁸ See § 790.4.

⁶⁹ See §§ 790.5 and 790.7.

⁷⁰ The word is also so used throughout section 2 of the Act which relates to past claims. See §§ 790.28-790.25.

⁷¹ Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

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

⁷³ 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).

by section 4 is not available to the employer with respect to such activity,⁷⁴ and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair Labor Standards Act.⁷⁵ Accordingly, in the event that no “express provision of a written or nonwritten contract” makes compensable 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.⁷⁶

(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.⁷⁷

(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.⁷⁸ Accordingly, “custom” and “practice,” as used in section 4(b) of the Portal Act, may be said to be de-

scriptive 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 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.”⁷⁹

(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.⁸⁰

(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.”⁸¹

(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

⁷⁴ See § 790.4.

⁷⁵ See §§ 790.5 and 790.7.

⁷⁶ 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.

⁷⁷ See § 790.9(b).

⁷⁸ 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.

⁷⁹ Statements of Representative Gwynne, 93 Cong. Rec. 1566.

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

⁸¹ See § 790.9(d).

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of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.⁸² 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.⁸³

§ 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."⁸⁴ 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;⁸⁵ 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

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

⁸³ Senate Report, pp. 45, 49.

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

⁸⁵ See §§ 790.4-790.6.

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Act,⁸⁶ 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.⁸⁷

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

§ 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that "the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation" or "any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged." In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the "Administrator of the Wage and Hour Division of the Department of Labor," and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.⁸⁸ But where the acts or omissions complained of occurred before May 14, 1947, the employer may show

⁸⁶ Conference Report, pp. 12, 13.

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

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

⁸⁸ Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17 and 790.19.