Lead Report

Wage & Hour

High Court FLSA Ruling on Post-Shift Tasks Gives Health-Care Employers New Guidance

The U.S. Supreme Court's recent application of the Fair Labor Standards Act to employees' pre- and post-shift activities has broad applicability in the health-care industry, attorneys told Bloomberg BNA (*Integrity Staffing Solutions, Inc. v. Busk*, 2014 BL 344253, U.S., No. 13-433, 12/9/14).

The ruling sheds light on compensation owed under the FLSA for a range of common health-care industry practices, such as the time health-care employees spend above and beyond 40 hours a week donning and doffing protective equipment, reporting before work or staying late for patient briefings or trainings, traveling to see patients, waiting to pass through security screenings or being subject to searches for anti-theft or security reasons, attorneys said.

The unanimous decision by Justice Clarence Thomas held that warehouse employees at two Nevada facilities that serve Amazon.com customers aren't entitled to compensation under the FLSA for time spent going through anti-theft security screens before leaving work. The court clarified that payment is required under the act only if an ancillary activity ''is integral and indispensable'' to a worker's primary duties.

''Although the decision isn't factually on point for the industry as a whole, health-care employers should benefit from knowing the proper analysis to determine whether a preliminary or postliminary activity is compensable—namely, whether the activity in question is 'integral and indispensable' to the duties performed by the employee,'' Sean P. Ray, with Barran Liebman LLP, Portland, Ore., said.

'Clear Benefit' to Health Industry. ''There certainly is case law already out there regarding certain compensable or noncompensable preliminary and postliminary activities related to the health-care industry, and this decision doesn't undo everything already established by the Supreme Court,'' Ray said. However, the high court's clarification should help health-care employers decide whether preliminary or postliminary activities—about which there might not be case law—are compensable under the FLSA.

The decision should eliminate some of the gray areas and make it easier for employers to draw a distinction between compensable and noncompensable pre- or post-shift activities, Douglas A. Hass, with Franczek Radelet PC, Chicago, said. ''After *Integrity Staffing*, health-care workers who are required to pass through a metal detector or who are subjected to security screenings/searches—for controlled substances, for example—by the hospital before or after a shift are not entitled to compensation for that time,'' he said. ''That's clearly a benefit to the health-care employers.''

Legal Test: 'Integral and Indispensable.' The Supreme Court ruling for Integrity Staffing Solutions Inc. reversed a U.S. Court of Appeals for the Ninth Circuit decision that warehouse employees who alleged they spent up to 25 minutes waiting to clear mandatory security screens after their shifts ended could have FLSA claims. The screens were ''necessary'' to the employees' primary work and done solely for the benefit of the employer (713 F.3d 525), the Ninth Circuit found.

The workers couldn't show the security screens were ''integral and indispensable'' to their principal work activities, the standard the court previously has set under the FLSA, the high court ruled.

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The screenings weren't an intrinsic element of the job of retrieving products from warehouse shelves or packaging them for shipment and Integrity Staffing could have eliminated the screenings altogether without impairing the ability of its employees to complete their work, the court said.

The FLSA requires employers to pay nonexempt employees at least minimum wage for hours worked up to 40 hours per week, and overtime for hours worked in excess of 40 hours per week. The Portal-to-Portal Act exempts employers from liability under the FLSA with respect to certain categories of work-related activities engaged in by nonexempt employees.

The court analyzed language in the Portal-to-Portal Act and said its decision was consistent with the Department of Labor's interpretation of that statute. The act generally excludes from FLSA coverage processes—such as checking in and out or waiting in line to do so—by which employees arrive at and depart from their places of employment, the court noted.

Donning and Doffing. Although the decision clarifies the standard for determining when the Portal to Portal Act applies, one area in which confusion remains is the donning and doffing of protective equipment used by health-care workers.

Cases specifically addressing the donning and doffing of safety equipment seem to hold these activities are compensable in the health-care context, Ray said. He cited the U.S. Court of Appeals for the Fourth Circuit's decision in *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011), which found that donning, sanitizing,

and doffing safety gear in a chicken processing plant was compensable time.

''Certainly, the argument would follow that donning and doffing of protective gear, such as that required to treat Ebola here in the U.S., would similarly be compensable, as stopping a global outbreak, in addition to healing the patient, would undoubtedly be part and parcel of treating the patient,'' he said.

He noted, however, the unanimous U.S. Supreme Court decision in *Sandifer v. U.S. Steel Corp.*, 82 U.S.L.W. 4071 (U.S. Jan. 27, 2014), in which the court held personal protective gear is considered ''clothes'' under the FLSA and that the FLSA doesn't require pay for time spent by union-represented steel workers changing into such gear.

Hass agreed that the standard for donning and doffing remains confusing.

''*Sandifer* holds that such activities are not subject to the FLSA in a unionized workplace but that holding is in tension with 29 C.F.R. § 541.4, which explicitly affirms that collective bargaining agreements can't waive or reduce the FLSA's protections,'' he said.

Eugene Droder III, with Frost Brown Todd LLC, Cincinnati, said there certainly could be an argument based on *Integrity Staffing* that some donning and doffing activities in the health-care industry aren't compensable.

''Putting on, taking off, and even maintaining certain required gear, clothing, or uniforms is an intrinsic part of some jobs and cannot be eliminated by the employer in order to do those jobs, so determining compensability will depend on the nature of the job duties at issue,'' he said.

Application in Other Contexts. Ray said it will be interesting to see how *Integrity Staffing* affects a current FLSA health-care worker case in Colorado. In *Stransky v. HealthONE of Denver*, (D. Colo. No. 1:11-cv-2888), some nurses sued their employer seeking compensation for the time it takes them to put on scrubs that aren't allowed to leave the hospital—likely for safety and health reasons—but that they must wear while working. ''The court will have to determine whether changing into the scrubs is 'integral and indispensable' to the nurses' performance of their duties,'' he said.

In other ways, *Integrity Staffing* makes claims that nonexempt health-care workers have filed in recent years more clearly compensable, Hass said. ''For example, claims related to pre-shift training related to health-care duties is a good example of an activity that is pretty clearly compensable after *Integrity Staffing*, absent some other facts,'' he said. ''Eliminating the training arguably would impair the safety and effectiveness of the principal health-care activities.''

''Nonexempt health-care workers also have filed minimum wage/overtime lawsuits pursuant to the FLSA and state laws over being required to report prior to shifts and to stay after shifts to participate in information sharing sessions about patients, safety briefings, patient briefings, mandatory training, and more,'' he said. ''*Integrity Staffing* makes it clearer that such 'integral and indispensable' activities related to the 'performance of productive work' are compensable,'' he said.

Bryan Schwartz, with Bryan Schwartz Law, in Oakland, Calif., pointed to compensation issues arising out of certain health-care workers' travel time.

''Health-care workers who must travel for their jobs will need to argue that the travel is an integral and indispensable part of the health care they are providing—for example, arguing that you cannot treat a patient in her home without going to her home, and you are being paid to go to her home and provide that in-home care,'' he said.

He agreed that training time shouldn't be affected by *Integrity Staffing* and that such time should be compensable. ''Similarly, if you have to spend time maintaining certain health-care equipment needed for your job, that would be compensable as well, I believe, because the equipment is integral/indispensable to your job.''

Based on the Supreme Court's reasoning, time spent searching employees' bags or coats at the end of a shift to prevent the theft of medicines or screening employees before they begin work in restricted facilities to prevent the importation of weapons or contraband wouldn't be compensable, Steven R. Anderson, Faegre Baker Daniels LLP, Minneapolis, said, adding that he didn't know how common such practices are. ''However, pre-shift orientation or training probably wouldn't be affected by this decision,'' he said.

Advice: Properly Classify Health-Care Workers. Hass said that the decision underscores the need for health-care employers to take an even more proactive approach to properly classifying employees as exempt or nonexempt for purposes of FLSA and state law overtime requirements. He pointed to the use of ''learned professionals,'' such as nurse practitioners, who have completed a specific course of education and earned certifications that may warrant an exemption from the FLSA's minimum wage and overtime requirements under the correct circumstances.

''If a health-care employer misclassifies a nurse practitioner as an exempt employee, claims associated with uncompensated pre- and post-shift activities could expose the employer to substantial liability,'' he said. ''Given the multitude of positions in this industry, this nurse practitioner example barely scratches the surface of the complexities of classifying health-care employees for purposes of the FLSA and state laws, which often differ.''

Schwartz agreed that health-care employers shouldn't forget state law requirements that may be more stringent. ''Wage claims under California law, which says an employer must compensate employees when an employee is 'subject to the control of an employer' with no personal freedom to 'use the time effectively for their own purposes,' are unaffected by the *Integrity Staffing* decision,'' he said.

Mark R. Thierman, of the Thierman Law Firm, in Reno, Nev., represented the employees. Paul D. Clement, of Bancroft LLC, in Washington, represented Integrity Staffing Solutions. Solicitor General Donald B. Verrilli Jr. represented the U.S. as amicus for Integrity Staffing.

BY KEVIN MCGOWAN AND PEYTON M. STURGES

To contact the reporters on this story: Kevin McGowan in Washington at kmcgowan@bna.com and Peyton M. Sturges in Washington at psturges@bna.com

To contact the editor responsible for this story: Barbara Yuill at byuill@bna.com

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