

Third Circuit Upholds \$22M Jury Verdict: Requiring Payment for "Actual" Working Time

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A Federal Court of Appeals upheld a \$22 million jury verdict against a Pennsylvania employer, holding that employers must pay hourly employees for the *actual* time they spend completing activities – not just the “reasonable time” it should take to finish the assigned tasks. In doing so, the Third Circuit Court of Appeals placed the burden on the employer to prove that any unpaid working time falls within the trivial “*de minimus*” exception.

A Pennsylvania employer, East Penn Manufacturing Co., Inc., now owes 11,780 hourly workers \$22 million in back pay for time spent dressing and showering after the Third Circuit found that the workers were entitled to compensation for the time they spent putting on and taking off their protective gear (also known as 'donning and doffing').

The Department of Labor sued the Pennsylvania employer under the Fair Labor Standards Act (FLSA) for allegedly failing to pay employees for all the time spent changing and showering before and after their shifts. Because the workers' employment involved hazardous materials, the workers were required to change into protective uniforms and put on special gear prior to their shift. They also needed to shower after their shifts ended. East Penn did not record the actual time workers spent changing and showering before and after their shifts; it simply granted the workers a five minute paid grace period before the start of their shift and a 10 minute paid grace period at the end of their shift. However, the court found that employees spent more than 15 minutes at the beginning of their shift and 11 minutes after their shift to complete the necessary tasks. This amounted to more time than that which East Penn had paid them.

Despite arguing that being forced to pay workers for the actual time they spent completing the necessary tasks only incentivizes employees to drag their feet or tend to personal matters during the workday, the Third Circuit Court of Appeals held that the company was required to pay employees for the *actual time* they spent on these required tasks. In upholding the jury verdict, the Third Circuit distinguished a Supreme Court decision from the 1940s that allowed employers to pay for only a *reasonable* amount of time, stating that the case addressed employees who were dilly-dallying and “loafing” in between job activities instead of working. In contrast, it was undisputed that the changing and showering activities indeed constituted work, as they were required due to employees' hazardous contact with lead and other substances. The Third Circuit stated that East Penn could discipline or terminate employees who attempted to capitalize on the requirements of changing and showering in a disingenuous manner, but could not withhold their compensation.

Notably, in a 2014 U.S. Supreme Court case, the Court held that compensation for these additional duties, such as applying protective equipment and changing, is negotiable for employees whose terms and conditions of employment are outlined in and subject to the terms of a Collective Bargaining Agreement. Therefore, in instances where the parties to the Agreement negotiate and agree that compensation for such activities will be limited to a set period of time, such provision of an Agreement does not violate the FLSA. Importantly, the Supreme Court's holding was specific to those employers whose employees are unionized and have participated in the negotiation process.

Impacts for Employers

Unfortunately, the Third Circuit did not enumerate a bright-line rule for determining whether a work activity constitutes work and, therefore, did *not* prohibit the use of payment for a *reasonable time* when the activity may not constitute “work.” Employers should carefully review their policies, procedures, and payroll practices to determine whether they currently pay hourly employees for *reasonable* or *actual* time to ensure that the amount of paid time is equivalent to or exceeds the actual time being spent by employees. Employers also should track and record all hours worked by employees, including any required pre- and post-shift duties, to avoid potential violations under the FLSA. Finally, if there is a concern that employees are “dilly-dallying” certain activities, the proper response is discipline or termination. Employers are not prohibited from disciplining employees who take longer than what, in the employer's estimation, is a *reasonable* amount of time to accomplish a particular task.

The Porzio Employment Team is available to help employers review their policies and procedures and determine the appropriate payment method for their unique situation to stay compliant with the ever-evolving legal landscape and ensure employers understand their obligations.