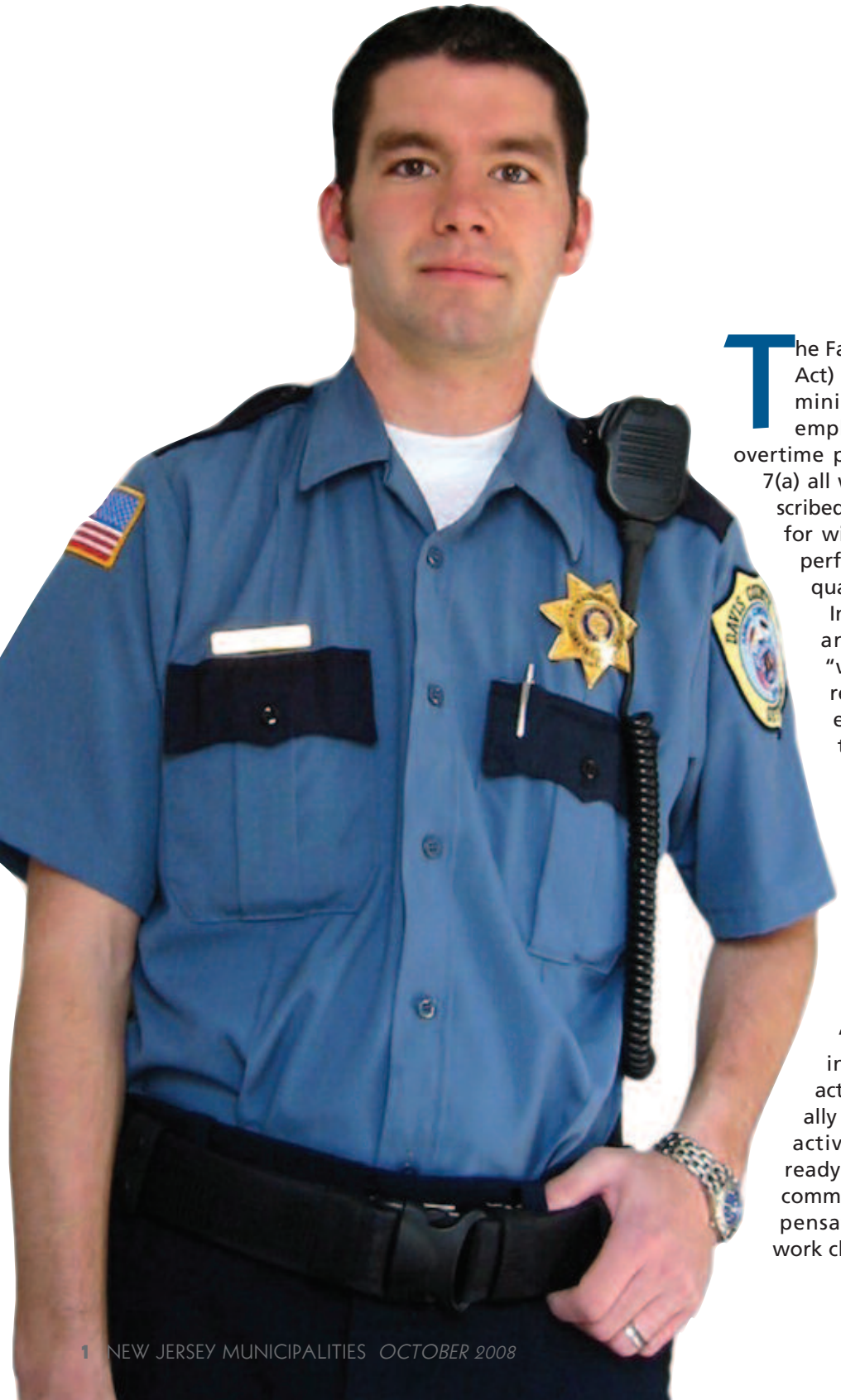
Overtime Pay and the Fair Labor Standards Act

By Brian W. Kronick
Genova, Burns & Vernoia



The Fair Labor Standards Act of 1938 (FLSA or the Act) establishes standards for overtime pay and minimum wage for public and private sector employers. Section 7(a) of the Act deals with overtime pay requirements. To comply with section 7(a) all work weeks that exceed the maximum prescribed amount of 40 hours must be compensated for with overtime pay. However, not all "work" performed in excess of the 40-hour maximum qualifies an employee for overtime pay.

In order to determine when the law requires an employer to pay overtime the term "work" must be defined. The type of "work" referred to by the FLSA is physical or mental exertion that is controlled or required by the employer, and undertaken for the main benefit of the employer.[1] The Portal-to-Portal Act of 1947 is an amendment to the Act that was passed in response to a Supreme Court case where the court ruled that the workweek included "the time employees spent walking from time clocks near a factory entrance to their workstations."[2] The Portal-to Portal Act removes from the category of work that is compensable, work that was done "preliminarily" and "postliminarily," meaning before or after the main employment activity.[3] In other words, employers are generally not required to compensate employees for activities done before work such as getting ready for work, showering, getting dressed, or commuting. They are also not required to compensate employees for changing out of their work clothes or commuting home.

Recent court decisions have further examined the type of "work" that qualifies as triggering compensation under FLSA:

Circuits Split on Whether Suiting Up Constitutes Work A police officer in San Leandro brought a suit seeking a declaration that the 25 to 35 minutes he spent putting on and taking off his uniform and equipment was "work" and compensable under FLSA. The United States District Court in California agreed. The District Court ruled that putting on and taking off a police uniform could be compensable under FLSA. Even though changing ones clothes and showering are not ordinarily compensable under the Portal-to-Portal Act, the United States Supreme Court had carved out an exception in Steiner v. Mitchell.

In Steiner, the Supreme Court held that showering and changing were compensable activities for battery plant employees that worked in a highly toxic environment.[4] The Supreme Court reasoned that an activity that takes place before or after an employee performs the activity that is the main purpose of their employment is compensable if it is "integral and indispensable" to that activity which is the main purpose of their employment. The District Court in California ruled that just as showering and changing were compensable in Steiner because they were "integral and indispensable" activities, so to putting on and taking off a police uniform are compensable activities because they are "integral and indispensable" to being a San Leandro police officer. The District Court further explained that it looked to the Ninth Circuit for precedent in determining which activities qualify as "integral and indispensable."

The District Court employed the two-pronged standard set by the Ninth Circuit in Alvarez v. IBP, Inc for determining whether a "preliminary" or "postliminary" activity is "integral and indispensable". The two prongs are whether the activity was necessary to the work performed and of benefit to the employer.[5] The District Court determined that uniforms were necessary because an officer cannot perform all of his or her duties without the uniform and because the uniform and equipment kept the officers safer. The District Court went on to explain that the uniforms benefited the employer, the San Leandro Police Department (SLPD), because they made the officer's job safer and more efficient.

In Gorman v. Consol. Edison Corp.,[6] the Second Circuit was presented with a case similar to that of the San Leandro police officer, relating to the donning and doffing of protective gear by nuclear power station employees. Unlike the California District Court's decision regarding police uniforms, the Second Circuit ruled that the acts of putting on and removing protective gear were not integral to the main employment activity and consequently not compensable. The Second Circuit did not use the two-pronged standard of necessary and for the benefit of the employer that the Ninth Circuit used to interpret the "integral and indispensable" exception to the Portal-to-Portal Act. Instead, the Second Circuit explicated "integral and indispensable" as necessary and "intrinsically connected with" or "essential to completeness."

The Second Circuit interpreted indispensable as necessary and listed the following examples as demonstrative of the meaning of integral or "intrinsically connected with": the sharpening of a knife to the act of carving a carcass; turning on the power and testing an x-ray machine to the act of taking x-rays; feeding, training and walking the dog to the work of a k-9 officer. In footnote four of their decision, the Second Circuit differentiated between the employees in the nuclear containment area who were compensated for putting on and taking off their specialized gear and the other employees that were not compensated for putting on and taking off their ordinary protective gear. The Second Circuit viewed the former as paralleling the battery plant employees in Steiner, where changing was necessary for the health and hygiene of the employees due to the extremely toxic environment, and the latter as more akin to the regular act of changing ones clothing, which is not compensable under the Portal-to-Portal Act.

The Third Circuit joined into the fray with the case of De Ascencio v. Tyson Foods, Inc.[7] In De Ascencio former employees at a chicken processing plant brought an FLSA action to recover wages for time spent donning and doffing work gear. Most employees wore: "a smock, hairnet, beard net, ear plugs, and safety glasses. Additional sanitary and protective items that certain employees [wore] include[d] a dust mask, plastic apron, soft plastic sleeves, cotton glove liners, rubber gloves, a metal mesh glove and rubber boots." Tyson's witness claimed it took employees six to ten minutes per employee per shift to don and doff their equipment. The employee's expert estimated that it took a little over 13 minutes. The donning and doffing took place six times a day, before and after the employees' paid shifts and before and after their two daily meal breaks. First a jury trial found in favor of the employer. The employees appealed and the appellate court reversed and remanded. The Third Circuit Appellate Court held that the jury instruction given at the trial was impermissible and that "the donning and doffing activity in this case constitutes 'work' as a matter of law." The Third Circuit Appellate Court asserted a preference for an Alvarez like definition of "integral and indispensable," as did the District Court in the San Leandro case.

Both the District Court in the San Leandro police officer case and the Third Circuit Court of Appeals in De Ascencio declined to adopt the standard of "integral and indispensable" articulated by the Second Circuit in Gorman. The Second Circuit's approach is more stringent with regard to which activities qualify as work that is compensable and consequently more employer friendly. An activity could be

"integral and indispensible" by the Ninth and Third Circuits' standard of necessary to the work performed and beneficial to the employer, but not "integral and indispensable" by the Second's Circuit's standard of necessary and "essential to the completeness" of the main employment activity; thereby making that same activity compensable in the Ninth and Third Circuits and not in the Second. Consequently, the definition of a "preliminary" or "postliminary" activity that is so "integral and indispensable" that it is compensable depends on the circuit.

On November 8, 2005, the United States Supreme Court affirmed the Ninth Circuit's ruling in Alvarez v. IBP. However, the United States Supreme Court, on June 9, 2008 declined review in both De Ascencio and Gorman. In doing so the Supreme Court affirmed the use of "integral and indispensible" as the standard of "preliminary" and "postliminary" activities which are compensable under FLSA but also allowed the contradictory standards for defining "integral and indispensable" to stand.

New York City Fire Alarm Inspectors Excess Baggage New York City fire alarm inspectors, who carried around 15 to 20 pounds of files, claimed that the burden of carrying around the files while commuting before and after work and while on the job, qualified as "work" for the purposes of overtime pay. They argued that their commutes took longer because of the encumbrance of the files. The Second Circuit ruled that carrying files while commuting was not compensable because the burden on the fire alarm inspectors was minimal and carrying the files did not transform their commute into actual work.[8] Though the fire alarm inspectors are carrying the files for the benefit of their employers, the mere fact of their doing so, does not alter the reality that their commutes are their own to read, listen to music, or do errands as they would if they were not carrying the files. Therefore, the carrying of files falls outside the scope of "work" covered by FLSA.

No Overtime Pay Necessary for Shift Substitutions The U.S. Department of Labor (the DOL) issued an opinion, FLSA 2008-2, in response to a query regarding public agency employees of the same classification substituting shifts for one another. Specifically, the public agency wanted to know whether it needed to directly compensate the employee that accrued extra hours of labor by means of the shift substitution. Interpreting 29 U.S. C. § 207 (p)(3), the DOL responded that employers would not be responsible for directly compensating public agency employees that voluntarily covered another employee's shift. However, employers could be liable to compensate an employee that covers so many shifts that their normal hourly wage would fall below minimum wage. In that sense the employer would not be paying the employee overtime for shift substitutions but rather the employer would be paying the employee in order to be in compliance with FLSA's minimum wage standard.

The scenario in which the public agency employer would be required to directly compensate the employee that covers so many shifts that their standard pay falls below minimum wage is unlikely to ever occur since shift substitutions need to be done both voluntarily and with the approval of the employer. Thus, ordinarily the matter of compensation for time worked during a shift substitution is "a matter of agreement between the two employees involved in the substitution."

Who considers what "work" is compensable under FLSA? Whether or not work related activities ought to be considered "work" and compensable under the Act varies by jurisdiction. The matter of whether donning and doffing ought to be compensable highlighted the differences of opinion between the circuits. Consistent with their more stringent standard for determining what activities ought to be compensated the Second Circuit ruled against the fire alarm inspectors. Though they had no gear to put on and take off, they did have files to pick up, carry around, and drop off. Just as the donning and doffing of nuclear power station employees was found by the Second Circuit as non compensable, so was the carrying of files by the fire alarm inspectors. The Third and Ninth Circuits on the other hand share a preference for a more lenient standard that finds ancillary work activities compensable as long as they are necessary and for the benefit of the employer.

Finally, where public agency employees of the same classification, are allowed to substitute shifts for one another, the work done by the employee during the substituted shift is not considered compensable work. The wages of both the employee who covered the shift and the employees whose shift was covered remain unaffected. ▲

Brian W. Kronick is a partner with Genova, Burns & Vernoia in Livingston, New Jersey, and practices in the area of labor and employment law on behalf of employers. Summer Associate, Bonnie Fire, assisted in preparing this article.

1 Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, 152 A.L.R. 1014 (U.S. Ala. Mar 27, 1944) (No.409).

2 Anderson, 328 U.S. at 691-92.

3 29 U.S.C. § 254(a).

4 v. Mitchell, 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267 (U.S.Tenn. Jan 30, 1956) (NO. 22).

5 Alvarez v. IBP, Inc., 339 F.3d 894, 148 Lab.Cas. P 34,731, 8 Wage & Hour Cas.2d (BNA) 1601, 03 Cal. Daily Op. Serv. 6961, 2003 Daily Journal D.A.R. 8739 (9th Cir.(Wash.) Aug 05, 2003) (NO. 02-35042, 02-35110).

6 Gorman v. Consolidated Edison Corp., 488 F.3d 586, 154 Lab.Cas. P 35,296, 12 Wage & Hour Cas.2d (BNA) 1104 (2nd Cir.(N.Y.) May 30, 2007) (NO. 05 6546 CV, 06 2241 CV).

7 De Asencio v. Tyson Foods, Inc., 500 F.3d 361 (3rd Cir. 2007).

8 Sing v. City of New York, _____ F.3d_____, 2008 WL 1885327, 13 Wage & Hour Cas.2d (BNA) 865 (2nd Cir.(N.Y.) Apr 29, 2008) (NO. 06-2969-CV).