

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.

§ 790.6 Periods within the “workday” unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the “workday” proper, roughly described as the period “from whistle to whistle,” and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.³⁴ Under the provisions of section 4, one of the conditions that must be present before “preliminary” or “postliminary” activities are excluded from hours worked is that they ‘occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases’ the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee’s first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.³⁵ The

³⁴The report of the Senate Judiciary Committee states (p. 47), “Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section.”

³⁵See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388;

principles for determining hours worked within the “workday” proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,³⁶ which is concerned with this question only as it relates to time spent outside the “workday” in activities of the kind described in section 4.³⁷

(b) “Workday” as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the “workday”, and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.³⁸ If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his “workday” commences at the time he reports there for work in accordance with the employer’s requirement, even though through a cause beyond the employee’s control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,³⁹ and section 4 of the Portal Act would not affect its inclusion in hours worked for

statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

³⁶The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

³⁷See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

³⁸Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

³⁹Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

§ 790.7

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purposes of the Fair Labor Standards Act.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.7 “Preliminary” and “postliminary” activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in “preliminary” or “postliminary” activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.⁴⁰ On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not “preliminary” or “postliminary” activities outside the workday.⁴¹ And even where there is a contract, custom, or practice to pay for time spent in such a “preliminary” or “postliminary” activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be

⁴⁰See Conference Report, pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

⁴¹See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

so counted under the latter Act alone.⁴²

(b) The words “preliminary activity” mean an activity engaged in by an employee before the commencement of his “principal” activity or activities, and the words “postliminary activity” means an activity engaged in by an employee after the completion of his “principal” activity or activities. No categorical list of “preliminary” and “postliminary” activities except those named in the Act can be made, since activities which under one set of circumstances may be “preliminary” or “postliminary” activities, may under other conditions be “principal” activities. The following “preliminary” or “postliminary” activities are expressly mentioned in the Act: “Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.”⁴³

(c) The statutory language and the legislative history indicate that the “walking, riding or traveling” to which section 4(a) refers is that which occurs, whether on or off the employer’s premises, in the course of an employee’s ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee’s regular working hours.⁴⁴ For example, travel by a repairman from one place where he performs repair work to another such

⁴²See § 790.5(a).

⁴³Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

⁴⁴These conclusions are supported by the limitation, “to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform,” which follows the term “walking, riding or traveling” in section 4(a), and by the additional limitation applicable to all “preliminary” and “postliminary” activities to the effect that the Act may affect them only if they occur “prior to” or “subsequent to” the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.