

# Continuous Confusion: Defining the Workday in the Modern Economy

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## I. Introduction

Employers have long endured a lack of cohesive guidance as to what constitutes “work” under the Fair Labor Standards Act (FLSA or Act).<sup>1</sup> The FLSA itself does not define the term, and the Supreme Court has remained mostly silent on the topic since the 1940s. A patchwork of court cases and regulatory guidance has attempted to fill this void, resulting in a variety of standards and conflicting outcomes. Particularly intense litigation has arisen over the donning and doffing of protective gear in industrial plants. Much ink has been spilled addressing the divergent case law that has developed concerning whether time spent by employees on these activities must be included in hours worked and whether such activities are “principal activities” that mark the beginning of the “continuous workday” and render subsequent activities compensable.<sup>2</sup> In June 2010, the U.S. Department of Labor (DOL) entered (or, rather, reentered) the fray with an Administrator’s Interpretation that narrowly defines “clothes” for the purposes of a statutory provision that allows employers to exclude time spent “changing clothes or washing at the beginning or end of each workday” from compensable time pursuant to a collective bargaining agreement (CBA).<sup>3</sup> The interpretation, which withdrew a series of opinion letters issued by prior administrations that espoused less restrictive definitions, also adds an

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1. 29 U.S.C. §§ 201–19 (2006).

2. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005) (holding that time between the first and last principal activities of the day are compensable as part of the “continuous workday”).

3. Wage & Hour Div., U.S. Dep’t of Labor, Administrator’s Interpretation No. 2010-2, Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), and the Definition of “Clothes” (June 16, 2010), available at [http://www.dol.gov/WHD/opinion/adminInterprtn/FLSA/2010/FLSAAI2010\\_2.pdf](http://www.dol.gov/WHD/opinion/adminInterprtn/FLSA/2010/FLSAAI2010_2.pdf) [hereinafter Interpretation No. 2010-2].

additional wrinkle to the compensable time conundrum; specifically, it insists that activities excludable from compensable time under section 203(o) may nonetheless start the continuous workday.<sup>4</sup> While the interpretation purports to provide “needed guidance,”<sup>5</sup> it falls far short of providing employers a clear or sensible path toward FLSA compliance within the relatively narrow field where it directly applies, much less the broader context of the legal definition of “work.”

This article begins by briefly examining the Supreme Court’s various attempts to define “work” for purposes of the FLSA. It then turns to the administrator’s interpretation and argues that while the DOL’s new definition of “clothes” is not likely to be persuasive to courts, the second half of that document—which takes the position that activities that are noncompensable pursuant to section 203(o) and a CBA may nonetheless be principal activities that begin the continuous workday—may gain more traction. Finally, the article examines the effect the interpretation might have on another well-established carve-outs from working time, the *de minimis* exception, which applies to activities that take minimal time to perform and would be administratively difficult to record. The article concludes that the varying case law and rapidly shifting DOL policy in this area demonstrate the need for the Supreme Court to reexamine the meaning of “work” in today’s technological business environment.

## II. A Brief History of “Work”: The Supreme Court’s Early Cases and the Portal-to-Portal Act

The FLSA dictates that “no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”<sup>6</sup> The statute defines the term “employ” to “include[] to suffer or permit to work,” but it does not define the terms “work” or “workweek.”<sup>7</sup>

The Supreme Court first attempted to define “work” for purposes of the FLSA in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*.<sup>8</sup> In that case, a group of iron ore mining companies sought a declaratory judgment that the time spent by miners traveling in underground tunnels to reach the mine’s active faces was not working time for which the miners must be compensated. The Court determined

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4. *Id.* at 4–5.

5. *Id.* at 1.

6. 29 U.S.C. § 207(a)(1) (2006).

7. *Id.* § 203(g). The DOL has issued regulations that also bear on the meaning of “work.” These regulations are discussed below in Part III.

8. 321 U.S. 590 (1944).

that Congress intended for the words “work” and “employment” to be interpreted “as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”<sup>9</sup> Applying this definition, the Court held that, under the Act, time spent traversing the underground tunnels must be included in the miners’ hours worked despite the long-standing industry custom of paying only for time spent at the faces of the mines.<sup>10</sup> The Court stressed the extraordinarily difficult conditions mine workers faced in the tunnels and found that “[t]he exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb.”<sup>11</sup>

In a pair of cases later that year, the Supreme Court revisited its definition of “work” in a very different context. *Armour Co. v. Wantock*<sup>12</sup> and *Skidmore v. Swift & Co.*<sup>13</sup> addressed whether time firefighters spent on-call at their place of employment must be considered compensable working time. In both cases, the firefighters were employed by private companies. The *Skidmore* plaintiffs were employed in a packing plant and had regular daytime job duties for which they were paid in compliance with the FLSA.<sup>14</sup> Several nights per week, they also remained on the premises to respond to fire alarms.<sup>15</sup> The employer provided

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9. *Id.* at 598.

10. The Court wrote:

[I]t is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek. . . . The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee’s time while compensating him for only a part of it.

*Id.* at 602.

11. *Id.* at 598. The Court described the conditions in the mines in excruciating detail:

These subterranean walks are filled with discomforts and hidden perils. The surroundings are dark and dank. The air is increasingly warm and humid, the ventilation poor. Odors of human sewage, resulting from a complete absence of sanitary facilities, permeate the atmosphere. Rotting mine timbers add to the befouling of the air. Many of the passages are level, but others take the form of tunnels and steep grades. Water, muck and stray pieces of ore often make the footing uncertain. Low ceilings must be ducked and moving ore skips must be avoided. Overhead, a maze of water and air pipe lines, telephone wires, and exposed high voltage electric cables and wires present ever-dangerous obstacles, especially to those transporting tools. At all times the miners are subject to the hazards of falling rocks.

*Id.* at 596.

12. 323 U.S. 126 (1944).

13. 323 U.S. 134 (1944).

14. *Id.* at 135.

15. *Id.*

facilities for recreation and sleep but paid the firefighters only for time actually spent responding to alarms.<sup>16</sup> In  *Armour*, the plaintiffs were employed in a soap factory. Along with their daytime duties, they were also required to stay on the employer's premises to respond to fire alarms.<sup>17</sup> As in  *Skidmore*, the employer provided facilities for recreation and sleeping, but the employees were paid a fixed weekly wage, regardless of the wide variations in hours they spent on their different duties.<sup>18</sup> When they were not responding to alarms, the employees in each case were permitted to use their time in any matter they wished, so long as they stayed on the premises or "within hailing distance."<sup>19</sup> Here, the Court held that whether the firefighters' on-call time constituted compensable work depended on whether the employees were "engaged to wait, or . . . waited to be engaged," which was a "question of fact to be resolved by appropriate findings of the trial court."<sup>20</sup>

In  *Anderson v. Mt. Clemens Pottery Co.*,<sup>21</sup> the Supreme Court once again expanded the definition of work, by holding that time spent by employees of a pottery factory traveling from the entrance of the facility to their work stations was compensable time.<sup>22</sup> This holding resulted in a torrent of lawsuits, prompting Congress to respond with the Portal-to-Portal Act.<sup>23</sup> In addition to limiting the retroactive effect of the statute and redefining its statute of limitations,<sup>24</sup> the Portal-to-

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16.  *Id.* at 135–36.

17.  *Armour*, 323 U.S. at 127–28.

18.  *Id.* at 128.

19.  *Skidmore*, 323 U.S. at 136; see  *Armour*, 323 U.S. at 128.

20.  *Skidmore*, 323 U.S. at 136–37. The Court noted in  *Armour* that the definition of work it had expounded in  *Tennessee Coal* was "not intended as a limitation on the Act" and had "no necessary application to other states of facts."  *Armour*, 323 U.S. at 133. In addition, the  *Skidmore* and  *Armour* decisions, which explicitly relied on the customs of the parties to determine whether time was to be considered "work," create an apparent conflict with the  *Tennessee Coal* holding that such customs and contracts are "immaterial" to the question. Compare  *Skidmore*, 323 U.S. at 137, with  *Tenn. Coal, Iron, & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 600–02 (1943). The Court attempted to harmonize these decisions to some degree in  *Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of America*, in which the Court distinguished  *Armour* as dealing with a "difficult and doubtful question[]" as to whether certain activity or nonactivity constitutes work" and stated that where the facts leave "no reasonable doubt" that a particular activity is work,  *Tennessee Coal* and its holding that courts should not be "concerned . . . with the use of bona fide contracts or customs" should govern. 325 U.S. 161, 169–70 (1945). As described below, more than half a century after these cases were decided, courts still struggle to determine how they interact and whether  *Armour* intended to overrule  *Tennessee Coal*.

21. 328 U.S. 680 (1946).

22.  *Id.* at 693.

23. See Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251–62 (2006)). In its findings, Congress stated: "[T]he Fair Labor Standards Act . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation. . . ." 29 U.S.C. § 251(a).

24. See 29 U.S.C. § 252 (limiting retroactive effect);  *id.* § 254 (defining "activities not compensable");  *id.* § 255 (defining the statute of limitations).

Portal Act provided that employers would not be liable for failure to pay minimum wages or overtime for time spent “(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities.”<sup>25</sup> Two years later, Congress added section 203(o) to the FLSA to preserve the ability of employers and unions to bargain with respect to the compensability of time spent “changing clothes or washing at the beginning or end of each workday.”<sup>26</sup>

The Court addressed the Portal-to-Portal Act for the first time in *Steiner v. Mitchell*,<sup>27</sup> in which employees of a battery factory claimed to be entitled to pay for time spent changing into and out of work clothes and showering at the end of each day in order to limit their exposure to lead and other toxic chemicals.<sup>28</sup> Although the employer admitted that these activities were integral and indispensable to the task of producing batteries, it claimed that because those activities occurred off of the production line, they were preliminary and postliminary activities excluded from coverage.<sup>29</sup> The Court held that activities “integral and indispensable” to a principal activity are themselves principal activities and are not excludable from work time under the Portal-to-Portal Act.<sup>30</sup>

*IBP, Inc. v. Alvarez*<sup>31</sup> followed the *Steiner* decision approximately fifty years later and held that performance of integral and indispensable activities render subsequent activities, even those that are not themselves integral and indispensable, a compensable part of the continuous

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25. *Id.* § 254(a).

26. *Id.* § 203(o).

In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

*Id.* In some circumstances, courts have interpreted the phrase “custom or practice under a bona fide collective bargaining agreement” to encompass policies concerning compensability of clothes changing in effect at the time that a CBA is executed, even if the CBA itself does not address compensation for such activities. *See, e.g., Allen v. McWane, Inc.*, 593 F.3d 449, 454–58 (5th Cir. 2010); *Anderson v. Cagle’s, Inc.*, 488 F.3d 945, 958–59 (11th Cir. 2007). These courts reason that failure to address such policies in the CBA may constitute acquiescence so long as union representatives were aware of the policy. *See Allen*, 593 F.3d at 457 (“[R]egardless of whether the parties negotiated regarding compensation for changing time, acquiescence of the employees may be inferred.”). For simplicity and conciseness, when discussing section 203(o), this paper uses the phrases “under a CBA” or “pursuant to a CBA” even though the provision has been construed more broadly.

27. 350 U.S. 247 (1956).

28. *Id.* at 248.

29. *Id.* at 251–52.

30. *Id.* at 256.

31. 546 U.S. 21 (2005).

workday.<sup>32</sup> In *Alvarez*, the Court addressed two parallel cases in which the lower courts had held that time spent by employees of a meat processing plant donning and doffing protective gear was integral and indispensable to their principal activities.<sup>33</sup> Neither employer challenged that finding; rather, the case addressed whether time spent waiting to don the protective gear, walking to a work station after donning protective gear, and waiting to doff the protective gear at the end of the day was compensable.<sup>34</sup> Reasoning that walking and waiting “before starting work is excluded” by the Portal-to-Portal Act but activities that “occur[] after the workday begins and before it ends” are not excluded by the statutory text, the Court held that waiting to don required protective gear was not compensable, but walking to work stations after donning the gear and waiting to doff the gear at the end of the workday were compensable activities.<sup>35</sup>

### III. The DOL’s View of “Work”

Like the FLSA itself, the DOL’s regulations interpreting the FLSA do not define work. The DOL has, however, defined the term “workday” in regulations promulgated shortly after the passage of the Portal-to-Portal Act. These regulations describe the workday as “roughly . . . the period ‘from whistle to whistle.’”<sup>36</sup> They further state that “[p]eriods 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. . . .”<sup>37</sup> These provisions have not changed since they were first drafted in 1947. Although the Supreme Court approved the application of the continuous workday concept described in these regulations in the *Alvarez* case,<sup>38</sup> translating them to the modern economy is not simple. For example, the “whistle to whistle” language used in the regulation has little relevance outside of the context of the production line: few, if any, employees in modern workplaces have this type of definitive beginning and end to their working hours.<sup>39</sup> The DOL has also periodically issued

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32. *Id.* at 34.

33. *Id.* at 31–32.

34. *Id.* at 32, 39.

35. *Id.* at 30, 34–35.

36. 29 C.F.R. § 790.6(a) (2010).

37. *Id.*

38. *See Alvarez*, 546 U.S. at 35–37 (reviewing regulations and noting that they support the Court’s continuous workday analysis).

39. The examples used in the regulations as guidance for determining an employee’s “principal activities” are also arcane and unhelpful:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

other kinds of guidance documents, primarily in the form of opinion letters that bear on the issue of what constitutes “work.”<sup>40</sup> While these documents help interpret the FLSA in a modern context, the positions taken by the DOL in such documents have tended to shift with relative frequency.<sup>41</sup> The DOL’s most recent guidance, Interpretation No. 2010-2, provides an example of this interpretive fluctuation and demonstrates the challenges faced by employers in navigating this area of law.

#### A. *Overview of Interpretation No. 2010-2*

Interpretation No. 2010-2 represents a departure not only from the substantive guidance of prior administrations, but also from the procedure used by the DOL in previous administrations for issuing guidance documents. Unlike the opinion letters commonly issued by the DOL in the past, the interpretation does not respond to a particular inquiry by an employer or employee. Rather, it responds to a perceived general need, as identified by the Administrator of the Wage and Hour Division, for “further clarity regarding the proper interpretation of a statutory or regulatory issue.”<sup>42</sup> Interpretation 2010-2 is only the second document of its kind.<sup>43</sup> The DOL intends for interpretations like

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(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

29 C.F.R. § 790.8(b) (2010).

40. In addition to Interpretation No. 2010-2 and the opinion letters discussed in that interpretation, other recent examples of opinion letters touching on the definition of “work” include Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter FLSA2009-15 (Jan. 15, 2009), available at [http://www.dol.gov/whd/opinion/FLSA/2009/2009\\_01\\_15\\_15\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_15_15_FLSA.pdf) (addressing whether certain training time required of city employees is compensable); Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter FLSA2004-7 (July 27, 2004), available at [http://www.dol.gov/whd/opinion/FLSA/2004/2004\\_07\\_27\\_7\\_FLSA\\_SleepingTime.pdf](http://www.dol.gov/whd/opinion/FLSA/2004/2004_07_27_7_FLSA_SleepingTime.pdf) (addressing conditions under which sleeping time is compensable); and Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter (Aug. 11, 1993), available at 1993 WL 901171 (addressing whether time spent by police officers caring for police dogs is compensable time).

41. For example, in January 2009, just prior to the time that President Barack Obama took office, the DOL issued thirty-six opinion letters on various topics, many of which were withdrawn after the change of administration. See *Wage and Hour Division Opinion Letters—Fair Labor Standards Act*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/opinion/flsa.htm> (last visited Apr. 15, 2011) (linking to opinion letters and noting with an asterisk the opinion letters that have been withdrawn).

42. *Rulings and Interpretations*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Apr. 15, 2011).

43. The DOL’s first interpretation—Administrator’s Interpretation No. 2010-1, Application of the Administrative Exemption Under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), to Employees Who Perform the Typical Job Duties

No. 2010-2 to “appl[y] across-the-board to all those affected by the provision in issue.”<sup>44</sup> The DOL purports to have based the interpretation on a “careful analysis of the statutory provision and a thorough review of the legislative history and case law. . . .”<sup>45</sup>

The interpretation rejects the use of dictionary definitions in determining the meaning of “clothes” for purposes of section 203(o), stating that “[s]uch definitions are, by design, a collection of a word’s various meanings depending on the context in which it is used.”<sup>46</sup> Instead, the interpretation relies on a review of the legislative history of the provision and references two pieces of historical information in particular. The first of these is a statement by Representative Christian A. Herter during a debate of section 203(o) on the House floor in 1949:

In the bakery industry, for instance, . . . there are [CBAs]. . . . In some of those [CBAs], the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other [CBAs] it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.<sup>47</sup>

The administrator stresses that the original version of section 203(o) considered by Congress permitted employers to “bargain away any activity performed by an employee,” but the provision was later limited to “clothes changing” and “washing” in order to narrow its scope. From these items, the interpretation concludes that “clothes” must exclude protective gear of any sort because:

The “clothes” that Congress had in mind in 1949 when it narrowed the scope of § 203(o)—those “clothes” that workers in the bakery industry changed into and “took off” in the 1940s—hardly resemble the modern-day protective equipment commonly donned and doffed by workers in today’s meat packing industry, and other industries where protective equipment is required by law, the employer, or the nature of the job.<sup>48</sup>

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of a Mortgage Loan Officer (Mar. 24, 2010)—similarly represented a departure from the DOL’s prior guidance with respect to the topic at issue, withdrawing a 2006 opinion letter that it deemed not to “comport with this interpretive guidance.” At least in these first two documents, the DOL thus appears to use the Administrator’s Interpretation procedure as a means to reverse positions taken in prior opinion letters without waiting for the issue to arise in the field.

44. *Rulings and Interpretations*, *supra* note 42.

45. Interpretation No. 2010-2, *supra* note 3, at 1.

46. *Id.* at 2.

47. *Id.* (quoting 95 CONG. REC. H1,1210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter)).

48. *Id.* at 2–3. The interpretation praises a handful of circuit and district court cases that it believes to have adopted a “plain meaning” of “clothes” that is “more faithful to the legislative intent.” See *id.* at 3 (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905–06 n.9 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21 (2005); *In re Cargill Meat Solutions*



The second half of the interpretation is devoted to a separate but related proposition. Drawing from what it claims to be the “weight of authority,” the interpretation states that even where “clothes changing” is excluded from compensable time by operation of section 203(o) and a CBA, it may be a “principal activity” that triggers the start of the workday.<sup>49</sup> If so, all “subsequent activities, including walking and waiting, are compensable.”<sup>50</sup> This portion of the interpretation withdraws a statement from a 2007 opinion letter that determined that activities that are excludable under section 203(o) cannot be principal activities.<sup>51</sup>

## B. Effect of the Interpretation

### 1. The Definition of “Clothes”

The effect of the interpretation and how it will be received by the courts is unclear.<sup>52</sup> The DOL’s opinion letters and other interpretations

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Wage & Hour Litig., 632 F. Supp. 2d 368, 398 (M.D. Pa. 2008); *Spoerle v. Kraft Foods Global, Inc. (Spoerle I)*, 527 F. Supp. 2d 860, 868 (W.D. Wis. 2007); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 930 (N.D. Ill. 2003)). The interpretation acknowledges that two appellate courts have interpreted the term “clothes” to include protective gear (and it actually cites three such cases) but states that they both involved the donning and doffing of “lighter gear” than was at issue in prior DOL opinion letters. *Id.* at 2 n.3 (citing *Allen v. McWane, Inc.*, 593 F.3d 449, 451 (5th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 211 (4th Cir. 2009); *Anderson v. Cagle’s, Inc.*, 488 F.3d 945, 956 (11th Cir. 2007)). The number of circuits that fall into the category of those that disagree with the DOL’s approach has increased since the interpretation was published. As discussed below, in addition to the Fourth, Fifth, and Eleventh Circuits, the Seventh and Sixth Circuits both recently followed the *Sepulveda* decision. *Spoerle v. Kraft Foods Global, Inc. (Spoerle II)*, 614 F.3d 427 (7th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010).

49. Interpretation No. 2010-2, *supra* note 3, at 5.

50. *Id.*

51. *Id.* at 4–5 (withdrawing Wage & Hour Div., Dep’t of Labor, Opinion Letter FLSA2007-10 (May 14, 2007), available at [http://www.dol.gov/whd/opinion/FLSA/2007/2007\\_05\\_14\\_10\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf)).

52. One effect is the elimination of any defense to liability based on earlier opinion letters rejected by the DOL in the interpretation. The FLSA provides a complete defense to liability where an employer relies in good faith on the written interpretations of the DOL:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [DOL].

See 29 U.S.C. § 259 (2006).

Thus, to the extent that an employer relied on the DOL’s 2002 or 2007 opinion letters in treating time spent donning and doffing protective gear as noncompensable pursuant to a CBA, it will still be able to argue that its interpretation of the law was correct; however, it may not be able to assert the section 259 absolute bar to liability for purported violations occurring after June 16, 2010.

of the federal wage laws are entitled to a certain amount of deference, but only to the extent that the courts find their reasoning to be persuasive.<sup>53</sup> With respect to the DOL's definition of "clothing," employers have a number of strong defenses to the application of the interpretation. First of all, the DOL's position on this topic has frequently fluctuated over the last several years.<sup>54</sup> Where an interpretation conflicts with a prior agency guidance on the same subject, it is subject to less deference by the courts.<sup>55</sup> Moreover, the interpretation's analysis of the legislative history surrounding section 203(o) is superficial and inaccurate.<sup>56</sup> The administrator essentially determines that where the congressional debate referred to CBAs governing clothes changing in the baking industry, it must have excluded all protective gear based on an unfounded assumption: the clothes worn by bakers in the 1940s "hardly resemble the modern-day protective equipment commonly donned and doffed by workers in . . . industries where protective equipment is required by law, the employer, or the nature of the job."<sup>57</sup> The interpretation provides no citation to or description of the types of clothes referred to in those congressional debates. In fact, workers in wholesale bread bakeries in the 1940s in a number of positions—such as panners (who loaded dough into pans), rackers (who moved loaded dough pans to racks to be taken to the oven), oven loaders (who placed the dough into the oven), and oven dumpers (who removed bread from the oven after baking)—wore protective gloves, hats, and aprons.<sup>58</sup>

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53. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (citations omitted) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant [controlling] deference" and "opinion letters are 'entitled to respect' . . . only to the extent that those interpretations have the 'power to persuade.'"); see also *Parker v. Nutrisystem, Inc.*, 620 F.3d 274, 282 (3d Cir. 2010) (declining to afford deference to opinion letter where its analysis of statutory provision was "insufficiently 'thorough' to persuade [the court]").

54. See Interpretation No. 2010-2, *supra* note 3, at 1 (describing previous DOL opinion letters).

55. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.").

56. Courts look to the quality of analysis in determining whether to rely on an agency's interpretive guidance. See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc) (quotations omitted) (in determining whether to rely on agency guidance, courts "look to the thoroughness, validity, and consistency of the agency's reasoning").

57. Interpretation No. 2010-2, *supra* note 3, at 2–3.

58. See *THE BAKING INDUSTRY* (Vocational Guidance Films, Inc. 1946), available at <http://www.open-video.org/details.php?videoid=3543>. This informative (and entertaining) film was part of a series prepared to introduce students of the day to industries in which they might find employment. The film was written by a vocational studies professor at Iowa State College and provides an overview of the industrial bread baking process as well as some types of baking performed in small retail shops.

Such items are hardly distinguishable from the rubber gloves, hairnets, and aprons apparently excluded from the definition of clothes by the interpretation and some case law.<sup>59</sup>

Finally, the interpretation runs contrary to the majority of circuit court decisions on the subject. The interpretation acknowledges that it conflicts with caselaw in the Fourth, Fifth, and Eleventh Circuits.<sup>60</sup> In addition, the Seventh Circuit recently summarily rejected the DOL's position in *Spoerle v. Kraft Foods Global, Inc.*, bluntly calling the argument that protective gear is not clothing under section 203(o) "a loser."<sup>61</sup> Other courts have rejected the argument with similar fervor. The Fifth Circuit, for example, called an attempt to draw a distinction between "clothes" and sanitary garments used in medical equipment manufacturing "nonsensical."<sup>62</sup> In fact, the only circuit court to have agreed with the DOL is the Ninth Circuit in *Alvarez v. IBP*,<sup>63</sup> and that case employed reasoning that has been repeatedly rejected elsewhere.<sup>64</sup> The *Alvarez* court based its decision on an assumption that section 203(o) is an exemption under the statute and thus must be narrowly construed.<sup>65</sup> Most courts to have considered the issue, however, have held that section 203 is a definitional section for which narrow construction is not required.<sup>66</sup> The interpretation cites only one other case, a district court decision from the Middle District of Pennsylvania, that has adopted its position.<sup>67</sup> There, the court relied on *Alvarez's* discredited logic but also expressed the view that items like hard hats, steel-toed boots, and cut-resistant gloves are "obviously different from typical work-related clothing" because they have "functional aspects such as safety" that distinguishes them from other apparel.<sup>68</sup>

One circuit court has already specifically rejected Interpretation No. 2010-2 to the extent that it purports to define "clothes." In *Franklin v.*

59. See, e.g., Interpretation No. 2010-2, *supra* note 3, at 3 (citing, *inter alia*, *Spoerle v. Kraft Foods Global, Inc. (Spoerle I)*, 527 F. Supp. 2d 860, 862 (W.D. Wis. 2007) (holding that hard hats, bump caps, hairnets, beard nets, plastic gloves, and plastic aprons, among other similar items, are not "clothes" for purposes of section 203(o))).

60. *Id.* at 3 n.3.

61. *Spoerle v. Kraft Foods Global, Inc. (Spoerle II)*, 614 F.3d 427, 428 (7th Cir. 2010).

62. *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001).

63. 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

64. *Id.* at 905. The *Alvarez* case was affirmed by the Supreme Court, but the parties did not appeal the Ninth Circuit's holding with respect to the application of section 203(o). See 546 U.S. at 32.

65. *Alvarez*, 339 F.3d at 905.

66. *E.g.*, *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) ("Had Congress sought to bestow upon § 203(o) the same status as the exemptions set forth in § 213, it easily could have amended § 213 instead of § 203, which is titled, not coincidentally, 'Definitions.'").

67. *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368, 398 (M.D. Pa. 2008).

68. *Id.* at 385.

*Kellogg Co.*,<sup>69</sup> a case argued two days after the interpretation issued, the Sixth Circuit held that the interpretation was not entitled to deference and that protective and sanitary gear worn by employees in a frozen breakfast food plant must be included in the definition of “clothes” under section 203(o).<sup>70</sup> The court noted that the “DOL’s position on this issue has changed repeatedly in the last twelve years, indicating that we should not defer to its interpretation.”<sup>71</sup> The Sixth Circuit also rejected the DOL’s assertion that it should not rely on dictionary definitions for “clothes,” stating, “that idea is simply inconceivable, given our extensive history of consulting dictionaries in defining undefined words in a statute.”<sup>72</sup> The court thus held that, because the protective gear at issue all fell within the common definition of clothes—“covering for the body”—time spent donning the gear was excludable pursuant to section 203(o).<sup>73</sup> Under these circumstances, it seems unlikely that the interpretation will gain traction except in the handful of jurisdictions that have already concluded that the compensability of time spent donning and doffing protective gear cannot be the subject of collective bargaining.<sup>74</sup>

## 2. The Continuous Workday

The DOL’s proclamation that changing clothes can trigger the start of the continuous workday, even when the task itself is not compensable pursuant to a CBA provision and the operation of section 203(o), presents a more interesting and difficult question. The administrator primarily relies on a survey of cases on point and the “weight of authority” from those cases.<sup>75</sup> The interpretation is correct that a majority of courts that have addressed the issue have concluded that the question of whether time spent changing clothes may be excluded from compensable time under section 203(o) must be addressed separately from whether it is integral and indispensable to a principal activity.<sup>76</sup> These cases hold

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69. 619 F.3d 604 (6th Cir. 2010).

70. *Id.* at 614, 620.

71. *Id.* at 614.

72. *Id.* at 615.

73. *Id.* The Sixth Circuit also found that its “conclusion [is] supported by the legislative history.” *Id.* at 614. While acknowledging that the introduction of the word “clothes” to section 203(o) was meant to narrow the statute’s scope, the court stated that its “interpretation of the word ‘clothes’ does not expand the meaning of the statute to ‘any activity’ but rather ‘simply recognizes that certain standard protective equipment is properly considered to be clothes.’” *Id.* at 615–16.

74. In light of the fact that the Seventh Circuit recently rejected this position, the only remaining jurisdictions that hold that protective gear cannot be “clothes” are the Ninth Circuit and the Middle District of Pennsylvania. See *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21 (2005); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368, 398 (M.D. Pa. 2008).

75. Interpretation No. 2010-2, *supra* note 3, at 4.

76. See, e.g., *Arnold v. Schreiber Foods, Inc.*, 690 F. Supp. 2d 672, 684 (M.D. Tenn. 2010):

that while section 203(o) affects the compensability of donning and doffing time when a CBA is in place, the donning and doffing itself is either an “integral and indispensable” part of the employee’s work or not; thus, the character of the activity is not affected by the fact that the operation of section 203(o) in conjunction with a CBA may ultimately allow it to be excluded from compensable time.<sup>77</sup> One court also points out that “section 203(o), by its terms, applies only to clothes changing that occurs ‘at the beginning or end of each workday.’ This implies that such activities are work and that the continuous-work-day clock has already started to run.”<sup>78</sup> The cases that have held otherwise have relied on the simple fact that it seems illogical to have a noncompensable activity begin the workday.<sup>79</sup> At least one later decision, however, has disregarded this reasoning.<sup>80</sup> Like the interpretation’s analysis with respect to the definition of “clothing,” the administrator’s assertions regarding the effect of section 203(o) on the continuous workday represent a departure from prior DOL guidance, which may limit the deference afforded it by courts.<sup>81</sup> However, the fact that this portion of the interpretation relies on and more closely adheres to the majority position found in the relevant case law may signal that it could receive more favorable treatment by the courts than the administrator’s interpretation of “clothes.”<sup>82</sup>

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A greater number of courts, however, have held that determining what constitutes a “principal activity” and determining what constitutes “changing clothes” are separate inquiries. Even if time spent donning a uniform is non-compensable under § 203(o), it still might start the workday, making subsequent activities compensable under § 254(a) and the continuous workday rule.

*Id.* (citations omitted).

77. *Id.* at 684–85; see also *Andrako v. U.S. Steel Corp.*, 632 F. Supp. 2d 398, 412–13 (W.D. Pa. 2009) (“Section 203(o) relates to the *compensability* of time spent donning, doffing, and washing in the collective-bargaining process. It does not render such time any more or less integral or indispensable to an employee’s job.”); *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at \*20 (W.D. Pa. Sept. 3, 2008) (“[T]he *character* of donning and doffing activities is not dependent upon whether such activities are excluded pursuant to a collective-bargaining agreement.”).

78. *Arnold*, 690 F. Supp. 2d at 685 n.15 (citing *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007)).

79. *Hudson v. Butterball, LLC*, No. 08-5071, 2009 WL 3486780, at \*4 (W.D. Mo. Oct. 14, 2009); *Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1011 (W.D. Tenn. 2008).

80. See *Arnold*, 690 F. Supp. 2d at 685 (addressing the court’s concerns in *Sisk* and stating that any “oddity” associated with treating a noncompensable activity as the start of the workday “diminishes as the period of the subsequent activity grows longer. For example, if an employer required employees to don uniforms in a company locker room and then spend 30 minutes traveling to a work site, it would not seem ‘illogical’ to require the employer to pay for the travel time.”)

81. Interpretation No. 2010-2, *supra* note 3, at 4 (noting conflict with Wage & Hour Div., U.S. Dep’t of Labor, Opinion Letter FLSA2007-10 (May 14, 2007), available at [http://www.dol.gov/whd/opinion/FLSA/2007/2007\\_05\\_14\\_10\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf)).

82. The view that excludable time under section 203(o) may start the workday also calls into question the view that de minimis time cannot start or end the workday, as discussed below in Part IV.

#### IV. The Continuous Workday in the Technological Workplace

The current state of the law with respect to compensable time under the FLSA leaves employers with very little concrete guidance. The Court's early decisions focused on the core question left unanswered by the statute and regulations: What is work? However, the decisions arrived at unsatisfying and conflicting answers. To this day, it remains unclear whether *Tennessee Coal's* definition of "work," which requires "physical or mental exertion," has continuing viability in light of *Armour* and *Skidmore* and their holdings that waiting time may be work. By shifting the focus to the "continuous workday," *Alvarez* further complicated this issue. *Alvarez* and *Steiner* both hold that an activity that is integral and indispensable to a principal activity is itself a principal activity and therefore compensable.<sup>83</sup> Furthermore, under *Alvarez*, any activity that occurs between the first and last principal activities of the day is also compensable as part of the continuous workday.<sup>84</sup> This paradigm seems to make the exercise of identifying "work" obsolete except to the extent that the first and last principal activities of the day constitute work.

The Third Circuit effectively adopted this holding in *De Asencio v. Tyson Foods, Inc.*<sup>85</sup> In that case, the district court had instructed the jury to consider whether exertion was required in determining whether donning and doffing of protective gear in a poultry plant was compensable work.<sup>86</sup> The jury instruction paralleled language from a pre-*Alvarez* Tenth Circuit case, *Reich v. IBP, Inc.*,<sup>87</sup> that had relied on *Tennessee Coal* in determining that donning and doffing protective gear is compensable work only where the gear "requires physical exertion, time, and a modicum of concentration to put . . . on securely and properly."<sup>88</sup> On appeal, the Third Circuit rejected the *Reich* analysis.<sup>89</sup> It noted another court had questioned *Reich's* reliance on *Tennessee Coal* in light of the Supreme Court's decision in *IBP v. Alvarez*.<sup>90</sup> The court held that, after *Alvarez*, the question of whether an employee must be paid donning and doffing time turns entirely on whether that activity is an integral and indispensable part of the job.<sup>91</sup> De-

83. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005); *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

84. *Alvarez*, 546 U.S. at 42.

85. 500 F.3d 361, 373 n.12 (3d Cir. 2007).

86. *Id.* at 373. Specifically, the court instructed the jury to determine "whether the gear was cumbersome, heavy, or required concentration to don and doff." *Id.*

87. 38 F.3d 1123 (10th Cir. 1994).

88. *Id.* at 1126.

89. *De Asencio*, 500 F.3d at 372.

90. *Id.* at 371.

91. *See id.* at 372. The Third Circuit relied instead on a Ninth Circuit case, *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). In *Ballaris*, the Ninth Circuit held

spite the Third Circuit's suggestion that *Tennessee Coal* is no longer relevant, the Supreme Court has not explicitly overruled the case or any of the cases defining work that have followed it. Tyson Foods petitioned the Supreme Court for a writ of certiorari, which would have given the Court the opportunity to review its precedent concerning the meaning of "work," but the Court denied the petition.<sup>92</sup>

#### A. *The De Minimis Exception and the Continuous Workday*

If the continuous workday analysis in *Alvarez* does supplant other Supreme Court precedent defining "work," then employers in most modern workplaces are left with few defenses to the compensability of many common pre-shift activities. For example, under the *Tennessee Coal* definition of work, an employer may be able to argue successfully that booting up a computer requires negligible exertion and thus is not work. It is more difficult to argue that this activity is not "integral and indispensable" to an employee's principal activities where computer use is a required part of the employee's job.

One of the few defenses that remain available to an employer in such circumstances is the de minimis doctrine, which permits employers to disregard certain small increments of otherwise compensable time. The Supreme Court created the doctrine in *Anderson v. Mt. Clemens Pottery Co.* by holding:

The workweek contemplated by [the FLSA] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.<sup>93</sup>

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that employees of a factory that produced silicon wafers for the computer industry were entitled to compensation for time spent changing into and out of uniforms required by the company. *Id.* at 911. Citing to *Armour*, the court stated that "work," as used in the FLSA, includes even "non-exertional acts" and thus the sole relevant inquiry is whether the activity at issue is primarily for the benefit of the company. *Id.* (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003)). Finding that the uniforms worn by the plaintiffs "were required to limit potential cleanroom contamination, and thereby to assist the employer in ensuring the quality of the silicon chips manufactured at the plant," the court concluded that time spent putting on and taking off the uniforms was compensable. *Id.*

92. See *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008); see also *Petition for Writ of Certiorari, De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (2008) (No. 07-1014). In seeking certiorari, Tyson stressed that employers currently face varying standards in each circuit, making compliance for national employers challenging. In fact, it owned the very plant at issue in *Reich v. IBP, Inc.*, where the court had held that donning and doffing of non-unique protective gear was not compensable. *Petition for Writ of Certiorari* at 6, *De Asencio*, 500 F.3d 361 (No. 07-1014).

93. 328 U.S. 680, 692 (1945).

Courts commonly employ a three-prong test to determine whether time is *de minimis*.<sup>94</sup> The test looks to (1) “the practical administrative difficulty of recording the additional time”; (2) “the aggregate amount of compensable time”; and (3) “the regularity of the additional work.”<sup>95</sup> As a general rule, most courts hold that activities that take less than ten minutes are eligible to be considered *de minimis*, but some courts have found activities of up to twenty minutes’ duration to fall within the scope of this defense.<sup>96</sup>

When taken to its logical extension, however, the position espoused by the DOL with respect to the effect of section 203(o) on the continuous workday could severely limit the usefulness of the *de minimis* exception. By its terms, Interpretation No. 2010-2 applies only to the narrow situation in which donning and doffing clothes is excluded from compensable time by operation of a collective bargaining agreement and section 203(o). However, there is a danger that the DOL and courts could attempt to stretch the interpretation’s reasoning and to apply it more broadly. The interpretation and the courts that have concurred with it have reasoned that the fact that an activity falls into an exception that makes it noncompensable under the FLSA does not affect the character of that activity with respect to whether it is a principal activity.<sup>97</sup> A *de minimis* activity is excluded from compensable time by virtue of the fact that it takes a very small amount of time

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94. *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1058–59 (9th Cir. 2010) (quoting *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984)); see also *Kosakow v. New Rochelle Radiology Assocs. P.C.*, 274 F.3d 706, 719 (2d Cir. 2001) (noting that Second Circuit adopted test outlined in *Lindow*); *Metzler v. IBP, Inc.*, 127 F.3d 959, 964 (10th Cir. 1997) (utilizing *Lindow* test in analyzing whether time was *de minimis*). In *Lindow*, the Ninth Circuit addressed the claims of employees of the Army Corps of Engineers who operated hydroelectric dams in Oregon. 738 F.2d at 1059. These employees sometimes spent up to eight minutes before the start of their shifts reviewing log books and exchanging information with employees working the prior shift. *Id.* at 1059–60. The Ninth Circuit held that these activities were *de minimis* because they were not performed consistently and would have been administratively difficult to record. *Id.* at 1064.

95. *Lindow*, 738 F.2d at 1063; *Rutti*, 596 F.3d at 1058–59.

96. Courts have held that increments of time from one to twenty minutes may be *de minimis*, but activities that take fewer than ten minutes most commonly qualify for this treatment. See, e.g., *Frank v. Wilson & Co.*, 172 F.2d 712, 716 (7th Cir. 1949) (holding that 9.2 minutes per day consisting of 6.2 minutes of walking time and 3 minutes of other preliminary activities is considered *de minimis*); *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949) (*de minimis* rule applied to employees who reported up to ten minutes before start of shift to check in and prepare for work); *McIntyre v. Joseph E. Seagram & Sons Co.*, 72 F. Supp. 366, 372 (W.D. Ky. 1947) (ten to twenty minutes per day going to locker, exchanging uniform, changing uniform, and reporting to foreman within *de minimis* rule); *Lasater v. Hercules Powder Co.*, 73 F. Supp. 264, 271 (E.D. Tenn. 1947) (changing clothes and preliminary preparations for work were *de minimis*, although not stating the amount of time preliminary activities took).

97. See, e.g., *Andrako v. U.S. Steel Corp.*, 632 F. Supp. 2d 398, 412–13 (W.D. Pa. 2009); *Figas v. Horse Head Corp.*, No. 06-1344, 2008 WL 4170043, at \*20 (W.D. Pa. Sept. 3, 2008); Interpretation No. 2010-2, *supra* note 3, at 4–5.



to complete. However, that fact, following the logic of the interpretation, could arguably not affect whether the activity itself is integral and indispensable to the employee's principal activities.<sup>98</sup> If an activity started the continuous workday despite the fact that it is *de minimis*, it could vastly increase the scope of compensable time for many employers, particularly in connection with the use of electronic devices like PDAs, smart phones, cell phones, and home computers.<sup>99</sup> For example, if an employee spends two minutes using his smart phone to respond to a work-related e-mail in the morning before leaving for work, the time actually spent responding to the e-mail is probably *de minimis*.<sup>100</sup> However, if a *de minimis* activity can begin the continuous workday,

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98. See, e.g., *Rutti*, 596 F.3d at 1058 (quoting *Lindow*, 738 F.2d at 1062) (“[M]ost courts have found daily periods of approximately ten minutes *de minimis even though otherwise compensable*. . . .”) (emphasis added).

99. The Second and Ninth Circuits have held that *de minimis* activities cannot start the continuous workday. See *Rutti*, 596 F.3d at 1060 (holding commute not compensable where pre-commute principal activities were *de minimis*); *Singh v. N.Y.C.*, 524 F.3d 361, 371 n.8 (2d Cir. 2008) (“[A] *de minimis* principal activity does not trigger the continuous workday rule.”). However, at least one court has interpreted language in *Alvarez* to suggest that this view is incorrect. See *In re Tyson Foods*, 694 F. Supp. 2d 1358, 1370 (M.D. Ga. 2010). In *Alvarez*, the Supreme Court remanded the First Circuit case consolidated with *Alvarez* for appeal, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), stating that the First Circuit’s “categorical conclusion” with respect to post-donning walking time was “incorrect.” *IBP, Inc., v. Alvarez*, 546 U.S. 21, 39 (2005). Looking at the passage in the First Circuit’s decision cited by the Court, the Supreme Court may only have rejected the “categorical conclusion” that walking time *in general* is noncompensable. See *Tum*, 360 F.3d at 281 (stating that Portal-to-Portal Act “sought to exclude preliminary and postliminary waiting and walking time from compensability”). However, because the Supreme Court noted that the First Circuit had held that the activity preceding the walking time was *de minimis*, at least one court has taken this to mean that the Supreme Court rejected the conclusion that time following a *de minimis* activity cannot start the workday. See *In re Tyson Foods*, 694 F. Supp. 2d at 1370 (citing *Alvarez*, 546 U.S. at 39–40) (asserting *Alvarez* stands for proposition that “it was error to reach categorical conclusion that post-donning/pre-doffing walking time was not compensable simply because donning and doffing time itself was *de minimis* and therefore not compensable”). In a 2006 Wage and Hour Advisory Memorandum (WHAM), the DOL’s Wage and Hour Administrator took something of a middle view, stating that “*Alvarez* . . . stands for the proposition that where the *aggregate time spent donning, walking, waiting, and doffing* exceeds the *de minimis* standard, it is compensable.” Wage & Hour Div., U.S. Dept’t of Labor, Wage and Hour Advisory Memorandum 2006-2, at 3 (May 31, 2006), available at [http://www.dol.gov/whd/FieldBulletins/AdvisoryMemo2006\\_2.htm](http://www.dol.gov/whd/FieldBulletins/AdvisoryMemo2006_2.htm) (emphasis added). Notwithstanding the fact that WHAMs are issued to Wage and Hour field personnel rather than the public at large, these documents receive a level of deference at least as great as opinion letters. See *Long Island Care at Home, Ltd., v. Coke*, 127 S. Ct. 2339, 2349 (2007) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (finding that WHAM interpreting DOL’s own regulations was due “controlling [deference] unless plainly erroneous or inconsistent with’ the regulations being interpreted.”). However, given the Obama administration’s propensity to reconsider views taken in prior administrations, it is unclear whether the DOL would continue to interpret *Alvarez* in this manner.

100. The frequently predicted flood of smart-phone abuse cases, ones concerning the use of smart phones and other mobile devices for work off of company premises and off shift, has not materialized as of this writing. See Sean L. McLaughlin, Note, *Controlling*

the employer may then be required to pay for all the time subsequent to that e-mail, possibly including the employee's lengthy commute.

This hypothetical scenario is not far from reality. In *Dooley v. Liberty Mutual Insurance Co.*,<sup>101</sup> the District of Massachusetts addressed a case asserted by automobile insurance appraisers who traveled to customers' locations to perform insurance inspections.<sup>102</sup> Prior to leaving their homes for their first inspection job of the day, "[a]ppraisers [were] required, as part of their job duties, to check their email and voice mail, to prepare their computers for use, and to return telephone calls."<sup>103</sup> *Dooley* held that these tasks were principal activities because they were "part of the regular work of the employees."<sup>104</sup> Accordingly, they therefore rendered subsequent activities, including the commute to the first job site of the day, fully compensable.<sup>105</sup> The *Dooley* court did not address whether the time spent by the employees working from home prior to their first customer visit was de minimis. However, the case demonstrates the type of liability employers could face if de minimis work performed remotely at the beginning of the workday is deemed to commence the continuous workday.

Courts generally have been reluctant to allow claims for compensation for commuting time, even when employees complete compensable activities at home.<sup>106</sup> For example, in *Rutti v. Lojack Corp.*,<sup>107</sup> the Ninth Circuit recently addressed whether technicians who traveled to customers' locations to repair car alarms were due overtime compensation as a result of tasks performed remotely at the beginning and end of the day.<sup>108</sup> Among other things, the plaintiffs in *Rutti* alleged that time spent in the evening uploading data about the day's work to the company was compensable.<sup>109</sup> They further argued that this work

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*Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime*, 58 U. KAN. L. REV. 737, 738 (2010) (stating that as of March 2010, no published cases existed in which employees alleged overtime violations due to use of smart phones outside of work). This may be the result of an expectation among plaintiffs' counsel that such time will fall into the de minimis exception or because of precautionary policies and practices that many employers have implemented to restrict off-duty use of such devices.

101. 307 F. Supp. 2d 234 (D. Mass. 2004).

102. *Id.* at 239.

103. *Id.* at 242.

104. *Id.* (quoting *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976)).

105. *Id.* at 243.

106. See *Adams v. United States*, 65 Fed. Cl. 217, 228 (2005) (identifying cases from other jurisdictions denying compensation for commuting time).

107. 596 F.3d 1046 (9th Cir. 2010).

108. *Id.* at 1048–49.

109. *Id.* at 1049. The plaintiffs also argued that time spent each morning logging on to a handheld computer to check their assigned jobs for the day, planning their routes, and completing paperwork was compensable. *Id.* The court held that the plaintiffs' morning activities were not integral to their principal activities because "receiving, mapping, and prioritizing jobs [were] related to [the employees'] commute," not the job itself. *Id.*

performed at home rendered their travel time to their homes at the end of the day compensable.<sup>110</sup> Even though the court found that the work performed at home may be compensable, the court rejected the plaintiffs' theory with respect to their commuting time, relying on a section of the regulations that permits exclusion from compensable time of "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes. . . ."<sup>111</sup> The *Rutti* court reasoned:

Lojack allows a technician to make the transmissions at any time between 7:00 p.m. and 7:00 a.m. Thus, from the moment a technician completes his last installation of the day, he "is completely relieved from duty." His only restriction is that sometime during the night he must complete the PDT transmission. Because he has hours, not minutes, in which to complete this task, the intervening time is "long enough to enable him to use the time effectively for his own purpose."<sup>112</sup>

Similarly, in *Lemmon v. City of San Leandro*,<sup>113</sup> the Northern District of California held that time spent by police officers changing into their uniforms at home was compensable time but refused to permit such activities to convert the police officers' commute into working time.<sup>114</sup> The court stated that such a result would violate the "spirit of the FLSA" and would convert the continuous workday rule into a "continuous pay" rule.<sup>115</sup> These courts have effectively taken the position

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at 1057. In another recent case, satellite television technicians made similar allegations regarding work performed from home. See *Farmer v. DirectSat USA, LLC*, No. 08-C-3962, 2010 WL 3927640, at \*11 (N.D. Ill. Oct. 4, 2010) (denying motion for summary judgment with respect to claim by satellite television technicians that they were owed overtime compensation for commute time because they were required to load company vans and make calls to customers from home at the start of the workday).

110. *Rutti*, 596 F.3d at 1050. The court held that this was a principal activity and remanded the issue to the trial court for further factual findings with respect to whether the time spent on this activity may be de minimis. See *id.* at 1061. The court, citing the "aggregate amount of compensable time" prong of the de minimis test from *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), noted it appeared to favor the plaintiffs based on a theory that the approximately fifteen minutes per day spent on the transmissions would add up to "over an hour [per] week," which the court believed to be "a significant amount of time and money." *Rutti*, 596 F.3d. at 1059.

111. *Id.* at 1060 (quoting 29 C.F.R. § 785.16 (2010)).

112. *Id.* (quoting *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1413 (5th Cir. 1990)). The Second Circuit recently adopted similar reasoning in *Kuebel v. Black & Decker Inc.*, 2011 WL 1677737 (2d Cir. May 1, 2011). The court affirmed that part of a district court decision rejecting the claim of a retail specialist responsible for product merchandising at retail stores that he was entitled to compensation for the period of time between his last store visit of the day and various tasks performed after he arrived home. *Id.* at \*6. The court called this time "ordinary home to work travel" and noted that the plaintiff had "flexibility in deciding when to complete his daily administrative responsibilities of checking email, checking voicemail, synching his PDA, printing sales reports, making signs, and so forth." *Id.*

113. 538 F. Supp. 2d 1200 (N.D. Cal. 2007).

114. *Id.* at 1209.

115. *Id.*

that the continuous workday paradigm finds its best application on the employer's premises and should not be expanded to cover commuting time that has traditionally been noncompensable.

## V. Conclusion

Since the FLSA became law more than seventy years ago, employers and employees have faced uncertainty in determining the types of activities that would be considered compensable work time by the Department of Labor and the courts. The Supreme Court's 2005 decision in *Alvarez*, rather than clarifying this issue, has added substantial further confusion. Litigants and the lower courts continue to grapple with the contours of the continuous workday and those activities that are integral and indispensable to principal activities that begin and end the workday. In the context of the technological workplace, where employees commonly use computers and other electronic devices before and after their regularly scheduled shifts, this problem has become acute. As a result of the recent explosion of wage and hour lawsuits, the risks posed to employers are severe. In the short term, the lower courts should follow the reasoning of those decisions that have constrained the continuous workday by holding that noncompensable de minimis activities do not start the workday clock. Moreover, other pre- and post-shift activities that may qualify as work time should not require compensation for contiguous activities, such as commuting time, as the Portal-to-Portal Act intended to exclude them. In the long term, statutory reform and Supreme Court guidance are necessary to provide employers with the predictability that they need to avoid the sort of immense and unexpected liability that Congress expressly rejected more than half a century ago.