Chapter 8

**COMPENSABLE HOURS**

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I. Overview

The compensability of a worker’s activity depends on whether the time at issue constitutes “hours worked” under the Fair Labor Standards Act (FLSA). Section 4 of the Portal-to-Portal Act of 1947 excludes certain activities from being compensable under the FLSA.[[1]](#footnote-2) Determining the hours that are compensable is key to determining when an employer is obligated to pay overtime. This chapter focuses on the principles applicable in determining what constitutes compensable work time under these statutes.[[2]](#footnote-3)

The following interpretive bulletins, published as nonbinding regulations, are directly related to the materials covered in this chapter:

• 29 C.F.R. Part 785, Hours Worked; and

• 29 C.F.R. Part 790, Effect of the Portal-to-Portal Act.[[3]](#footnote-4)

II. Historical Context of the Term “Hours Worked”

**A. “Hours Worked”**

The concept of compensable “hours worked” has evolved over the decades since the FLSA’s enactment. An early series of U.S. Supreme Court decisions defined the term “work” as set forth in the FLSA.[[4]](#footnote-5) In 1944, in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123*,[[5]](#footnote-6) the Supreme Court stated that employees subject to the FLSA must be paid for all time spent in “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.”[[6]](#footnote-7) In its next term, the Supreme Court, in *Armour & Co. v. Wantock*,[[7]](#footnote-8) clarified that idle time may be compensable where the employer engaged employees to wait to perform work tasks.

Two years later, in *Anderson v. Mt. Clemens Pottery Co*.,[[8]](#footnote-9) the Supreme Court again examined compensable time under the FLSA. In *Mt. Clemens*, the employer required the employees to punch in, walk to their work benches, and perform preliminary duties during a 14-minute period preceding productive work, and to engage in such activities in reverse in the 14-minute period subsequent to the completion of productive work. The Court found that “since the statutory workweek includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation.”[[9]](#footnote-10)

Specifically, the Court concluded that the time spent by employees in “walking to work” on the employer’s premises after punching in was compensable time. “Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. … [Moreover,] such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory.”[[10]](#footnote-11) The Court distinguished such travel time inside the factory from ordinary commute time to the factory, which was not compensable.

The Court stated that in determining the compensability of walking time, the application of a de minimis rule might be appropriate where “the walking time is such as to be negligible.”[[11]](#footnote-12)

When the matter at issue concerns only a few seconds or minutes of work beyond the scheduled work 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. The *de minimis* rule can doubtless be applied to much of the walking in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking in issue.[[12]](#footnote-13)

Next, the Court examined the preliminary activities engaged in by employees after they arrived at their places of work “such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools.”[[13]](#footnote-14) The Court ruled that such activities are “clearly work falling within the definition enunciated and applied in the *Tennessee Coal* and *Jewell Ridge* cases.”[[14]](#footnote-15) The Court remanded *Mt. Clemens* for a determination of “the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages under the Act.”[[15]](#footnote-16)

**B. The Portal-to-Portal Act**

Congress found that the ruling in *Mt. Clemens* exposed businesses to billions of dollars in back wages that could adversely impact the economy.[[16]](#footnote-17) Congress responded with the Portal-to-Portal Act of 1947.

In Section 254 of the Portal-to-Portal Act, Congress excluded time spent traveling to and from the place of work and preliminary and postliminary work activities as compensable work time under the FLSA. Section 254 provides:

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended … on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act:

(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,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) … Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either:

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective bargaining representative and his employer, or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.[[17]](#footnote-18)

In November 1947, the U.S. Department of Labor (DOL) issued an interpretive bulletin (now included as Part 790 of Title 29 of the Code of Federal Regulations) addressing the “major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act.”[[18]](#footnote-19) These interpretations were based on the DOL’s contemporaneous “studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history,” as well as the existing judicial decisions interpreting the two laws.[[19]](#footnote-20)

**C. U.S. Supreme Court Interpretation of the Portal-to-Portal Act: *Steiner*, *King Packing*, *Alvarez*, *Sandifer,* and *Busk***

In 1956, the Supreme Court issued two decisions that examined in considerable detail whether, despite the Portal-to-Portal Act, certain preparatory and concluding activities should be compensable. In *Steiner v. Mitchell*,[[20]](#footnote-21) the Court addressed whether battery plant workers should be paid for time spent changing clothes and showering at the beginning and end of their workday. The Court found that the ordinary changing of clothes and showering would normally constitute excluded preliminary and postliminary activities, but concluded that where such activities are performed either before or after the regular work shift, on or off the production line, they are compensable if they are an integral and indispensable part of the principal activities. Based largely on the fact that the plaintiffs worked with dangerous and toxic materials, the Court ruled that “given the vital considerations of health and hygiene,”[[21]](#footnote-22) the clothes-changing and washing activities in *Steiner* were an integral and indispensable part of the employees’ principal activity and therefore were compensable.

In *Mitchell v. King Packing Co.*,[[22]](#footnote-23) decided the same day as *Steiner*, the Supreme Court applied the reasoning of *Steiner* to the time that knifemen employed at a meatpacking plant spent sharpening their knives before or after their shifts or during their meal breaks. The Court concluded that because the knives had to be razor-sharp to achieve proper performance of the knifemen’s butchering duties, the knife-sharpening activities were an integral part of, and indispensable to, the principal activities for which the knifemen were principally employed.[[23]](#footnote-24)

In 2005, in *IBP v. Alvarez*,[[24]](#footnote-25) the Supreme Court again addressed the issue of preliminary and postliminary time. The Court considered whether the time that meat-processing plant workers spent walking between the place where they put on and took off protective clothing and equipment and the place where they process the meat was compensable. The Court held that because the parties had agreed that the clothes changing was a “principal activity” under the Portal-to-Portal Act, the time spent walking to and from their workstations after donning and before doffing was part of the “continuous workday” and therefore was compensable under the FLSA. However, the Court held that the time spent waiting in line to pick up the protective clothing before donning was not integral and indispensable to the principal work activities of the workers, and therefore was a noncompensable preliminary activity.

In 2014, the Supreme Court issued two more decisions addressing whether activities are integral and indispensable to an employee’s principal work activities under the Portal-to-Portal Act. In the first case, *Sandifer v*. *United States Steel Corp*.,[[25]](#footnote-26) the Court reaffirmed that activities that are integral and indispensable to a principal activity are themselves principal activities under the Portal-to-Portal Act, and that donning and doffing of protective clothing ordinarily would be a principal activity unless it is excluded under Section 203(o) of the FLSA.[[26]](#footnote-27) In the second case, *Integrity Staffing Solutions, Inc*. *v*. *Busk*,[[27]](#footnote-28) the Court considered whether time spent by warehouse workers on security screenings before leaving the warehouse each day was compensable under the FLSA. The Court explained that “an activity is integral and indispensable to the principal activities that the employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”[[28]](#footnote-29) The Court concluded that the at-issue security screenings were not compensable because the employer did not employ its workers to undergo security screenings, so the screenings were not “principal activities which the employee is employed to perform.”[[29]](#footnote-30) Nor were the screenings “integral and indispensable” to the employees’ duties because the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment, and the employer could have eliminated the screenings without impairing the employees’ ability to complete their work.[[30]](#footnote-31) As a result, the Court held that the security screenings were postliminary activities that were noncompensable under the Portal-to-Portal Act.[[31]](#footnote-32)

III. Principles for Determining “Hours Worked”

Courts apply various principles to determine whether an employee’s activity is compensable under the FLSA, often starting with the definition of “employ,” followed by resolving such issues as whether the employee was “suffered or permitted to work”; whether the employer had actual or constructive knowledge of the work activity in question; whether there is a contract, agreement, custom, or practice that is relevant to the analysis; and how the employer defines the start and end of the workday. This section examines these principles; Section IV provides examples of how they are applied in the context of a number of general categories of activities that often arise in litigation.

**A. Definition of “Employ”**

The FLSA defines “employ” to mean “to suffer or permit to work,”[[32]](#footnote-33) but does not define the term “work.”[[33]](#footnote-34) The regulations add that “work not requested but suffered or permitted is work time.”[[34]](#footnote-35) Time spent on a “principal activity” for the benefit of the employer, with the employer’s actual or constructive knowledge, is considered to be hours worked and is therefore compensable.[[35]](#footnote-36) “Principal activities” include all activities that are an “integral and indispensable” part of the employee’s job.[[36]](#footnote-37)

The statutory and regulatory definition of “employ” does not necessitate, and the courts have not required, proof of a contract of employment in order to demonstrate an employment relationship.[[37]](#footnote-38) However, as discussed in this section, an employer must know or have reason to believe the employee is working for the time to be compensable.[[38]](#footnote-39) An employer that has such knowledge cannot stand by and allow an employee to work without proper compensation, even if the work has not been requested by the employer.[[39]](#footnote-40)

***1. Knowledge of the Employer***

Circuit courts that first faced the issue of unauthorized work generally found that an employer must compensate its employees for work that, although not expressly approved, was performed with the knowledge and acquiescence of management.[[40]](#footnote-41) In *Forrester v. Roth’s I.G.A. Foodliner, Inc*.,[[41]](#footnote-42) the Ninth Circuit held that

an employer who knows or should have known that an employee is or was working overtime … cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.

However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation of [the FLSA].[[42]](#footnote-43)

Employer knowledge of time worked has been imputed in a number of situations. For instance, the Second Circuit has held that an employer should have known that overtime was being worked in certain circumstances, even when its employee underreported time worked;[[43]](#footnote-44) the Fourth Circuit has held that knowledge should be imputed to an employer when there was too much work performed for the time allotted;[[44]](#footnote-45) and the Fifth Circuit has held that an employer had knowledge of overtime work because the employee complained to his direct supervisor, despite the supervisor’s lack of authority to authorize or pay for the overtime.[[45]](#footnote-46) A wide range of cases similarly have found evidence sufficient to show that employers have had actual or constructive knowledge of work being performed.[[46]](#footnote-47)

An employer is not required to pay for time worked when it neither knew nor had reason to know that the work was being performed.[[47]](#footnote-48) Cases where employers were not required to   
compensate employees for time spent working include instances when employees withheld working time information,[[48]](#footnote-49) when employees falsified time sheets,[[49]](#footnote-50) and when the circumstances did not suggest uncompensated work,[[50]](#footnote-51) provided the employer did not know or have reason to know of these activities.[[51]](#footnote-52)

Simply observing an employee arrive at work early is not enough to impute knowledge to the employer that the employee is actually performing work.[[52]](#footnote-53) Also, as discussed more fully below,[[53]](#footnote-54) an employer may be relieved from liability under the FLSA if it took reasonable steps to prevent employees from working but the employees worked nonetheless.[[54]](#footnote-55) However, the employer may not be relieved from liability if it fails to exercise reasonable diligence in determining whether the employee worked.[[55]](#footnote-56)

***2. Work Performed Away From the Job Site, at Home, or on Mobile Devices***

The “suffer or permit” rule applies regardless of whether the work is performed on or away from the employer’s job site.[[56]](#footnote-57) For example, an employer must compensate an employee who takes files home and works on them there with the acquiescence of the employer.[[57]](#footnote-58) Similarly, police departments are required to pay police officers assigned to a canine unit for time worked at home caring for the dogs.[[58]](#footnote-59) When unassigned work is performed away from the employer’s premises, the critical question remains whether the employer has actual or constructive knowledge that such work is being performed.[[59]](#footnote-60)

In *Allen v. City of Chicago*,[[60]](#footnote-61) the city issued mobile electronic devices to members of its Bureau of Organized Crime. The officers sued, claiming that they were not paid for time spent on the smart phones outside their shifts during what would otherwise be off-duty time. The Seventh Circuit held that the time was properly not compensated largely because the officers failed to report the time as time worked, despite there being procedures to do so.

***3. Duty of Management***

Management must exercise control and prevent work from being performed if it does not want the work to be compensable.[[61]](#footnote-62) Management cannot accept the benefit of work without compensating the employees who performed the work.[[62]](#footnote-63)

The mere promulgation of a rule against unauthorized work is not enough; it is also the obligation of management to enforce such a rule.[[63]](#footnote-64) To avoid liability under the FLSA, an employer must “make every effort” to prevent employees from performing unauthorized work, which may include disciplining violators of its no-overtime work rules.[[64]](#footnote-65) Promulgating rules requiring employees to report all hours worked will not shield an employer from liability if it refused to accept employee reports of overtime work that was performed.[[65]](#footnote-66)

As discussed elsewhere in this treatise,[[66]](#footnote-67) workers who bring suit for unpaid minimum wage or overtime compensation bear the burden of proving that they performed work for which compensation is due.

**B. Effect of Contract, Agreement, Custom, or Practice**

***1. Contract or Agreement***

Under the Portal-to-Portal Act, a contract may convert preliminary or postliminary activities that are generally not compensable into compensable time.[[67]](#footnote-68) However, an agreement that attempts to convert activities that are compensable under the FLSA into noncompensable activities is invalid and unenforceable, except in a few special circumstances discussed below.[[68]](#footnote-69) Thus, a contractual provision stating that time spent by an employee transporting workers and equipment from the worksite to the employer’s warehouses is noncompensable was found to be invalid.[[69]](#footnote-70) However, with respect to workers residing on an employer’s premises or who work at home, courts have found that a “reasonable agreement” may determine which hours are compensable.[[70]](#footnote-71)

Courts may look to the parties’ intent to determine compensable hours worked, as shown by an employment agreement or, alternatively, to the circumstances surrounding the agreement.[[71]](#footnote-72) For example, in *Krause v. Manalapan Township*,[[72]](#footnote-73) the Third Circuit rejected an attempt by police officers to set aside an agreement with the township regarding compensation for off-duty work caring for police dogs, finding it “undisputed that the parties reached an agreement regarding the amount of comp time to be given as payment for the off-duty care of the dogs.”[[73]](#footnote-74)

***2. Custom or Practice***

A custom or practice may also make certain otherwise excluded activities compensable.[[74]](#footnote-75) Only the custom of the particular employer and workplace is relevant in determining compensable hours worked, not the custom of the industry in general.[[75]](#footnote-76) The custom or practice, moreover, must be in effect at the time of the activity for which the employee seeks compensation.[[76]](#footnote-77) An employer is generally free to change its customs and practices prospectively, absent an applicable collective bargaining agreement (CBA) requiring otherwise.[[77]](#footnote-78) On the other hand, a custom of an employer that does not recognize the rights guaranteed under the FLSA and the Portal-to-Portal Act will not control in determining hours worked.[[78]](#footnote-79)

Where both custom and a contractual provision apply to a task, the contractual provision will prevail over custom in determining whether the time involved is compensable. For example, where the custom of paying apprentice employees for classroom work is inconsistent with a contract that precludes compensation for this activity, the apprentices will not be entitled to compensation for their class time, assuming no other provision of the statute governs.[[79]](#footnote-80)

**C. The Continuous Workday Rule and the Concept of Principal Activities**

***1. In General***

The Supreme Court in *IBP, Inc. v. Alvarez*[[80]](#footnote-81) relied on the Portal-to-Portal Act’s definition of “workday” in holding that time spent walking to and from workstations after and before compensable clothes changing at the beginning and end of the workday was itself compensable.[[81]](#footnote-82) “Workday” is defined as

the period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.[[82]](#footnote-83)

In *Alvarez*, the district court had held that the donning and doffing of unique protective gear were principal activities under Section 4 of the Portal-to-Portal Act and were thus compensable.[[83]](#footnote-84) The employer did not challenge that holding in the Supreme Court, but rather argued that the time employees spent walking between the locker rooms where they donned and doffed the protective gear and the production areas was excluded from compensation by Section 4(a)(1) of the Portal-to-Portal Act as preliminary and postliminary walking.[[84]](#footnote-85)

Relying on its prior holding in *Steiner v. Mitchell*[[85]](#footnote-86) that Section 4 of the Portal-to-Portal Act does not exclude from compensation activities that are “integral and indispensable” to “principal activities,”[[86]](#footnote-87) the Supreme Court held that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under §4(a) of the Portal-to-Portal Act.”[[87]](#footnote-88) Thus, the Court concluded that any walking time occurring after the employee’s first principal activity—donning protective gear—and before the end of the employee’s last principal activity—doffing protective gear—was compensable under the FLSA because it was part of the continuous workday.[[88]](#footnote-89) Accordingly, under the circumstances in *Alvarez*, donning and doffing of protective gear defined “the outer limits of the workday.”[[89]](#footnote-90)

In 2014, in *Integrity Staffing Solutions v*. *Busk*,[[90]](#footnote-91) the Supreme Court revisited the issue of what constitutes a principal activity, and thereby what begins and ends the continuous workday. The employees in that case fulfilled orders at a warehouse by retrieving the ordered items from the shelves and then boxing them for shipping. The Court determined that these functions were what the employees were employed to perform, and that unrelated activities occurring at the end of their shifts (i.e., waiting in line and going through required security screenings) were not necessary to the performance of their work, and so were postliminary and noncompensable.[[91]](#footnote-92) The Court explained:

[T]he screenings were not the “principal activity or activities which [the] employee is employed to perform.” 29 U.S.C. §254(a)(1). Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products … .

The security screenings also were not “integral and indispensable” to the employees’ duties as warehouse workers. … [A]n activity is not integral and indispensable to an employee’s principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities. The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees’ ability to complete their work.[[92]](#footnote-93)

Although recognizing that the employer still benefited from the screenings, the Court held that a mere benefit does not convert the time to compensable work time; the activity must still be intrinsically connected to the activities the employees were employed to perform. In this regard, the Court explained: “A test that turns on whether the activity is for the benefit of the employer is … overbroad.”[[93]](#footnote-94)

Work intrinsically connected to the job, and thereby a principal activity, may still be noncompensable if it is de minimis. As held by the Second Circuit in *Singh v. City of New York*,[[94]](#footnote-95) a de minimis principal activity does not trigger the continuous workday rule.[[95]](#footnote-96) In *Singh*, city fire alarm inspectors sought additional pay for commute time because they had to carry inspection documents to and from work. The Second Circuit ruled that “the mere carrying of inspection documents without any other active employment-related responsibilities while commuting is not work under the FLSA, except to the extent that it increases the duration of the commute,”[[96]](#footnote-97) and because any increase in the duration of a commute was de minimis, the time was still noncompensable.[[97]](#footnote-98)

***2. When the Workday Starts and Ends If Collective Bargaining Agreements and Section 203(o) Are Applicable[[98]](#footnote-99)***

Section 203(o) of the FLSA provides:

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.[[99]](#footnote-100)

Thus, while changing clothes or washing may in other contexts constitute “principal activities” commencing or ending a continuous workday, it is not necessarily so when Section 203(o) is implicated.

There has been debate whether Section 203(o) constitutes an “exemption” or an exception to the calculation of compensable hours under the FLSA. The DOL regulations refer to Section 203(o) as an exception.[[100]](#footnote-101) The Ninth Circuit, in *Alvarez v. IBP, Inc*.,[[101]](#footnote-102) held that Section 203(o) was an exemption and thus subject to narrow construction against the employer.[[102]](#footnote-103) However, most other federal appellate courts that have addressed the issue have agreed that Section 203(o) is not an exemption, but rather an exception to what otherwise constitutes compensable hours. For instance, in *Anderson v. Cagle’s, Inc*.,[[103]](#footnote-104) the Eleventh Circuit held that Section 203(o) is merely a definitional restriction on compensable work and criticized the Ninth Circuit for analogizing to exemptions found under Section 213 of the FLSA.[[104]](#footnote-105) The Seventh Circuit in*Sandifer v*. *United States Steel Corp*.[[105]](#footnote-106) also held that Section 203(o) does not create an exemption, but rather an exclusion from compensable work.[[106]](#footnote-107) The court ruled that because time spent changing clothes was excluded from compensation under Section 203(o), it could not be a “principal activity.” Aware that it was creating a circuit split by ruling contrary to *Franklin v. Kellogg Co*.,[[107]](#footnote-108) the Seventh Circuit explained:

Section 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time, and they did so, agreeing that the workday would not start when the workers changed their clothes; it would start when they arrived at their worksite. If clothes-changing time is lawfully not compensated, we can’t see how it could be thought a principal employment activity, and so section 254(a) exempts the travel time in this case.[[108]](#footnote-109)

The Tenth Circuit in *Salazar v*. *Butterball, LLC*[[109]](#footnote-110)similarly concluded that Section 203(o) is not an exemption.[[110]](#footnote-111)

In *Adair v. ConAgra Foods, Inc.*,[[111]](#footnote-112) the Eighth Circuit agreed with the Seventh Circuit’s decision in *Sandifer*, holding that because donning and doffing of uniforms by production and maintenance workers was excluded from compensable work time under Section 203(o), such time is not a principal activity that begins and ends the workday.[[112]](#footnote-113) The court declined to give deference to the DOL’s contrary position,[[113]](#footnote-114) citing the DOL’s changing views on the issue.[[114]](#footnote-115)

The Tenth Circuit similarly applied Section 203(o) to a case where the union and employer negotiated to compensate employees for walking time in their latest CBA. In *Castaneda v*. *JBS USA, LLC*,[[115]](#footnote-116) after evaluating the holdings of *Sandifer* and *Adair* regarding compensability and start of the work day, the court held that walk time could have been rendered noncompensable by the CBA (through Section 203(o)), and therefore the employees were entitled to compensation only for time provided by the CBA in effect at the time.

In *Franklin v*. *Kellogg Co*.,[[116]](#footnote-117) the Sixth Circuit ruled that, even though donning and doffing a uniform and protective equipment were excluded from compensable time under Section 203(o), it was nonetheless “an integral and indispensable part of employment,” and thus triggered application of the continuous workday rule.[[117]](#footnote-118) The Sixth Circuit held that the time spent walking between a locker room and the time clock that occurred after donning and before doffing activities could be compensable, but remanded the matter for consideration of whether the walking time was de minimis.[[118]](#footnote-119) While so holding, the Sixth Circuit rejected the narrower interpretation of the Second Circuit in *Gorman v. Consolidated Edison Corp.*,[[119]](#footnote-120) and adopted the reasoning of the Ninth Circuit in *Ballaris v. Wacker Siltronic Corp.*[[120]](#footnote-121) and the Eleventh Circuit in *Bonilla v. Backer Concrete Construction, Inc.*[[121]](#footnote-122)

Consequently, whether the hours spent under a CBA’s clothes changing or washing provision must also count as hours worked, and thereby set the start and end of the workday, depends on the exemption versus exception dichotomy. In *Sandifer v. United States Steel Corp.*,[[122]](#footnote-123) the Supreme Court seemed to endorse the majority view that Section 203(o) provides a definitional limitation on the scope of compensable work and is not analogous to an exemption under Section 213 of the FLSA.[[123]](#footnote-124) The Court noted that exemptions generally reside in Section 213, while Section 203 is entitled “Definitions.”[[124]](#footnote-125) The Court further noted that, in *Christopher v. SmithKline Beecham Corp.*,[[125]](#footnote-126) it had found the principle requiring narrow construction––later rejected in *Encino Motorcars, LLC v. Navarro*[[126]](#footnote-127)––inapplicable to another provision of Section 203.[[127]](#footnote-128) In *Encino Motorcars,* however, the Supreme Court rejected the concept that exemptions are to be narrowly construed.[[128]](#footnote-129) Consequently, the previous and commonly recognized dichotomy may now be moot, i.e., whether Section 203(o) is an exclusion or an exemption may now be a distinction without a difference.

***3. Split Shifts and Other Workday Breaks Under the Continuous Workday Rule***

Whether time is compensable may also turn on whether the “workday” is truly continuous—an issue that arises for employees scheduled to work split shifts. The time between split shifts is typically not compensable if, during that time, the employee is “completely relieved from duty” and the time period is “long enough to enable him to use the time effectively for his own purpose.”[[129]](#footnote-130) Where significant restrictions are placed on how employees can spend their time between shifts, the employees may be deemed to be “engaged to wait” and thus owed compensation.[[130]](#footnote-131)

Courts have also applied the “completely relieved from duty” standard to exclude application of the continuous workday doctrine to commuting time that occurs before or after an employee performs certain preliminary or postliminary tasks at home. In *Kuebel v. Black & Decker Inc.*,[[131]](#footnote-132) the Second Circuit ruled that administrative tasks a retail specialist performed at home, including checking e-mail and voicemail, synching his personal digital assistant, and printing sales reports, even if integral and indispensable, did not render his morning and evening commuting time compensable. The court noted that the record did not indicate that the plaintiff was required to perform these duties immediately before leaving home or after returning home. Rather, the plaintiff had flexibility to perform the duties when he chose and was free to engage in personal pursuits between performing the duties and his commute.[[132]](#footnote-133)

In *Mitchell v. JCG Industries, Inc.*,[[133]](#footnote-134) the Seventh Circuit, in a split opinion, called into question the traditional ­interpretation of the continuous workday in ruling that employees of a poultry processing plant did not work one eight-hour day, but instead worked two four-hour workdays separated by a 30-minute lunch break.[[134]](#footnote-135) In *JCG Industries*, sanitation regulations required the workers to wear sanitary clothing while working, then remove the clothing at the start of their half-hour lunch break, and then put it back on before returning to work.[[135]](#footnote-136) The workers were not compensated for this time.[[136]](#footnote-137) The Seventh Circuit found the time noncompensable under Section 203(o) because it took place at the beginning and end of each four-hour “workday.”[[137]](#footnote-138) While the court acknowledged the definition of “workday” in 29 C.F.R. §790.6(b),[[138]](#footnote-139) it found that the “qualifying phrase ‘in general’” in the definition “allows room for an exception,” and concluded “there is compelling reason to recognize an exception in this case.”[[139]](#footnote-140) The court did not explain when such an exception should be applied. In a dissenting opinion to the denial of rehearing *en banc*, four judges expressed “serious concerns about what effect the majority’s analysis will have on the ‘continuous workday’ doctrine going forward.”[[140]](#footnote-141) District courts have questioned the reasoningin *JCG Industries*.[[141]](#footnote-142)

In other circumstances, some breaks of less than 20 minutes are noncompensable and therefore constitute exceptions to the traditional “continuous workday” concept.[[142]](#footnote-143) For instance, per an amendment adding Section 207(r) to the FLSA, breaks needed by lactating mothers for the purpose of expressing milk are noncompensable,[[143]](#footnote-144) and per a 2018 opinion letter, intermittent breaks of short duration provided pursuant to the Family and Medical Leave Act are also noncompensable.[[144]](#footnote-145)

IV. Application of Principles

This section discusses how the principles detailed in Section III have been applied to specific types of activities, and the extent to which those activities may constitute hours worked under the FLSA.

**A. Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities**

Employees engage in many activities as they present themselves for work at the beginning of each workday, and they also engage in various activities as the workday ends. Some of these activities are compensable and some are not. Generally, and as the following sections discuss, pre- and post-shift activities are not compensable when they are not integral and indispensable to the employee’s ability to perform the principal activities of the job at issue. A pre-or post-shift activity that is not closely related to the performance of the job’s principal activities is considered a preliminary or postliminary activity. Under the Portal-to-Portal Act, time spent in preliminary or postliminary activities is excluded from “hours of work” and is not compensable.[[145]](#footnote-146)

As referenced in Section II.B [Historical Context of the Term “Hours Worked”; The Portal-to-Portal Act] of this chapter, the Portal-to-Portal Act made certain activities that occurred at either the beginning or the ending of a workday noncompensable. It provides the following in Section 254(a)(2):

**(a) Activities not compensable** … no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, … on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

…

**(2)** activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities … .[[146]](#footnote-147)

During the Senate debate regarding the Portal-to-Portal Act, a colloquy ensued between several senators and Senator Cooper, a sponsor of the bill. The colloquy demonstrated that the senators wanted to be clear that the language of the Portal-to-Portal Act did not make all activities occurring at the beginning of or at the end of a workday noncompensable. Rather, the senators intended that certain preliminary and postliminary activities should come within the minimum wage and overtime protections of the FLSA if they were an integral part of and essential to the principal activities.[[147]](#footnote-148)

Following enactment of the Portal-to-Portal Act, the DOL drafted regulations found at 29 C.F.R. Part 790, “General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938.”[[148]](#footnote-149) These regulations quote from the legislative history of the Portal-to-Portal Act, noting that this history “indicates that Congress intended the words ‘principal activities’ to be construed liberally … to include any work of consequence performed for an employer no matter when the work is performed.”[[149]](#footnote-150) The parameters of what pre-shift and post-shift activities are to be compensable quickly became hotly contested before the courts, as described in Section II.C [Historical Context of the Term “Hours Worked”; U.S. Supreme Court Interpretation of the Portal-to-Portal Act] of this chapter. The extent to which cases preceding *Busk*,[[150]](#footnote-151) the most recent Supreme Court decision to address the compensability of pre- and post-shift work,can be relied on to determine whether time spent on pre-shift or post-shift activities relates to a principal activity is still being grappled with by the courts.

***1. Security and Health Screenings***

The Supreme Court’s 2014 decision in *Integrity Staffing Solutions v. Busk*[[151]](#footnote-152) fine-tuned the meaning of the phrase “integral and indispensable.” At issue in *Busk* was whether the time spent waiting for and undergoing mandatory post-shift security screening was compensable. During this screening, workers removed such items as belts and wallets and passed through metal detectors, and it took some employees up to 25 minutes to wait in line and pass through the screening.[[152]](#footnote-153) The Ninth Circuit held that the security clearances were compensable because they were required by the employer and performed for its benefit and therefore were integral and indispensable to the principal activities of the warehouse workers.[[153]](#footnote-154)

The Supreme Court reversed and held that work activities are integral and indispensable only if they are directly related to performing the job the employee was hired to perform. While so holding, the Court stated that the appellate court “erred by focusing on whether an employer *required* a particular activity.”[[154]](#footnote-155) The Court also ruled that “[a] test that turns on whether the activity is for the benefit of the employer is similarly overbroad.”[[155]](#footnote-156) To the contrary, the Court held that an activity is integral and indispensable to principal activities and thus compensable under the FLSA “if it is an intrinsic element of those activities and one which the employee cannot dispense if he is to perform his principal activities.”[[156]](#footnote-157)

Applying this standard in *Busk*, the Court held that the time spent going through security screenings was noncompensable because the “screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment” and the employer could have “eliminated the screenings altogether without impairing” the ability of the workers to perform their work.[[157]](#footnote-158)

Before *Busk*, the Second and Eleventh Circuits had ruled that preliminary security screening was not compensable under the Portal-to-Portal Act. In *Gorman v. Consolidated Edison Corp*.,[[158]](#footnote-159) all workers and visitors at a nuclear power plant had to pass through security screening before entering the facility. Noting that “security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act,” the Second Circuit explained that although security screening activities may be necessary or “indispensable,” they are not necessarily “integral” to the principal work and thus not compensable.[[159]](#footnote-160) In *Bonilla v. Baker Concrete Construction, Inc*.,[[160]](#footnote-161) construction workers sought overtime compensation for the time spent passing through security at an airport. The Eleventh Circuit ruled that the workers need not be paid for this time because such a security regime was required by law and did not benefit the employer.[[161]](#footnote-162) *Busk* arrived at the same conclusion, but by means of a different analysis.

In some post-*Busk* contexts, time spent undergoing security screenings may be compensable. Such was the holding by the Tenth Circuit in *Aguilar v. Management & Training Corp.*[[162]](#footnote-163) *Aguilar* involved claims by prison security officers that their pre- and post-shift activities that included security screenings should be compensable. The court held that the security screenings and protocols were necessarily tied to the officers’ principal activities of providing prison security and searching for contraband.[[163]](#footnote-164) Some courts, however, disagree.[[164]](#footnote-165)

Many employers adopted health protocols in response to the COVID-19 pandemic, giving rise to the issue of whether the time employees spend undergoing coronavirus testing and screening outside of regular hours for their shifts was compensable. In its FAQs regarding COVID-19–related issues, the Department stated the following in response to a question as to whether the time taken for temperature screening is compensable:

It depends, under the FLSA, [whether] your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. For example, if a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such a task is necessary for her to safely and effectively perform her job during the pandemic. In other words, the temperature check is integral and indispensable to the nurse’s job. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.[[165]](#footnote-166)

When applying *Busk* to industries other than health care, some courts have held that time taken for COVID-19–related temperature checks and health screens are not compensable as they are not an activity that is integral and indispensable to the employees’ principal activities in their jobs.[[166]](#footnote-167) In contrast, one court has held that warehouse workers pled sufficient facts to show time spent in coronavirus screenings was compensable where the screenings served to prevent “the spread of a highly-contagious and deadly virus among employees,” and foregoing the screenings “would substantially impair the workplace safety at the fulfillment centers.”[[167]](#footnote-168)

***2. Donning and Doffing Clothing and Protective Equipment***

*a. In General*

Since *Steiner*[[168]](#footnote-169) and *King Packing Co.*,[[169]](#footnote-170) there has been significant litigation addressing whether preliminary and postliminary donning and doffing activity is compensable, but now courts appear to have reached something of a consensus on the issue. Prior to *Busk*,[[170]](#footnote-171) the result typically depended on how the court interpreted the integral and indispensable standard in the context of pre- and post-shift clothes changing. In this regard, some circuit courts ruled that clothes-changing activity required by law, the employer, or the nature of the work, satisfied the integral and indispensable standard and therefore was compensable.[[171]](#footnote-172) However, the basis for those holdings was, at least in part, abandoned by the Court in *Busk* when it rejected the notion that compensability turned on whether the activity at issue is required by or benefits the employer.[[172]](#footnote-173)

Appellate courts have cited to *Busk* for the rule that work must be an “intrinsic element” and not one that can be “dispense[d] with” in order for workers to perform their principal activities.[[173]](#footnote-174) For example, in *Balestrieri v*. *Menlo Park Fire Protection District*,[[174]](#footnote-175) firefighters sought compensation for the time it took to deal with fire-fighting gear in two situations: (1) the voluntary acceptance of an overtime shift when the firefighter was called at home, and (2) the time it took the firefighter to load up gear when the firefighter was already at work early and was told to report to a visiting station. The Ninth Circuit found the activities to be “preliminary” or “postliminary” to the firefighters’ “principal activities” of “the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.”[[175]](#footnote-176) The court held that “[l]oading up turnout gear to report to a shift at a visiting station is ‘two steps removed’ from that activity, not ‘integral and indispensable’ to it.”[[176]](#footnote-177)

In contrast, in *Meeks v*. *Pasco County Sheriff*,[[177]](#footnote-178) the Eleventh Circuit held that the act of transporting a patrol car from a secure location to a patrol zone was an “intrinsic element” of a sheriff’s patrol duties,[[178]](#footnote-179) reasoning that the car and car’s radio were integral to the duty of maintaining contact and responding to assignments and the plaintiff could not have dispensed with the act of transporting the vehicle to the patrol zone.[[179]](#footnote-180)

*b. Donning and Doffing in the Context of Section 203(o)*

As fully discussed in Section III.C.2 [Principles for Determining “Hours Worked”; The Continuous Workday Rule and the Concept of Principal Activities; When the Workday Starts and Ends If Collective Bargaining Agreements and Section 203(o) Are Applicable] of this chapter, Section 203(o) of the FLSA provides that the time employees spend “changing clothes or washing at the beginning or end of each workday” may be excluded from time worked when that time is specifically deemed noncompensable under the terms of a CBA or a custom and practice under such a contract.[[180]](#footnote-181) That time is noncompensable even where changing or washing is required by the nature of the job, except where special conditions exist.

*(i.) What Constitutes a “Custom or Practice” Under Section 203(o)*

The “custom or practice” of not compensating for clothes-changing time need not be specified in a CBA or any other writing to satisfy the requirement of a policy in force or effect at the time a bona fide CBA was executed.[[181]](#footnote-182) “Custom” has been defined as an “ongoing understanding with some continuity.”[[182]](#footnote-183) A “practice,” on the other hand, “can include understandings with regard to the future agreed to by the parties.”[[183]](#footnote-184) Thus, where a new uniform policy was at issue during the negotiations of a CBA but pay for donning and doffing the uniforms was not addressed in the CBA, the Second Circuit held that although the “custom” requirement was not met, the “practice” requirement was.[[184]](#footnote-185)

The “custom or practice” may be evidenced in the history of negotiations that produced the CBA.[[185]](#footnote-186) For instance, in *Bejil v. Ethicon, Inc.*, the Fifth Circuit held that where the employer and union negotiated over clothes-changing time but did not require that time to be paid under the CBA, a “custom or practice” existed under Section 203(o).[[186]](#footnote-187) Moreover, a policy, written or unwritten, concerning compensability of clothes-changing time that exists at the time a CBA is executed satisfies Section 203(o)’s requirement of a “custom or practice” under a CBA.[[187]](#footnote-188) Thus, the absence of negotiations regarding a noncompensation policy does not necessarily prove the nonexistence of a “custom or practice”; rather, it can demonstrate acquiescence to it.[[188]](#footnote-189) For example, in *Turner v. City of Philadelphia*,[[189]](#footnote-190) the Third Circuit found that the existence of a 30-year policy of not paying corrections officers for time spent changing into and out of their uniforms became an implied term in the labor agreement, and thus held that such time could be excluded from measured working time as a “custom or practice under a bona fide collective-bargaining agreement” pursuant to Section 203(o).[[190]](#footnote-191)

*(ii.) What Constitutes “Clothing” Under Section 203(o)*

Section 203(o) does not define “clothes.” The Supreme Court addressed the meaning of the term in *Sandifer v. United States Steel Corp.*[[191]](#footnote-192) Rejecting both the workers’ and the employer’s proposed definitions, the Court reviewed dictionaries from the time Section 203(o) was enacted and concluded that “clothes” denotes “items that are both designed and used to cover the body and are commonly regarded as articles of dress.”[[192]](#footnote-193) The Court noted that “[a]lthough the Labor Department has construed §203(o) on a number of occasions, the Government [supporting the employer as amicus curiae] has expressly declined to ask us to defer to those interpretations, which have vacillated considerably over the years.”[[193]](#footnote-194) The workers argued that “clothes” does not refer to items designed and used to protect against workplace hazards, but the Court found no basis for concluding that the term “clothes” excludes protective clothing. The Court noted such a distinction “runs the risk of reducing §203(o) to near nothingness” since “protective gear is the *only* clothing that is integral and indispensable to the work of factory workers, butchers, longshoremen, and a host of other occupations.”[[194]](#footnote-195) The Court also rejected the more expansive definition proposed by the employer, and adopted by some circuit courts, that “clothes” includes essentially anything worn on the body.[[195]](#footnote-196) Rather, the Court explained that its “definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices.”[[196]](#footnote-197)

Applying these principles, *Sandifer* found that nine of the items at issue were “clothes” (flame-retardant jacket, pants and hood; hardhat; snood; wristlets; work gloves; leggings; and metatarsal boots), while three were not (safety glasses, earplugs, and a respirator).[[197]](#footnote-198) However, the Court noted that “it is most unlikely Congress meant §203(o) to convert federal judges into time-study professionals” required to separate the minutes spent changing “clothes” from the minutes spent on other activities.[[198]](#footnote-199) Thus, the Court instructed that “[t]he question for courts is whether the period at issue can, *on the whole*, be fairly characterized as ‘time spent in changing clothes or washing.’”[[199]](#footnote-200) Holding that “if the vast majority of the time is spent donning and doffing ‘clothes’ as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted,” the Court held that the entire donning and doffing period at issue qualified as time spent changing “clothes” within the meaning of Section 203(o).[[200]](#footnote-201)

Following the Supreme Court’s decision in *Sandifer*, the Third Circuit in *Rosano v. Township of Teaneck*[[201]](#footnote-202) addressed whether police officers’ donning and doffing of certain equipment and uniforms involved “clothes.” The court ruled that 14 of the items at issue constituted “clothes” as the term is defined in *Sandifer* (uniform hat; uniform jacket; shirts; pants; dress blouse; leather gear; shoes/boots; socks; tie; winter/summer uniform; sweaters; gloves; rainwear; and bullet-resistant vest), but 13 of the items did not(nightstick; handcuffs; nameplate; medals; awards; shield and department I.D. card; notebook and pen; firearm and ammunition; whistle; baton; watch; pepper spray; and flashlight). While recognizing that the number of items in each category was close, the court concluded that “the vast majority of the time in question” was spent donning and doffing “clothes” and therefore the entire period qualified as time spent changing clothes.[[202]](#footnote-203)

*(iii.) What Constitutes “Changing” Under Section 203(o)*

*Sandifer*[[203]](#footnote-204) also considered the meaning of “changing,” and concluded that “changing” clothes is not limited to taking off one set of clothes to put on another, but may also include layering clothes atop other clothes.

*(iv.) What Constitutes “Washing” Under Section 203(o)*

Section 203(o) does not define the term “washing.” According to the DOL’s Wage and Hour Division (WHD), the term refers only to washing parts of the body.[[204]](#footnote-205) This is the same result reached by courts that have addressed the issue.[[205]](#footnote-206)

***3. Preparing Equipment and Vehicles***

In addition to discussing “clothes changing” as a preparatory or concluding activity,[[206]](#footnote-207) the regulations also briefly address “preparing equipment or workstations” as preparatory activities in 29 C.F.R. §785.24(b). That regulation provides that the term “principal activities” includes all activities that are an integral part of a principal activity, citing to the legislative history of the Portal-to-Portal Act and the two examples of compensable time referenced by Senator Cooper’s remarks on “preliminary/postliminary time” when the Portal-to-Portal Act was first proposed: (1) the lathe operator who starts the workday oiling, greasing, or cleaning a machine or installing a new cutting tool; and (2) a garment worker who shows up 30 minutes before others to get machines ready for operation.[[207]](#footnote-208)

In cases involving law enforcement officers and their preparatory activities, courts have differed as to whether weapons care and maintenance is compensable time. In *Bull v. United States*,[[208]](#footnote-209) the Federal Court of Claims found that off-duty weapons care and maintenance was compensable work because it was “an integral and indispensable part of the job of a canine enforcement officer.”[[209]](#footnote-210) The court cited other cases finding that time spent by an officer cleaning autoua firearm and vehicle were compensable because they were required by the employer and were not de minimis.[[210]](#footnote-211) However, more recent cases have found such activities not compensable, because time spent maintaining ballistic vests, cleaning radios, cleaning safety vests and guns, and oiling handcuffs are either preliminary and postliminary activities (and not compensable under the Portal-to-Portal Act), de minimis,[[211]](#footnote-212) or not essential to the officers’ performance of their principal duties under the Portal-to-Portal Act.[[212]](#footnote-213)

Pre-trip loading of a vehicle and conducting pre-trip inspections have been found to be compensable.[[213]](#footnote-214) Employees who use service vehicles also may be entitled to compensation for time spent loading and unloading, fueling, and cleaning the vehicle where such tasks are a necessary part of the job.[[214]](#footnote-215) Most of these cases predate *Busk*,[[215]](#footnote-216) and therefore may have turned out differently with the benefit of the Supreme Court’s guidance.

***4. Shift Change Activities***

Pre-*Busk*, where employers required shift change activities, such as roll-calls or receiving instruction from supervisors or briefings from employees coming off-duty, courts generally held such time to be compensable.[[216]](#footnote-217) Post-*Busk*, courts look to whether the job at issue could be done without the pre- or post-shift activities at issue. Thus, in *Bonds v. GMS Mine Repair & Maintenance, Inc.*,[[217]](#footnote-218) the court held that pre-shift safety meetings of underground miners were not compensable because the meetings were “not an intrinsic element of conducting underground mining activities.”[[218]](#footnote-219) On the other hand, in *Aguilar v. Management & Training Corp.*,[[219]](#footnote-220) the Tenth Circuit held that time spent by detention officers while completing security screenings, briefings, and other security protocols at the start and end of shifts was integral and indispensable to their principal activities of the jobs they were employed to perform where the detention officers were responsible for the custody and detention of inmates at a correctional facility.[[220]](#footnote-221)

***5. Other Preparatory/Concluding Activities***

Other preparatory or concluding activities found compensable by the courts include caring for police dogs,[[221]](#footnote-222) performing administrative tasks at home before servicing clients in the field,[[222]](#footnote-223) reviewing work schedules and gathering and distributing materials to workstations,[[223]](#footnote-224) and other endeavors performed for the benefit of the employer.[[224]](#footnote-225)

Since *Busk*, however, at least some of these activities may lose their compensability status. Those cases that denied compensation for pre-work activities because the activities were not “integral and indispensable” to the principal activities of the workers, such as riding to a worksite on a bus provided for employee convenience,[[225]](#footnote-226) transporting police dogs,[[226]](#footnote-227) responding to e-mails and synchronizing a phone,[[227]](#footnote-228) and unloading groceries and performing other off-shore housekeeping activities,[[228]](#footnote-229) will likely be found to be in line with the *Busk* analysis.[[229]](#footnote-230)

In *Campbell v. Empire Merchants, LLC*,[[230]](#footnote-231) the court applied *Busk* and determined that an employee was not entitled to compensation for the time he was required to be present in a particular place at a particular time to receive a work assignment; that time was not integral and indispensable to the employee’s principal work activities.

**B. Travel Time**

Determining whether time spent in travel is working time depends on the kind of travel involved,[[231]](#footnote-232) the employee’s activities during travel, the time during which the travel takes place, and the purpose of the travel.[[232]](#footnote-233)

***1. Preliminary and Postliminary Travel***

Generally, pre- and post-shift travel time is not compensable.[[233]](#footnote-234) Thus, ordinary home-to-work travel (i.e., commuting time) is not compensable.[[234]](#footnote-235) The Sixth Circuit has gone so far as to hold that even when an employer has a custom or practice of paying for commute time, ordinary commute time is noncompensable for purposes of overtime calculation.[[235]](#footnote-236)

Travel time from a central location to an outlying worksite before the start of work is generally noncompensable, provided that employees (1) are not required to travel from the central site to the worksite, and (2) do not perform work-related activities before or during the travel.[[236]](#footnote-237) Before *Busk*, courts found that if duties were performed at the central location before the travel, then the travel from a central location to an outlying worksite was compensable, being “all in a day’s work.”[[237]](#footnote-238) However, post-*Busk*, courts may look to the activities performed at the central location to determine if they are integral and indispensable to the employees’ principal activity and therefore compensable. For example, in *Hernandez v. NJK Contractors, Inc.*,[[238]](#footnote-239) the court found that time spent at the shop before and after the commute to the job site, loading and unloading tools and material onto or off vans, was compensable because the activities performed at the shop were integral to the principal activity of roofing.

After *Busk*,activities that occur at a central location may no longer be compensable if they are found not to be “integral and indispensable” to the principal activities of the workers.[[239]](#footnote-240)

Travel time to and from a location to wash up before a meal period is not likely to be compensable unless the employees are performing particularly dirty or toxic work.[[240]](#footnote-241) Such noncompensable travel time may encompass activities directly related to the travel, such as opening and closing gates to reach the actual place of performance.[[241]](#footnote-242)

Travel time has been found to be noncompensable even where the trips are lengthy.[[242]](#footnote-243) For instance, in *Vega v. Gasper*,[[243]](#footnote-244) the Fifth Circuit determined that the four hours per day spent by workers traveling between remote fields and the community in which they lived, on buses provided by their employer, was not compensable. In so holding, the court emphasized that (1) the workers performed no work before or during the bus ride; (2) the workers did not load tools or engage in activities that prepared them or their equipment for working in the fields before or during the ride; (3) the information received while on the buses regarding pay rates and the field they would be working was not sufficient to render the time compensable; (4) the workers were not required to use the buses; and (5) the workers chose where they lived and how to get to and from work.[[244]](#footnote-245)

In *Bridges v. United States,*[[245]](#footnote-246)the Federal Circuit considered whether travel time from a prison at the end of a correctional officer’s shift to a hospital to work another shift was compensable. The court first determined that the travel time was akin to commuting because no activities related to the officer’s principal activities were performed during the travel to the hospital.[[246]](#footnote-247) Next, the court held that the “continuous workday” rule did not apply because the continuous workday can be interrupted by the start and end of a principal activity. Here, the officers worked a full shift, it ended, and then they started a new shift at the hospital. In finding the travel time noncompensable, the court also reasoned that the travel did not occur during the workday.[[247]](#footnote-248)

However, there are instances where preliminary and postliminary travel have been deemed a principal activity and therefore compensable. For instance, the Tenth Circuit held that bus drivers working split shifts must be paid for time shuttling to and from relief points at the beginning and end of their split-shift periods because such travel was integral to staffing the bus runs.[[248]](#footnote-249) Restrictions on the means of travel (e.g., requiring carpooling) are usually of little relevance unless probative to the issue of whether the travel time was integral and indispensable to principal activities.[[249]](#footnote-250)

***2. Travel During the Workday***

Travel time from job site to job site during the course of the workday is compensable.[[250]](#footnote-251) The regulation includes the following example: “where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the workplace is part of the day’s work [and is compensable].”[[251]](#footnote-252) Courts have generally followed this rule, finding that once an employee engages in compensable work at one site, the employee is entitled to compensation for travel to the next job site. For instance, police officers who had to pick up their squad cars at a district station and then drive to a substation where they were assigned to work were held entitled to compensation for travel time between the district station and their assigned substation.[[252]](#footnote-253) In another case, the court held that auto damage appraisers were entitled to compensation for time spent travelling from home to their first assignment and from their last assignment back home because they performed administrative tasks from home at both ends of the workday.[[253]](#footnote-254) However, in *Chambers v*. *Sears Roebuck & Co*.,[[254]](#footnote-255) the Fifth Circuit distinguished the preparatory and concluding activities of appliance technicians from that of the auto appraisers in *Dooley*, finding that work performed on a laptop and tasks associated with loading tools and supplies were not integral and indispensable to their principal activities, and thus such activities did not transform their commute into compensable time.[[255]](#footnote-256)

Travel that is compensable as part of the workday must be distinguished from bona fide breaks in the continuous workday, as illustrated in the DOL regulation:

If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer’s premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer’s premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.[[256]](#footnote-257)

This distinction was critical in *United Transportation Union Local 1745 v. City of Albuquerque*,[[257]](#footnote-258) where the Tenth Circuit held that bus drivers working split shifts were entitled to pay for shuttling between relief points during the shift breaks,[[258]](#footnote-259) but not for shuttling to their first run of the day or from the end of their last run.[[259]](#footnote-260) On the other hand, the court in *Gilmer v. Alameda-Contra Costa Transit District*[[260]](#footnote-261) held, in a pre-*Busk* case with facts almost identical to those in *City of Albuquerque*, that time spent by bus drivers traveling back to where their shifts began is compensable. In this regard, the court said:

The ending points are not chosen for the convenience of the employees. Rather, arranging an ending point different from a starting point is “required by the employer and pursued necessarily and primarily for the benefit of the employer.”[[261]](#footnote-262)

Travel during a workday by teleworkers to their employer sites may not be compensable. In a 2020 opinion letter, the Administrator concluded that if the trip is at the employee’s discretion and personal matters were handled during the trip, the time is “off duty time” and not “between worksites.”[[262]](#footnote-263) In these instances, the Administrator concluded, the continuous workday rule was inapplicable.[[263]](#footnote-264)

***3. Travel After Principal Activities Are Performed at Home***

Where principal activities are performed at home before preliminary or after postliminary travel, the travel time may be compensable as part of a “continuous workday” or “all in a day’s work.”[[264]](#footnote-265) However, the Second Circuit in *Kuebel v. Black & Decker, Inc.*[[265]](#footnote-266) found that a commute from home to work by a retail specialist was not rendered compensable by administrative tasks he performed before leaving home because he was not required to perform the tasks at any particular time.[[266]](#footnote-267)

***4. Transporting Tools and Equipment***

Transporting tools and equipment may be compensable, depending on the circumstances.[[267]](#footnote-268) The Portal-to-Portal Act regulations note the following:

An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel “to and from the actual place of performance” of the principal activities he is employed to perform.[[268]](#footnote-269)

However, the same regulation distinguishes transporting heavy equipment from carrying hand tools and implies that time involving the latter activity would not be compensable.[[269]](#footnote-270) Some courts have found that if the transporting of essential equipment is in the ordinary course of business, then it is compensable.[[270]](#footnote-271)

The impact of the Supreme Court’s 2014 decision in *Integrity Staffing Solutions, Inc. v. Busk*[[271]](#footnote-272) on this issue is still evolving.[[272]](#footnote-273) For instance, in *Chagoya v. City of Chicago*,[[273]](#footnote-274)the Seventh Circuit held that, under *Busk*, SWAT officers were not entitled to be compensated for time spent driving their SWAT gear home in their police vehicles and then securely storing that gear in their homes. The officers claimed that responding quickly to emergencies from their homes, with their gear, was integral and indispensable to their duties. The circuit court disagreed with the officers and affirmed summary judgment for the city. The city encouraged, but did not require, the SWAT officers to take their gear home. The court stated: “An activity that allows a reduced response time is an activity that promotes greater efficiency, but greater efficiency alone does not turn an activity into an integral and indispensable one.”[[274]](#footnote-275) The court elaborated:

The CPD requirement that certain equipment not be left in the vehicle but stored in the residence is nothing more than a reasonable directive that its officers take the precautions necessary to ensure the safe and secure storage of the weapons and equipment. This activity is very far removed, both logically and practically, from the operators’ principal activity of handling critical incidents. It is simply designed to protect the public and ensure that Chicago-owned dangerous equipment is not used abusively.[[275]](#footnote-276)

Prior to *Busk*, in *Singh v. City of New York*,[[276]](#footnote-277) the Second Circuit analyzed whether commuting time should be compensated under the “predominant benefit” test regularly used by courts to determine the compensability of meal periods.[[277]](#footnote-278) Field inspectors were required to carry fire inspection documents in a briefcase to and from work. The court concluded that the inspectors were not engaged in compensable work because “the mere carrying of a briefcase without any active employment-related responsibilities does not transform the plaintiff’s entire commute into work.”[[278]](#footnote-279) Adapting the “predominant benefit test,” which is usually applied in meal period actions, to the commuting context, the court explained that[[279]](#footnote-280)

[i]n the commuting context, we believe that the appropriate application of the predominant benefit test is whether an employer’s restrictions hinder the employees’ ability to use their commuting time as they otherwise would have had there been no work-related restrictions.[[280]](#footnote-281)

The court also found that “[c]arrying a briefcase during a commute presents only a minimal burden on the inspectors” and that the city was not the “predominant beneficiary” of the commute time.[[281]](#footnote-282)

Travel time may be compensable based on the extensive nature of the equipment or supplies being transported, or on the additional responsibilities related to such transport.[[282]](#footnote-283) In an opinion letter, the DOL stated that law enforcement officers were entitled to compensation for time spent transporting prisoners.[[283]](#footnote-284) Under a CBA, officers received compensation for up to only eight hours a day while transporting prisoners. The DOL recognized that the officers were guarding the prisoners during the transport and thus must be compensated for all the transport time.

The impact of travel restrictions and tasks performed during travel has been extensively litigated in actions involving law enforcement officers who commute in government vehicles. Typically, these officers are in uniform during their travel, transport their weapons and other gear, monitor their vehicle radios, and are required to respond to calls.[[284]](#footnote-285) For instance, K-9 officers are expected to travel with their dogs and tend to their needs during travel. In *Reich v. New York City Transit Authority*,[[285]](#footnote-286) a seminal decision in this area, the Second Circuit surveyed many of these decisions and observed,

While no clear standards emerge, certain generalizations can be drawn from these authorities. The more the preliminary (or postliminary) activity is undertaken for the employer’s benefit, the more indispensable it is to the primary goal of the employee’s work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable. The ability of the employer to maintain records of such time expended is a factor. And, where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it.[[286]](#footnote-287)

The court concluded that the time spent by dog handlers driving to and from work with their dogs is noncompensable time.[[287]](#footnote-288) While the Second Circuit acknowledged the dog-care duties performed during the commute constituted “work,” it found such activities to be de minimis and thus not compensable.[[288]](#footnote-289) Other courts have denied compensation for such activities using this same analysis.[[289]](#footnote-290)

Since *IBP, Inc. v. Alvarez*,[[290]](#footnote-291) the Second Circuit, commenting on its decision in *New York City Transit Authority*, observed in a footnote that “it is perhaps unclear (after [the] continuous workday rule [in *Alvarez*]) whether the de minimis test measures only the first integral and indispensable activity of the day, or includes as well all intervening steps that precede the next principal activity of the continuous workday.”[[291]](#footnote-292)

There is split authority on the question of whether walking or travel time that follows the donning of protective clothing is compensable where the time spent donning is excluded from compensation under Section 203(o). The Sixth Circuit has held that such travel time may be compensable,[[292]](#footnote-293) while the Seventh and Eighth Circuits have held that it is not compensable.[[293]](#footnote-294)

***5. Travel in an Employer’s Vehicle: The Employee Commuting Flexibility Act of 1996***

Congress addressed the compensability of commute time in an employer’s vehicle in the Employee Commuting Flexibility Act of 1996 (ECFA),[[294]](#footnote-295) which amended the Portal-to-Portal Act. The ECFA provides that otherwise noncompensable commuting to work is not made compensable because an employee uses the employer’s vehicle.[[295]](#footnote-296) The ECFA states:

[T]he use of an employer’s vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee’s principal activities if the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.[[296]](#footnote-297)

Nearly identical language is now found in the DOL regulations, as part of the April 5, 2011, final rule entitled “Updating Regulations Issued Under the Fair Labor Standards Act.”[[297]](#footnote-298)

Before the ECFA was enacted, courts generally held that commute time was compensable if the employer received a benefit from the use of the company vehicle and driving the company vehicle was an integral and indispensable function of its business.[[298]](#footnote-299) Thus, the ECFA limits employer liability for FLSA claims related to commuting time in employer-provided vehicles.[[299]](#footnote-300)

To fall within the protections of the ECFA, the employer must prove there is an agreement not to compensate the employees for commute time.[[300]](#footnote-301) Although the ECFA does not define “agreement,” the legislative history indicates that the agreement requirement may be satisfied through a formal written agreement between the employee and employer, a CBA, or an understanding based on established industry or company practices.[[301]](#footnote-302) While the ECFA may not protect an employer absent an agreement, the absence of an agreement does not necessarily mean the travel time is compensable.[[302]](#footnote-303)

An agreement not to compensate for commuting in a company-owned vehicle may shield the employer from liability for activities in addition to the driving time. The ECFA excludes from compensable time all activities that are “incidental” to the use of the employer-provided vehicle.[[303]](#footnote-304) The legislative history shows that Congress intended such “incidental” activities to include communication between employer and employee to receive assignments or instructions or to transmit work status reports, routine vehicle safety inspections, and transporting tools and supplies.[[304]](#footnote-305) Courts have relied on this legislative history to hold a variety of activities to be noncompensable, including time spent on cleaning and scheduling the maintenance of city-owned vehicles used for commuting,[[305]](#footnote-306) calling in end-of-day reports,[[306]](#footnote-307) and transporting tools.[[307]](#footnote-308) One court concluded that the “incidental activities” language of the ECFA “enlarge[d] the scope of noncompensable activities related to employee commuting.”[[308]](#footnote-309) Another court rejected an argument that the Supreme Court’s discussion in *Busk*[[309]](#footnote-310) about activities that are integral and indispensable to an employee’s principal activities meant that time spent on job duties incidental to commuting in an employer’s van was compensable.[[310]](#footnote-311)

In *Rutti v*. *Lojack Corp*.*, Inc.*,[[311]](#footnote-312) a technician argued that he was entitled to compensation for his commute because his use of a company vehicle was not voluntary and amounted to a condition of employment. The technician also argued that the restrictions placed on his use of the vehicle, which included no detours while driving to and from work, no personal use of the vehicle, no passengers, and requiring a cell phone on board while driving, rendered the commute compensable. The Ninth Circuit rejected these arguments, ruling that the ECFA did not prohibit making commuting in a company vehicle a condition of employment. The court found that the restrictions on the use of the vehicle did not make the commute compensable, noting that the restrictions were less onerous than those at issue in *Adams v*. *United States*[[312]](#footnote-313)and *Bobo v*. *United States*.[[313]](#footnote-314) The court concluded that the plaintiff had “failed to show that the restrictions amount to ‘additional legally cognizable work.’”[[314]](#footnote-315)

The Fifth Circuit, in *Chambers v*. *Sears Roebuck & Co*.,[[315]](#footnote-316) followed *Rutti*, holding that commute time in company vans was not made compensable by requiring the technicians to transport tools and equipment in the vans and restricting personal use of the vans.[[316]](#footnote-317) The Fifth Circuit ruled that the activities were “incidental” to the technicians’ commutes under the ECFA and thus were noncompensable. Such “incidental” activities included uploading assignments and downloading information on a laptop, and loading and transporting tools and equipment.[[317]](#footnote-318)

***6. Emergency or Call-Back Situations***

In certain circumstances, travel from home to work is compensable.[[318]](#footnote-319) Specifically, when an employee who has gone home after completing work is subsequently called out to travel a substantial distance in order to handle an emergency for a customer, all the time spent while traveling is working time.[[319]](#footnote-320) The DOL declined to opine on whether travel time is compensable in an emergency or call-back situation where the employee travels to the regular place of business.[[320]](#footnote-321)

***7. Overnight Travel***

When employees are required to take a trip by public transportation that keeps them away from home overnight, all time spent traveling during the hours corresponding to the employees’ normal working hours must be counted as time worked.[[321]](#footnote-322) This includes travel hours on Saturdays, Sundays, and holidays when the hours of traveling correspond to the hours the employee would normally work on other days of the week.[[322]](#footnote-323) However, bona fide meal periods may be excluded.[[323]](#footnote-324) In 2019, the DOL issued guidance stating that time spent by a driver or assistant in a truck’s sleeping berth while relieved of all duties is noncompensable off-duty travel time, whether or not the truck is moving.[[324]](#footnote-325)

The DOL does not consider out-of-town travel time to be compensable if it occurs outside of regular working hours.[[325]](#footnote-326) Courts have agreed with the DOL regulation.[[326]](#footnote-327)

If an employee requests permission from the employer to use a private automobile instead of public transportation for out-of-town travel, an employer “may count as hours worked either the time spent driving the car or the time [the employee] would have had to count as hours worked during working hours if the employee had used the public conveyance.”[[327]](#footnote-328)

***8. Special One-Day Trips***

The DOL has recognized an exception to the noncompensability of home-to-work travel time where employees travel for “special 1-day work assignments in another city.”[[328]](#footnote-329) This special travel time is compensable if it is performed “for the employer’s benefit and at his special request to meet the needs of the particular and unusual assignment.”[[329]](#footnote-330) Such travel qualifies as an integral part of the “principal activity which the employee was hired to perform on the workday in question.”[[330]](#footnote-331)

In *Imada v. City of Hercules*,[[331]](#footnote-332) the Ninth Circuit addressed the applicability of the DOL’s “special 1-day work assignment” exception in considering whether the FLSA required a city to compensate its police officers for time spent commuting from their homes to mandatory off-site training locations when that time exceeded their regular commuting time. Finding that the travel was not unusual, but rather normal, contemplated, and in fact required by the officers’ CBA, the court concluded the conditions for compensation under that regulation were not met. The court also noted that travel need not occur frequently to be considered normal or usual. In addition, the court found that the travel was not undertaken to meet a special need of the employer. The travel to the off-site training facility conferred benefits on the city, but the court concluded that the officers realized an equivalent, if not greater, benefit from the training, because they were required to attend the training sessions to maintain their state law enforcement certifications. Because it was neither unusual nor specialized, the travel time fell outside the regulatory exception and was considered noncompensable ordinary home-to-work travel time.[[332]](#footnote-333)

Even where travel time related to a special one-day work assignment is found to be compensable, it must be separated from noncompensable travel time. That is, because an employee would ordinarily have to report to the regular worksite, the travel between home and the railroad depot or airport may be deducted, being “home-to-work” commuting time.[[333]](#footnote-334) Usual mealtimes are also deductible from compensable time.[[334]](#footnote-335)

**C. Waiting Time**

While employers must compensate employees for time actively working, questions arise as to whether the minimum wage and overtime provisions of the FLSA also apply to time spent waiting to perform productive work. The general test announced by the Supreme Court in *Skidmore v. Swift & Co.*[[335]](#footnote-336) is whether the employee was engaged to wait, and thus entitled to compensation, or waiting to be engaged, for which no compensation is owed.[[336]](#footnote-337) Whether waiting time constitutes time worked involves “’scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances.’”[[337]](#footnote-338)

The Supreme Court held that time spent waiting for work is compensable if it is spent “primarily for the benefit of the employer and [its] business.”[[338]](#footnote-339) Conversely, that time is not compensable if it is spent primarily for the benefit of the employee.[[339]](#footnote-340) After *Busk*,[[340]](#footnote-341) tests that turn on whether the activity benefits the employer or whether the employer requires the activity have been rejected by some courts as overbroad.[[341]](#footnote-342) Instead, many courts determine if the waiting is an intrinsic element of the employee’s principal activities and, if so, conclude the time is compensable.[[342]](#footnote-343)

***1. On-Duty Waiting Time***

Waiting time while on duty is included in compensable time “where the time belongs to and is controlled by the employer.”[[343]](#footnote-344) Compensable waiting time is often unpredictable or is of such short duration that the employees cannot use the time effectively for their own purposes.[[344]](#footnote-345) In those instances, the employees are to be compensated whether their work is on or off the employer’s premises, even if the employees spend the time engaging in such amusements as playing cards, watching television, or reading.[[345]](#footnote-346) In essence, if an employee is engaged to wait, then the wait time is compensable.[[346]](#footnote-347)

For instance, in *Mireles v. Frio Foods*,[[347]](#footnote-348) the Fifth Circuit found that assembly line workers who experienced idle time of 45 minutes or less due to delays in delivery and mechanical failures were engaged in compensable waiting time.[[348]](#footnote-349) Similarly, in *Wright v. Carrigg*,[[349]](#footnote-350) the Fourth Circuit found that truck drivers carrying mail who had periodic layovers lasting two hours or less due to loading or unloading problems were engaged in compensable waiting time.[[350]](#footnote-351) The same holding was reached by the court in *Wirtz v. Spencer*,[[351]](#footnote-352) which involved waiting time claims by employees who experienced occasional idle time caused by machinery breakdowns.[[352]](#footnote-353)

***2. Off-Duty Waiting Time***

The FLSA regulations provide that “[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 are not hours worked.”[[353]](#footnote-354) Whether time off work is truly sufficient to enable employees to effectively use the time for their own purposes is a factual issue that depends on the circumstances. In these situations, courts consider the duration of the time off and any other facts that may place restrictions on employees.[[354]](#footnote-355)

For instance, the court in *Little v. Technical Specialty Products*[[355]](#footnote-356) found that the employer did not violate the FLSA by denying compensation for idle time spent by a field service technician who was required to travel to various worksites and spent time outside the workday and away from home waiting for truck repairs, because the technician could use the time for his own purposes.[[356]](#footnote-357) Similarly, in *Gifford v. Chapman*,[[357]](#footnote-358) the court held that truck drivers who were responsible for picking up and delivering the mail, but who were free to attend to personal matters and occupy their time as they desired during the waiting time between scheduled runs, were properly not compensated for that time.[[358]](#footnote-359) The same outcome occurred in *United Transportation Union Local 1745 v. City of Albuquerque*,[[359]](#footnote-360) where the court held that bus drivers who had significant breaks between split shifts were not entitled to compensation for that time.[[360]](#footnote-361)

***3. On-Call Time***

Courts examine the particular facts to determine whether the on-call time is primarily for the benefit of the employer or whether the employee was “waiting to be engaged.”[[361]](#footnote-362) The compensability of on-call time may turn on whether the employees are required to remain on the employer’s premises or so close to the premises that they cannot use the time effectively for their own purposes.[[362]](#footnote-363) Employers may impose some restrictions on employees who are on call without the time becoming compensable; otherwise, “all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject.”[[363]](#footnote-364)

The Ninth Circuit, in *Owens v. Local 169, Ass’n of Western Pulp & Paper Workers*,[[364]](#footnote-365) surveyed decisions addressing the compensability of on-call time and assembled an illustrative list of factors to determine compensability, including whether (1) there was an on-premises living requirement;[[365]](#footnote-366) (2) there were excessive geographical restrictions on employee movements;[[366]](#footnote-367) (3) the frequency of calls was unduly restrictive;[[367]](#footnote-368) (4) a fixed time limit for response was unduly restrictive;[[368]](#footnote-369) (5) the on-call employee could easily trade on-call responsibilities;[[369]](#footnote-370) (6) the use of a pager could ease restrictions;[[370]](#footnote-371) and (7) the employee had actually engaged in personal activities during the on-call time.[[371]](#footnote-372) No one of these factors is dispositive.[[372]](#footnote-373)

Courts balance the facts to determine whether the limitations on employee freedoms prohibit the employees from using the time effectively for their own private pursuits.[[373]](#footnote-374) Some appellate courts have found that, under all the circumstances, the employees were “engaged to wait” and should be compensated for their on-call time. For instance, in *Cross v. Arkansas Forestry Commission*,[[374]](#footnote-375) forestry service employees who were required to remain within 50 miles of the worksite, could not participate in social or other activities that would prevent them from monitoring radio transmissions while off site, had to respond to an emergency call within 30 minutes, and could not obtain relief from the on-call status because they were subject to call 24 hours per day, were entitled to compensation for the on-call time.[[375]](#footnote-376) Similarly, in *Pabst v. Oklahoma Gas & Electric Co.*,[[376]](#footnote-377)electronic technicians who worked or were on call 24 hours a day, seven days a week; received three to five calls per on-call period; and had to either return to work premises or take some action remotely by computer within 15 minutes of the call, were not sufficiently relieved of duty to not be paid for all of their on-call time.[[377]](#footnote-378) The court in *Brigham v. Eugene Water & Electric Board*[[378]](#footnote-379) also held that the on-call time of hydroelectric facility workers was compensable. Those workers lived on site and had to remain near home while on call in order to respond immediately to emergencies and monitor alerts.[[379]](#footnote-380)

Many courts, however, have found that the restrictions placed on employees while on call were not so onerous as to prevent them from using the time effectively for their own benefit.[[380]](#footnote-381) For instance, in *Rutlin v. Prime Succession, Inc.*,[[381]](#footnote-382) the Sixth Circuit held that the on-call time of a funeral director and embalmer who handled 15–20 telephone calls per on-call shift, totaling one hour per shift, and had to retrieve a body and take it to the funeral home once a week, on average, but who otherwise was able to engage in personal activities and could swap on-call periods, was not compensable.[[382]](#footnote-383) In *Adair v. Charter County of Wayne*,[[383]](#footnote-384) the Sixth Circuit held that time spent by airport police officers who had to live within 30 minutes of airport and while on-call had to remain at home, but could otherwise attend to personal pursuits, was not compensable on-call time.[[384]](#footnote-385) Likewise, in *Brock v. El Paso Natural Gas Co.*,[[385]](#footnote-386) on-call time spent by employees of satellite pumping stations for natural gas pipelines who were given wide latitude to determine among themselves who would be on call during a particular night, were otherwise free to engage in recreational and social activities as long as they were “within hailing distance” of the alarm station, and only rarely had to respond to alarms, was noncompensable.[[386]](#footnote-387)

The DOL has opined that where restrictions on how an employee uses the on-call time are not onerous, such time is not compensable.[[387]](#footnote-388)

**D. Rest Breaks and Meal Periods**

The FLSA does not require employers to provide rest breaks or meal periods, but some state laws do.[[388]](#footnote-389) When such breaks are provided, their compensability turns on the length of the breaks and the extent to which the employer restricts use of such time.[[389]](#footnote-390) A 2023 field assistance bulletin elaborates on how the rules apply to teleworkers.[[390]](#footnote-391)

***1. Rest Breaks***

*a. In General*

In most instances where an employer provides rest breaks, those of short duration—about 5–20 minutes—must be counted as compensable hours worked.[[391]](#footnote-392) Breaks of less than 20 minutes may be noncompensable in certain limited circumstances. For instance, the DOL has opined that a 15-minute break given as a medical accommodation for an employee’s disability was primarily for the benefit of the employee, and thus not compensable.[[392]](#footnote-393)

Employers may not offset any compensable rest breaks against other types of work time, such as compensable waiting or on-call time.[[393]](#footnote-394) The Third Circuit, for example, applied the “bright line” rule found in 29 C.F.R. §785.18 in holding that any break of 20 minutes or less is compensable.[[394]](#footnote-395) Other courts likewise have applied a hard and fast 20-minute rule in determining whether breaks must be paid,[[395]](#footnote-396) while some courts instead examine whether employees may use the break time effectively for their own purposes.[[396]](#footnote-397) Longer rest breaks may be compensable if the employees are not free to use such time as their own.[[397]](#footnote-398) As explained in the WHD’s *Field Operations Handbook*: “Where a regular rest period of known duration is longer than 20 minutes, the waiting time rules apply. In other words, if the employees are free to go where they please, and the rest period is long enough to permit the employees to use it for their own purposes … such periods are not hours worked.”[[398]](#footnote-399) Similarly, when an employee extends an authorized break without authorization, the extra time is not counted has hours worked.[[399]](#footnote-400)

*b. Noncompensable Rest Breaks for Nursing Mothers to Express Milk*

In 2010, Congress amended Section 207 of the FLSA by adding a provision that requires employers with more than 50 employees to provide

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[[400]](#footnote-401)

The statute requires only uncompensated break times.[[401]](#footnote-402)

Following the statute’s enactment, the DOL issued a fact sheet on the topic that stated, “[o]nly employees who are not exempt from section 7, which includes the FLSA’s overtime pay requirements, are entitled to breaks to express milk.”[[402]](#footnote-403) The fact sheetalso noted that although the statute does not require compensation for the break time, if employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break times.[[403]](#footnote-404) “In addition, the FLSA’s general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.”[[404]](#footnote-405)

If a nursing mother is denied lactation breaks, Section 216(b) provides a private right of action.[[405]](#footnote-406) However, as one court has noted, the statute creates an “enforcement paradox” for a private plaintiff because “recovery under the statute is limited to lost wages, but an employer is not required to compensate nursing mothers for lactation breaks. As a result, it will often be the case that a violation of Section 207(r) will not be enforceable because it does not cause lost wages.”[[406]](#footnote-407) Although lost wages may not be, as a practical matter, available for denial of a lactation break, nursing mothers may seek monetary damages and other relief under the FLSA’s retaliation provision.[[407]](#footnote-408)

In 2022, Congress further amended the FLSA by enacting the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act),[[408]](#footnote-409) which broadened eligibility for breaks to express milk. The obligations also now extend to most FLSA-exempt employees; as to employers with fewer than 50 employees, the obligations apply unless doing so would impose an undue hardship.[[409]](#footnote-410)

***2. Meal Periods***

“Bona fide” meal periods are not considered to be work time, according to the DOL.[[410]](#footnote-411) There is a split of authority as to what standard should apply in determining whether a meal period is bona fide. According to the DOL regulations, for a meal period to be bona fide, the employee must be completely relieved from duty for the purpose of eating regular meals.[[411]](#footnote-412) Thirty minutes or more ordinarily is a sufficient meal period, but the applicable regulation notes that a shorter period may suffice “under special conditions.”[[412]](#footnote-413) For example, the DOL has opined that 15- and 20-minute meal periods may be bona fide where the circumstances allow the employee sufficient time to eat.[[413]](#footnote-414)

The majority of courts have adopted a “predominant benefit” test to determine the compensability of meal periods,[[414]](#footnote-415) but several courts have strictly applied the regulation that requires employees to be “completely relieved from duty.”[[415]](#footnote-416) These other courts applied principles from the Supreme Court’s decisions in *Armour*[[416]](#footnote-417)and *Skidmore*,[[417]](#footnote-418) which predate adoption of the regulation governing meal periods.[[418]](#footnote-419) Many of the cases that adopt the “predominant benefit” test involve law enforcement personnel,[[419]](#footnote-420) but the test is not limited to such cases.[[420]](#footnote-421)

The tests were applied by two circuit courts in cases with virtually identical facts involving security officers on flights returning individuals deported to their homelands.[[421]](#footnote-422) On the flights back to the United States, the officers did not perform any duties but had to remain on the planes. The employer deducted one hour of that return flight time as an unpaid meal break. The employees claimed they were unable to leave the plane en route and also were limited in what they were able to do during the time treated as meal breaks, e.g., not able to use the Internet. The courts had to resolve the tension between the continuous workday aspect of the flights and whether the meal breaks were compensable. The outcomes were the same in both cases: the meal breaks were deemed noncompensable, with one court applying the “completely relieved from duty” test[[422]](#footnote-423) and the other applying the “predominant-benefit” test.[[423]](#footnote-424)

The regulations provide that if a worker is required or permitted to perform any duties, whether active or inactive, during the time designated for eating, the worker is “not relieved” and the time is considered compensable time.[[424]](#footnote-425) For example, where office or factory workers are required to eat at their desks or machines, the time spent eating must be treated as hours worked.[[425]](#footnote-426) Also, where meal periods are frequently interrupted by calls to duty, the entire period must be counted as hours worked.[[426]](#footnote-427)

Under the predominant benefit test, courts have ruled that the entire meal period is noncompensable provided the meal period predominantly benefits the employees. In *Guyton v. Tyson Foods, Inc.*,[[427]](#footnote-428) production workers at meat-processing facilities sought to recover unpaid wages for time spent donning and doffing during 35-minute meal periods. The Eighth Circuit affirmed the grant of summary judgment in favor of the employer, applying the predominant benefit test to the entire meal period, including the donning and doffing time.[[428]](#footnote-429) The court noted it was undisputed that, apart from the time spent donning and doffing, the entire meal period was uninterrupted, employees could wear much of the protective clothing while eating, and the meal period as a whole benefitted the employees.[[429]](#footnote-430)

The Fourth Circuit has held as a matter of law that poultry workers are not entitled to compensation for donning and doffing personal protective equipment prior to and after meals because such activity is part of a “bona fide meal period”; however, it did not consider the predominant benefit analysis.[[430]](#footnote-431) Post-*Busk,*[[431]](#footnote-432)the Ninth Circuit similarly held that time spent by employees going through security screens to take their meal breaks was not integral and indispensable to their jobs and therefore was not compensable.[[432]](#footnote-433)

The regulations provide that an employer does not have to allow workers to leave the premises during a meal period, but the employee must be “completely freed from duties” during the meal time.[[433]](#footnote-434)

*a. Decisions Finding That Meal Periods Are Compensable*

• In *Reich v. Southern New England Telecommunications Corp*.,[[434]](#footnote-435) the Second Circuit ruled that outside craft telecommunications employees were entitled to compensation for their meal periods. The employees were required to take half-hour lunches at specified times and were not allowed to leave the job site (for safety reasons and to forestall loss of equipment). The court found persuasive that the employer would have had to hire security and/or safety employees if the workers left the site and that safety and security services were solely for the benefit of the employer and not the employees.[[435]](#footnote-436)

• In *Naylor v*. *Securiguard, Inc*.,[[436]](#footnote-437) the Fifth Circuit held that security guards were entitled to compensation for meal periods where they were required to make 12-minute employer-mandated car rides during their 30-minute meal break, which deprived them the opportunity to eat during 40 percent of the break, because such an interruption “strikes at the heart of what we and other courts have recognized as the most important consideration: an employee’s ability to use the time for his or her own purposes.”[[437]](#footnote-438)

• In *Hartsell v. Dr. Pepper Bottling Co. of Texas*,[[438]](#footnote-439) employees who worked as merchandisers building and stocking displays in stores were entitled to compensation for meal periods. The district court’s finding that the time was spent predominantly for the benefit of the employer was supported by the employees’ testimony that they rarely took their meal period and were verbally disciplined when they did so.

• In *Bernard v. IBP Inc. of Nebraska*,[[439]](#footnote-440) the Fifth Circuit held that maintenance employees at a meat-processing plant were entitled to compensation for meal breaks. The jury determined that the meal breaks were predominantly for the employer’s benefit because the employees were required to wear their radios and tools during lunch, could not leave the site, and had their lunch breaks interrupted frequently by work demands. The critical issue for determining whether the meal breaks were compensated “[was] whether the employee [could] use the time effectively for his or her own purposes.”[[440]](#footnote-441)

• In *AFSCME Local 889 v. State of Louisiana*,[[441]](#footnote-442) the Fifth Circuit found that correctional officers were entitled to compensation for meal periods where they had to take their meals at the prison cafeteria and respond to any inmate disturbances.

• In *Bennett v. City of Albuquerque*,[[442]](#footnote-443) the Tenth Circuit affirmed without discussion a district court finding that prison officers were entitled to compensation for 30-minute meal periods where the officers were restricted from leaving the facility and were frequently disturbed during meal periods.[[443]](#footnote-444)

• In *Havrilla v*. *United States*,[[444]](#footnote-445) the Court of Federal Claims held that “small arms repairers” for the Navy should be compensated for meal breaks where they had to remain within, or within sight of, a weapon room, and where they were permitted to eat, read, use the phone, watch television, use a computer, or otherwise use the time as they wished, but they were not relieved of duty. The meal time was compensable because an integral part of their job was to “wait for something to happen,” which they did under the same conditions whether they were “on the clock” or taking a “meal break.”[[445]](#footnote-446)

*b. Decisions Finding That Meal Periods Are Not Compensable*

• In *Akpeneye v. United States*,[[446]](#footnote-447) the Federal Circuit rejected police officers’ claims for unpaid overtime for their meal breaks applying the “‘predominant benefit’ test, which looks to whether the employer or the employee is the primary beneficiary of the meal break, even if the meal period is subject to interruptions, duties, or restrictions,”[[447]](#footnote-448) rather than to the Department’s more stringent test, which addresses whether employees are “completely relieved from duty.”[[448]](#footnote-449) The Federal Circuit held that the police officers were the primary beneficiaries because although they were occasionally subject to interruptions and were on standby status, carry radios, and respond to emergencies, their breaks were not interrupted on a daily basis and, if interrupted, they could take another meal break later in the shift.

• In *Ruffin v*. *MotorCity Casino*,[[449]](#footnote-450) the Sixth Circuit found that security guards were not entitled to compensation for meal breaks because they had no substantial job duties or regular interruptions, and could conduct personal activities during such breaks.

• In *Myracle v. General Electric Co.*,[[450]](#footnote-451) the Sixth Circuit held that mechanics were not entitled to compensation for their 20-minute meal periods where they could pursue the assigned meal time comfortably and adequately and did not engage in substantial duties.

• In *Hill v. United States*,[[451]](#footnote-452) the Sixth Circuit held that a postal carrier’s meal period was not compensable due to limitations as to when the break could occur because the postal carrier had insubstantial responsibilities during such breaks.[[452]](#footnote-453)

• In *Busk v. Integrity Staffing Solutions, Inc.*,[[453]](#footnote-454) the Ninth Circuit held that the plaintiffs were not entitled to compensation for their entire 30-minute lunch periods although the time it took to walk between the time clock and the lunchroom shortened their lunch break, because walking to the lunchroom is not a work duty.

* In *Alonzo v. Akal Security Inc.*,[[454]](#footnote-455) the Ninth Circuit held that the employer’s policy of automatically deducting one-hour meal breaks from security officers’ workdays while on return flights of more than 90 minutes after dropping off deportees in another country and during which no duties were assigned was permissible because the officers were completely removed from duty. As such, the court held the time deducted was for a bona-fide, noncompensable meal period.

• In *Castaneda v*. *JBS USA, LLC*,[[455]](#footnote-456) the Tenth Circuit determined that meat-processing workers failed to show they were owed compensation for meal breaks because it was not proven that the “plug in time”––the time added to employees’ time cards to compensate them for donning and doffing their clothes and safety equipment at the beginning and end of their lunch break––was inadequate to compensate them for any work performed during meal breaks.[[456]](#footnote-457)

• In *McKnight v. Kimberly Clark Corp*.,[[457]](#footnote-458) the Tenth Circuit held that a meal period was not compensable even though the employee could not leave the employer’s premises and was subject to call back.

Being on call for emergencies during a meal period also may not be sufficient to render the period compensable absent other significant restrictions.[[458]](#footnote-459) In *Roy v. County of Lexington*,[[459]](#footnote-460) the Fourth Circuit held emergency medical service paramedics and technicians’ meal periods noncompensable, where their only responsibility during such periods was to remain in an 82-square-mile area in order to respond to emergencies.[[460]](#footnote-461) Similarly, in *Henson v. Pulaski County Sheriff Department*,[[461]](#footnote-462) the Eighth Circuit held that police officers were not entitled to meal-period pay where their duties were limited to monitoring radios for emergency calls for return to service and tending to occasional questions from citizens.[[462]](#footnote-463)

Addressing an issue of first impression for a circuit court, in *Secretary of Labor v. Timberline South, LLC*,[[463]](#footnote-464) the Sixth Circuit held that the fact that an employer paid for the time employees spent in a meal period did not make the time “compensable” for overtime purposes.[[464]](#footnote-465)

**E. Sleeping Time and Certain Other Activities**

In various occupations, employees remain continuously at the workplace for many hours; some employees reside for extended periods on the employer’s premises, or work full-time out of their own homes. Workers may have to be compensated for on-the-job time spent sleeping or engaging in other personal activities, depending on the schedules they are required to work and other circumstances. In the private sector, different compensability rules apply to employees who are on duty for less than 24 hours and to those who are on duty for 24 hours or more.[[465]](#footnote-466)

***1. Duty Period of Less Than 24 Hours***

Under the regulations, employees who are on duty for less than a 24-hour period must be paid for all on-duty time, even if they are permitted to sleep or engage in other personal activities when not busy.[[466]](#footnote-467)

The presence of employer-furnished sleeping facilities does not change this result.[[467]](#footnote-468) As long as the shift is less than 24 hours, the employer cannot exclude authorized sleeping time from the calculation of hours worked. Employees in the public sector who are paid under the provisions of Section 207(k) are subject to a similar rule for tours of duty of 24 hours or less.[[468]](#footnote-469)

In 2019, the DOL issued guidance that time spent by a trucker in the truck’s sleeping berth while the trucker is relieved of all duties is noncompensable.[[469]](#footnote-470) However, some courts have refused to give the DOL’s 2019 guidance *Auer*[[470]](#footnote-471) deference.[[471]](#footnote-472)

***2. Duty Period of 24 Hours or More***

In most situations where the employee is on duty for 24 hours or more,[[472]](#footnote-473) the employer and the employee may, by agreement, exclude from time worked a regularly scheduled sleeping period of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night’s sleep.[[473]](#footnote-474) The entire sleeping period must be counted as time worked if the employee is interrupted so often that a reasonable night’s sleep is impossible.[[474]](#footnote-475) The regulations state that “if the employee cannot get at least five hours’ sleep during the scheduled period the entire time is working time.”[[475]](#footnote-476) Several courts have adopted this rule.[[476]](#footnote-477)

The agreement may be express or implied,[[477]](#footnote-478) but it must represent an actual meeting of the minds between the employer and the employee.[[478]](#footnote-479)

As to implied agreements regarding sleep time, the question of whether the employee consented to the exclusion depends on the particular facts. For example, where an employee protested the exclusion, courts have found that no implied agreement existed.[[479]](#footnote-480) Conversely, an employee’s silence coupled with continued employment suggests the employee agrees with the exclusion.[[480]](#footnote-481) Because the employer seeks to obtain the benefits of the exclusion, the employer has the burden of proving an agreement exists.[[481]](#footnote-482)

For employees hired after a sleep-time exclusion has been adopted as policy by the employer, the courts have considered whether the employee raised the issue of sleep time before or shortly after the relationship commenced.[[482]](#footnote-483) However, where the employee continued to work under the policy, acquiescence has been found despite the employee complaining about the policy.[[483]](#footnote-484) Express agreements obtained under threat of termination are not enforceable.[[484]](#footnote-485) However, a CBA reached between the employer and the union will bind the employee.[[485]](#footnote-486)

***3. Employee Residing on Employer’s Premises***

Employees who reside on the employer’s premises are not on duty at all times; ordinarily, an employee may engage in a variety of “normal pursuits,” including eating, sleeping, entertaining, and engaging in off-premises activities.[[486]](#footnote-487) The regulations note that it is difficult to determine the exact hours worked under these circumstances[[487]](#footnote-488) and provide that any “reasonable agreement” between the parties that takes into consideration all of the pertinent facts will be accepted.[[488]](#footnote-489) Workers permanently residing on the employer’s premises do not always have to be free to leave the premises during sleep time for the time to be unpaid.[[489]](#footnote-490)

Where the employee both resides and works on the employer’s premises, the regulations provide that the employee may either reside permanently on the employer’s premises or reside there for extended periods in order for a reasonable agreement as to time worked to be effective.[[490]](#footnote-491) Generally, employees who remain on their employer’s premises at least five days per week are considered to reside there “for extended periods of time.”[[491]](#footnote-492)

In 1988, the DOL issued an enforcement policy titled “Hours Worked in Residential Care (Group Home) Establishments—Sleep Time and Related Issues—Enforcement Policy”.[[492]](#footnote-493) The policy lists several criteria that must be met for the employer to deduct sleep time from an employee’s work hours:

(1) the employer and the employee have reached an agreement in advance that sleep time is being deducted;

(2) adequate sleeping facilities with private quarters were furnished;

(3) if interruptions occurred, employees in fact got at least five hours of sleep during the scheduled sleeping period;

(4) employees are in fact compensated for any interruptions in sleep; and

(5) no more than 8 hours of sleep time is deducted for each full 24-hour on-duty period.[[493]](#footnote-494)

With respect to the requirement that “adequate sleeping facilities with private quarters” be furnished, the Eighth Circuit affirmed a district court ruling that, in the context of a group home, adequate facilities were provided where each of the group homes furnished a private bedroom and bathroom for the home manager on duty.[[494]](#footnote-495)

Under some circumstances, even an individual who maintains a separate residence in the same geographic area as the employer and reports to the employer’s premises for work on Monday morning and departs on Friday afternoon could be deemed to reside on the employer’s premises permanently or for an extended period for purposes of applying the reasonable agreement rule.[[495]](#footnote-496)

**F. Lectures, Meetings, and Training Programs**[[496]](#footnote-497)

Generally, time spent attending employer-sponsored lectures, meetings, and training programs is compensable, according to the DOL.[[497]](#footnote-498) However, such time may be noncompensable when the activity meets all of the following four criteria: (1) attendance is outside of the employee’s regular working hours; (2) attendance is in fact voluntary; (3) the course, lecture, or meeting is not directly related to the employee’s job; and (4) the employee does not perform any productive work during such attendance.[[498]](#footnote-499) Whether all these criteria must be met under the standards set by the Supreme Court in *Busk*,[[499]](#footnote-500) however, has yet to be addressed by the courts.

DOL regulations clarify these four criteria and address related topics, including (1) involuntary attendance, (2) the relationship between a training program and the employee’s job, (3) independent training, and (4) apprenticeship training.[[500]](#footnote-501)

***1. Involuntary Attendance***

Generally, according to the DOL, attendance at training programs is involuntary if it is required by the employer or if employees are led to believe that their working conditions or continuance of employment would be adversely affected by nonattendance.[[501]](#footnote-502)

The Eleventh Circuit applied this definition to a training course designed to train meter readers to use new equipment.[[502]](#footnote-503) The company did not require the employees to take the course to continue working in their current positions; however, successful completion of the course would provide opportunity for a higher salary. Under the involuntary attendance regulation, the court determined that participation in this program was wholly voluntary, in that continuance of employment was not affected by nonattendance. Thus, time spent engaged in such training was noncompensable.[[503]](#footnote-504)

In contrast, the DOL in a 2009 opinion letter addressed whether time spent after work hours studying for employer-required training programs and classes was compensable.[[504]](#footnote-505) Concluding that such time was involuntary, the time was deemed compensable, but the employer could limit the number of hours allowed for such studying.[[505]](#footnote-506)

Similarly, operating engineers who were required to take periodic reassessment tests under a “skills initiative program” and advance two skill levels per year were entitled to payment for up to 40 hours per year of training under the program.[[506]](#footnote-507) Although the employer did not require the employees to attend any specific training to prepare for the reassessment tests, it did provide studying and training options. In addition, the company disciplined employees who failed to advance two skill levels and had completed less than 40 hours of training.[[507]](#footnote-508)

Whether training activity is “voluntary” also arises where certain training is required for government licensing requirements. The DOL has issued opinion letters concluding that where the training and related certification is required by the employer, the training is likely not voluntary.[[508]](#footnote-509) But where the training is required by the state for individual licensing in the employee’s field, then the “voluntary” requirement would likely be met.[[509]](#footnote-510) Following these opinion letters, the Second Circuit held that a radiological technician might be entitled to compensation for training necessary for vocational certification if the technician could prove that the certification was required by the employer and not by the state.[[510]](#footnote-511)

By contrast, the Eleventh Circuit found that police officers’ off-duty physical training activities were “voluntary” and thus noncompensable.[[511]](#footnote-512) The officers were required to maintain physical fitness standards on which they were evaluated monthly. However, the officers had complete discretion as to the method, location, and time for their training. Moreover, they were not subject to discipline for failing to train so long as the physical fitness standards were met. Because the officers had broad freedom in fulfilling the physical fitness requirement, the court found that the workout regimens were voluntary.[[512]](#footnote-513)

***2. “Directly Related to” Employee’s Job***

Training is directly related to an employee’s job if it is designed to allow the employee to perform the job more effectively, as distinguished from training that an employee receives for another job or for a new or additional skill.[[513]](#footnote-514) When a training program is for the purpose of preparing an employee for advancement or promotion and is not intended to enable the employee to perform more efficiently in the employee’s current job, the training is not considered to be directly related to the employee’s job.[[514]](#footnote-515)

The Eleventh Circuit ruled that the “directly related” standard had not been met with regard to police officers who engaged in physical training activities.[[515]](#footnote-516) While the county employer required its officers to meet physical fitness standards and tested them monthly, the court found that such fitness standards did not require the officers to develop a specific skill unique to their employment. The court also observed that the off-duty training “also provides the individual officers with benefits that extend beyond their employment position.”[[516]](#footnote-517)

The DOL has issued opinion letters that address whether training is directly related to an employee’s job. In one such letter, the DOL opined that hours spent by employees attending a first-aid training program offered by the Red Cross were compensable.[[517]](#footnote-518) The program was designed to enable employees to obtain an active first-aid certificate, which was a requirement for employment and was therefore directly related to the employees’ jobs.[[518]](#footnote-519)

The regulations provide an exception to the general rule of compensability for training “directly related to the employee’s job.” Specifically, if an employer establishes, for the benefit of employees, a program of instruction that corresponds to courses offered by independent bona fide institutions of learning, then voluntary attendance by employees at such courses outside of working hours is not compensable even if the courses are directly related to an employee’s job.[[519]](#footnote-520) The DOL applied this exception to training of ambulance attendant employees.[[520]](#footnote-521) Minnesota required that all ambulance attendants receive certain annual training. To allow the attendants to meet the requirements, an ambulance service employer provided training courses for its employees. The DOL stated that time spent at these training courses was not compensable because the training would allow an employee to gain or continue employment *with any ambulance company* *employer*, and therefore was primarily for the benefit of the employee, not the employer. The DOL found that the state law requirement for the training (as opposed to a requirement imposed by the employer) distinguished this situation from others that involved employer-provided training and warranted the conclusion that the training time was not compensable.[[521]](#footnote-522)

The state law requirement for training was also critical in another DOL opinion letter, finding that time spent by childcare center employees in state-mandated training programs was not compensable.[[522]](#footnote-523) The training was offered by their employer and required as a condition of maintaining state certificates. The mandated training, which could be obtained from the employer or third-party education services, enabled an employee to gain or continue employment with any child-care service provider. Thus, the exception to the “directly related to the employee’s job” requirement, as provided in 29 C.F.R. §785.31, was met.

In contrast, the DOL has also opined that a company was obligated to compensate employees for the time they spent outside of normal working hours at their homes completing required prerequisite classes before taking a voluntary training class.[[523]](#footnote-524) The employer training and prerequisite classes offered instructions to enable the employees to perform their present jobs better by enhancing their abilities to use a network system they were presently using. The DOL found the special situations set forth in 29 C.F.R. §785.31 that make voluntary attendance nonwork time did not apply because the training focused on ways to utilize a particular product and did not appear to correspond to a course offered by a bona fide institution of learning.

Similarly, the DOL opined that employee study time after hours and away from the workplace may be compensable when it is required to supplement nonvoluntary classroom training conducted during regular working hours.[[524]](#footnote-525) The DOL noted that the employer could establish a specific amount of time to be spent completing assignments outside the classroom after normal hours, but warned that if employees spent more time completing the assignment than allowed by the employer, the time may be compensable unless management enforced its study time rules.

***3. Independent Training***

Where an employee, on his or her own initiative, attends an independent school, college, or trade school after hours, the time is not hours worked for the employer, even if the course is related to the job.[[525]](#footnote-526)

For instance, in *Bull v. United States*,[[526]](#footnote-527) canine enforcement officers sought compensation from the U.S. Department of Homeland Security for off-duty, training-related activities. Such activities included attending extra weapons-proficiency training, training for positions that constituted promotions, and studying at the training academy outside normal classroom hours. The court held that the activities were not compensable. In so holding, the court noted that the employer did not require those activities and may not have known they were being engaged in, and that the activities were not necessary or integral to meeting the expectations of the officers’ current positions.[[527]](#footnote-528)

In a 2006 opinion letter, the DOL analyzed whether an employer must compensate employees for time voluntarily spent at home studying employer-provided English language training materials.[[528]](#footnote-529) The employer permitted and paid employees to study the materials during their regular working hours, and prohibited employees from removing the materials from its premises. However, the employees expressed an interest in taking the materials home to study and share with family members. Applying the four criteria in 29 C.F.R. §785.27, the DOL determined that the time spent outside of working hours voluntarily studying English was not compensable. The Administrator noted that the training offered to the employees was similar to curricula offered by other institutions of learning and was not narrowly tailored to any requirements of the employer or particular job held by the employees.

Similarly, the Supreme Court has held that employers that furnish potential employees with training that is a prerequisite for hiring are not required to pay such trainees under the FLSA.[[529]](#footnote-530) Courts have extended this concept to circumstances where the employees complete the prerequisite training after they are hired, finding that the training activities are not productive work, are not an “integral and indispensable part of the principal activities,” and are thus excluded from compensation under the Portal-to-Portal Act.[[530]](#footnote-531)

In *Bienkowski v. Northeastern University*,[[531]](#footnote-532) the First Circuit held that time spent in training undertaken after hire in order to obtain state certification as an emergency medical technician was not compensable because the certification was a prerequisite for hiring. The Sixth Circuit, in *Chao v. Tradesman International, Inc.*,[[532]](#footnote-533) followed *Bienkowski* in holding that occupational and safety training that had to be completed before hiring or within the first 60 days on the job was not compensable.

***4. Apprenticeship Training***

Time spent by employees in an organized program of related, supplemental instruction working under a bona fide apprenticeship program may be excluded from working time if certain criteria are met. First, the apprentice must be employed under a written apprenticeship agreement or program that substantially meets the standards of the Bureau of Apprenticeship and Training of the DOL.[[533]](#footnote-534) Second, the time may not involve productive work or performance of the apprentice’s regular duties.[[534]](#footnote-535) If these criteria are met, then time spent in related supplemental training does not have to be counted as hours worked unless a written agreement specifically provides otherwise.[[535]](#footnote-536)

In *Ballou v. General Electric Co*.,[[536]](#footnote-537) apprentices sought to be paid for the time spent in classes and studying as part of a program run by General Electric that consisted of on-the-job training conducted at the plant, with additional classes conducted off the premises by independent educational institutions. The employees were required by their employment contracts to prepare for, attend, and make satisfactory progress in the classes.[[537]](#footnote-538) For the most part, the classwork did not relate directly to the skills the apprentices acquired in on-the-job training, but was more theoretical and provided the apprentices with an academic understanding of the skills they were developing. On this basis, the court held that “the principal activity of apprentices as employees is the work that takes place during their regular 40 hour work-training week and that activity as students pursuing their required course of study is neither integral nor indispensable to that principal activity.”[[538]](#footnote-539)

In *Merrill v. Exxon Corp*.,[[539]](#footnote-540) a district court held that apprentices were not entitled to compensation under the FLSA for attendance in an apprenticeship training program to work in oil refineries that included attendance at college classes. The court based its decision on the fact that the collective bargaining agreement between the employer and the union dictated that no compensation was to be received for attending the program, the program met DOL standards, and the program did not entail performance of regular productive duties.[[540]](#footnote-541) The training instead was intended to reinforce scientific education with six semesters of technical vocational courses in oil refinery.[[541]](#footnote-542)

Current and former apprentices in a firefighter/paramedic apprenticeship program sought overtime compensation for off-duty class-time and on-the-job practical training on ambulance ride-alongs in *Carter v*. *Mayor & City Council of Baltimore City*.[[542]](#footnote-543) Applying the “integral and indispensable” test, the court held that the plaintiffs’ principal duties would not include emergency medical technician work until after certification and that the value to the employer of an extra person on an ambulance was de minimis.

**G. “Booting Up” Computers**

Courts are grappling with how time spent booting-up computers at the start of the work day should be treated when the computers are used by employees both for signing-in for work and performing their primary duties.[[543]](#footnote-544)

**H. Time Spent on Other Activities**

***1. Adjusting Grievances***

Time spent adjusting employment grievances during the time employees are required to be on the premises is compensable work time, but if a union is involved then the counting of such time will be left to the collective bargaining process or the custom or practice under the labor contract.[[544]](#footnote-545) Where attendance at a grievance hearing is voluntary and the hearing is not determinative of the employee’s rights, compensation may not be required.[[545]](#footnote-546)

***2. Health-Related Activities***

The regulations provide that time spent by an employee waiting for and receiving medical attention on an employer’s premises or at the direction of an employer during normal working hours on days when the employee is working constitutes hours worked.[[546]](#footnote-547) The regulations provide an example of hours worked in this context:

To illustrate, consider an employee whose scheduled workday runs from 7:00 a.m. to 3:30 p.m. The employee reports for work at 7:00 a.m., is injured at 10:50 a.m., and is sent to a local hospital for treatment. At 1:30 p.m., the worker returns from the hospital, punches out, and goes home. The employee must be credited with time worked from 7:00 a.m. to 1:30 p.m., provided that the trip to the hospital was undertaken at the employer’s direction and that the worker spent all the time between 10:50 a.m. and 1:30 p.m. either waiting for or receiving medical attention or traveling to and from the hospital. If the worker ate lunch during this period, the lunch time would not be considered hours worked.[[547]](#footnote-548)

Moreover, while the regulation instructs employers to compensate employees receiving medical care during normal work hours, care outside normal hours also may be compensable if the employer requires the employee to seek such care as part of the employee’s job. For example, in *Sehie v. City of Aurora*,[[548]](#footnote-549) the Seventh Circuit affirmed the district court’s finding that time the plaintiff spent attending and traveling to and from employer-mandated psychotherapy sessions constituted compensable work time. As a condition of employment, the employer required the employee to attend the weekly sessions outside of her regularly scheduled work hours. In rejecting the employer’s contention that the counseling sessions were for the benefit of the employee, the court relied on the following, among other things: (1) attendance was a mandatory condition of continued employment; (2) the city was short on telecommunications staff; and (3) the employer would not allow the employee to see her own therapist. The court also noted that the purpose of the required sessions was to enable the employee to perform her job duties and relate to co-workers more effectively and at a higher skill level. The court rejected the employer’s argument that Section 785.43 prevents compensation for the time an employee spends during *nonworking* hours receiving employer-required treatment for a work-related injury.[[549]](#footnote-550)

The Administrator has opined that time spent by employees to attend wellness activities, biometric screenings, and benefit fairs is not compensable when attendance is voluntary, unrelated to the employees’ jobs, and without any direct benefit to the employer.[[550]](#footnote-551)

***3. Civic and Charitable Work***

The time an employee spends working for public or charitable purposes at the employer’s request, under the employer’s direction or control, or while the employee is required to be on the employer’s premises constitutes hours worked for which the employee must be compensated.[[551]](#footnote-552) However, the time an employee spends voluntarily engaging in civic or charitable activities outside of normal working hours does not constitute hours worked.[[552]](#footnote-553)

In a 2019 opinion letter,[[553]](#footnote-554) the WHD determined that time spent by an employee participating in an employer’s optional volunteer program, which awarded a bonus to certain participating employees, did not constitute hours worked under the FLSA because the employer did not unduly pressure its employees to participate by adversely affecting their working conditions or employment prospects if they did not participate. The WHD also concluded that the employer’s use of a mobile device to track a participating employee’s time spent volunteering did not alter the outcome as the application was not used to direct or control the employee’s activities.[[554]](#footnote-555)

***4. Suggestion Systems***

Time spent outside of regular working hours developing suggestions under a general suggestion system ordinarily is not counted as time worked,[[555]](#footnote-556) but where employees are permitted to work on suggestions during working hours or are assigned to work on development of a suggestion as part of the job, such time is time worked.[[556]](#footnote-557)

***5. Bidding for Work Schedules or Vacation Leave***

In *Abbey v. United States*,[[557]](#footnote-558) air traffic controllers sought compensation for time spent “off duty” bidding on work and vacation schedules. In a case of apparent first impression, the court held that “bidding is not work. It is simply a process for requesting one’s preferred work and vacation schedule no different analytically than filling out a leave slip.”[[558]](#footnote-559) In so holding, the court found that such tasks benefited the employees more than the employer and held that the time was not compensable.[[559]](#footnote-560)

V. Recording Working Time

Employers must maintain accurate records of time worked, but are not required to use time clocks, time cards, or any particular type of time-recording system.[[560]](#footnote-561) Where an employer does use time clocks, it can disregard early or late punching by employees who voluntarily arrive early or remain after hours as long as the employees do not perform any work during these periods.[[561]](#footnote-562)

Regardless of the type of timekeeping system an employer uses, problems can arise over the rounding of recorded time and compensability of de minimis activities outside of recorded work time.[[562]](#footnote-563)

**A. Rounding Practices**

The DOL has stated that for enforcement purposes, rounding is permissible “provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.”[[563]](#footnote-564) In a 2019 opinion letter,[[564]](#footnote-565) the WHD reiterated this point[[565]](#footnote-566) and noted that “it has been our policy to accept rounding to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour as long as the rounding averages out so that the employees are compensated for all the time they actually work.”[[566]](#footnote-567) Minor differences between clock records and actual hours worked usually cannot be avoided, but major discrepancies should be avoided “because they raise a doubt as to the accuracy of the records of the hours actually worked.”[[567]](#footnote-568)

**B. The De Minimis Doctrine**

***1. General Principle***[[568]](#footnote-569)

The de minimisdoctrine often arises in situations involving activities that occur immediately before and after scheduled shifts. The doctrine’s framework was first articulated by the Supreme Court in *Anderson v. Mt. Clemens Pottery Co*.,[[569]](#footnote-570) finding that “insubstantial and insignificant” periods of time need not be included in the workweek for purposes of complying with the FLSA.[[570]](#footnote-571) The Court noted:

We do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by 7(a) 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.[[571]](#footnote-572)

For about 15 years following the Supreme Court’s decision in *Mt. Clemens*, courts generally found that time spent in preliminary/postliminary activities of 10 minutes or less constituted de minimistime.[[572]](#footnote-573) Courts are split on whether the de minimis rule is an affirmative defense that an employer must plead and prove.[[573]](#footnote-574)

In 1961, the DOL addressed the issue of de minimis time in 29 C.F.R. §785.47. That regulation now provides:

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee’s fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.[[574]](#footnote-575)

In *Sandifer v. United States Steel Corp.*,[[575]](#footnote-576) the Supreme Court considered the de minimis doctrine in the context of clothes-changing time excluded from compensable work time pursuant to Section 203(o). The Seventh Circuit had affirmed that the time workers spent donning and doffing non-clothes items was de minimis because it took only seconds.[[576]](#footnote-577) However, the Supreme Court expressed “doubt that the *de minimis* doctrine can properly be applied to the present case.”[[577]](#footnote-578) Distinguishing *Mt. Clemens*, which involved the determination of whether certain preliminary activities had to be included as part of hours worked under Section 207(a), the Court noted that the de minimis doctrine “does not fit comfortably within the statute at issue here, which, it can fairly be said, is *all about* trifles—the relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs.”[[578]](#footnote-579) The Court concluded that all the time at issue was noncompensable, including time spent putting on and taking off non-clothing items, because the “vast majority” of the time at issue was spent engaged in activities expressly covered by Section 203(o).[[579]](#footnote-580) In such circumstances, the entire period of time qualifies as clothes changing and “the time spent putting on and off other items need not be subtracted.”[[580]](#footnote-581)

***2. Determining What Constitutes De Minimis Time***

*a. Factors*

In *Lindow v. United States*,[[581]](#footnote-582) the Ninth Circuit set forth the following factors, which generally have been used by the circuit courts to analyze whether time is de minimis:[[582]](#footnote-583) (1) the amount of daily time spent on the additional work; (2) the practical administrative difficulty of recording the actual time; (3) the aggregate amount of compensable time; and (4) whether the work was performed on a regular basis.[[583]](#footnote-584)

With respect to the first factor, the Ninth Circuit stated,

An important factor in determining whether a claim is *de minimis* is the amount of daily time spent on the additional work. There is no precise amount of time that may be denied compensation as *de minimis*. No rigid rule can be applied with mathematical certainty. … Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable.[[584]](#footnote-585)

*Lindow* concluded that the approximately seven to eight minutes spent each day before the shift reading the log book and exchanging information was de minimis because it was irregular and difficult to monitor.

There is no precise amount of actual time that is strictly held to be de minimis; if the employer can do so, it must compensate for even small amounts of time.[[585]](#footnote-586) Administrative impracticalities recording small amounts of time weigh in favor of finding time de minimis.[[586]](#footnote-587) But even small amounts of daily time may be compensable if it is substantial when aggregated over the statutory period of time or is based on the total number of workers.[[587]](#footnote-588) The de minimis doctrine may also require examining a series of connected activities in the aggregate, such as donning protective gear, collecting tools, and then traveling to the production line.[[588]](#footnote-589) Finally, it is significant whether the work was performed regularly on a daily basis or if there is uncertainty as to how often it actually was performed.[[589]](#footnote-590)

The Tenth Circuit addressed the de minimis doctrine in *Reich v. IBP, Inc*.,[[590]](#footnote-591) in relation to aggregating time spent on a series of work activities. Regarding the time that knife-using employees at a meatpacking company spent donning, doffing, and cleaning “unique” protective gear, the Tenth Circuit found that

[a]lthough putting on just one or two items of extra gear could be *de minimis*, the necessity to combine several items coupled with the need to regularly and thoroughly clean the equipment creates measurable additional working time.[[591]](#footnote-592)

The Tenth Circuit expounded on its *IBP* ruling in *Reich v. Monfort*,[[592]](#footnote-593) where it held that “aggregation” was appropriate when applying the de minimis doctrine.[[593]](#footnote-594) On this basis, the court held that preliminary and postliminary activities amounting to 10 minutes per day for each meat-processing company employee, including putting on and taking off safety gear, was not de minimis. Relevant to the court’s decision was the fact that from May 1989 to May 1993, between 1,537 and 1,717 employees worked in the relevant departments of the plant and performed these activities on a daily basis.[[594]](#footnote-595) Even though both the trial court and the appellate court found it would be administratively difficult to record time worked on preliminary activities, the Tenth Circuit held that the total amount of time involved, both on a per employee basis (10 minutes per day over a three-year period) and on an aggregate basis for all the employees as a group (in excess of 1,500 employees), would properly be considered substantial. The Tenth Circuit also determined that the regularity of the activities weighed against a de minimis finding.[[595]](#footnote-596)

In 2003, two appellate decisions considered, among other issues, the de minimis doctrine. In *Alvarez v. IBP, Inc*.,[[596]](#footnote-597) the Ninth Circuit distinguished between what it called “unique” protective gear (chain-link metal aprons, vests, Plexiglas armguards, and special gloves) and “non-unique” protective gear (hard hats, ear plugs, safety glasses, boots, and hairnets) in applying the de minimis rule. The court held that donning and doffing “unique” protective gear was compensable, but that time employees spent donning and doffing non-unique protective gear, while “integral and indispensable” to the employees’ principal activities, was not compensable because the time was de minimis “as a matter of law.”[[597]](#footnote-598)

In *Tum v. Barber Foods*,[[598]](#footnote-599) a jury found that the time employees spent donning and doffing protective clothing and equipment was de minimis. As a result, the jury did not require the employer to compensate employees for the time spent on these donning and doffing activities.

On appeal, *Alvarez* and *Tum* were consolidated and reviewed by the Supreme Court,[[599]](#footnote-600) but the de minimis issue was not addressed.[[600]](#footnote-601)

After the Supreme Court decided *Alvarez*, the DOL issued a Wage and Hour Advisory Memorandum (WHAM)[[601]](#footnote-602) addressing the Ninth Circuit’s holding with respect to the donning and doffing of “non-unique” gear such as hairnets, goggles, hardhats, and smocks:

[T]he Ninth Circuit erred in its application of the *de minimis* rule. The *de minimis* rule applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity, and particularly not to certain activities “as a matter of law.” The Supreme Court’s continuous workday rationale renders the Ninth Circuit’s “*de minimis* as a matter of law” discussion untenable.[[602]](#footnote-603)

WHAM 2006-2 acknowledged that the Supreme Court in *IBP v. Alvarez* did not rule on the scope or meaning of de minimis activities nor on the effect of de minimis activities on the compensability of donning, doffing, walking, and waiting time. WHAM 2006-2 concluded that the Supreme Court’s decision in *Alvarez*

clearly [stood] for the proposition that where the aggregate time spent donning, walking, waiting and doffing exceeds the *de minimis* standard, it is compensable. Any other conclusion would be inconsistent with the continuous workday rule. It would also appear to render the Supreme Court’s holding in *Tum* an advisory opinion, and leave the Court’s remand of the case to the First Circuit devoid of any apparent purpose.[[603]](#footnote-604)

The Fourth Circuit in *Perez v*. *Mountaire Farms, Inc.*[[604]](#footnote-605) cited WHAM 2006-2 and held that it must consider the aggregate of the time spent by poultry-processing workers donning and doffing in considering whether such time was de minimis.[[605]](#footnote-606) The court rejected the argument that the 10 minutes spent on average donning and doffing each day was de minimis as a matter of law, and went on to find that, when such time was aggregated for all 280 employees in the plant for an entire year, it amounted to an additional $425 per employee. The court thus rejected the de minimis defense to claims for time spent donning and doffing protective gear.[[606]](#footnote-607)

In *Valladon v*. *City of Oakland*,[[607]](#footnote-608) police officers sought pay for time spent cleaning and maintaining their uniforms and equipment. The employer argued that each activity should be examined individually. The officers argued that the activities should be evaluated in the aggregate. The district court found the aggregate approach to be more appropriate, noting, “In the context of donning and doffing, the Ninth Circuit has considered the uniform as a whole, not the time spent donning and doffing each item of clothing.”[[608]](#footnote-609)

Similarly, in *Gilmer v*. *Alameda-Contra Costa Transit District*,[[609]](#footnote-610) the district court rejected the argument that uncompensated overtime was de minimis because the amounts were small when disaggregated.[[610]](#footnote-611) The plaintiff bus drivers spent small amounts of time on split-shift travel. The plaintiffs demonstrated that the time was not administratively difficult to track and, when aggregated, was substantial. Based on this showing, the court denied summary judgment on the de minimisdefense.[[611]](#footnote-612)

*b. Cases Finding That Time Is De Minimis*

In *Lindow v. United States*,[[612]](#footnote-613) the Ninth Circuit considered whether hydroelectric dam workers who reported to work before their shifts to check log books and exchange information with the workers leaving at the end of their shifts were entitled to compensation for such pre-shift time. The court observed that these activities took only seven to eight minutes, the time could not be tracked administratively (especially as it often occurred after a shift began), and the employees often engaged in no work-related activities during the pre-shift time period.[[613]](#footnote-614) The court held that “[a]lthough plaintiffs’ aggregate claim may be substantial … their claim is *de minimis* because of the administrative difficulty of recording the time and the irregularity of the additional pre-shift work.”[[614]](#footnote-615)

According to the district court in *Farris v*. *County of Riverside,*[[615]](#footnote-616) under the Ninth Circuit’s decision in *Alvarez v*. *IBP, Inc.,*[[616]](#footnote-617) “time concerning uniforms must be separated from time concerning equipment.”[[617]](#footnote-618) The jury in that case found that the plaintiffs spent nine minutes donning and doffing their uniforms and between two and six minutes donning and doffing equipment. Because the court did not consider this time in the aggregate, it found all of these activities to be de minimis as a matter of law.[[618]](#footnote-619)

In *Chambers v. Sears Roebuck & Co.*,[[619]](#footnote-620) in-home service technicians sought compensation for time spent on a variety of pre- and post-shift activities performed on company vehicles. The court concluded that the pre- and post-shift activities were de minimis, and thus noncompensable,because no evidence indicated the activities would take, in the aggregate, more than a few minutes for the technicians to complete.[[620]](#footnote-621)

Work conducted during commute time has frequently been found to be de minimis and thus noncompensable. For instance, in *Reich v. New York City Transit Authority*,[[621]](#footnote-622) the Second Circuit addressed whether K-9 officers who transported their dogs to and from work were entitled to compensation for their commute time. The court concluded:

Considering the administrative difficulty of establishing a reliable system for recording the time spent in such care [of the dogs] during commutes, the irregularity of the occurrence, and the tiny amount of aggregate time so expended, we conclude that these episodes of additional compensable work are *de minimis* and, therefore, need not be compensated.[[622]](#footnote-623)

Similarly, in two companion cases, *Shepard v. City of Burlington*[[623]](#footnote-624)and *Bartholomew v. City of Burlington*,[[624]](#footnote-625) a district court held that, under the de minimis doctrine, patrol officers were not entitled to overtime compensation for time spent on briefings conducted on the way to work between an officer going off duty and the replacement officer. The court found that the amount of time spent above and beyond necessary travel time was small, it was administratively difficult to record the time at issue, and the officers were only occasionally required to spend up to an additional 15 minutes in preparing for work by participating in the briefings.[[625]](#footnote-626)

Short interruptions in other off-duty situations have also been found to be noncompensable under the de minimis doctrine. For instance, time spent by police officers monitoring a police radio so as to respond to possible emergencies arising during their commutes to work was found to be de minimis and thus not compensable.[[626]](#footnote-627) Similarly, interruptions during meal periods were regarded as too insignificant to warrant compensation.[[627]](#footnote-628) In another case, a plaintiff was denied compensation for taking occasional work-related calls at home.[[628]](#footnote-629)

*c. Cases Finding That Time Is Not De Minimis*

While holding that no one factor should be determinative under the de minimis doctrine, the Sixth Circuit in *Brock v. City of Cincinnati*[[629]](#footnote-630) determined that the doctrine did not apply to police officers who spent an hour to one and one-half hours per day caring for their dogs off duty, despite the administrative difficulties of tracking such time.[[630]](#footnote-631) The court found that these difficulties were outweighed by the fact that the dog care occurred every day and there was a “gross amount” of time involved in caring for the dogs.[[631]](#footnote-632)

In *Mireles v. Frio Foods, Inc.*,[[632]](#footnote-633) the Fifth Circuit held that the de minimis doctrine did not apply to workers who were required to arrive up to 15 minutes before they performed productive work. In denying the de minimis defense, the court found no “administrative impracticalities” because the employer could easily track when the employees reported for work.[[633]](#footnote-634)

Applying the same rationale in *Burton v. Hillsborough County*,[[634]](#footnote-635) the Eleventh Circuit held that time spent by workers driving between county lots and job sites at the beginning and end of each day was not de minimis because it was easily tracked, was not an insignificant amount of time (one and one-half to three hours per day), and happened each day.[[635]](#footnote-636)

In *Peterson v. Nelnet Diversified Solutions, LLC*,[[636]](#footnote-637) the Tenth Circuit reversed the trial court’s grant of summary judgment and instead held that time spent booting up computers used to both record the start of the workday and to perform the employees’ job were both compensable and not de minimis. The time at issue was estimated to be less than 2.5 minutes per day, per employee. The court held that it was administratively feasible for the employer to at least estimate the amount of time involved, particularly because the employer’s expert did so for trial. The court also determined that the aggregate amount of compensable time at issue was not de minimis, whether viewed per employee ($0.48 per shift, $2.40 per week, or $125 per year) or as to all employees at issue (i.e., approximately $30,000). Supporting its conclusion, the court noted that the regularity of the time at issue, i.e., every day of work, weighed against applying the de minimis doctrine. In conclusion, the court said: “[T]he relatively small size of the claims is not enough to outweigh the regularity of the work and the absence of any significant practical administrative burden in estimating the amount of time involved.”[[637]](#footnote-638)

Similarly, in *Kosakow v. New Rochelle Radiology Associates*,[[638]](#footnote-639) the Second Circuit reversed summary judgment for the employer under the de minimis doctrine, finding that time spent by a radiological technician turning on and testing the X-ray machines 15 minutes before the offices opened was significant, regular, and not difficult to calculate.[[639]](#footnote-640)

The same conclusion was reached in *Kellar v*. *Summit Seating, Inc.*,[[640]](#footnote-641)where the Seventh Circuit held that pre-shift activities by a manager reviewing work schedules and gathering and distributing materials to subordinates was not de minimisin that such work was done as a part of a daily routine, and thereby feasible to track, and took 10–40 minutes a day.[[641]](#footnote-642)

The de minimis defense was also rejected by the court in *Fast v. Applebee’s International, Inc*.,[[642]](#footnote-643) where employees were encouraged to arrive 15 minutes early and could sign onto the computer using the “clock in as scheduled” option. The computer would then record a clock-in time for the start of their scheduled shift, rather than clocking them in at the actual sign-on time; employees could then place orders and complete transactions on the computer. If the employee attempted to clock in showing the actual time, the computer would not allow the employee to place orders or complete transactions. The court found that the time was not de minimis because, even if it did not happen regularly and the amount of time was small, it could easily be tracked because the employee was using the computer. The court also pointed out that this system set up the expectation that employees would begin work before their scheduled start time and noted that, if it chose to do so, the employer could change the clock-in method.[[643]](#footnote-644)

Other courts have similarly found the de minimis defense to be unavailing in a variety of factual settings.[[644]](#footnote-645)

1. 29 U.S.C. §254. [↑](#footnote-ref-2)
2. State laws may have different rules regarding compensable hours of work. *See generally* Wage and Hour Laws: A State-by-State Survey(Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-3)
3. These bulletins appear in the Department of Labor, Wage and Hour Division, Statements of General Policy or Interpretation Not Directly Related to Regulations, 29 C.F.R. Parts 775–794 (Chapter V, Subchapter B). The reader should consult Chapter 2, Operations and Functions of the Department of Labor, for a detailed discussion of deference with respect to nonbinding interpretive versus noninterpretive bulletins and the deference doctrine set by the Court in *Skidmore* v. *Swift*, 323 U.S. 134, 138 (1944). *See* 29 C.F.R. §785.2 and 29 C.F.R. §790.1. [↑](#footnote-ref-4)
4. The FLSA does not define the term “work.” Section 203(g) of the FLSA provides that the term “employ” includes to “suffer or permit to work.” [↑](#footnote-ref-5)
5. 321 U.S. 590 (1944). [↑](#footnote-ref-6)
6. *Id*. at 598. The Supreme Court applied these same factors in finding time spent in an employer’s underground mine compensable. Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of Am., 325 U.S. 897 (1945). [↑](#footnote-ref-7)
7. 323 U.S. 126 (1944). [↑](#footnote-ref-8)
8. 328 U.S. 680 (1946). [↑](#footnote-ref-9)
9. *Id*. at 692. [↑](#footnote-ref-10)
10. *Id*. [↑](#footnote-ref-11)
11. *Id*. at 693. [↑](#footnote-ref-12)
12. *Id*. See the discussion of de minimis in §V.B [Recording Working Time; The *De Minimis* Doctrine] of this chapter. [↑](#footnote-ref-13)
13. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 694 (1946). [↑](#footnote-ref-14)
14. *Id*. at 693 (referring to *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944), and *Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of Am*., 325 U.S. 897 (1945) (finding that underground travel time in mine was compensable under FLSA, because it (1) required physical and mental exertion that was (2) controlled and required by employer (3) for employer’s benefit)). [↑](#footnote-ref-15)
15. *Id*. at 695. [↑](#footnote-ref-16)
16. 1947 U.S.C.C.A.N. 1032. [↑](#footnote-ref-17)
17. Portal-to-Portal Act ch. 52, §4, 61 Stat. 86 (1947) (codified as amended at 29 U.S.C. §254(a), (b)) (emphasis added). [↑](#footnote-ref-18)
18. 12 Fed. Reg. 7,655 (Nov. 18, 1947). *See* 29 C.F.R. §790.1(b). [↑](#footnote-ref-19)
19. *Id.* [↑](#footnote-ref-20)
20. 350 U.S. 247 (1956). [↑](#footnote-ref-21)
21. *Id.* at 248. [↑](#footnote-ref-22)
22. 350 U.S. 260 (1956). [↑](#footnote-ref-23)
23. *Id*. at 261–63. [↑](#footnote-ref-24)
24. 546 U.S. 21, 10 WH Cases2d 1825 (2005). [↑](#footnote-ref-25)
25. 571 U.S. 220, 21 WH Cases2d 1477 (2014). [↑](#footnote-ref-26)
26. 571 U.S. at 226–27. See §IV.A.2.b [Application of Principles; Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities; Donning and Doffing Clothing and Protective Equipment; Donning and Doffing in the Context of Section 203(o)] of this chapter. [↑](#footnote-ref-27)
27. 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-28)
28. 574 U.S. at 37. [↑](#footnote-ref-29)
29. *Id*. at 35 (citing 29 U.S.C. §254(a)(1)). [↑](#footnote-ref-30)
30. *Id*. at 35. [↑](#footnote-ref-31)
31. For more on the significance of *Busk*, see §IV.A.1 [Application of Principles; Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities; Security Screenings] of this chapter. [↑](#footnote-ref-32)
32. 29 U.S.C. §203(g); *see also* 29 C.F.R. §785.6. [↑](#footnote-ref-33)
33. 29 C.F.R. §785.6. [↑](#footnote-ref-34)
34. *Id.* §785.11. [↑](#footnote-ref-35)
35. *Id.* §785.7, .9, .11. [↑](#footnote-ref-36)
36. IBP v. Alvarez, 546 U.S. 21, 10 WH Cases2d 1825 (2005); Steiner v. Mitchell, 350 U.S. 247, 252–53 (1956). [↑](#footnote-ref-37)
37. *See* Walling v. Sanders, 136 F.2d 78, 81, 3 WH Cases 345 (6th Cir. 1943); *see also* Chapter 3, The Employment Relationship. [↑](#footnote-ref-38)
38. For a detailed discussion of “knowledge,” see §III.B.1[Principles for Determining “Hours Worked”; Definition of “Employ”; Knowledge of the Employer] of this chapter. [↑](#footnote-ref-39)
39. 29 C.F.R. §785.13 (1996); Forrester v. Roth’s I.G.A. Foodliner, Inc., 646 F.2d 413, 414, 24 WH Cases 1406 (9th Cir. 1981). [↑](#footnote-ref-40)
40. *See* 29 C.F.R. §785.11 and cases cited therein. [↑](#footnote-ref-41)
41. 646 F.2d 413, 24 WH Cases 1406 (9th Cir. 1981). [↑](#footnote-ref-42)
42. 646 F.2d at 414. [↑](#footnote-ref-43)
43. Aguilar v. Management & Training Corp., 948 F.3d 1270, 1289 (10th Cir. 2020) (employer cannot claim lack of knowledge of time spent by guards doing required pre- and post-shift duties, despite employee acknowledgments that they have reported all time worked); Kuebel v. Black & Decker, Inc., 643 F.3d 352 (2d Cir. 2011) (finding triable issue as to whether employer knew off-the-clock work was performed at home based on evidence that supervisor had instructed plaintiff not to record more than 40 hours per week on his time records); Echeverria v. Nevada, 2022 BL 179057, 2022 WL 1652450 (D. Nev. May 23, 2022) (mandatory pre-shift meeting is compensable even if employees did not report it as work time because employer obviously knew of time worked).

    *See also*

    *Second Circuit:* Lawtone-Bowles v. City of N.Y., 2020 WL 2833366, at \*13 (S.D.N.Y. June 1, 2020) (denying summary judgment for employer because policy requiring preapproval for working overtime could have discouraged employees from reporting overtime and timekeeping system allegedly captured unpaid pre-shift time).

    *Eighth Circuit:* Brennan v. Qwest Commc’ns Int’l, Inc., 727 F. Supp. 2d 751 (D. Minn. 2010) (finding disputed facts concerning employer knowledge of alleged off-the-clock work even where workers underreported their time, because evidence could support inference that employer knew or should have known that workers were motivated by performance standards to work off the clock and were assigned daily workload that employer acknowledged would require more than scheduled time to complete).

    *Eleventh Circuit:* Murray v. Birmingham Bd. of Educ., 172 F. Supp. 3d 1225, 1267 (N.D. Ala. 2016) (holding that notice element can be satisfied if defendant “had actual or constructive knowledge of work” and that constructive knowledge “may be imputed to the employer when its supervisors or management encourage artificially low reporting,” or when management “has reason to believe that that its employee is working beyond his shift”).

    *But see*

    *Fifth Circuit:* Fairchild v. All American Check Cashing, Inc., 815 F.3d 959 (5th Cir. 2016) (affirming judgment for employer after bench trial where evidence demonstrated that employer had access to computer usage reports showing that plaintiff worked overtime, but question was whether employer “should have known” that overtime was worked, and “mere access” to such reports was insufficient to establish constructive knowledge); Newton v. City of Henderson, 47 F.3d 746, 749, 2 WH Cases2d 1025 (5th Cir. 1995) (holding that access to information that would show police officer was working overtime did not constitute constructive knowledge that overtime was actually worked); Banks v. Claiborne Cnty. Sch. Dist., 2021 BL 509830, 2021 WL 7080980, at \*7 (S.D. Miss. Dec. 29, 2021) (“it is not enough for an employee to show her workload was such that she had to work overtime to complete assigned tasks,” but where payroll clerk instructed her to alter her timesheets claim survived summary judgment); Beans v. AT&T Servs., Inc., 2022 BL 173790, 2022 WL 1590475 (N.D. Tex. Apr. 8, 2022) (magistrate judge’s recommendation to grant summary judgment to defendant holding that knowledge cannot be imputed to employer merely due to existence of computer tracking system used to track work without other direct evidence of constructive or direct knowledge that work was performed and not recorded), *adopted sub nom.* 2022 WL 1592832 (N.D. Tex. May 19, 2022).

    *Seventh Circuit:* Allen v. City of Chi., 865 F.3d 936, 944, 27 WH Cases2d 706 (7th Cir. 2017) (affirming judgment for defendant, rejecting arguments that district court erred by holding that defendant did not actually or constructively know employees were underreporting their overtime). [↑](#footnote-ref-44)
44. Martin v. Deiriggi, 1991 WL 323416, at \*10, 30 WH Cases 1129 (N.D. W. Va. 1991), *aff’d*, 985 F.2d 129, 1 WH Cases2d 250 (4th Cir. 1992) (imputing knowledge of extra work to employer where plaintiff occasionally assisted another employee because there was too much work for latter to do alone). *See also* Martin v. George Junior Republic of Pa., 2016 WL 6647911 (W.D. Pa. Nov. 10, 2016) (denying defendant’s summary judgment motion, finding that defendant could have knowledge of overtime hours worked because plaintiffs’ charges in group home required constant supervision and no relief was provided during their shifts); Gonzalez v. McNeil Techs., 2007 WL 1097887, at \*6 (E.D. Va. Apr. 11, 2007) (finding that employer had constructive knowledge that employee worked more than 8 hours per day because office was open 10 hours per day and worker was sole employee in office). [↑](#footnote-ref-45)
45. Brennan v. General Motors Acceptance Corp., 482 F.2d 825, 827–88, 21 WH Cases 187 (5th Cir. 1973). *See also McNeil Techs.*, 2007 WL 1097887 (finding that employer had knowledge of overtime because employee complained to direct supervisor, despite supervisor’s lack of power to authorize payment for overtime). *But see* Darrikhuma v. Southland Corp., 975 F. Supp. 778, 4 WH Cases2d 277 (D. Md.), *aff’d*, 129 F.3d 1258 (4th Cir. 1997) (holding that knowledge of field consultant was insufficient to show employer knowledge of off-the-clock hours where employee presented no other evidence of knowledge or of overtime hours worked). [↑](#footnote-ref-46)
46. *See*

    *First Circuit*: Manning v. Boston Med. Ctr. Corp., 725 F.3d 34, 44, 21 WH Cases2d 207 (1st Cir. 2013) (vacating order granting motion to dismiss, employees subject to auto-deductions for meal breaks sufficiently pled that they worked during meal breaks with defendants’ knowledge); Republican Publ’g Co. v. American Newspaper Guild, 172 F.2d 943, 945–46, 8 WH Cases 598 (1st Cir. 1949) (time spent by movie and theater reviewers watching shows but unpaid was obviously work performed with defendant’s knowledge).

    *Second Circuit*: Chao v. Gotham Registry, 514 F.3d 280, 287 (2d Cir. 2008) (holding that employer knowledge of work recorded on time sheets was sufficient to find that employer suffered or permitted work); Holzapfel v. Town of Newburgh, 935 F. Supp. 418 (S.D.N.Y. 1996), *aff’d*, 145 F.3d 516, 524 (2d Cir. 1998).

    *Third Circuit:* *See generally* Souryavong v. Lackawanna Cnty., 2015 WL 3409472 (M.D. Pa. May 27, 2015) (finding that employer knew or should have known plaintiffs worked overtime where they reported overtime hours worked but payroll system did not recognize overtime).

    *Fourth Circuit*: Pforr v. Food Lion, 851 F.2d 106, 109, 28 WH Cases 1169 (4th Cir. 1988) (holding that pattern and practice of acquiescence may show knowledge, if based on more than a few incidents of employer knowledge in large operation).

    *Fifth Circuit*: Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 515, 18 WH Cases 751 (5th Cir. 1969) (finding that because of number of minors assisting parents cleaning shrimp, employer should have seen them working). *See also* Mohammadi v. Nwabuisi, 2013 WL 1966746, at \*7 (W.D. Tex. May 10, 2013) (finding that employer had plain and clear evidence, in form of plaintiff’s automated time cards, that plaintiff had worked more than 40 hours during at least some weeks); Prince v. MND Hospitality, Inc., 2009 WL 2170042, at \*11 (S.D. Tex. July 20, 2009) (finding that evidence permitted inference that employer had actual or constructive knowledge that maintenance worker worked uncompensated overtime hours where worker’s supervisors regularly saw him prepare and stock his cart with supplies before he began his shift).

    *Sixth Circuit*: Burry v. National Trailer Convoy, 338 F.2d 422, 426, 16 WH Cases 713 (6th Cir. 1964) (despite contract requiring prior approval of overtime work and plaintiffs not recording their overtime hours, defendant had actual knowledge of overtime work and was therefore liable for unpaid overtime).

    *Seventh Circuit*: Meadows v. NCR Corp., 2021 BL 437797, 2021 WL 5299778 (N.D. Ill. Nov. 15, 2021) (finding sufficient evidence to uphold jury verdict that employer had actual or constructive knowledge of employee’s uncompensated pre-shift time, where employee received off-the-clock calls and emails from supervisors that he was told he needed to check before his shift, supervisors interrupted his meal breaks, and supervisors told him he would not be compensated for this time); *Allen*, 865 F.3d at 944 (affirming judgment for defendant, rejecting arguments that district court erred by holding that defendant did not actually or constructively know employees were underreporting their overtime); Kellar v. Summit Seating, Inc., 664 F.3d 169, 177, 18 WH Cases2d 888 (7th Cir. 2011) (employee’s performance of non–de minimis principal activities were without employer’s knowledge and were therefore noncompensable). *See also* Skelton v. American Intercont’l Univ. Online, 382 F. Supp. 2d 1068 (N.D. Ill. 2005) (concluding that evidence of work practices, including employer monthly goals for numbers of new enrollees by admissions advisors and checklist of required tasks, showed that overtime hours were routinely worked); Pierce v. Coleman Trucking, Inc., 2005 WL 2338822, at \*11 (N.D. Ohio Sept. 23, 2005) (concluding that if defendants permitted workers to work in warehouse before their shifts actually started, then such work was compensable).

    *Eighth Circuit*: Mumbower v. Callicott, 526 F.2d 1183, 1188, 22 WH Cases 602 (8th Cir. 1975) (defendant tacitly approved and thereby had constructive knowledge that telephone operator worked overtime because work was done at defendant’s direction). *See also* Fast v. Applebee’s Int’l, Inc., 502 F. Supp. 2d 996, 1006–07, 12 WH Cases2d 1066 (W.D. Mo. 2007), *order vacated on other grounds*, 2009 WL 4344562 (W.D. Mo. 2009) (awarding compensation to employee where computer clocked employee in at scheduled start time, but allowed employee to enter orders on computer prior to actual start time).

    *Ninth Circuit*: Lillehagen v. Alorica, Inc., 2014 WL 6989230 (C.D. Cal. Dec. 10, 2014) (finding that employer had reason to know plaintiffs were working while logged out of timekeeping system because they were closely monitored).

    *Tenth Circuit*: Handler v. Thrasher, 191 F.2d 120, 122–23, 10 WH Cases 343 (10th Cir. 1951) (despite contract proscribing overtime and plaintiff’s failure to claim any unpaid time until after he was terminated, defendant had actual knowledge that plaintiff was working extended hours per day and worked seven days per week).

    *Eleventh Circuit*: Reich v. Department of Conservation & Natural Res., 28 F.3d 1076, 1081–84, 2 WH Cases2d 385 (11th Cir. 1994) (holding that employer had constructive knowledge that conservation officers were working overtime both from inconsistencies contained in arrest records between hours reported and documented times of arrests and from number of officer complaints that work could not be accomplished in 40 hours). *See also* Maldonado v. Alta Healthcare Grp., Inc., 17 F. Supp. 3d 1181, 1193–94 (M.D. Fla. 2014) (concluding that employer had constructive knowledge of uncompensated work performed by live-in staff member at assisted living facility because staff member placed notes in company observation logs regarding incidents staff member addressed during night shifts, and with reasonable diligence employer could have discovered overtime work).

    *Federal Circuit*: Havrilla v. United States, 125 Fed. Cl. 454, 466 (2016) (granting summary judgment for employee where defendant Navy “suffered or permitted” plaintiffs to work through their lunch periods because defendant knew that plaintiffs worked their entire shift in “ready for issue” room, guarding it and responding to requests, and it was Navy policy that plaintiffs could leave room only if they specifically obtained relief from supervisor; even if Navy officials were ignorant of fact that plaintiffs were “working” as defined by FLSA, “such ignorance was a reflection of their misapprehension of law—that is, their failure to appreciate that guarding the [room] and being available to respond to requests for assistance constitutes ‘work’ under the FLSA”); Doe v. United States, 372 F.3d 1347, 1361, 9 WH Cases2d (Fed. Cir. 2004). [↑](#footnote-ref-47)
47. *See*

    *Third Circuit:* Alers v. City of Phila., 919 F. Supp. 2d 528, 558–59 (E.D. Pa. 2013) (police detectives who obtained approval to work overtime from only supervisors but not commanders as required by policy failed to meet their burden that employer had knowledge of overtime work at issue).

    *Fourth Circuit:* Davis v. Food Lion, 792 F.2d 1274, 1276, 27 WH Cases 1214 (4th Cir. 1986) (store employee failed to meet his burden to prove employer’s knowledge that overtime was worked because he did not follow prohibition on working off-the-clock and never informed management that he could not meet productivity standard during regular work hours); Marshall v. Novant Health, Inc., 2020 WL 5577888 (W.D.N.C. Sept. 17, 2020) (nurse who had used exception notifications that lunches were missed cannot claim that auto-deductions for lunches failed to account for meal periods missed when hospital was unaware that meals were missed and not so recorded).

    *Fifth Circuit:* Chambers v. Sears Roebuck & Co., 428 F. App’x 400, 420 (5th Cir. 2011) (employer had no knowledge that service employee performed extra tasks before shift that were not required to be performed at that time); Newton v. City of Henderson, 47 F.3d 746, 748, 2 WH Cases2d 1025 (5th Cir. 1995) (reversing summary judgment for plaintiff undercover police officer on basis that work did not necessarily require overtime work, rules requiring approval of overtime work were not followed, and plaintiff did not demand pay for overtime; fact that employer had access to time records did not establish employer knowledge); *cf*. Edmiston v. Skinnys, Inc., 2003 WL 22228737, at \*6 (N.D. Tex. Sept. 15, 2003) (holding that if district manager knew store manager would be called to store to fill staff gaps, then constructive knowledge existed sufficient for such overtime work to be compensated).

    *Sixth Circuit:* White v. Baptist Mem’l Health Care Corp., 699 F.3d 869, 873, 19 WH Cases2d 1441 (6th Cir. 2012) (hospital lacked knowledge that plaintiff nurse missed meal breaks because exception policy allowed plaintiff to note that meal breaks were missed but plaintiff failed to do so and, by not doing so, plaintiff’s acts prevented employer from acquiring knowledge).

    *Seventh Circuit: Kellar*, 664 F.3d at 177–78 (finding that employer had no actual or constructive knowledge that plaintiff was performing pre-shift work, as plaintiff arrived after shift began and never raised matter that she was working overtime or prior to beginning of her shift; clocking in before shift began did not show that plaintiff performed pre-shift work that employer should have known about).

    *Eighth Circuit:* Donovan v. Williams Chem. Co., 682 F.2d 185, 188, 25 WH Cases 757 (8th Cir. 1982) (employer reasonably assumed that plaintiffs, husband and wife team who lived on employer’s premises, did not work overtime and thereby lacked knowledge of when they may have worked together); Bell v. Westside Dialysis Unit, LLC, 2023 BL 21529, 2023 WL 2350598 (E.D. Ark. Jan. 23, 2023) (employer not liable for work it neither knew or should have known about and employee’s recollections were vague and unsupported).

    *Ninth Circuit:* Forrester v. Roth’s I.G.A. Foodliner, Inc., 646 F.2d 413, 414, 24 WH Cases 1406 (9th Cir. 1981) (plaintiff prevented employer from acquiring knowledge of overtime work because plaintiff never recorded or otherwise informed employer of such work, and plaintiff admitted that had he properly recorded time it would have been paid); Fox v. Summit King Mines, 143 F.2d 926, 932, 4 WH Cases 581 (9th Cir. 1944) (plaintiffs failed to record their claimed overtime work on their time cards and employer believed plaintiffs were recording their time accurately; therefore, employer lacked knowledge that any overtime worked was unpaid).

    *Tenth Circuit:* Robertson v. Board of Cnty. Comm’rs, 78 F. Supp. 2d 1142, 1160, 5 WH Cases2d 1449 (D. Colo. 1999) (partial summary judgment granted to defendant because plaintiff had no evidence that defendant knew of plaintiff’s on-call time or that such time was so restrictive to convert that time to compensable time).

    *Federal Circuit:* Bull v. United States, 68 Fed. Cl. 212, 10 WH Cases2d 1687 (2005), *aff’d on other grounds*, 479 F.3d 1365, 12 WH Cases2d 699 (Fed. Cir. 2007) (denying claim for compensation for time spent grooming drug-sniffing dog, care and maintenance of vehicle, and completing paperwork, because plaintiff failed to show that employer knew or should have known of these off-the-clock activities) [↑](#footnote-ref-48)
48. *See*

    *Second Circuit:* Joza v. WW JFK LLC, 2010 WL 3619551, 16 WH Cases2d 1518 (E.D.N.Y. Sept. 10, 2010) (granting summary judgment for employer where it had established procedure for reporting and paying overtime worked and plaintiff reported that she had not worked overtime when on site after her scheduled hours).

    *Fifth Circuit:* Nieddu v. Lifetime Fitness, Inc., 38 F. Supp. 3d 849 (S.D. Tex. 2014) (granting summary judgment for employer where plaintiff failed to report hours worked in violation of company policy directing workers to track all hours worked).

    *Sixth Circuit:* Jones-Turner v. Yellow Enter. Sys., LLC, 597 F. App’x 293 (6th Cir. 2015) (affirming summary judgment for employer where plaintiffs failed to follow employer’s reasonable process for reporting missed lunches); *White*, 699 F.3d at 877 (affirming summary judgment for employer for nonpayment of missed or interrupted meal periods where plaintiff failed to use employer-established exception report policy to seek pay for working through meal periods).

    *Seventh Circuit: Allen*, 865 F.3d 936 (affirming summary judgment for employer where employees failed to use available time-reporting slips to report work on Blackberries away from work; fact that supervisors sometimes knew that work was being performed did not mean that they knew it was not being reported).

    *Ninth Circuit:* *Forrester*, 646 F.2d at 414–15 (denying overtime compensation when employee never mentioned working extra hours to his employer and reported no overtime on time sheets, and employer regularly paid overtime to those who reported it) [↑](#footnote-ref-49)
49. This may give rise to the estoppel defense. See Chapter 16, Litigation Issues, regarding submission of false time reports. [↑](#footnote-ref-50)
50. *See*

    *Fourth Circuit:* *Davis*, 792 F.2d at 1278 (awarding no overtime when employee was told not to work overtime, no employee complained of inability to accomplish work in 40-hour workweek, and others completed work in 40 hours).

    *Sixth Circuit:* Oldham v. U.S. Postal Serv., 465 F. App’x 440, 447 (6th Cir. 2012) (affirming summary judgment against postal worker where he reported his own time, reported some overtime, and U.S. Postal Service had no reason to suspect that his overtime reports were inaccurate); Wood v. Mid-Am. Mgmt. Corp., 192 F. App’x 378, 382 (6th Cir. 2006) (affirming dismissal of claim for overtime because plaintiff failed to report overtime hours).

    *Tenth Circuit:* Martin v. State of Wyo., 770 F. Supp. 612, 620, 30 WH Cases 811 (D. Wyo. 1991), *aff’d sub nom.* Reich v. State of Wyo., 993 F.2d 739, 1 WH Cases2d 649 (10th Cir. 1993) (holding that spouses of game wardens who assisted in answering door and telephone at state-provided residences and who occasionally gave out public information were not entitled to compensation).

    *Eleventh Circuit:* Alvino v. Equinox Holdings, Inc., 629 F. App’x 847 (11th Cir. 2015) (affirming summary judgment for employer where plaintiff personal trainer failed to present sufficient evidence that defendant knew or should have known that trainer was working overtime). [↑](#footnote-ref-51)
51. *See* Stanislaw v. Erie Indem. Co., 2012 WL 517332, at \*6–7 (W.D. Pa. Feb. 15, 2012) (denying cross-motions for summary judgment where evidence suggested that employer attempted to discourage accurate overtime reporting); Gonzalez v. McNeil Techs., 2007 WL 1097887 (E.D. Va. Apr. 11, 2007) (awarding compensation despite time sheets showing reported time because employee reasonably believed that it was futile to report actual hours worked). [↑](#footnote-ref-52)
52. Gaines v. K-Five Constr. Corp., 742 F.3d 256, 270–71, 21 WH Cases2d 1321 (7th Cir. 2014). [↑](#footnote-ref-53)
53. See §III.A.3 [Principles for Determining “Hours Worked”; Definition of “Employ”; Duty of Management] of this chapter. [↑](#footnote-ref-54)
54. *Third Circuit:* Alers v. City of Phila., 919 F. Supp. 2d 528, 559 (E.D. Pa. 2013) (finding that overtime was not compensable where employer required approval for overtime work and plaintiff had not sought approval).

    *Fourth Circuit:* Pforr v. Food Lion, 851 F.2d 106, 109, 28 WH Cases 1169 (4th Cir. 1988) (denying overtime compensation where employer instructed plaintiffs to stop working off the clock); Darrikhuma v. Southland Corp., 975 F. Supp. 778, 4 WH Cases2d 277 (D. Md.), *aff’d*, 129 F.3d 1258 (4th Cir. 1997)(denying overtime compensation where employer expressly told employee not to work overtime and employee presented no evidence of actual overtime hours worked); *In re* Food Lion Effective Scheduling Litig., 861 F. Supp. 1263, 1272–77 (E.D.N.C. 1994) (refusing to award overtime compensation where employees were directed not to work overtime and no pattern or practice of unpaid overtime was shown).

    *Sixth Circuit:* White v. Baptist Mem’l Health Care Corp., 699 F.3d 869, 877, 19 WH Cases2d 1441 (6th Cir. 2012)(precluding claim for missed meal periods under auto-deduct policy where employee failed to follow employer procedures for being compensated for missed meal periods and employer did not know employee worked through unpaid meal periods). [↑](#footnote-ref-55)
55. *Sixth Circuit:* Craigv. Bridges Bros. Trucking LLC, 823 F.3d 382, 26 WH Cases2d 713 (6th Cir. 2016) (where time records reflected all time worked and through “reasonable diligence” employer could have discovered employee worked overtime, employee’s failure to complain did not preclude claim for unpaid overtime).

    *Eighth Circuit:* Fast v. Applebee’s Int’l, Inc., 502 F. Supp. 2d 996, 1006 (W.D. Mo. 2007) (deeming employer handbook that required employees to show up 15 minutes before start of shift was evidence of constructive knowledge).

    *Tenth Circuit:* Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128, 1133, 6 WH Cases2d 609 (10th Cir. 2000) (stating that employer that established on-call system, for which it did not pay employees, could not claim it did not know employees kept on-call hours).

    *Eleventh Circuit*: Allen v. Board of Pub. Educ. for Bibb Cnty., 495 F.3d 1306, 12 WH Cases2d 1422 (11th Cir. 2007) (reversing summary judgment on issue of uncompensated overtime because there was evidence that employer knew or should have known employees were working overtime without compensation where employer told employees not to record overtime). [↑](#footnote-ref-56)
56. 29 C.F.R. §785.12. [↑](#footnote-ref-57)
57. Hogue v. National Auto. Parts Ass’n, 87 F. Supp. 816, 818, 820, 9 WH Cases 336 (E.D. Mich. 1949). See cases regarding work at home before and after formal shift in §IV.A.5 [Application of Principles; Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities; Other Preparatory/Concluding Activities] of this chapter. [↑](#footnote-ref-58)
58. See cases concerning the care of police dogs cited in §IV.A.5 [Application of Principles; Preparatory and Concluding Activities, As Distinct From Preliminary and Postliminary Activities; Other Preparatory/Concluding Activities] of this chapter. [↑](#footnote-ref-59)
59. 29 C.F.R. §785.12; *see*, *e*.*g*., Meadows v. NCR Corp., 2021 BL 437797, 2021 WL 5299778 (N.D. Ill. Nov. 15, 2021) (finding sufficient evidence to uphold jury verdict that employer had actual or constructive knowledge of employee’s uncompensated pre-shift time where employee received off-the-clock calls and emails from supervisors that he was told he needed to check before his shift, supervisors interrupted his meal breaks, and supervisors told him he would not be compensated for this time); Allen v. City of Chi., 865 F.3d 936, 943, 27 WH Cases2d 706 (7th Cir. 2017) (“the reasonable diligence standard asks what the employer should have known, not what it ‘could have known’”); Brown v. ScriptPro, LLC, 700 F.3d 1222, 1230–31, 19 WH Cases2d 1675 (10th Cir. 2012) (affirming summary judgment for employer where plaintiff performed work at home, but did not enter hours into timekeeping system or keep any record of hours he worked from home); Kuebel v. Black & Decker, Inc., 643 F.3d 352 (2d Cir. 2011) (reversing summary judgment for employer, finding triable issue whether employer knew about off-the-clock work performed at home based on evidence that plaintiff was expected to perform some work at home, but supervisor instructed plaintiff not to record more than 40 hours per week on his time records). [↑](#footnote-ref-60)
60. 865 F.3d 936, 27 WH Cases2d 706 (7th Cir. 2017). [↑](#footnote-ref-61)
61. 29 C.F.R. §785.13. [↑](#footnote-ref-62)
62. *Id*.; *see*, *e.g.*,Brown v. L&P Indus., LLC, 2005 WL 3503637, at \*6 (E.D. Ark. Dec. 21, 2005) (finding that employer practice of altering time records to eliminate pay for unauthorized hours was improper as matter of law). [↑](#footnote-ref-63)
63. 29 C.F.R. §785.13. [↑](#footnote-ref-64)
64. *Id*. *See*

    *Second Circuit*: Chao v. Gotham Registry, Inc., 514 F.3d 280, 287 (2d Cir. 2008) (concluding that employer failed to fulfill its duty to prevent unauthorized overtime).

    *Third Circuit*: Campbell v. Victory Sec. Agency, L.P., 2014 WL 1317574, at \*3 (W.D. Pa. Mar. 31, 2014) (stating that employers must compensate for all hours worked even where such work is performed contrary to policy).

    *Fourth Circuit*: *In re* Food Lion Effective Scheduling Litig., 861 F. Supp. 1263, 1273 (E.D.N.C. 1994) (holding employer liable for overtime compensation even though employees were instructed not to work overtime, yet they were not disciplined for violating rule).

    *Sixth Circuit*: White v. Baptist Mem’l Health Care Corp., 699 F.3d 869, 879, 19 WH Cases2d 1441 (6th Cir. 2012) (stating that “mere existence of a policy requiring an employee to inform management of a missed break does not relieve an employer from its obligation to provide compensation for that time”).

    *Seventh Circuit:* DeMarco v. Northwestern Mem’l Healthcare, 2011 WL 3510896, at \*5 (N.D. Ill. Aug. 10, 2011) (denying summary judgment for employer where it had policy providing for duty-free meal periods and prohibiting post-shift work, but employer did not demonstrate that it “consistently enforce[d] compliance by discipline or comparable means”).

    *Eighth Circuit*: Mumbower v. Callicott, 526 F.2d 1183, 22 WH Cases 604 (8th Cir. 1975) (awarding overtime when employer made no effort to prevent employee from performing duties before and after normal work hours other than to advise employee not to do so).

    *Eleventh Circuit*: Reich v. Department of Conservation & Natural Res., 28 F.3d 1076, 1083, 2 WH Cases2d 385 (11th Cir. 1994) (employer failed in its duty to prevent overtime when it could have disciplined those who violated rule against performing more than 40 hours of work). [↑](#footnote-ref-65)
65. *See, e.g.,*

    *Sixth Circuit:* *White*, 699 F.3d at 879.

    *Seventh Circuit:* Skelton v. American Intercont’l Univ. Online, 382 F. Supp. 2d 1068 (N.D. Ill. 2005).

    *Tenth Circuit:* Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128, 1133, 6 WH Cases2d 609 (10th Cir. 2000).

    *Eleventh Circuit:* Zimmerman v. Netco, Inc., 2005 WL 2077307 (M.D. Fla. Aug. 26, 2005). [↑](#footnote-ref-66)
66. See Chapter 16, Litigation Issues, §VIII (Burden of Proof). [↑](#footnote-ref-67)
67. *See* 29 U.S.C. §254(b)(1); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 4 WH Cases 866 (1944); Armour & Co. v. Wantock, 323 U.S. 126, 4 WH Cases 862 (1944). *But see* Bridgeman v. Ford, Bacon & Davis, Inc., 161 F.2d 962, 964–65, 6 WH Cases 907 (8th Cir. 1947) (holding that firefighters were not entitled to compensation for eight-hour rest period under contract, although they engaged in various tasks such as stripping beds for 20 minutes); Bell v. Porter, 159 F.2d 117, 120, 6 WH Cases 498 (7th Cir. 1946), *order vacated*, 330 U.S. 813 (1947) (holding that payment for sleeping time precluded under contract and therefore was not compensable). [↑](#footnote-ref-68)
68. *See*

    *Supreme Court:* Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177, 5 WH Cases 849, *reh’g denied*, 327 U.S. 816 (1946).

    *Third Circuit:* Vadino v. A. Valey Eng’rs, 903 F.2d 253, 265, 29 WH Cases 1289 (3d Cir. 1990).

    *Eighth Circuit:* Johnson v. Dierks Lumber & Coal Co., 130 F.2d 115, 118, 2 WH Cases 181 (8th Cir. 1942).

    *Tenth Circuit:* Handler v. Thrasher, 191 F.2d 120, 123, 10 WH Cases 343, 345 (10th Cir. 1951).

    *See also* Bernard v. IBP, Inc., 154 F.3d 259, 264, 4 WH Cases2d 1604 (5th Cir. 1999) (holding that claim for compensation for meal period under FLSA was not precluded by collective bargaining agreement (CBA)). [↑](#footnote-ref-69)
69. Walling v. Mid-Continent Pipe Line Co., 143 F.2d 308, 311, 4 WH Cases 554 (10th Cir. 1944). [↑](#footnote-ref-70)
70. *See* 29 C.F.R. §785.23 and WH Op. FLSA2019-1 (Mar. 14, 2019); *see also* Krause v. Manalapan Twp., 486 F. App’x 310 (3d Cir. 2012) (defendant could rely on agreement that comp time adequately compensated patrol officers for off-duty time spent caring for police dogs because agreement was reasonable and accounted for all pertinent facts); Brock v. City of Cincinnati, 236 F.3d 793, 6 WH Cases2d 1197 (6th Cir. 2001); §IV.E.3 [Application of Principles; Sleeping Time and Certain Other Activities; Employee Residing on Employer’s Premises] of this chapter. [↑](#footnote-ref-71)
71. *See*

    *Supreme Court:* Skidmore v. Swift & Co., 323 U.S. 134, 137, 4 WH Cases 866 (1944).

    *Eighth Circuit:* Donovan v. Williams Chem. Co., 682 F.2d 185, 188, 25 WH Cases 757 (8th Cir. 1982).

    *Ninth Circuit:* Owens v. Local No. 169, Ass’n of W. Pulp & Paper Workers, 971 F.2d 347, 354, 30 WH Cases 1633 (9th Cir. 1992).

    *But see* Mascol v. E & L Transp., Inc., 387 F. Supp. 2d 87 (E.D.N.Y. 2005) (refusing to endorse CBA that stated overtime would be paid “in accordance with past practice,” but that did not include formula). [↑](#footnote-ref-72)
72. 486 F. App’x 310 (3d Cir. 2012). [↑](#footnote-ref-73)
73. *Id.* at 314. [↑](#footnote-ref-74)
74. 29 U.S.C. §254(b)(2); *see also*

    *Sixth Circuit*: Chao v. Akron Insulation & Supply, Inc., 184 F. App’x 508, 511, 11 WH Cases2d 1026 (6th Cir. 2006) (holding waiting time compensable where employer had custom of requiring employees to report early to receive assignments, assemble crews, load company-owned vehicles, and drive trucks to job sites).

    *Seventh Circuit*:Brand v. Comcast Corp., 135 F. Supp. 3d 713, 734–37 (N.D. Ill. 2015) (after overviewing case law on preliminary and postliminary time, as well as custom and practice, employer’s policies describing compensable work did not establish custom and practice that covert otherwise noncompensable time to compensable hours).

    *Eleventh Circuit*: Thrower v. Peach Cnty. Bd. of Educ., 2010 WL 4536997 (M.D. Ga. Nov. 2, 2010) (triable issue as to whether pre- and post-trip activities of bus drivers and monitors, such as fueling and cleaning buses, were an express nonwritten provision of an employee contract or custom because employer expected buses to be fueled and cleaned and reprimanded employees for failure to accomplish such tasks).

    *But see* Secretary of Labor v. Timberline South LLC, 925 F.3d 838, 855, 2019 WH Cases2d 195940 (6th Cir. 2019) (commute and meal time paid per custom and practice are not to be counted as hours worked for overtime purposes). [↑](#footnote-ref-75)
75. 29 C.F.R. §790.10(d); Kassa v. Kerry, 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007). [↑](#footnote-ref-76)
76. 29 C.F.R. §790.11; Chambers v. Sears Roebuck & Co., 428 F. App’x 400, 421–22 (5th Cir. 2011) (rejecting argument that certain pre- and post-shift activities were compensable where defendant had previously compensated employees for this time but had implemented new compensation policy). [↑](#footnote-ref-77)
77. 29 C.F.R. §790.11. [↑](#footnote-ref-78)
78. *See* Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123, 321 U.S. 590, 602, 4 WH Cases 293 (1944); Republican Publ’g Co. v. American Newspaper Guild, 172 F.2d 943, 945, 8 WH Cases 598 (1st Cir. 1949); *see also* Jones v. C & D Techs., Inc., 2014 WL 1233390 (S.D. Ind. Mar. 25, 2014) (finding employer violated FLSA by paying employees based on eight-hour shift, rather than actual hours worked, where CBA provided allowance of 15 minutes for donning and doffing activities and such activities increased the average total time employees worked per day above eight hours). [↑](#footnote-ref-79)
79. 29 C.F.R. §790.10(f); *see* Ballou v. General Elec. Co., 310 F. Supp. 476, 478–79, 19 WH Cases 440 (D. Mass. 1970), *aff’d*, 433 F.2d 109, 113 (1st Cir. 1970) (construing 29 U.S.C. §254(b)). [↑](#footnote-ref-80)
80. 546 U.S. 21, 10 WH Cases2d 1825 (2005). [↑](#footnote-ref-81)
81. 546 U.S. at 36. [↑](#footnote-ref-82)
82. 29 C.F.R. §790.6(b). The regulation further states that a rest period or a meal period is part of the “workday” and §4 of the Portal-to-Portal Act, and therefore plays no part in determining whether such a period should be included in the computation of hours worked. *Id*. [↑](#footnote-ref-83)
83. *Alvarez*, 546 U.S. at 32. [↑](#footnote-ref-84)
84. *Id*. Some time during the continuous workday, however, is noncompensable. See §IV.D [Application of Principles; Rest Breaks and Meal Periods] of this chapter. [↑](#footnote-ref-85)
85. 350 U.S. 247 (1956). [↑](#footnote-ref-86)
86. IBP, Inc. v. Alvarez, 546 U.S. 21, 33–34, 10 WH Cases2d 1825 (2005) (citing *Steiner*, 350 U.S. at 253). [↑](#footnote-ref-87)
87. 546 U.S. at 37. [↑](#footnote-ref-88)
88. *Id*. [↑](#footnote-ref-89)
89. *Id.* at 36. [↑](#footnote-ref-90)
90. 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-91)
91. 574 U.S. at 35. [↑](#footnote-ref-92)
92. *Id.* [↑](#footnote-ref-93)
93. *Id.* at 36. [↑](#footnote-ref-94)
94. 524 F.3d 361, 13 WH Cases2d 865 (2d Cir. 2008). [↑](#footnote-ref-95)
95. 524 F.3d at 372. In *Gorman v. Consolidated Edison Corp.*, the Second Circuit acknowledged that “it is perhaps unclear (after *IBP*’s continuous workday rule) whether the *de minimis* test measures only the first integral and indispensable activity of the day, or includes as well all intervening steps that precede the next principal activity of the continuous workday.” 488 F.3d 586, 594 n.7, 12 WH Cases2d 1104 (2d Cir. 2007). In *Singh v. City of New York*, the Second Circuit stated that “[a]lthough we do not fully resolve this question here, we believe that the *de minimis* test necessarily only measures time that involves work.” 524 F.3d at 372 n.8. Because the court had already concluded that the commuting time did not constitute work for purposes of the FLSA, it did not include that time as part of its de minimisanalysis. *Id.* [↑](#footnote-ref-96)
96. *Singh*, 524 F.3dat 364. [↑](#footnote-ref-97)
97. *Id.* Some of the reasons given for an extended commute include: missed bus or subway due to carrying the documents, slowed walk due to carrying the briefcase, and need to take the subway in the opposite direction in order to board a train with fewer people and more space for the briefcase. *Id.* [↑](#footnote-ref-98)
98. For a discussion of what constitutes activities covered by Section 203(o), see §IV.A.2.b [Application of Principles; Preparatory and Concluding Activities, as Distinct From Preliminary and Postliminary Activities; Donning and Doffing Clothing and Protective Equipment; In the Context of Section 203(o)] of this chapter. [↑](#footnote-ref-99)
99. 29 U.S.C. §203(o). [↑](#footnote-ref-100)
100. *See* 29 C.F.R. §785.26. [↑](#footnote-ref-101)
101. 339 F.3d 894, 8 WH Cases2d 1601 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21, 10 WH Cases2d 1825 (2005). [↑](#footnote-ref-102)
102. 339 F.3d at 905 (“Following the Supreme Court’s lead, we have also read FLSA exemptions—such as §3(o)—tightly, refusing to apply FLSA exemptions except [in contexts] *plainly and unmistakably* within the[] [given exemption’s] terms and spirit.”). While the court held that §203(o) is to be narrowly construed, it also concluded that personal protective equipment was not encompassed within the meaning of “clothing,” a conclusion that it deemed more significant. *Id.* *Alvarez* also predates the Supreme Court’s pronouncement in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), that FLSA exemptions are not to be narrowly construed. See§III.C.2 [Principles for Determining “Hours Worked”; The Continuous Workday Rule and the Concept of Principal Activities; When the Workday Starts and Ends If Collective Bargaining Agreements and Section 203(o) Are Applicable] of this chapter and Chapter 5, White-Collar Exemptions, §III.A [Legal Principles That Govern the Analysis of the White-Collar Exemptions; Construction and Burden of Proof]. [↑](#footnote-ref-103)
103. 488 F.3d 945, 12 WH Cases2d 1160 (11th Cir. 2007). [↑](#footnote-ref-104)
104. 488 F.3d at 957. [↑](#footnote-ref-105)
105. 678 F.3d 590 (7th Cir. 2012). [↑](#footnote-ref-106)
106. *Id*. at 595. [↑](#footnote-ref-107)
107. 619 F.3d 604, 16 WH Cases2d 939 (6th Cir. 2010). [↑](#footnote-ref-108)
108. *Sandifer*, 678 F.3d at 596–97. [↑](#footnote-ref-109)
109. 644 F.3d 1130, 17 WH Cases2d 1473 (10th Cir. 2011). [↑](#footnote-ref-110)
110. 644 F.3d at 1138. [↑](#footnote-ref-111)
111. 728 F.3d 849, 21 WH Cases2d 326 (8th Cir. 2013). [↑](#footnote-ref-112)
112. 728 F.3d at 853. [↑](#footnote-ref-113)
113. The court referenced WH Op. FLSA2010-2, 2010 WL 2468195 (June 16, 2010). [↑](#footnote-ref-114)
114. *Adair*, 728 F.3d at 853 (referencing a 2007 DOL opinion letter that expressed different view and noting that DOL’s “views on whether excluded activities can be principal activities have changed with the vicissitudes of electoral winds, with no reference to its experience or expertise in the matter”). [↑](#footnote-ref-115)
115. 819 F.3d 1237 (10th Cir. 2016). [↑](#footnote-ref-116)
116. 619 F.3d 604, 16 WH Cases2d 939 (6th Cir. 2010). [↑](#footnote-ref-117)
117. 619 F.3d at 618–19. [↑](#footnote-ref-118)
118. *Id*.; *see also*

     *Third Circuit:* Andrako v. U.S. Steel Corp., 632 F. Supp. 2d 398, 413, 14 WH Cases2d 1838 (W.D. Pa. 2009) (concluding that post-donning/pre-doffing walking time was compensable even though donning and doffing time itself was noncompensable under §203(o)).

     *Fifth Circuit:* Israel v. Raeford Farms of La., LLC, 784 F. Supp. 2d 653 (W.D. La. 2011) (holding that donning and doffing of safety gear excluded from compensability under §203(o) could still be considered principal activity, but concluding that donning and doffing at issue was not integral and indispensable to poultry processing workers’ principal duties).

     *Sixth Circuit:* Johnson v. Koch Foods, Inc., 670 F. Supp. 2d 657, 15 WH Cases2d 960 (E.D. Tenn. 2009) (noting that if donning, doffing, and hand washing were integral and indispensable, those activities could commence workday even if they were not compensable under §203(o)) [↑](#footnote-ref-119)
119. 488 F.3d 586, 594 n.7, 12 WH Cases2d 1104 (2d Cir. 2007). [↑](#footnote-ref-120)
120. 370 F.3d 901, 910, 9 WH Cases2d 1193 (9th Cir. 2004). [↑](#footnote-ref-121)
121. 487 F.3d 1340, 1344, 12 WH Cases2d 1100 (11th Cir. 2007). [↑](#footnote-ref-122)
122. 571 U.S. 220, 21 WH Cases2d 1477 (2014). [↑](#footnote-ref-123)
123. 571 U.S. 232 n.7. [↑](#footnote-ref-124)
124. *Id.* [↑](#footnote-ref-125)
125. 567 U.S. 142, 19 WH Cases2d 257 (2012). [↑](#footnote-ref-126)
126. 138 S. Ct. 1134 (2018). [↑](#footnote-ref-127)
127. *Sandifer*,571 U.S. 232 n.7. [↑](#footnote-ref-128)
128. 138 S. Ct. at 1137. [↑](#footnote-ref-129)
129. 29 C.F.R. §785.16(a); *see*, *e.g*., United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1117–18, 5 WH Cases2d 555 (10th Cir. 1999) (holding noncompensable bus drivers’ three- to five-hour period between shifts in which they were free to do anything they chose but drink alcohol); Walling v. Clinchfield Coal Corp., 64 F. Supp. 347, 350 (W.D. Va.) (holding that period between two mining shifts was not hours of work where miners were “free to leave the mines, go home, or do anything they pleased”), *aff’d*, 159 F.2d 395 (4th Cir. 1946).

     *But see* Estorga v. Santa Clara Valley Transp. Auth., 2019 WH Cases2d 3188 (N.D. Cal. 2019) (split shifts were compensable because employees had to travel between ending points of first part of shift to starting points of second part of shift). [↑](#footnote-ref-130)
130. *United Transp. Union Local 1745*, 178 F.3d at 1117. [↑](#footnote-ref-131)
131. 643 F.3d 352, 17 WH Cases2d 1025 (2d Cir. 2011). [↑](#footnote-ref-132)
132. 643 F.3d at 360–61; *see also* Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 1060, 15 WH Cases2d 1569 (9th Cir. 2010) (concluding that time spent transmitting work information via home modem did not extend continuous workday because transmissions could take place at any time during 12-hour period after returning home from last assignment and thus time period at issue was not continuous); Hernandez v. NJK Contractors, Inc., 2015 WL 1966355, at \*27 (E.D.N.Y. May 1, 2015) (before and after commute time spent at employer’s location loading and unloading trucks prior to leaving for job site benefited employer and constituted principal activities under Portal-to-Portal Act). See §IV.C [Application of Principles; Waiting Time] of this chapter. [↑](#footnote-ref-133)
133. 745 F.3d 837, 22 WH Cases2d 325 (7th Cir.), *reh’g denied en banc*, 753 F.3d 695, 22 WH Cases2d 1081 (7th Cir. 2014). [↑](#footnote-ref-134)
134. 745 F.3d at 840. [↑](#footnote-ref-135)
135. *Id.* at 838. [↑](#footnote-ref-136)
136. *Id*. at 839. [↑](#footnote-ref-137)
137. *Id.* at 840. [↑](#footnote-ref-138)
138. “Workday” as used in the Portal-to-Portal Act means, in general, the period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period, whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the “workday,” and §4 of the Portal-to-Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked. 29 C.F.R. §790.6(b). [↑](#footnote-ref-139)
139. Mitchell v. JCG Indus., Inc., 745 F.3d 837, 840, 22 WH Cases2d 325 (7th Cir.), *reh’g denied en banc*, 753 F.3d 695, 22 WH Cases2d 1081 (7th Cir. 2014). [↑](#footnote-ref-140)
140. 753 F.3d at 696 (Williams, J., dissenting). [↑](#footnote-ref-141)
141. Abadeer v. Tyson Foods, Inc., 14 F. Supp. 3d 1062, 1077, 22 WH Cases2d 857 (M.D. Tenn. 2014) (“Departing radically from the conventional understanding of ‘workday’—in effect since 1947 and approved by the Supreme Court in 2005—*[JCG Industries]* found that the period before a meal break was the end of one ‘workday’ and the period after a meal break was the start of another.”);Castaneda v. JBS USA, LLC, 2014 WL 1796707, at \*3, 22 WH Cases2d 1747 (D. Colo. 2014) (declining to follow *JCG Industries* in considering whether donning and doffing during meal period rendered it compensable). [↑](#footnote-ref-142)
142. *See* §IV.D.1 [Application of Principles; Rest Breaks and Meal Periods; Rest Breaks] of this chapter. [↑](#footnote-ref-143)
143. 29 U.S.C. §207(r). [↑](#footnote-ref-144)
144. WH Op. FLSA2018-19, 2018 WL 2348798 (Apr. 12, 2018). [↑](#footnote-ref-145)
145. 29 C.F.R. §551.412(b). [↑](#footnote-ref-146)
146. 29 U.S.C. §254(a)(2) (citations omitted). [↑](#footnote-ref-147)
147. Steiner v. Mitchell, 350 U.S. 247, 256–59 (1956). A copy of the colloquy was appended to the *Steiner* decision. *Id*. at 256. [↑](#footnote-ref-148)
148. 29 C.F.R. Part 790. These regulations were first published on November 18, 1947, and were amended in 1970. [↑](#footnote-ref-149)
149. *Id.* §790.8(a). [↑](#footnote-ref-150)
150. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-151)
151. 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-152)
152. 574 U.S. at 30. The Supreme Court declined to attach any significance to the amount of time required to complete the security clearance, noting that the time spent by workers “on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform.” *Id.* at 37. [↑](#footnote-ref-153)
153. Busk v. Integrity Staffing Sols., Inc., 713 F.3d 525, 531 (9th Cir. 2013). [↑](#footnote-ref-154)
154. *Busk,* 574 U.S. at 36 (emphasis in original). [↑](#footnote-ref-155)
155. *Id*. [↑](#footnote-ref-156)
156. *Id.* at 37. [↑](#footnote-ref-157)
157. *Id.* at 35. *See also* Buero v. Amazon.com Servs., Inc., 61 F.4th 1031 (9th Cir. 2023) (time spent going through security checks to take meal break was noncompensable); Olive v. Tennessee Valley Auth., 2015 WL 4711260 (N.D. Ala. Aug. 7, 2015) (finding time that nuclear plant security officers spent going to and undertaking post-shift radiation screening was noncompensable). [↑](#footnote-ref-158)
158. 488 F.3d 586 (2d Cir. 2007). [↑](#footnote-ref-159)
159. *Id*. at 593. [↑](#footnote-ref-160)
160. 487 F.3d 1340 (11th Cir. 2007). [↑](#footnote-ref-161)
161. *Id.* at 1344–45; *see also* Levias v. Pacific Mar. Ass’n, 760 F. Supp. 2d 1036 (W.D. Wash. 2011) (ruling that dock workers were not entitled to compensation for few minutes spent “badging through” port gate, because such security screening process did not require them to report early in order to report on time). [↑](#footnote-ref-162)
162. 948 F.3d 1270 (10th Cir. 2020). [↑](#footnote-ref-163)
163. *Id.* at 1282–83. *See also* Harwell-Payne v. Cudahy Place Senior Living LLC, 2022 BL 363167, 2022 WL 1652450 (E.D. Wis. Sept. 30, 2022) (motion to dismiss denied because, in health care environment, COVID-19 screening could be integral to patient care worker’s job). [↑](#footnote-ref-164)
164. *See, e.g.,* Aitken v. United States, 162 Fed. Cl. 356 (2022) (security screening of prison guards not compensable); Medrano v. United States, 159 Fed. Cl. 537 (2022) (same); Alkire v. United States, 158 Fed. Cl. 380 (2022) (same). [↑](#footnote-ref-165)
165. U.S. Dep’t of Labor, Wage & Hour Div., *COVID-19 and the Fair Labor Standards Act Questions and Answers,* Temperature/Health Screenings, at #4, https://www.dol.gov/agencies/whd/flsa/pandemic#4 (last visited Aug. 2022). [↑](#footnote-ref-166)
166. Howard v. Post Foods, LLC, 2022 BL 324134, 2022 WL 4233221 (W.D. Mich. Sept. 14, 2022) (COVID-19 screening of cereal plant employees not integral and indispensable to jobs); Pipich v. O’Reilly Auto Enters., LLC, 2022 BL 87442, 2022 WL 788671, at \*4 (S.D. Cal. Mar. 14, 2022) (holding, that, unlike health care workers, time taken by distribution center workers is not integral and indispensable to their jobs); Adegbite v. United States, 156 Fed. Cl. 495 (2021) (holding that correctional officers not responsible for inmates’ health care and therefore time for undergoing health screenings not integral and indispensable to their jobs, and therefore time was noncompensable); Perez v. Walmart, Inc., 2021 BL 465796, 2021 WL 5741484 (W.D. Mo. Oct. 25, 2021) (screenings not integral and indispensable to store worker’s job). [↑](#footnote-ref-167)
167. Boone v. Amazon.com Servs, LLC, 562 F. Supp. 3d 1103, 1120–21 (E.D. Cal. 2022). [↑](#footnote-ref-168)
168. Steiner v. Mitchell, 350 U.S. 247 (1956). [↑](#footnote-ref-169)
169. Mitchell v. King Packing Co., 350 U.S. 260 (1956). [↑](#footnote-ref-170)
170. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-171)
171. *See* Perez v. Mountaire Farms, Inc., 650 F.3d350 (4th Cir. 2011); De Asencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007). [↑](#footnote-ref-172)
172. Before *Busk*, some appellate courts had ruled that clothes changing was compensable only if the items were “unique” rather than “generic” or “non-unique.” Pirant v. U.S. Postal Serv., 542 F.3d 202, 208 (7th Cir. 2008);Gorman v. Entergy Nuclear Operations, Inc., 488 F.3d 586 (2d Cir. 2007); Alvarez v. IBP, Inc., 339 F.3d 894, 903–04 (9th Cir. 2003). During this period, the DOL took the position that the distinction between unique and non-unique items was irrelevant to whether clothes changing was compensable by taking the position that clothes-changing required by the employer, the law, or the nature of the work was compensable. As explained earlier, this general rule was rejected, at least in part, in *Busk.* Following the Court’s decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 10 WH Cases2d 1825 (2005), the DOL issued Wage & Hour Division Advisory Memo. No. 2006-2 (May 31, 2006), in which it stated: “It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.” *See* U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook §31b13 [hereinafter FOH], https://www.dol.gov/agencies/whd/field-operations-handbook (dressing at home is not compensable).

     *See also*

     *Second Circuit:* Perez v. City of N.Y., 832 F.3d 120 (2d Cir. 2016) (in certain circumstances, donning and doffing of special gear may be integral and indispensable to job at issue).

     *Third Circuit:* Clark v. Delaware Valley Sch., 450 F. Supp. 3d 551, 562 (M.D. Pa. 2020) (summary judgment granted to employer because security officer had option to don uniforms at home; inquiry is not whether uniforms are indispensable to job, but whether nature of the work required donning on employer’s premises).

     *Fifth Circuit:* Stuntz v. Lion Elastomers LLC, 826 F. App’x 391 (5th Cir. 2020) (ability to take personal protective equipment home or leave equipment at facility supported conclusion that time spent was not integral and indispensable to principal activities); Kibodeaux v. A&D Ints,, Inc, 2022 BL 112402, 2022 WL 980354 (S.D. Tex. Mar. 31, 2022) (off-the-clock time spent by exotic dancers fixing their hair, putting on makeup, and changing into and out of dancing attire are preliminary and postliminary activities and therefore noncompensable);

     *Ninth Circuit:* Bamonte v. City of Mesa, 598 F.3d 1217, 15 WH Cases2d 1761 (9th Cir. 2010).

     *Court of Claims:* Akpeneye v. United States, 146 Fed. Cl. 356, 367 (2019) (ability to don and doff a uniform at home means that activity is not integral to a principal activity). [↑](#footnote-ref-173)
173. *Busk*, 574 U.S. at 37. [↑](#footnote-ref-174)
174. 800 F.3d 1094 (9th Cir. 2015). [↑](#footnote-ref-175)
175. *Id*. at 1101. [↑](#footnote-ref-176)
176. *Id*. [↑](#footnote-ref-177)
177. 688 F. App’x 714 (11th Cir. 2017). [↑](#footnote-ref-178)
178. *Id*. at 717. *Compare* Llorca v. Sheriff, Collier Cnty., 893 F.3d 1319, 1324 (11th Cir. 2018) (citing *Busk*,holding that donning and doffing protective gear for sheriff deputies “is not ‘integral’ to the deputies’ principal activities. An ‘integral’ activity ‘form[s] an intrinsic portion or element [of the principal activities], as distinguished from an adjunct or appendage.”). [↑](#footnote-ref-179)
179. *See also* Tyger v. Precision Drilling Corp., 832 F. App’x 108 (3d Cir. 2020) (reversing trial court’s granting of summary judgment because donning and doffing of basic personal protective equipment by oil rig workers working with highly toxic materials created factual dispute as to whether activities were integral and indispensable to jobs). On remand, the trial court again granted summary judgment to the employer by adopting the Second Circuit’s standard in *Perez v. City of New York*, 832 F.3d 120, 127, 26 WH Cases2d 1726 (2d Cir. 2016), that for the donning of the basic protective equipment to be deemed integral and thereby compensable, the employees had to establish that the equipment “guards against ‘workplace dangers’ that accompany [their] principal activities and ‘transcend ordinary risks.’” Tyger v. Precision Drilling Corp., 594 F. Supp. 3d 626, 651 (M.D. Pa. 2022). *See also* Walsh v. East Penn Mfg. Co., 555 F. Supp. 3d 89 (E.D. Pa. 2021) (holding time spent by employees changing into and out of clothes and protective gear and showering at lead battery acid plant compensable). [↑](#footnote-ref-180)
180. 29 U.S.C. §203(o); *see also* Arcadi v. Nestle Food Corp., 38 F.3d 672, 2 WH Cases2d 644 (2d Cir. 1994), *aff’g* 841 F. Supp. 477, 1 WH Cases2d 1384 (N.D.N.Y. 1994) (holding that if parties to contract negotiate over issue and have understanding that resolves it, then practice exists even in absence of express written terms); Pressley v. Sanderson Farms, Inc. (Processing Div.), 2001 WL 850017, at \*4 (S.D. Tex. Apr. 23, 2001), *aff’d*, 33 F. App’x 705 (5th Cir. 2002) (declining to state that time spent by poultry processing employees walking, donning, doffing, and cleaning their equipment was not compensable work under §203(o) where it was “unclear” whether all plaintiffs were covered by CBA). [↑](#footnote-ref-181)
181. *Second Circuit:* *Arcadi*, 38 F.3d at 675.

     *Fifth Circuit:* Stuntz v. Lion Elastomers, LLC, 826 F. App’x 391 (5th Cir. 2020) (holding that 26-year practice by bargaining unit employees of treating time spent donning and doffing personal protective equipment, which fell within definition of clothes under §203(o), was properly treated as noncompensable); Anderson v. Pilgrim’s Pride Corp., 147 F. Supp. 2d 556, 565 (E.D. Tex. 2001), *aff’d*, 44 F. App’x 652 (5th Cir. 2002) (holding that donning and doffing time was excluded from compensable work time under §203(o) where there was “both a custom and practice under the CBAs of not compensating line employees” for such time).

     *Sixth Circuit:* Franklin v. Kellogg, 619 F.3d 604, 617–18 (6th Cir. 2010) (finding custom or practice of nonpayment for changing clothes where policy had been in effect for at least 19 years and existed long before employer and union entered into their first CBA).

     *Eighth Circuit*: Lyons v. ConAgra Foods Packaged Foods LLC, 899 F.3d 567, 582 (8th Cir. 2018) (affirming summary judgment for employer where employer did not pay employees for donning and doffing before and after renegotiated CBA, finding that it was continuing custom and practice permitted by FLSA).

     *Eleventh Circuit:* Anderson v. Cagle’s, Inc., 488 F.3d 945, 958, 12 WH Cases2d 1160 (11th Cir. 2007) [↑](#footnote-ref-182)
182. *Arcadi*, 38 F.3d at 675. [↑](#footnote-ref-183)
183. *Id*. [↑](#footnote-ref-184)
184. *Id*. [↑](#footnote-ref-185)
185. *See id*.; Bejil v. Ethicon, Inc., 269 F.3d 477, 480, 7 WH Cases2d 530 (5th Cir. 2001); Hoover v. Wyandotte Chems. Corp., 455 F.2d 387, 389, 20 WH Cases 498 (5th Cir. 1972). [↑](#footnote-ref-186)
186. 269 F.3d at 480. [↑](#footnote-ref-187)
187. Anderson v. Cagle’s, Inc., 488 F.3d 945, 958–59, 12 WH Cases2d 1160 (11th Cir. 2007); *see also* Gatewood v. Koch Foods of Miss., LLC, 569 F. Supp. 2d 687 (S.D. Miss. 2008) (finding “practice” of not paying for time spent donning and doffing sanitary clothing where parties knew of practice at time CBA was negotiated). [↑](#footnote-ref-188)
188. *Third Circuit:* Turner v. City of Phila., 262 F.3d 222, 225–27, 7 WH Cases2d 339 (3d Cir. 2001).

     *Fifth Circuit:* Allen v. McWane, Inc., 593 F.3d 449, 15 WH Cases2d 1230 (5th Cir. 2010) (holding that acquiescence to nonpayment may be inferred where policy of noncompensation has been in effect over long period of time even when issue was never negotiated).

     *Seventh Circuit:* Marshall v. Amsted Rail Co., Inc., 817 F. Supp. 2d 1066, 1078 (S.D. Ill. 2011) (excluding time spent changing clothes from hours worked where unions were aware of policy of nonpayment over many years and never challenged issue during negotiations over execution of several CBAs).

     *Eighth Circuit:* Harvey v. AB Electrolux, 9 F. Supp. 3d 950, 956 (N.D. Iowa 2014) (finding custom or practice where policy of noncompensation was in place for more than 30 years and union never challenged practice); Musticchi v. City of Little Rock, 734 F. Supp. 2d 621 (E.D. Ark. 2010) (finding that absence of negotiation of compensation for donning and doffing despite noncompensation for more than three decades suggested acquiescence).

     *Eleventh Circuit:* *Anderson*, 488 F.3d at 959. [↑](#footnote-ref-189)
189. 262 F.3d 222, 7 WH Cases2d 339 (3d Cir. 2001). [↑](#footnote-ref-190)
190. 262 F.3d at 225–27; *see*

     *Third Circuit:* Rosano v. Township of Teaneck, 754 F.3d 177, 193–94, 22 WH Cases2d 1485 (3d Cir. 2014) (finding custom or practice based on similar facts).

     *Tenth Circuit:* Salazar v. Butterball, LLC, 644 F.3d 1130, 1141–42 (10th Cir. 2011) (finding acquiescence to custom and practice of not paying for time spent donning and doffing protective gear where employer had never paid for such time and, even after union grieved issue, subsequent CBA remained silent on issue).

     *Eleventh Circuit:* *Anderson*, 488 F.3d at 958–59 (finding “custom or practice” of not paying for clothes-changing time where union and employer executed three sequential CBAs that were all silent on issue). [↑](#footnote-ref-191)
191. 571 U.S. 220, 21 WH Cases2d 1477 (2014). [↑](#footnote-ref-192)
192. 571 U.S. at 227. [↑](#footnote-ref-193)
193. *Id.* at 227 n.5. The DOL issued opinion letters in 1997, 1998, 2001, and 2002, and a 2010 administrative interpretation withdrawing some of its earlier opinion letters. *See* WH Op., 1997 WL 998048 (Dec. 3, 1997) (stating that “the ‘plain meaning’ of ‘clothes’ as used in [§203(o)] did not encompass protective equipment (e.g., mesh aprons, plastic belly guards, mesh sleeves, shin guards and weight belts)”); WH Op. (Feb. 18, 1998) (following 1997 opinion letter); WH Op., 2001 WL 58864 (Jan. 15, 2001) (following 1997 opinion letter); WH Op. FLSA2007-10, 2007 WL 2066454 (May 14, 2007) (departing from 1997 opinion letter); WH Op. FLSA2002-2, 2002 WL 33941766 (June 6, 2002) (departing from 1997 opinion letter); WH Op. FLSA2010-2, 2010 WL 2468195 (June 16, 2010), *partially withdrawing* WH Op. FLSA2002-2 (June 6, 2002) *and fully withdrawing* WH Op. FLSA2007-10 (May 14, 2007). [↑](#footnote-ref-194)
194. *Sandifer*, 571 U.S. at 229. [↑](#footnote-ref-195)
195. *Id.* at 230 (specifically rejecting definition adopted by Tenth Circuit in *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139–40 (10th Cir. 2011)). [↑](#footnote-ref-196)
196. *Id.* [↑](#footnote-ref-197)
197. Sandifer v. United States Steel Corp., 571 U.S. 220, 223, 21 WH Cases2d 1477 (2014); *see generally*:

     *Fourth Circuit:* Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 15 WH Cases2d 1135 (4th Cir. 2009).

     *Fifth Circuit:* Bejil v. Ethicon, Inc., 269 F.3d 477 (5th Cir. 2001).

     *Sixth Circuit:* Franklin v. Kellogg, 619 F.3d 604, 612–16 (6th Cir. 2010).

     *Tenth Circuit:* Salazar v. Butterball, LLC, 644 F.3d 1130, 1140 (10th Cir. 2011).

     *Eleventh Circuit:* Anderson v. Cagle’s Inc., 488 F.3d 945, 956, 12 WH Cases2d 1160 (11th Cir. 2007). [↑](#footnote-ref-198)
198. *Sandifer*,571 U.S. at 234–35. [↑](#footnote-ref-199)
199. *Id.* at 221. [↑](#footnote-ref-200)
200. *Id.* at 221–22. *See also* Howard v. Post Foods, LLC, 2022 BL 324134, 2022 WL 4233221 (W.D. Mich. Sept. 14, 2022) (donning ear plugs, safety glasses, hair nets and beard nets are noncompensable because vast majority of time at issue is spent on changing clothes per §203(o)). [↑](#footnote-ref-201)
201. 754 F.3d 177 (3d Cir. 2014). [↑](#footnote-ref-202)
202. *Id.* at 194–95; *see also* Howard v. Post Foods, LLC,2022 BL 324134, 2022 WL 4233221 (W.D. Mich. Sept. 14, 2022) (holding although safety glasses, earplugs, and hair and beard nets were not clothing for purposes of §203(o), the time plaintiffs spent putting them on was not compensable since the majority of time changing was spent changing into clothing); Harvey v. AB Electrolux, 9 F. Supp. 3d 950, 956 (N.D. Iowa 2014) (concluding that entire period production workers spent donning both clothes and non-clothes items qualified as time spent changing “clothes,” because clothes items required more time to don than non-clothes items). [↑](#footnote-ref-203)
203. Sandifer v. United States Steel Corp., 571 U.S. 220, 21 WH Cases2d 1477 (2014). [↑](#footnote-ref-204)
204. WH Op. FLSA2002-2, 2002 WL 33941766 (June 6, 2002). [↑](#footnote-ref-205)
205. *See*, *e*.*g*., Arnold v. Schreiber Foods, Inc., 690 F. Supp. 2d 672, 686 (M.D. Tenn. 2010) (holding that “washing” is limited to one’s body); Johnson v. Koch Foods, Inc., 670 F. Supp. 2d 657, 667–68 (E.D. Tenn. 2009) (same); Burks v. Equity Grp.-Eufaula Div., LLC, 571 F. Supp. 2d 1235, 1244 (M.D. Ala. 2008) (holding that legislative history limits “washing” to cleaning one’s body). [↑](#footnote-ref-206)
206. 29 C.F.R. §785.24(c). [↑](#footnote-ref-207)
207. *Id.* §§785.24(b)(2), 790.8(b)(2). [↑](#footnote-ref-208)
208. 68 Fed. Cl. 212, 238, 10 WH Cases2d 1687 (2005), *aff’d on other grounds*, 479 F.3d 1365, 12 WH Cases2d 699 (Fed. Cir. 2007). [↑](#footnote-ref-209)
209. 68 Fed. Cl. at 261. [↑](#footnote-ref-210)
210. *Accord* Albanese v. Bergen Cnty., 991 F. Supp. 421 (D.N.J. 1998); Hellmers v. Town of Vestal, 969 F. Supp. 837, 844 (S.D.N.Y. 1997); Treece v. City of Little Rock, 923 F. Supp. 1122, 1127 (E.D. Ark. 1996). [↑](#footnote-ref-211)
211. Musticchi v. City of Little Rock, 734 F. Supp. 2d 621 (E.D. Ark. 2010). [↑](#footnote-ref-212)
212. Chagoya v. City of Chi., 992 F.3d 607 (7th Cir. 2021) (holding time spent by city SWAT officers taking gear home, at their option, even though doing so was encouraged and increased their efficiency in responding to incidents, was not integral and indispensable to their jobs); Garmon v. Board of Educ. for Buffalo City Sch. Dist., 2017 BL 396164, 2017 WL 7038200 (W.D.N.Y. Nov. 2, 2017) (holding time spent by security officers cleaning and maintaining uniforms was not compensable because it was not essential to officers’ performance of principal duties under Portal-to-Portal Act). [↑](#footnote-ref-213)
213. Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50–51, 26 WH Cases 1663 (8th Cir. 1984) (finding compensable pre-trip safety inspection activities); Chao v. Gary Bauerly, LLC, 2005 WL 1656915 (D. Minn. July 14, 2005) *and* 2005 WL 1923716 (D. Minn. Aug. 11, 2005) (ruling compensable pre-trip tasks such as pre-trip vehicle inspections, waiting for load, and greasing and washing trucks). [↑](#footnote-ref-214)
214. *See*, *e.g*., Dunlop v. City Elec., Inc., 527 F.2d 394, 401, 22 WH Cases2d 728 (5th Cir. 1976) (ruling that electricians and their helpers were entitled to pay for fueling, loading, and cleaning trucks). [↑](#footnote-ref-215)
215. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-216)
216. *See*

     *Fifth Circuit:* AFSCME Local 889 v. Louisiana, 145 F.3d 280, 4 WH Cases2d 1355 (5th Cir. 1998) (concluding that field officers at state correctional facilities were entitled to compensation for 15-minute roll-call period preceding shifts).

     *Sixth Circuit:* Forrester v. American Sec. & Prot. Serv., LLC, 2022 BL 166219, 2022 WL 1514905 (6th Cir. May 13, 2022) (time spent by correctional officers exchanging meaningful information before shift is compensable).

     *Ninth Circuit:* Echeverria v. Nevada, 2022 BL 179057, 2022 WL 1652450 (D. Nev. May 23, 2022) (time spent by prison guards for pre-shift muster, pass down, and collecting mail and gear is compensable).

     *Seventh Circuit:* Schwertfeger v. Village of Sauk Vill., 2001 WL 293115 (N.D. Ill. Mar. 23, 2001) (finding that 15-minute roll-call period for police officers was compensable work time).

     *Tenth Circuit:* Brubach v. City of Albuquerque, 893 F. Supp. 2d 1216, 1229, 19 WH Cases2d 1614 (D.N.M. 2012) (required pre-shift briefing of security guards by guards going off duty was integral and indispensable to principal activities). [↑](#footnote-ref-217)
217. 2015 WH Cases2d 308856, 2015 WL 5602607 (W.D. Pa. Sept. 23, 2015). [↑](#footnote-ref-218)
218. 2015 WL 5602607, at \*10. *See also* *Forrester,* 2022 BL 166219, 2022 WL 1514905 (holding time spent by security guards during pass downs not compensable where no meaningful information exchanged). [↑](#footnote-ref-219)
219. 948 F.3d 1270, 1278–79 (10th Cir. 2020). [↑](#footnote-ref-220)
220. *See also*

     *Fifth Circuit:* Sandel v. Fairfield Indus., 2015 WL 7709583 (S.D. Tex. June 25, 2015) (applying *Busk*, finding that time spent at safety meetings by employees working off shore to perform seismic data was compensable); AFSCME Local 889 v. Louisiana, 145 F.3d 280, 4 WH Cases2d 1355 (5th Cir. 1998) (concluding that field officers at state correctional facilities were entitled to compensation for 15-minute roll-call period preceding shifts).

     *Seventh Circuit:* *Schwertfeger*, 2001 WL 293115 (finding that 15-minute roll-call period for police officers was compensable work time).

     *Tenth Circuit:* Bustillos v. Board of Cnty. Comm’rs of Hildago Cnty., 697 F. App’x 597, 598–99, 2017 WH Cases2d 323699 (10th Cir. 2017) (holding that the five minutes the employer required emergency dispatchers to report to work pre-shift to be briefed by departing dispatcher were compensable because obtaining that information was integral and indispensable to the job of dispatching);Serna v. Board of Cnty. Comm’rs, 2018 BL 288607, 2018 WL 3849878 (D.N.M. Aug. 13, 2018) (holding that pre-shift time was compensable because learning prisoner conditions and behavior was “integral and indispensable” to job of corrections officer).*Brubach*, 893 F. Supp. 2d at 1229 (required pre-shift briefing of security guards by guards going off duty was integral and indispensable to principal activities).

     *Eleventh Circuit*: Gibson v. Outokumpu Stainless Steel USA, LLC, 2023 BL 94419 (S.D. Ala. Mar. 22, 2023) (forklift operator’s pre- and post-shift change over activities were integral and indispensable to employee’s job and thereby compensable). [↑](#footnote-ref-221)
221. *See*

     *First Circuit:* Andrews v. DuBois, 888 F. Supp. 213, 217, 2 WH Cases2d 1297 (D. Mass. 1995) (holding that “time spent feeding, grooming, and walking the dogs … is time spent working”).

     *Second Circuit:* Holzapfel v. Town of Newburgh, 145 F.3d 516, 528, 4 WH Cases2d 1097 (2d Cir. 1998) (whether training and care of police dogs after hours was compensable depended on whether jury found that employer or employee benefited more from such activities).

     *Third Circuit:* Krause v. Manalapan Twp., 486 F. App’x 310 (3d Cir. 2012) (acknowledging that police officers’ off-duty care for dogs was compensable, but finding that terms of agreement adequately compensated officers for such time).

     *Fourth Circuit*: Truslow v. Spotsylvania Cnty. Sheriff, 783 F. Supp. 274, 279, 30 WH Cases 1259 (E.D. Va. 1992), *aff’d*, 1 WH Cases2d 744 (4th Cir. 1993) (holding that off-duty dog care time was compensable).

     *Fifth Circuit*: Karr v. City of Beaumont, 950 F. Supp. 1317, 4 WH Cases2d 630 (E.D. Tex. 1997) (holding that officers’ care and transportation of dogs was integral and indispensable part of officers’ duties).

     *Sixth Circuit*: Brock v. City of Cincinnati, 236 F.3d 793, 6 WH Cases2d 1197 (6th Cir. 2001) (finding that time police officers spent caring for police dogs at home was compensable work, in part because defendant required officers to spend time caring for their dogs while off duty).

     *Seventh Circuit*: De Braska v. Milwaukee, 11 F. Supp. 2d 1020, 4 WH Cases2d 1377 (E.D. Wis. 1998), *aff’d in part, reversed in part on other grounds*, 189 F.3d 650 (7th Cir. 1999) (granting partial summary judgment for K-9 officers that they were entitled to additional compensation for off-duty time spent caring for their dogs); Graham v. City of Chi., 828 F. Supp. 576, 582 (N.D. Ill. 1993) (holding that time spent caring for police dogs was compensable).

     *Eighth Circuit*: Treece v. City of Little Rock, 923 F. Supp. 1122, 1125, 3 WH Cases2d 300 (E.D. Ark. 1996) (finding as matter of law that time spent grooming, exercising, feeding, training, and cleaning up after police dogs was compensable).

     *Ninth Circuit:* Dixon v. City of Forks,2009 WL 1459447 (W.D. Wash. May 26,2009) (denying summary judgment for employer where evidence showed that officer inquired about receiving overtime pay for caring for dog at home, was told that K-9 program would be discontinued if department had to pay for such work, and department had previously paid for such activities). [↑](#footnote-ref-222)
222. *See* Boudreaux v. Bantec, Inc., 366 F. Supp. 2d 425 (E.D. La. 2005) (denying summary judgment due to factual dispute as to whether time spent on certain administrative activities before leaving for initial worksite was compensable). [↑](#footnote-ref-223)
223. Kellar v. Summit Seating, Inc., 664 F.3d 169, 174–76, 18 WH Cases2d 888 (7th Cir. 2011). [↑](#footnote-ref-224)
224. Dunlop v. City Elec., Inc., 527 F.2d 394, 400–01, 22 WH Cases 728 (5th Cir. 1976) (ruling that certain pre-shift activities were within broad range of principal activities); Lee v. Am-Pro Protective Agency, 860 F. Supp. 325, 327–28, 2 WH Cases2d 592 (E.D. Va. 1994) (refusing to grant summary judgment for employer because record contained sufficient evidence that employer derived benefit from requiring employees to change into security guard uniforms at workplace). [↑](#footnote-ref-225)
225. Segovia v. Fuelco Energy LLC, 2022 BL 343679, 2022 WL 4545756 (W.D. Tex. Sept. 28, 2022) (although driving crews to job site in company vehicle is compensable, performing pre-trip vehicle inspections is not); Vega v. Gasper, 36 F.3d 417, 424–27, 2 WH Cases2d 614 (5th Cir. 1994) (finding that long bus ride for agricultural workers to fields did not constitute integral part of principal activities because workers were not required to travel in bus). [↑](#footnote-ref-226)
226. *See* Reich v. New York City Transit Auth*.*, 45 F.3d 646, 652, 2 WH Cases2d 833 (2d Cir. 1995) (concluding that time spent by police canine unit dog handlers driving to and from work with dogs did not constitute compensable time, but that non–de minimis “true dog-care work” occurring during commute was compensable); Jerzak v. City of S. Bend, 996 F. Supp. 840, 4 WH Cases2d 736 (N.D. Ind. 1998) (finding that time involved in transporting police dog to and from work was not compensable). *But see* Karr v. City of Beaumont, 950 F. Supp. 1317, 4 WH Cases2d 630 (E.D. Tex. 1997) (holding that officers’ care and transportation of dogs was integral and indispensable part of their duties); Graham v. City of Chi., 828 F. Supp. 576, 582 (N.D. Ill. 1993) (ruling that time spent by canine unit dog handlers transporting dogs to workplace represented indispensable part of employees’ principal activities). [↑](#footnote-ref-227)
227. *See* Kuebel v. Black & Decker Inc., 643 F.3d 352, 17 WH Cases2d 1025 (2d Cir. 2011) (holding that checking email and voicemail, synching personal digital assistant, and printing sales reports were not compensable); Butler v. DirectSAT USA, LLC, 55 F. Supp. 3d 793 (D. Md. 2014) (time reading emails from employer about next day’s work assignments, mapping directions, and prioritizing routes was not compensable). [↑](#footnote-ref-228)
228. Sandel v. Fairfield Indus., 2015 WL 7709583 (S.D. Tex. June 25, 2015) (applying *Busk*, holding that time spent by workers on off-shore rig unloading their groceries and performing other housekeeping chores was noncompensable). [↑](#footnote-ref-229)
229. *Second Circuit:* Kuebel v. Black & Decker (U.S.), Inc., 2009 WL 1401694, at \*9–10 (W.D.N.Y. May 18, 2009), *aff’d on other grounds*, 643 F.3d 352 (2d Cir. 2011).

     *Fourth Circuit:* Butler v. DirectSAT USA, LLC, 55 F. Supp. 3d 793 (D. Md. 2014) (time reading e-mails from employer about next day’s work assignments, mapping directions, and prioritizing routes was not compensable).

     *Fifth Circuit:* Bridges v. Empire Scaffold, LLC, 875 F.3d 222, 227 (5th Cir. 2017) (applying *Busk* standard and finding that time spent waiting for shift to start after shuttle ride to refinery was not integral and indispensable to employees’ jobs and thus was not compensable; in doing so court rejected prior case law in which compensability of activity “turned on whether the activity benefits the employer or whether the employer requires the activity”).

     *Eighth Circuit:* Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 16 WH Cases2d 1161 (D. Minn. 2010) (cleaning and fueling vehicles and mapping routes to work locations were not integral to principal activities of private investigators and thus not compensable as matter of law).

     *Ninth Circuit:* Young v. Beard, 2015 WL 1021278 (E.D. Cal. Mar. 9, 2015) (submitting requests for time off was not “integral and indispensable” to correctional officers’ principal work).

     *D*.*C*. *Circuit:* Dinkel v. MedStar Health, Inc., 99 F. Supp. 3d 37 (D.D.C. 2015) (distinguishing uniform maintenance from safety-related activities that were found compensable in *Busk*) [↑](#footnote-ref-230)
230. 2018 WL 5456666 (E.D.N.Y Aug. 27, 2018). [↑](#footnote-ref-231)
231. 29 C.F.R. §785.33. [↑](#footnote-ref-232)
232. *Id. See also* WH Op. FLSA2018-18, 2018 WL 2348797 (Apr. 12, 2018). [↑](#footnote-ref-233)
233. Some pre- and post-shift travel is regarded as compensable under atypical travel for work circumstances or, in some cases, if required by custom or practice. See subsections 2–8 below. [↑](#footnote-ref-234)
234. 29 U.S.C. §254; 29 C.F.R. §§785.34–.35, 790.7(f). *See*

     *Second Circuit:* Singh v. City of N.Y., 524 F.3d 361, 367, 13 WH Cases2d 865 (2d Cir. 2008) (holding that employees need not be compensated for commute time).

     *Third Circuit:* Smith v. Allegheny Techs., Inc., 754 F. App’x 136 (3d Cir. 2018) (time spent by temporary workers travelling from hotel to worksite in company van and delayed by crossing picket line was not integral and indispensable to employees’ principal activity of making steel).

     *Fifth Circuit:* Chambers v. Sears Roebuck & Co, 428 F. App’x 400, 410 (5th Cir. 2011) (ruling that what is “ordinary commute time” is measured in time, not distance, and affirming that policy of not compensating for commutes of 35 minutes or less is lawful). *See also* Segovia v. Fuelco Energy LLC, 2022 BL 343679, 2022 WL 4545756 (W.D. Tex. Sept. 28, 2022) (time spent by employee while driving crew to worksite is compensable).

     *Sixth Circuit*: Kasiotis v. AWP, Inc., 2022 BL 333215, 2022 WL 4366972 (N.D. Ohio Sept. 16, 2022) (picking up other employees on way to job site as required by employer is still a part of a noncompensable commute); Secretary of Labor v. Timberline S., LLC, 925 F.3d 838 (6th Cir. 2019) (ordinary home-to-work and work-to-home commute time does not qualify as “work” under FLSA even if employer has paid for such time, and therefore that time is not subject to overtime requirement); Aiken v. City of Memphis, 190 F.3d 753, 758, 5 WH Cases2d 961 (6th Cir. 1999).

     *Ninth Circuit*: Imada v. City of Hercules, 138 F.3d 1294, 4 WH Cases2d 705 (9th Cir. 1998) (holding that police officers were not entitled to compensation for time spent commuting to mandatory off-site training); Estorga v. Santa Clara Valley Transp. Auth., 2019 WL 109452, 2019 WH Cases2d 3188 (N.D. Cal. Jan. 4, 2019) (applying *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513, 23 WH Cases2d 1485 (2014), bus drivers’ start/end travel time to points where their actual bus driving starts/ends was noncompensable).

     *Tenth Circuit*: United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1120, 5 WH Cases2d 555 (10th Cir. 1999) (holding that bus drivers were not entitled to compensation while commuting on city shuttle to their first bus run and from their last bus run of day).

     *Federal Circuit*: Adams v. United States, 471 F.3d 1321, 1325 (Fed. Cir. 2006) (ruling that merely commuting in government-owned vehicle was not compensable) [↑](#footnote-ref-235)
235. *Timberline South*, 925 F.3d 838. [↑](#footnote-ref-236)
236. *See* 29 C.F.R. §§785.41, 790.7(f); *see* *also* WH Op. 2020-16 (Nov. 3, 2020) (travel by employees reporting to employer’s place of business to ride with foreman to local job site noncompensable).

     *Fifth Circuit:* Griffin v. S&B Eng’rs & Constructors, Ltd., 507 F. App’x 377, 20 WH Cases2d 164 (5th Cir. 2013) (affirming summary judgment for employer on claims for unpaid overtime for time spent traveling on company buses to and from job site because laborer did not perform any work before travel; did not receive any work-related instructions before or during bus rides; and could engage in personal activities during bus rides, such as sleeping or reading).

     *Seventh Circuit:* Gallardo v. Scott Byron & Co., 2014 WL 126085 (N.D. Ill. Jan. 14, 2014) (finding that travel time in company trucks by landscaping crews from employer’s main facility to first client worksite of day and back to facility after last worksite of day was not compensable because employees were not required to report to main facility at beginning and end of workday or to ride together in company trucks).

     *Eighth Circuit*: Morgan v. Crush City Constr., LLC, 2022 BL 244420, 2022 WL 2752614, at \*6 (W.D. Wis. July 14, 2022) (holding travel time could be “all in the day’s work”—and therefore compensable—if employer required technician employees to attend meetings or pick up tools at a separate location before going to job site).

     *Ninth Circuit:* Levias v. Pacific Mar. Ass’n, 760 F. Supp. 2d 1036 (W.D. Wash. 2011) (concluding that travel from union dispatch hall to worksite was not compensable work time, because union hall was not worksite, nor was travel from port gate to site where principal work activity was performed); Wren v. RGIS Inventory Specialists, 2009 WL 2612307, 15 WH Cases2d 544 (N.D. Cal. Aug. 24, 2009) (holding that travel in company-provided vehicle from central location to inventory sites was commute time and noncompensable, even though employer paid minimum wage for travel time beyond one hour).

     *Eleventh Circuit*: Villarino v. Pacesetter Pers. Serv., Inc., 2022 BL 467875, 2022 WL 18023213 (S.D. Fla. Dec. 1, 2022) (holding that travel time between union hall and job site was not compensable because it was not connected to nor intertwined with their principal job duties). [↑](#footnote-ref-237)
237. 29 C.F.R. §§785.38, 785.41; *see*

     *Second Circuit:* Hernandez v. NJK Contractors, Inc., 2015 WL 1966355 (E.D.N.Y. May 1, 2015) (finding that time spent at shop before and after commute to job site, and loading and unloading tools and materials onto or off vans, was compensable because activities performed at shop were activities integral to principal activity).

     *Fourth Circuit:* Jones v. Hoffberger Moving Servs. LLC, 92 F. Supp. 3d 405 (D. Md. 2015) (finding that travel time from warehouse to job site was compensable only when employees loaded and unloaded trucks before departing for job sites).

     *Fifth Circuit:* Cantu v. Milberger Landscaping, Inc., 12 F. Supp. 3d 918, 922–23 (W.D. Tex. 2014) (determining that travel time in company trucks from last job site of day to company yard was compensable because on returning to company yard, landscapers performed tasks such as unloading tools and flowers, disposing of trash, cleaning and fueling vehicles, and reloading trucks for next day).

     *Seventh Circuit:* Graham v. City of Chi., 828 F. Supp. 576, 582 (N.D. Ill. 1993) (deeming time spent transporting police canines to and from work to be compensable as integral part of canine police officer job because officers fed and prepared animals for work and, after taking them home, fed and exercised them).

     *Ninth Circuit:* Dole v. Enduro Plumbing, 1990 WL 252270, 30 WH Cases 196, 200 (C.D. Cal. Oct. 16, 1990) (holding that where employee was required to report to designated meeting place to receive instructions before proceeding to job site, subsequent travel was part of day’s work).

     *Tenth Circuit:* Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1350, 27 WH Cases 1343 (10th Cir. 1986) (holding that travel time in employer’s vehicle taking tools to service drilling rigs scattered across several states was compensable); D A & S Oil Well Serv., Inc. v. Mitchell, 262 F.2d 552, 555, 14 WH Cases 6 (10th Cir. 1958) (concluding that employees who transported equipment needed to service oil wells must be compensated for travel time).

     See §IV.B.2 [Application of Principles; Travel Time; Travel During the Workday] of this chapter. [↑](#footnote-ref-238)
238. 2015 WL 1966355 (E.D.N.Y. May 1, 2015). [↑](#footnote-ref-239)
239. *See*

     *Fourth Circuit: Jones*, 92 F. Supp. 3d 405 (finding that travel time from warehouse to job site was compensable only if employees loaded and unloaded trucks before departing for job sites).

     *Fifth Circuit:* DOL v. Five Star Automatic Fire Prot., LLC, 987 F.3d 436 (5th Cir. 2021) (without referencing *Busk*, holding time spent loading trucks before shift, driving to job site, returning to shop, and unloading materials was compensable); Bridges v. Empire Scaffold, LLC, 875 F.3d 222, 227 (5th Cir. 2017) (applying *Busk* standard and finding that time spent waiting for shift to start after shuttle ride to refinery was not integral and indispensable to employees’ jobs and thus was not compensable; in doing so, court rejected prior case law in which compensability of activity “turned on whether the activity benefits the employer or whether the employer requires the activity”).

     *Seventh Circuit:* Sanford v. Preferred Staffing, 447 F. Supp. 3d 752 (E.D. Wis. 2020) (employees required to appear at central location an hour before shift to receive assignment for work at another location, who then received assignments, goggles, and brief orientation before being bused to job site, did not have claim for such time prior to starting work at second site, because such pre-shift time had no effect on the factory’s production).

     *Ninth Circuit:* Cortes-Diaz v. DL Reforestation, Inc., 2022 BL 95551, 2022 WL 833334 (D. Or. Mar. 21, 2022) (loading trucks before riding to forest job site is not compensable); Young v. Beard, 2015 WL 1021278 (E.D. Cal. Mar. 9, 2015) (submitting requests for time off was not “integral and indispensable” to correctional officers’ principal work).

     *Eleventh Circuit:* Llorca v. Sheriff, Collier Cnty., 893 F.3d 1319 (11th Cir. 2018) (traveling in marked patrol vehicle was “incidental” to job of sheriff deputy); McAnally v. Alabama Plumbing Contractor, LLC, 2023 BL 52383, 2023 WL 2090277 (N.D. Ala. Feb. 17, 2023) (employees opting to meet at shop instead of driving directly from home to job site is not compensable work time under *Busk*); May v. Alabama Plumbing Contractor, LLC, 2023 BL 45539, 2023 WL 1973208 (N.D. Ala. Feb. 13, 2023) (same).

     *D*.*C*. *Circuit:* Dinkel v. MedStar Health, Inc., 99 F. Supp. 3d 37 (D.D.C. 2015) (distinguishing uniform maintenance from safety-related activities that were found compensable in *Busk*). [↑](#footnote-ref-240)
240. *See* WH Op. FLSA2006-1NA, 2006 WL 4512943 (Jan. 17, 2006) (finding that route drivers were not entitled to compensation for traveling to wash-up site before eating lunch, as their work was not particularly dirty and did not involve handling toxic substances). [↑](#footnote-ref-241)
241. *See* Lindow v. United States, 738 F.2d 1057, 1064 (9th Cir. 1984) (holding that three minutes spent opening and closing security gates to project areas was kind of activity covered by “walking, riding, or traveling to and from the actual place of performance” exception). [↑](#footnote-ref-242)
242. 29 C.F.R. §790.7(f); S. Rep. No. 80-48, at 48 (1947). *See*

     *First Circuit:* Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 94 F. Supp. 3d 47 (D. Mass. 2015) (holding that transit operators were not entitled to compensation for time they spent traveling (1) after their last route of day to return to where they started work (“start-end travel time”) and (2) during mid-day breaks when second part of split shift required starting at location different from where first part ended (“split-shift travel time”)).

     *Second Circuit*: Kavanagh v. Grand Union Co., Inc., 192 F.3d 269, 272–73, 5 WH Cases2d 1089 (2d Cir. 1999) (holding that commuting time of five to nine hours per day was not compensable).

     *Fourth Circuit*: Ralph v. Tidewater Constr. Corp., 361 F.2d 806, 808, 17 WH Cases 352 (4th Cir. 1966) (riding 15 minutes to one hour by boat from shore to work was preliminary noncompensable activity).

     *Fifth Circuit*: Chambers v. Sears Roebuck & Co., 428 F. App’x 400, 410 (5th Cir. 2011)(affirming that policy of not compensating for commutes of 35 minutes or less was lawful); Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994) (holding that four hours workers spent traveling on employer bus each day was not compensable).

     *Tenth Circuit*: Smith v. Aztec Well Servicing Co., 462 F.3d 1274 (10th Cir. 2006) (holding that gas drillers were not entitled to compensation for travel that ranged from 30 minutes to three-and-a-half hours each way); United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1120–21 (10th Cir. 1999) (holding that bus drivers were not entitled to compensation for time spent shuttling to and from either their first or last bus run of day); Mayhew v. Angmar Med. Holdings, Inc., 2022 BL 39689, 2022 WL 343670 (D. Kan. Feb. 4, 2022) (extraordinarily long commute is not compensable and does not trigger continuous workday where only limited amount of work is performed during commute).

     *Eleventh Circuit*: Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340, 1343 (11th Cir. 2007) (holding that time spent in employer vehicles both before and after security checkpoint fell within Portal-to-Portal Act exceptions).

     *D.C. Circuit*: Carter v. Panama Canal Co., 463 F.2d 1289, 1291, 20 WH Cases 698 (D.C. Cir. 1972) (holding that two 15-minute walks from assignment board to place of performance was preliminary noncompensable activity). [↑](#footnote-ref-243)
243. 36 F.3d 417 (5th Cir. 1994). [↑](#footnote-ref-244)
244. *Id*. at 425. [↑](#footnote-ref-245)
245. 54 F.4th 703 (Fed. Cir. 2022). [↑](#footnote-ref-246)
246. *Id.* at 704. [↑](#footnote-ref-247)
247. *Id.* at 707. [↑](#footnote-ref-248)
248. United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1120 (10th Cir. 1999); *see also* Estorga v. Santa Clara Valley Transp. Auth., 2019 WL 109452 (N.D. Cal. Jan. 4, 2019) (split-shift travel time was integral and indispensable to employees’ principal activity of driving bus routes, despite length of split or that personal errands were performed during it, because employees were required to be present at different locations to start their second runs). *But see* Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 94 F. Supp. 3d 47 (D. Mass. 2015) (holding that transit operators were not entitled to compensation for time they spent traveling (1) after their last route of day to return to where they started work (“start-end travel time”) and (2) during mid-day breaks when second part of split shift required starting at location different from where first part ended (“split-shift travel time”). See also §IV.B.2 [Application of Principles; Travel Time; Travel During the Workday] of this chapter. [↑](#footnote-ref-249)
249. *Aztec Well Servicing*, 462 F.3d at 1288 (holding that mandatory carpooling to and from well sites was not compensable where reasons for traveling together were “related to the logistics of commuting rather than anything integral and indispensable to their principal activities”); *see also Bonilla*, 487 F.3d at 1343 (both uncontrolled travel to security gate and travel to worksite on authorized vehicles after security gate were noncompensable); Reich v. N.Y.C. Transit Auth*.*, 45 F.3d 646, 651 (2d Cir. 1995) (finding that commute time was not compensable even though K-9 officers traveling with their dogs could not take public transportation). [↑](#footnote-ref-250)
250. 29 U.S.C. §785.38; WH Op. FLSA2018-18, 2018 WL 2348797 (Apr. 12, 2018). [↑](#footnote-ref-251)
251. *Id*. *See also* WH Op. FLSA2018-18 (travel from home to office to pick up instructions is not compensable, but travel to first worksite thereafter is). [↑](#footnote-ref-252)
252. DeBraska v. City of Milwaukee, 11 F. Supp. 2d 1020, 4 WH Cases2d 1377 (E.D. Wis. 1998), *aff’d in part, reversed in part on other grounds*, 189 F.3d 650 (7th Cir. 1999); *see also*

     *Third Circuit:* Su v. Nursing Home Care Mgmt., Inc., 2023 BL 162592 (E.D. Pa. May 12, 2023) (holding that homecare nurses’ travel between client homes, and between office and client homes, are compensable).

     *Fifth Circuit:* Segovia v. Fuelco Energy LLC, 2022 BL 343679, 2022 WL 4545756 (W.D. Tex. Sept. 28, 2022) (holding time spent by plaintiff frack fuel technicians traveling between the yard—where work was performed—and well sites compensable); Cantu v. Milberger Landscaping, Inc., 12 F. Supp. 3d 918, 922–23 (W.D. Tex. 2014) (finding that travel time in company trucks from last job site of day to company yard was compensable because on returning to company yard, landscapers performed tasks such as unloading tools and flowers, disposing of trash, cleaning and fueling vehicles, and reloading trucks for next day).

     *Sixth Circuit:* Chao v. Akron Insulation & Supply, Inc*.*, 184 F. App’x 508 (6th Cir. 2006) (affirming that “shop time” and waiting time before off-site work assignments were distributed was compensable).

     *Eleventh Circuit:* Burton v. Hillsborough Cnty., 181 F. App’x 829, 11 WH Cases2d 848 (11th Cir. 2005) (affirming summary judgment for county engineers who sought pay from time they picked up county vehicles with tools and supplies from parking lot and drove to first worksite, and back to lot at end of day) [↑](#footnote-ref-253)
253. Dooley v. Liberty Mut. Life Ins. Co., 307 F. Supp. 2d 234, 9 WH Cases2d 972 (D. Mass. 2004). *But cf.*

     *Second Circuit:* Kuebel v. Black & Decker, Inc*.*, 643 F.3d 352, 360–61 (2d Cir. 2011) (affirming summary judgment rejecting commute time claim because evidence did not indicate that plaintiff had to perform administrative tasks immediately before leaving home or immediately after returning home).

     *Sixth Circuit:* Bowman v. Crossmark, Inc., 2012 WL 2597875 (E.D. Tenn. July 5, 2012) (same).

     *Seventh Circuit:* Harris v. Reliable Reports, Inc., 2014 WL 931070, at \*5 (N.D. Ind. Mar. 10, 2014) (same). [↑](#footnote-ref-254)
254. 428 F. App’x 400, 17 WH Cases2d 1388 (5th Cir. 2011). [↑](#footnote-ref-255)
255. 428 F. App’x at 422; *see also* Rutti v. Lojack Corp., Inc*.*, 596 F.3d 1046, 15 WH Cases2d 1569 (9th Cir. 2010) (concluding that plaintiffs were not entitled to compensation for travel time from home to first worksite of day because receiving, prioritizing, and mapping assignments before commuting to first work assignment were not principal activities, but finding disputed issue of fact as to whether time spent on daily, at-home transmissions of information regarding completed work assignments was integral to principal activities). [↑](#footnote-ref-256)
256. 29 C.F.R. §785.38; *see also* WH Op. FLSA2018-18, 2018 WL 2348797 (Apr. 12, 2018). [↑](#footnote-ref-257)
257. 178 F.3d 1109 (10th Cir. 1999). [↑](#footnote-ref-258)
258. *Id*. at 1119–20. [↑](#footnote-ref-259)
259. *Id*. at 1120–21. [↑](#footnote-ref-260)
260. 15 WH Cases2d 1478, 2010 WL 289299 (N.D. Cal. Jan. 15, 2010). [↑](#footnote-ref-261)
261. 2010 WL 289299,at \*7 (quoting Tennessee Coal, Iron & R.R. v. Muscoda Local 123, 321 U.S. 590, 598 (1944)). *Compare* Mayhew v. Angmar Med. Holding, Inc., 2022 BL 39689, 2022 WL 343670 (D. Kan. Feb. 4, 2022) (extended periods between traveling nurse visits not compensable), *with* Estorga v. Santa Clara Valley Transp. Auth., 2019 WL 109452 (N.D. Cal. Jan. 4, 2019) (split-shift travel time was integral and indispensable to employees’ principal activity of driving bus routes). [↑](#footnote-ref-262)
262. WH Op. 2020-19, 2020 WL 9762458, at \*4–5 (Dec. 31, 2020). [↑](#footnote-ref-263)
263. *Id.* [↑](#footnote-ref-264)
264. Dooley v. Liberty Mut. Ins. Co., 307 F. Supp. 2d 234, 9 WH Cases2d 972 (D. Mass. 2004) (deeming that administrative tasks performed at home by claims adjusters before and after work in field rendered time spent traveling to first site and from last site compensable); *see also* McLaughlin v. Somnograph, Inc., 2005 WL 3489507, at \*6 (D. Kan. Dec. 21, 2005) (concluding that because sleep technicians were required to clock in 30 minutes prior to their specified departure to job site and were not permitted to clock out until they downloaded information from equipment, travel time was compensable as integral and indispensable part of their job); *cf*. Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 15 WH Cases2d 1569 (9th Cir. 2010) (finding that time plaintiffs spent receiving, prioritizing, and mapping assignments prior to commuting to first work assignment did not represent principal activities and was not compensable; triable issue of fact as to whether time spent on daily, at-home transmissions of information regarding completed work assignments was integral to principal activities). [↑](#footnote-ref-265)
265. 643 F.3d 352 (2d Cir. 2011). [↑](#footnote-ref-266)
266. *Id*. at 360–61. *See also*

     *Third Circuit:* Bettger v. Crossmark, Inc., 2014 WL 2738536 (M.D. Pa. June 17, 2014) (granting summary judgment for defendant where plaintiff had wide discretion over daily schedule, and no evidence suggested plaintiff was required to perform administrative tasks immediately before driving to first assignment).

     *Sixth Circuit:* Bowman v. Crossmark, Inc., 2012 WL 2597875, at \*8 (E.D. Tenn. July 5, 2012) (finding issue of fact concerning whether retail representative was required to perform administrative tasks immediately prior to leaving for first retail location and immediately after returning home from last retail location).

     *Seventh Circuit:* Harris v. Reliable Reports, Inc., 2014 WL 931070, at \*5 (N.D. Ind. Mar. 10, 2014) (finding question of fact concerning whether field reporting specialist had flexibility in when to complete his daily administrative responsibilities).

     *Eighth Circuit:* Ahle v. Veracity Research Co., 738 F. Supp. 2d 896 (D. Minn. 2010) (concluding that even if pre- and post-shift surveillance activities were principal activities, that did not necessarily make travel time from home to investigation site and from investigation site to home compensable, because plaintiffs were not required to perform activities immediately prior to leaving for investigation or immediately after returning home). [↑](#footnote-ref-267)
267. *See, e.g*., Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1350, 27 WH Cases 1343 (10th Cir. 1986) (ruling travel time in employer’s vehicle taking tools to service drilling rigs scattered across several states was compensable); D A & S Oil Well Serv. Inc. v. Mitchell, 262 F.2d 552, 555 (10th Cir. 1958) (holding that employees who transported equipment needed to service oil wells must be compensated for travel time); Pehle v. Dufour, 2012 WL 4490955 (E.D. Cal. Sept. 28, 2012) (finding that time electrician spent at employer’s shop loading tools and materials into company vehicle and travel between shop and job sites, usually after picking up co-workers, was compensable because it was for employer’s benefit, was under employer’s control and direction, and was integral and indispensable part of plaintiff’s principal activities as electrician). [↑](#footnote-ref-268)
268. 29 C.F.R. §790.7(d). [↑](#footnote-ref-269)
269. *See id*.; *see also* Kerr v. Sturtz Finishes, Inc., 2010 WL 3211946, at \*3 (W.D. Wash. Aug. 12, 2010) (finding that equipment painter transported in his car did not transform his commuting time into compensable time because there was no evidence that commute with truck full of equipment was any different than commute in empty truck). [↑](#footnote-ref-270)
270. *See* Dunlop v. City Elec., Inc., 527 F.2d 394, 401, 22 WH Cases2d 728 (5th Cir. 1976) (holding that activity is integral and indispensable to principal activities only if “such work is necessary to the [employer’s] business and … performed by the employees … in the ordinary course of that business”); Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1290, 11 WH Cases2d 1450 (10th Cir. 2006) (citing *Dunlop* and rejecting claim for travel time where transporting equipment was performed only occasionally and thus was not “in the ordinary course of business”). [↑](#footnote-ref-271)
271. 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-272)
272. *See, e.g.*,Stebbins v. Petroleum Equip. Servs., 2022 BL 81018, 2022 WL 717166 (D.N.J. Mar. 9, 2022) (commuting in company vehicle containing tools not integral and indispensable to job); Shearer v. Edger Assocs., Inc., 2015 WH Cases2d 417835, 2015 WL 9274928 (M.D. Fla. Dec. 17, 2015) (applying *Busk*, finding that time spent by ultrasound technician traveling from her home with ultrasound machine to patient was noncompensable). [↑](#footnote-ref-273)
273. 992 F.3d 607 (7th Cir. 2021). [↑](#footnote-ref-274)
274. *Id.* at 623. [↑](#footnote-ref-275)
275. *Id*. [↑](#footnote-ref-276)
276. 524 F.3d 361, 13 WH Cases2d 865 (2d Cir. 2008). [↑](#footnote-ref-277)
277. See §IV.D.2 [Application of Principles; Rest Breaks and Meal Periods; Meal Periods] of this chapter. [↑](#footnote-ref-278)
278. *Singh*, 524 F.3d at 367; *see also* Bernal v. TrueBlue, Inc, 730 F. Supp. 2d 736 (W.D. Mich. 2010) (carrying paperwork did not transform commute into compensable time because documents were for administrative purposes only and were not equipment that was essential for job). [↑](#footnote-ref-279)
279. 524 F.3d at 368. [↑](#footnote-ref-280)
280. *Id*. at 369. [↑](#footnote-ref-281)
281. *Id*.; *see also* Clarke v. City of N.Y., 347 F. App’x 632 (2d Cir. 2009) (applying predominant benefit test to commute time between home and work and rejecting argument that entire commute of city food inspectors was compensable because they had to carry job-related materials on commute). [↑](#footnote-ref-282)
282. *See*

     *Second Circuit*: Medina v. Ricardos Mech., Inc., 2018 WL 3973007, at \*4 (E.D.N.Y. Aug. 20, 2018) (denying summary judgment, recognizing that majority of cases find plaintiffs’ commute time compensable if transported tools are needed for work and if plaintiffs load tools into vehicle).

     *Fourth Circuit:* Epps v. Arise Scaffolding & Equip., Inc., 2011 WL 1566001, 17 WH Cases2d 1149 (E.D. Va. Apr. 22, 2011) (finding triable issue as to whether additional requirements of early reporting, receipt of instructions and crew assignments, and loading tasks were principal activities that started continuous workday).

     *Seventh Circuit:* Thacker v. Halter Vegetation Mgmt., Inc., 2015 WL 417713 (S.D. Ind. Jan. 30, 2015) (finding that time spent transporting equipment to worksites within normal commuting area was not compensable, but time spent picking up equipment not already on company vehicle and transporting that to worksite was compensable if necessary to business and for benefit of employer).

     *Tenth Circuit:* Baker v. Barnard Constr. Co., 146 F.3d 1214, 1215–16 (10th Cir. 1998) (ruling that, where workers had to provide their own fully fueled and stocked welding rigs at worksite, travel time associated with refueling and restocking well-drilling rigs may be compensable if jury found that transporting rigs from site each day was “policy or practical reality”); Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1350, 27 WH Cases 1343 (10th Cir. 1986) (ruling that travel time in employer vehicle taking tools to service drilling rigs scattered across several states was compensable); D A & S Oil Well Serv., Inc. v. Mitchell, 262 F.2d 552, 555, 14 WH Cases 6 (10th Cir. 1958) (holding that employees who transported equipment needed to service oil wells must be compensated for travel time).

     *But see*

     *Second Circuit:* Colella v. City of N.Y., 986 F. Supp. 2d 320, 339 (S.D.N.Y. 2013) (transporting tools in vehicles did not render commute compensable, as “transporting equipment is not ‘integral’ to being a tradesman”).

     *Sixth Circuit:* Bernal v. TrueBlue, Inc, 730 F. Supp. 2d 736 (W.D. Mich. 2010) (carrying paperwork did not transform commute into compensable time).

     *Ninth Circuit:* Kerr v. Sturtz Finishes, Inc., 2010 WL 3211946 (W.D. Wash. Aug. 12, 2010) (transporting equipment in truck to worksite did not transform commute into compensable time as most of equipment was light).

     *Eleventh Circuit*: Villarino v. Pacesetter Pers. Serv., Inc., 2022 BL 467875, 2022 WL 18023213 (S.D. Fla. Dec. 1, 2022) (holding that the equipment plaintiffs picked up before they traveled to job site and dropped off upon return did not make travel time compensable because equipment was generic in nature and not integral to their principal job activities). [↑](#footnote-ref-283)
283. WH Op. FLSA2006-12NA, 2006 WL 4512954 (June 23, 2006). [↑](#footnote-ref-284)
284. *See, e.g.*,Llorca v. Sheriff, Collier Cnty., 893 F.3d 1319, 27 WH Cases2d 1401 (11th Cir. 2018). [↑](#footnote-ref-285)
285. 45 F.3d 646, 2 WH Cases2d 833 (2d Cir. 1995). [↑](#footnote-ref-286)
286. 45 F.3d at 650. [↑](#footnote-ref-287)
287. *Id*. at 652. [↑](#footnote-ref-288)
288. *Id*. at 652–53. [↑](#footnote-ref-289)
289. *See, e.g*., Adams v. United States, 471 F.3d 1321, 1327 (Fed. Cir. 2006) (relying on *New York City Transit Authority* in holding that federal law enforcement officers were not entitled to compensation for driving government vehicles to and from work); Aiken v. City of Memphis, 190 F.3d 753, 758, 5 WH Cases2d 961 (6th Cir. 1999) (citing *New York City Transit Authority* and denying claims because evidence showed only de minimis work during commutes); Bobo v. United States, 136 F.3d 1465, 1467–68 (Fed. Cir. 1998) (relying on *New York City Transit Authority* in holding that restrictions placed on commutes were “insufficient to pass the *de minimis* threshold”); *cf.* Graham v. City of Chi., 828 F. Supp. 576, 582 (N.D. Ill. 1993) (finding that time spent transporting police canines to and from work was compensable as integral part of job because officers fed and prepared animals for work and, after taking them home, fed, and exercised them). [↑](#footnote-ref-290)
290. 546 U.S. 21, 10 WH Cases2d 1825 (2005). [↑](#footnote-ref-291)
291. Gorman v. Consolidated Edison Corp., 488 F.3d 586, 594 n.7 (2d Cir. 2007). Note that the DOL takes the position that the de minimis rule applies to “the aggregate time spent donning, walking, waiting and doffing.” WHD, Advisory Memo. No. 2006-2 (May 31, 2006), at 1. See the discussion of de minimis in §V.B [Recording Working Time; The De Minimis Doctrine] of this chapter. [↑](#footnote-ref-292)
292. Franklin v. Kellogg,619 F.3d 604 (6th Cir. 2010). [↑](#footnote-ref-293)
293. Adair v. ConAgra Foods, Inc., 728 F.3d 849 (8th Cir. 2013); Sandifer v. United States Steel Corp., 678 F.3d 590 (7th Cir. 2012). [↑](#footnote-ref-294)
294. Pub. L. No. 104-188, §2102 (1996) (codified at 29 U.S.C. §254). [↑](#footnote-ref-295)
295. United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1117 (10th Cir. 1999). [↑](#footnote-ref-296)
296. 29 U.S.C. §254. [↑](#footnote-ref-297)
297. 29 C.F.R. §§785.9, 785.34, 785.50. *See also* WH Op. FLSA2018-18, 2018 WL 2348797 (Apr. 12, 2018) (“With respect to commuting time, however, the law specifies that use of a company-provided vehicle does not, alone, make an ordinary commute compensable, provided that “the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.”) [↑](#footnote-ref-298)
298. *See, e.g*., Brennan v. E.R. Field, Inc., 1974 WL 11099, 21 WH Cases 711, 712–13 (1st Cir. 1974) (concluding that time spent by electrician driving employer truck was compensable because essential purpose of truck was to convey tools and equipment and was primarily used as integral and indispensable function of business); Brennan v. Sunnycroft Ponderosa, Inc., 1973 WL 11992, 21 WH Cases 438, 441 (S.D.N.Y. 1973) (deeming that travel time was compensable because truck was primarily used to carry tools and supplies for use on job); *see also* Burton v. Hillsborough Cnty., 181 F. App’x 829 (11th Cir. 2005) (concluding that travel time was compensable because retrieving and returning vehicles constituted principal activity under Portal-to-Portal Act and was not de minimis); Manners v. State of N.Y., 285 A.D.2d 858, 859, 7 WH Cases2d 311 (N.Y. App. Div. 2001) (holding that travel was noncompensable because state employee was not engaged in work-related activity when commuting in state-owned vehicle to and from his principal work activity). [↑](#footnote-ref-299)
299. Adams v. United States, 65 Fed. Cl. 217, 225, 10 WH Cases2d 1000 (2005), *aff’d on other grounds*, 471 F.3d 1321 (Fed. Cir. 2007). [↑](#footnote-ref-300)
300. Bobo v. United States, 37 Fed. Cl. 690, 697, 3 WH Cases2d 1587 (1997), *aff’d on other grounds*, 136 F.3d 1465 (Fed. Cir. 1998) (holding that ECFA did not bar claims for commute time pay where employer failed to prove agreement). [↑](#footnote-ref-301)
301. H.R. Rep. No. 104-585 (1996); *see also Adams*, 65 Fed. Cl. at 225 (confirming legislative history). [↑](#footnote-ref-302)
302. *Adams*, 65 Fed. Cl. at 226. [↑](#footnote-ref-303)
303. 29 U.S.C. §254(a). [↑](#footnote-ref-304)
304. H.R. Rep. No. 104-585, at 5 (1996); *see also* Buzek v. Pepsi Bottling Grp., Inc., 501 F. Supp. 2d 876, 882–83 (S.D. Tex. 2007) (discussing legislative history). [↑](#footnote-ref-305)
305. Aiken v. City of Memphis, 190 F.3d 753 (6th Cir. 1999). [↑](#footnote-ref-306)
306. *Buzek*, 501 F. Supp. 2d at 885; *see also* Shepard v. City of Burlington, 1998 WL 240269, 4 WH Cases2d 1149 (D. Kan. 1998) *and* Bartholomew v. City of Burlington, 5 F. Supp. 2d 1161, 1170 (D. Kan. 1998) (finding that briefing time during commute was noncompensable). [↑](#footnote-ref-307)
307. *Buzek*, 501 F. Supp. 2d at 885; *see also* WH Op., 1997 WL 998025 (July 28, 1997) (relying on legislative history to opine that transportation of tools by police officers in patrol cars was noncompensable). [↑](#footnote-ref-308)
308. *Buzek*, 501 F. Supp. 2d at 884. [↑](#footnote-ref-309)
309. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases 2d 1485 (2014). [↑](#footnote-ref-310)
310. Brand v. Comcast Corp., 135 F. Supp. 3d 713, 731–33 (N.D. Ill. 2015) (surveying case law and holding that time spent by cable technicians immediately prior to and after to their shifts in employer’s van kept at home, such as logging into their computers; obtaining and reviewing assignments electronically; conducting vehicle inspections; and loading, unloading, or securing equipment in and from their company vehicles, was not compensable, and “[t]o suggest that an activity can be incidental to a commute under the ECFA but still be compensable because it is integral to a principal activity would render the ECFA meaningless”). [↑](#footnote-ref-311)
311. 596 F.3d 1046, 15 WH Cases2d 1569 (9th Cir. 2010). [↑](#footnote-ref-312)
312. 65 Fed. Cl. 217, 10 WH Cases2d 1000 (2005). [↑](#footnote-ref-313)
313. 37 Fed. Cl. 690, 697, 3 WH Cases2d 1587 (1997), *aff’d on other grounds*, 136 F.3d 1465 (Fed. Cir. 1998) (holding that ECFA did not bar claims for commute time pay where employer failed to prove agreement). [↑](#footnote-ref-314)
314. *Rutti*, 596 F.3d at 1054. *See also* Smith v. Allegheny Techs., Inc., 754 F. App’x 136 (3d Cir. 2018) (citing *Rutti*, holding that travel time by temporary employees crossing picket lines in company van was not principal activity and was not integral and indispensable where plaintiffs failed to plead why riding in company van was only way for them to get to work). [↑](#footnote-ref-315)
315. 428 F. App’x 400 (5th Cir. 2011). *See also* Stebbins v. Petroleum Equip. Servs., 2022 BL 81018, 2022 WL 717166 (D.N.J. Mar. 9, 2022) (transportation of tools and materials not compensable). [↑](#footnote-ref-316)
316. *Chambers*, 428 F. App’x at411–12. [↑](#footnote-ref-317)
317. *Id.* at 417. [↑](#footnote-ref-318)
318. 29 C.F.R. §785.36. [↑](#footnote-ref-319)
319. *Id*. [↑](#footnote-ref-320)
320. *Id*. [↑](#footnote-ref-321)
321. *Id*. §785.39; WH Op. FLSA2018-18, 2018 WL 2348797 (Apr. 12, 2018); WH Op. FLSA2020-16 (Nov. 3, 2020) (travel time involving overnight stay to remote site during normal work hours as passenger in foreman’s vehicle is compensable); *see, e.g*., Mendez v. Radec Corp., 232 F.R.D. 78, 11 WH Cases2d 172 (W.D.N.Y. 2005) (finding that electricians should have been compensated for overnight travel to and from project sites during normal work hours; rejecting argument that plaintiffs did not have regular hours because their shift hours fluctuated significantly). [↑](#footnote-ref-322)
322. 29 C.F.R. §785.39. [↑](#footnote-ref-323)
323. *Id*. [↑](#footnote-ref-324)
324. WH Op. FLSA2019-10 (July 22, 2019). [↑](#footnote-ref-325)
325. *Id*. *See also* WH Op. FLSA2018-18 (when there is no fixed workday for employee, employer may use reasonable method (such as previous 30 days) to set typical workday and not count time traveling overnight as compensable). [↑](#footnote-ref-326)
326. *Third Circuit:* DiGregorio v. Temple Univ., 1983 WL 2147, 26 WH Cases 1184, 1193 (E.D. Pa. Sept. 30, 1983) (stating that “overnight travel outside of regular working hours is not compensable”).

     *Sixth Circuit:* Bassett v. Tennessee Valley Auth., 2013 WL 2902821 (W.D. Ky. June 13, 2013) (rejecting argument that regulation allows for recovery of travel time outside of both regular working days and regular working hours); Dekker v. Construction Specialties of Zeeland, Inc., 2012 WL 726741 (W.D. Mich. Mar. 6, 2012) (finding that disputed issue of fact concerning regular work hours precluded summary judgment on claims for travel time).

     *Eighth Circuit:* Boll v. Federal Reserve Bank of St. Louis, 365 F. Supp. 637, 646, 21 WH Cases 876 (E.D. Mo. 1973) (travel time as passenger outside normal office hours was not compensable), *aff’d*, 497 F.2d 335, 21 WH Cases 886 (8th Cir. 1974).

     *Ninth Circuit:* Imada v. City of Hercules, 138 F.3d 1294, 1297 (9th Cir. 1998) (holding that police officers were not entitled to compensation for out-of-town travel to training sites where travel took place outside of regular working hours). [↑](#footnote-ref-327)
327. 29 C.F.R. §785.40; *see also* WH Op. 2020-16 (Nov. 3, 2020) (employees driving personal vehicles to remote site instead of riding to site in foreman’s vehicle may be paid the lesser of the time it would have taken to drive with the foreman or drive themselves). [↑](#footnote-ref-328)
328. *Id.* §785.37. [↑](#footnote-ref-329)
329. *Id*. [↑](#footnote-ref-330)
330. *Id*. The regulation specifically analogizes such travel to travel involved in an emergency call (as described in 29 C.F.R. §785.36) or travel that is “all in a day’s work” (as described in 29 C.F.R. §785.38). [↑](#footnote-ref-331)
331. 138 F.3d 1294 (9th Cir. 1998). [↑](#footnote-ref-332)
332. *Id*. at 1297. [↑](#footnote-ref-333)
333. 29 C.F.R. §785.37 (stating that phrase “home-to-work” refers to standard home-to-work travel exclusion from hours worked); *see also id*. §785.35; WH Op. (Oct. 22, 1997) (“The time spent by the employee in the normal, ‘home to work’ portions of the trips to and from the location of the assignment may be excluded from the compensable hours worked under FLSA.”). [↑](#footnote-ref-334)
334. 29 C.F.R. §785.37. [↑](#footnote-ref-335)
335. 323 U.S. 134 (1944). [↑](#footnote-ref-336)
336. *Id*. at 137. [↑](#footnote-ref-337)
337. 29 C.F.R. §785.14 (quoting *Skidmore*, 323 U.S. at 137). [↑](#footnote-ref-338)
338. *Skidmore*, 323 U.S. at 132–34 (citing Armour & Co. v. Wantock, 323 U.S. 126, 4 WH Cases 862 (1944)). [↑](#footnote-ref-339)
339. *Id.* [↑](#footnote-ref-340)
340. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases 2d 1485 (2014). [↑](#footnote-ref-341)
341. Bridges v. Empire Scaffold, LLC, 875 F.3d 222 (5th Cir. 2017) (applying *Busk* standard to wait time); Borne v. AAY Sec. LLC, 2019 WH Cases2d 403191, 2019 WL 5394010, at \*7–8, 10 (E.D. Tex. Oct. 21, 2019) (security guards incentivized to stay on site during hurricane by paying them $15 per off-shift hour, but who were not required to work or be on standby while off shift, were not engaged in activity intrinsic to their principle activities and therefore that time was noncompensable). [↑](#footnote-ref-342)
342. *Bridges*, 875 F.3d 222 (applying *Busk* standard to wait time); Campbell v. Empire Merchants, LLC, 2018 WL 5456666 (E.D.N.Y. Aug. 27, 2018) (same). [↑](#footnote-ref-343)
343. 29 C.F.R. §785.15. [↑](#footnote-ref-344)
344. *See*

     *Fourth Circuit:* Fields v. Luther, 1988 WL 59963, at \*15, 28 WH Cases 1062 (D. Md. 1988).

     *Fifth Circuit:* Smith v. Superior Casing Crews, 299 F. Supp. 725, 730, 18 WH Cases 888 (E.D. La. 1969).

     *Ninth Circuit:* Jimenez v. Servicios Agricolas Mex, Inc., 742 F. Supp. 2d 1078, 1091 (D. Ariz. 2010) (finding that lemon pickers lacked freedom to engage in personal activities when waiting for employer buses to arrive to take them to fields).

     *Eleventh Circuit:* Cole v. Farm Fresh Poultry, 824 F.2d 923, 929–30, 28 WH Cases 369 (11th Cir. 1987).

     *See also* 29 C.F.R. §785.15. *But cf.* McCoy v. N. Slope Borough, 2013 WL 4510780, at \*16 (D. Alaska Aug. 26, 2013) (finding that search and rescue pilots were not “on duty” during entire two-week rotation because they were not actively working during most or all of period). [↑](#footnote-ref-345)
345. 29 C.F.R. §785.15.

     *Supreme Court:* Armour & Co. v. Wantock, 323 U.S. 126, 132–34 (1944).

     *Eighth Circuit:* Brock v. DeWitt, 633 F. Supp. 892, 895–96, 27 WH Cases 1246 (W.D. Mo. 1986).

     *Tenth Circuit:* Handler v. Thrasher, 191 F.2d 120, 10 WH Cases 343 (10th Cir. 1951); Maxfield v. Marshall, 1981 WL 2351, at \*1, 25 WH Cases 293, 294 (D. Utah Mar. 3, 1981).

     *Eleventh Circuit:* Gregory v. Quality Removal, Inc., 2014 WL 5494448 (S.D. Fla. Oct. 30, 2014). [↑](#footnote-ref-346)
346. 20 C.F.R. §785.15. [↑](#footnote-ref-347)
347. 899 F.2d 1407, 29 WH Cases 1265 (5th Cir. 1990). [↑](#footnote-ref-348)
348. 899 F.2d at 1411–13. [↑](#footnote-ref-349)
349. 275 F.2d 448, 14 WH Cases 492 (4th Cir. 1960). [↑](#footnote-ref-350)
350. 275 F.2d at 449; *see also* *Maxfield*, 1981 WL 2351, at \*1; Mitchell v. Nicholson, 179 F. Supp. 292, 295–96, 14 WH Cases 487 (W.D.N.C. 1959). [↑](#footnote-ref-351)
351. 223 F. Supp. 692, 16 WH Cases 243 (N.D. Miss. 1963). [↑](#footnote-ref-352)
352. 223 F. Supp. at 694. For other cases holding that the time spent by employees is compensable waiting time, *see*

     *Federal Circuit*: Bull v. United States, 479 F.3d 1365, 1380, 12 WH Cases2d 699 (Fed. Cir. 2007), *aff’g* 68 Fed. Cl. 212, 238, 10 WH Cases2d 1687 (2005) (time spent by canine enforcement officers who had idle time at home between loading and unloading dog training towels from washing machines and dryers was compensable).

     *Fourth Circuit*: Jones v. Hoffberger Moving Servs. LLC, 92 F. Supp. 3d 405 (D. Md. 2015) (time spent by employees who traveled from employer’s warehouse to job sites aboard employer’s van service and, after arriving, waited for employer’s moving trucks and equipment to arrive, was compensable); Fields v. Luther, 1988 WL 59963, at \*15, 28 WH Cases 1062 (D. Md. 1988) (time spent by migrant farm workers who spent time waiting in fields for dew to dry on tomatoes before picking commenced was compensable).

     *Fifth Circuit*: Smith v. Superior Casing Crews, 299 F. Supp. 725, 728–29, 18 WH Cases 888 (E.D. La. 1969) (time spent by oil well casing crews who had to wait for casings after they set up their equipment was compensable).

     *Sixth Circuit*: Chao v. Akron Insulation & Supply, Inc., 2005 WL 1075067, at \*9 (N.D. Ohio May 5, 2005), *aff’d*, 184 F. App’x 508, 11 WH Cases2d 1026 (6th Cir. 2006) (time spent by employees waiting for assignments after reporting to shop at employer’s request was compensable): Twaddle v. RKE Trucking Co., 2006 WL 840388, at \*6, 11 WH Cases2d 886 (S.D. Ohio Mar. 29, 2006) (time spent by truck drivers who were required by their employer to wait on the premises for assignments is compensable).

     *Seventh Circuit*: Felker v. Southwestern Emergency Med. Servs., 581 F. Supp. 2d 1006, 1011 (S.D. Ind. 2008) (time spent by emergency medical technicians (who primarily transported convalescent home patients) who were engaged to wait because, although they had down time during 24-hour shifts, they were not allowed to leave premises and were required to respond on short notice, was compensable).

     *Eighth Circuit:* Brock v. DeWitt, 633 F. Supp. 892, 893–96, 27 WH Cases 1246 (W.D. Mo. 1986) (time spent by restaurant employees who were required to report to work at certain time even though they could not punch in until enough customers were present to make work available was compensable).

     *Tenth Circuit*: Handler v. Thrasher, 191 F.2d 120, 121–23, 10 WH Cases 343 (10th Cir. 1951) (time spent by well pumper, who resided on employer’s premises and who was required to be on duty at least eight hours per day, seven days per week, to pump wells and repair machinery when needed, was compensable).

     *Eleventh Circuit*: Donovan v. 75 Truck Stop, Inc., 1981 WL 2333, at \*12, 25 WH Cases 448 (M.D. Fla. July 20, 1981) (time spent by truck washers who were idle while waiting for arrival of next truck was compensable). [↑](#footnote-ref-353)
353. 29 C.F.R. §785.16(a). [↑](#footnote-ref-354)
354. *Second Circuit:* Galeana v. Lemongrass on Broadway Corp., 2014 WL 1364493, at \*17 n.4 (S.D.N.Y. Apr. 4, 2014).

     *Fifth Circuit:* Mireles v. Frio Foods, 899 F.2d 1407, 1411, 29 WH Cases 1265 (5th Cir. 1990); Halferty v. Pulse Drug Co., 821 F.2d 261, 269–70, 28 WH Cases 322 (5th Cir. 1987), *rev’d on other grounds*, 864 F.2d 1185, 28 WH Cases 495 (5th Cir. 1987).

     *Seventh Circuit:* Banks v. City of Springfield, 959 F. Supp. 972, 3 WH Cases2d 1507 (C.D. Ill. 1997).

     *Tenth Circuit:* Mitchell v. Greinetz, 235 F.2d 621, 623–25, 13 WH Cases 3 (10th Cir. 1956).

     *Eleventh Circuit:* Swan v. Nick Grp., Inc., 2013 WL 5200508, at \*6 (N.D. Ga. Sept. 13, 2013). [↑](#footnote-ref-355)
355. 940 F. Supp. 2d 460 (E.D. Tex. 2013). [↑](#footnote-ref-356)
356. 940 F. Supp. 2d at 477. [↑](#footnote-ref-357)
357. 6 WH Cases 806 (W.D. Okla. 1947). [↑](#footnote-ref-358)
358. 6 WH Cases at 809; *see also* Thompson v. Daugherty, 40 F. Supp. 279, 284, 1 WH Cases 679 (D. Md. 1941). [↑](#footnote-ref-359)
359. 178 F.3d 1109, 5 WH Cases2d 555 (10th Cir. 1999). [↑](#footnote-ref-360)
360. 178 F.3d at 1117–18; *cf*. Hiner v. Penn-Harris-Madison Sch. Corp., 256 F. Supp. 2d 854 (N.D. Ind. 2003) (triable issue whether bus drivers could use breaks between runs for their own pursuits). For more cases holding that the time at issue was not compensable off-duty time, *see*

     *Fifth Circuit*:Johnson v. RGIS Inventory Specialists, 554 F. Supp. 2d 693, 713 (E.D. Tex. 2007) (time spent by traveling auditors who were required to arrive at “meet site” 15 minutes before scheduled departure of free transportation provided by company, but who were not required to use such transportation, was not compensable); Rousseau v. Teledyne Movible Offshore, Inc., 805 F.2d 1245, 1247–48, 27 WH Cases 1574 (5th Cir. 1986), *reh’g denied*, 812 F.2d 971 (5th Cir. 1987) (offshore oil derrick barge employees required to live on employer’s premises during off-shift hours but who were free during their off-duty time to sleep, eat, watch television, exercise, play ping pong or cards, read, and engage in other personal amusements not entitled to be compensated for such off-shift hours); *see also* Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1136–38, 26 WH Cases 1050 (5th Cir. 1984) (security guards working during strike).

     *Sixth Circuit*: Aiken v. City of Memphis, 190 F.3d 753, 5 WH Cases2d 961 (6th Cir. 1999) (police officers on paid sick leave for periods of illness or on-the-job injury required to stay at home unless they received permission to leave not entitled to pay for that time); *see also* DeBraska v. City of Milwaukee, 189 F.3d 650, 652, 5 WH Cases2d 982 (7th Cir. 1999); Monserrate v. City of N.Y., 2000 WL 1741673 (S.D.N.Y. 2000) (following *Aiken* and *De Braska*); Bernal v. Trueblue, Inc., 730 F. Supp. 2d 736 (W.D. Mich. 2010) (time spent by temporary staffing company employees while waiting at staffing facility for assignments, who were told that such time was not compensable, and who were not required or asked to wait on site, was not compensable, although those present were preferred for assignment, because employees were free to spend time as they wished and were free to work only when they wanted to work and only on types of jobs they wanted to accept).

     *Eleventh Circuit*: Bell v. Car Wash Headquarters, Inc., 2016 WL 1243630 (N.D. Ala. Mar. 30, 2016) (although car wash attendants’ schedules were posted weekly, because car wash was weather-driven business, employees’ hours were not guaranteed; each employee was required to arrive at scheduled start time, but if no work was available, employee was free to leave car wash and was not required to return until next scheduled shift, and once they were sent home, they were off duty and not entitled to compensation for those off-duty hours).

     *But see* Estorga v. Santa Clara Valley Transp. Auth., 2019 WL 109452, at \*12–13 (N.D. Cal. Jan. 4, 2019) (holding that split-shift travel was integral and indispensable to employees’ principal activity of driving bus routes, despite length of split or personal errands performed during them, because employees were required to be present at different locations to start their second runs); Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996, 998, 6 WH Cases 796 (W.D. Pa. 1947) (holding that security guards on call at all times during strike were entitled to be compensated for around-the-clock work). [↑](#footnote-ref-361)
361. Skidmore v. Swift & Co., 323 U.S. 134, 137, 4 WH Cases 866 (1944). [↑](#footnote-ref-362)
362. 29 C.F.R. §785.17; *see* *Skidmore*, 323 U.S. at 139 (following regulation). [↑](#footnote-ref-363)
363. Bright v. Houston Nw. Med. Ctr. Survivor, Inc., 934 F.2d 671, 677, 30 WH Cases 609 (5th Cir. 1991) (en banc); *see also* Owens v. Local 169, 971 F.2d 347, 351, 30 WH Cases 1633 (9th Cir. 1992) (quoting *Bright*). [↑](#footnote-ref-364)
364. 971 F.2d 347 (9th Cir. 1992). *See also* Razak v. Uber Techs., 2017 WL 4052417 (E.D. Pa. Sept. 13, 2017) (collecting cases across circuits and various factors used for evaluating compensability of on-call time). [↑](#footnote-ref-365)
365. *See, e.g*., Armour & Co. v. Wantock, 323 U.S. 126, 134, 4 WH Cases 862 (1944); *Skidmore*, 323 U.S. at 140. *Cf.* Watkins v. United Needs & Abilities, Inc., 2021 BL 260475, 2021 WL 2915265 (D. Md. July 12, 2021) (employee of home for disabled residents required to remain on premises while on call was “waiting to be engaged” and thereby not on compensable time because he was able to pursue personal activities during that time, e.g., watching television, sleeping, and reading); Clayton v. Delmarva Cmty. Servs., Inc., 447 F. Supp. 3d 404, 414 (D. Md. 2020) (independent living facility employees required to remain on premises while on call were “waiting to be engaged” and thereby not on compensable time because they were able to pursue personal activities during that time, e.g., watching television, sleeping, and reading). [↑](#footnote-ref-366)
366. *See, e.g*.,

     *Fifth Circuit:* *Bright*, 934 F.2d at 673.

     *Eighth Circuit:* Cross v. Arkansas Forestry Comm’n, 938 F.2d 912, 916–17, 30 WH Cases 725 (8th Cir. 1991).

     *Ninth Circuit:* Perez v. Banana Republic, LLC, 2014 WL 2918421, at \*6 (N.D. Cal. June 26, 2014). [↑](#footnote-ref-367)
367. *Fourth Circuit:* Skrzecz v. Gibson Island Corp., 2014 WL 3400614 (D. Md. July 11, 2014).

     *Eighth Circuit:* *Cross*, 938 F.2d at 916.

     *Ninth Circuit: Owens*, 971 F.2d at 353.

     *Tenth Circuit:* Renfro v. City of Emporia, 948 F.2d 1529, 1538, 30 WH Cases 1017 (10th Cir. 1991); Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185, 29 WH Cases 281 (10th Cir. 1989). [↑](#footnote-ref-368)
368. *See, e.g*.,

     *Fifth Circuit:* *Bright*, 934 F.2d at 678.

     *Eighth Circuit:* *Cross*, 938 F.2d at 916–17.

     *Tenth Circuit:* *Renfro*, 948 F.2d at 1535. [↑](#footnote-ref-369)
369. *See, e.g*.,

     *Fifth Circuit:* Brock v. El Paso Natural Gas Co., 826 F.2d 369, 373, 28 WH Cases 629 (5th Cir. 1987).

     *Eighth Circuit:* *Cross*, 938 F.2d at 916–17.

     *Tenth Circuit:* *Renfro*, 948 F.2d at 1535.

     *See also* Taunton v. GenPak LLC, 762 F. Supp. 2d 1338 (M.D. Ala. 2010). [↑](#footnote-ref-370)
370. *See, e.g*.,

     *Sixth Circuit:* Abdelkhaleq v. Precision Door of Akron, 653 F. Supp. 2d 773, 779–81 (N.D. Ohio 2009).

     *Eighth Circuit:* *Cross*, 938 F.2d at 916–17.

     *Tenth Circuit:* Armitage v. City of Emporia, 982 F.2d 430, 432, 1 WH Cases2d 312 (10th Cir. 1992); Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 655–56, 28 WH Cases 930 (10th Cir. 1988). [↑](#footnote-ref-371)
371. *See also*

     *Third Circuit;* Ingram v. County of Bucks, 144 F.3d 265 (3d Cir. 1998).

     *Fifth Circuit:* Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1137–38, 26 WH Cases 1050 (5th Cir. 1984).

     *Ninth Circuit:* Owens v. Local 169, 971 F.2d 347, 355, 30 WH Cases 1633 (9th Cir. 1992).

     *Tenth Circuit:* *Armitage*, 982 F.2d at 432. [↑](#footnote-ref-372)
372. *Owens*, 971 F.2d at 351; *see also* Varner v. Shoreshide Petroleum, Inc., 2019 WL 5386461 (D. Ala. Oct. 21, 2019) (six of the seven *Owens* criteria suggested that time was noncompensable); Berry v. County of Sonoma, 763 F. Supp. 1055, 1058, 30 WH Cases 752 (N.D. Cal. 1991). [↑](#footnote-ref-373)
373. *Supreme Court:* Skidmore v. Swift & Co., 323 U.S. 134, 140, 4 WH Cases 866 (1944).

     *Second Circuit:* O’Neill v. Mermaid Touring Inc., 968 F. Supp. 2d 572, 582 (S.D.N.Y. 2013).

     *Ninth Circuit:* Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 9 WH Cases2d 519 (9th Cir. 2004). *Owens*, 971 F.2d at 351; Sperry v. Securitas Sec. Servs., USA, Inc., 2014 WL 1664916, at \*2 (N.D. Cal. Apr. 25, 2014).

     *See also* WH Op., 1998 WL 852812 (June 23, 1998); WH Op., 1999 WL 1788156 (Sept. 3, 1999). [↑](#footnote-ref-374)
374. 938 F.2d 912, 30 WH Cases 725 (8th Cir. 1991). [↑](#footnote-ref-375)
375. 938 F.2d at 916–17. [↑](#footnote-ref-376)
376. 228 F.3d 1128 (10th Cir. 2000). [↑](#footnote-ref-377)
377. 228 F.3d at 1134–35. [↑](#footnote-ref-378)
378. 357 F.3d 931, 9 WH Cases2d 519 (9th Cir. 2004). [↑](#footnote-ref-379)
379. *See also* Armour & Co. v. Wantock, 323 U.S. 126, 4 WH Cases 862 (1944) (private firefighters who were required to be on call on employer’s premises, had to remain in state of readiness to fight fires instantly, and had to respond to alarms almost every night after their regular shift ended, were entitled to compensation for their on-call time); Renfro v. City of Emporia, 948 F.2d 1529, 1538–39, 30 WH Cases 1017 (10th Cir. 1991) (city firefighters who were required within 20 minutes of being paged to report to station house in appropriate physical condition to work, were called back to work average of three to five times per 24-hour on-call period, could trade on-call shifts only with great difficulty, and were effectively precluded by their schedules from obtaining secondary employment were entitled compensation for their on-call time); Williams v. Alimar Sec., Inc., 2016 WL 1046889 (E.D. Mich. Mar. 16, 2016) (alarm response security officers who monitored and responded to alarms on premises of residential and business customers, where employer required them to remain near center of their designated patrol areas, in uniform, and in or near their patrol vehicles while prohibiting non-employees from being in them, were entitled to compensation for this on-call time). [↑](#footnote-ref-380)
380. *Third Circuit*: Harris v. Clean Harbors Env’t Servs., Inc., 2019 WL 5446299, at \*11 (D.N.J. Oct. 23, 2019) (on-call time by drivers required to carry cell phones but only occasionally called to work was noncompensable because they were free to pursue personal pursuits while on call and received very few calls); Brackin v. Air Liquide Indus. U.S., L.P., 2016 WL 6276749 (E.D. Pa. Oct. 27, 2016) (field service technicians); Genarie v. PRD Mgmt., Inc., 2006 WL 436733 (D.N.J. Feb. 17, 2006) (live-in maintenance personnel); McIntyre v. Division of Youth Rehab. Servs., Dep’t of Servs. for Children, Youth & Their Families, State of Del., 795 F. Supp. 668, 676, 1 WH Cases2d 275 (D. Del. 1992) (juvenile field investigators).

     *Fifth Circuit*: Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189–90, 29 WH Cases 273 (5th Cir. 1989) (telephone dispatcher for provider of nonemergency ambulance care).

     *Sixth Circuit*: Martin v. Ohio Tpk. Comm’n, 968 F.2d 606, 611–12, 30 WH Cases 1601 (6th Cir. 1992) (highway maintenance workers).

     *Seventh Circuit*: Jonites v. Exelon Corp., 522 F.3d 721, 726–27, 13 WH Cases2d 843 (7th Cir. 2008) (affirming district court holding that employer’s call-out program did not involve employees working while on call because they were merely required to leave word at home or work regarding where they may be reached); Brand v. Comcast Corp., 135 F. Supp. 3d 713, 726–31 (N.D. Ill. 2015) (providing overview of law and concluding that time while on call by cable line technicians required to report within 30 minutes of call was noncompensable); Roland v. Unity Ltd. P’ship, 2010 WL 1286722, at \*5–7, 15 WH Cases2d 1900 (E.D. Wis. Mar. 29, 2010) (nurses); Cleary v. ADM Milling Co., 827 F. Supp. 472, 475–77, 1 WH Cases2d 920 (N.D. Ill. 1993) (wheat processing plant maintenance employees).

     *Eighth Circuit*: Dickhaut v. Madison Cnty., 707 F. Supp. 2d 883, 892–94 (S.D. Iowa 2009) (emergency medical technicians); Sletten v. First Care Med. Servs., 2000 WL 1196199 (D. Minn. Mar. 20, 2000) (same).

     *Ninth Circuit*: Perez v. Banana Republic, LLC, 2014 WL 9218421, at \*4 (N.D. Cal. June 26, 2014) (retail employees); Kartchner v. Town of Kearny, 1996 WL 772519, 3 WH Cases2d 1153 (D. Ariz. 1996) (ambulance driver); Gonzales v. Charter Commc’ns, LLC, 2022 BL 38575, 2022 WL 1595725 (N.D. Cal. Jan. 26, 2022) (cable maintenance technicians).

     *Tenth Circuit*: Andrews v. Town of Skiatook, 123 F.3d 1327, 1328–29, 4 WH Cases2d 65 (10th Cir. 1997) (emergency medical technicians); Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185–86, 29 WH Cases 281 (10th Cir. 1989) (power company linemen); Robillard v. Board of Cnty. Comm’rs of Weld Cnty., 2012 WL 4442822 (D. Colo. Sept. 26, 2012) (medical investigator for county coroner); Shepard v. City of Burlington, 1998 WL 240269, at \*7, 4 WH Cases2d 1149 (D. Kan. Apr. 7, 1998) (police officers); Bartholomew v. City of Burlington, 5 F. Supp. 2d 1161, 4 WH Cases2d 1156 (D. Kan. 1998) (same).

     *Eleventh Circuit*: Birdwell v. City of Gadsden, 970 F.2d 802, 807–10, 30 WH Cases 1745 (11th Cir. 1992) (detectives); Gonzalez v. Metropolitan Delivery Corp., 2012 WL 1442668 (S.D. Fla. Apr. 26, 2012) (delivery drivers); Largent v. East Ala. Water, Sewer, & Fire Prot. Dist., 330 F. Supp. 2d 1252 (M.D. Ala. 2004) (firefighters); Lurvey v. Metropolitan Dade Cnty., 870 F. Supp. 1570, 1579–82, 2 WH Cases2d 851 (S.D. Fla. 1994) (county bomb squad technicians); Creese v. Bald Eagle Towing & Recovery, 2021 BL 251185, 2021 WL 2788382 (M.D. Fla. July 5, 2021) (tow truck drivers).

     *Texas*: Offutt v. Southwestern Bell Internet Servs., Inc., 130 S.W.3d 507, 9 WH Cases2d 986 (Tex. App. 2004) (systems engineers). [↑](#footnote-ref-381)
381. 220 F.3d 737, 6 WH Cases2d 359 (6th Cir. 2000). [↑](#footnote-ref-382)
382. 220 F.3d at 739–40. [↑](#footnote-ref-383)
383. 452 F.3d 482, 11 WH Cases2d 985 (6th Cir. 2006). [↑](#footnote-ref-384)
384. 452 F.3d at 488–89. [↑](#footnote-ref-385)
385. 826 F.2d 369, 28 WH Cases 629 (5th Cir. 1987). [↑](#footnote-ref-386)
386. 826 F.2d at 373–75. *See also*

     *Third Circuit*: *Ingram* v. County of Bucks*,* 144 F.3d 265, 4 WH Cases2d 1011 (3d Cir. 1998) (involving off-duty deputy sheriffs who carried beepers or left word where they could be reached, where frequency and urgency of calls did not preclude use of time for personal pursuits, they could trade on-call shifts, and they engaged in variety of personal activities while on call).

     *Fifth Circuit*: Depriest v. River W. LP, 187 F. App’x 403, 11 WH Cases2d 1376 (5th Cir. 2006) (holding that radiology technician was not entitled to compensation for on-call time where he was able to engage in personal activities); Bright v. Houston Nw. Med. Ctr. Survivor, 934 F.2d 671, 30 WH Cases 609 (5th Cir. 1991) (on-call time spent by hospital biomedical equipment repair technician who was not called to work while on call for period of more than one year, was required to wear pager, was required to remain sober, and had to be able to go to hospital within 20–30 minutes but could otherwise engage in personal interests, was not compensable).

     *Seventh Circuit*: Dinges v. Sacred Heart St. Mary’s Hosps., Inc., 164 F.3d 1056, 1058–59, 5 WH Cases2d 78 (7th Cir. 1999) (on-call time spent by emergency medical technicians who had to return to rural hospital within seven minutes of call and had only 50% chance of being called back during 14- or 16-hour on-call period, was not compensable).

     *Ninth Circuit*: Owens v. Local No. 169, 971 F.2d 347, 348–50, 30 WH Cases 1633 (9th Cir. 1992) (on-call time of pulp mill mechanics who had to respond to only one-third of calls that they received, accepted average of six calls per year, were issued pagers, and had to call their employer within 10 minutes of receiving call, was not compensable).

     *Tenth Circuit*: Gilligan v. City of Emporia, 986 F.2d 410, 412–13, 1 WH Cases2d 425 (10th Cir. 1993) (time spent by city water and sewer department employees who, while on call, could wear pagers, could not consume alcoholic beverages, and were called back to duty average of less than once per day, was not compensable); Armitage v. City of Emporia, 982 F.2d 430, 432–33, 1 WH Cases2d 312 (10th Cir. 1992) (on-call time spent by city police detectives who were called less than twice per week, could be reached by pager, and had to remain sober and report to duty within 20 minutes of responding to pager, was not compensable).

     *Eleventh Circuit:* Creese v. Bald Eagle Towing &Recovery, 2021 BL 251185, 2021 WL2788382 (M.D. Fla. July 5, 2021) (tow truck driver not entitled to compensation for on-call time spent outside regular shift where he was free to engage in most personal pursuits and few restrictions were placed on him). [↑](#footnote-ref-387)
387. WH Op. FLSA2009-17, 2009 WL 649019 (Jan. 16, 2009) (deeming on-call time not compensable where employees were on call for one-week periods every eight weeks, could exchange on-call weeks, had 45–60 minutes to respond, and calls averaged five per month and required only 10–30 minutes of travel); WH Op. FLSA2008-14NA, 2008 WL 5483054 (Dec. 18, 2008) (deeming on-call time not compensable where call-backs were infrequent, employees had one hour to respond to call, and only restriction was no alcohol). [↑](#footnote-ref-388)
388. *See* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-389)
389. *See* 29 C.F.R. §785.18–.19; *see also* *id*. §553.223 (supplementing §785.19 in context of firefighters and law enforcement personnel). For a discussion of the relationship between §§785.19 and 553.223, see Chapter 11, Government Employment, §§V.C.1 and V.C.2 [Special Provisions That Apply to Fire Protection and Law Enforcement Employees; Compensable Hours of Work Rules; Sleep Time and Meal Time]. [↑](#footnote-ref-390)
390. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2023-1: Telework Under the Fair Labor Standards Act and Family and Medical Leave Act (Feb. 9, 2023). [↑](#footnote-ref-391)
391. 29 C.F.R. §785.18; Lillehagen v. Alorica, Inc., 2014 WL 6989230 (C.D. Cal. Dec. 10, 2014) (all rest periods of “short duration” must be compensated except for breast milk expression breaks and rest periods falling within narrow exception found in Chapter 31a01 of the DOL’s *Field Operations Handbook*); *see also* 29 C.F.R. §785.19(a) (governing meal breaks and specifically excluding coffee breaks or time for snacks as noncompensated meal breaks). [↑](#footnote-ref-392)
392. WH Op. FLSA2018-19, 2018 WL 2348798 (Apr. 12, 2018). [↑](#footnote-ref-393)
393. 29 C.F.R. §785.18; *see also* Smiley v. E.I. Dupont De Nemours & Co., 839 F.3d 325 (3d Cir. 2016) (holding that defendant could not offset meal and rest break compensation for minutes owed for donning and doffing time, reasoning that policy rationales underlying FLSA do not permit crediting compensation used in calculating employee’s regular rate of pay because it would allow employers to double-count compensation); Kasten v. Saint-Gobain Performance Plastics Corp., 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008) (holding that additional minutes outside of 10-minute rest breaks provided by employer cannot offset compensation owed for donning and doffing time, as rest periods of 5–20 minutes are considered compensable under 29 C.F.R. §778.18; rejecting offset for 5 minutes of paid time that employer tacked onto end of 30-minute unpaid meal period, as that time was used to don protective gear and sanitize as required by defendant). [↑](#footnote-ref-394)
394. U.S. Dep’t of Labor v. American Future Sys., Inc., 873 F.3d 420 (3d Cir. 2017) (cited by WH Op. FLSA 2018-19). [↑](#footnote-ref-395)
395. *See*

     *Second Circuit*: Martin v. Waldbaum, Inc., 1992 WL 314898, at \*1 (E.D.N.Y. Oct. 16, 1992).

     *Sixth Circuit*: Rose v. Velocys, Inc., 2018 WL 5927558, at \*4–5 (S.D. Ohio Nov. 13, 2018).

     *Seventh Circuit*: *Kasten*, 556 F. Supp. 2d at 953.

     *Eight Circuit*: Brown v. L & P Indus., LLC, 2005 WL 3503637, at \*6 (E.D. Ark. Dec. 21, 2005).

     *Ninth Circuit*: *Lillehagen*, 2014 WL 6989230, at \*10. [↑](#footnote-ref-396)
396. Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956) (applying fact-intensive test in determining whether short breaks were predominantly for benefit of employer or employee); Garcia v. Tyson Foods, Inc., 766 F. Supp. 2d 1167, 17 WH Cases2d 811 (D. Kan. 2011) (applying Tenth Circuit test in *Greinetz*); *see also* WH Op. FLSA2018-19. [↑](#footnote-ref-397)
397. *See, e.g*., Chao v. Self Pride, Inc., 232 F. App’x 280, 12 WH Cases2d 1025 (4th Cir. 2007) (holding that two 4-hour breaks over 48-hour period given to residential home caretakers was compensable, where caretakers could not sleep during breaks, had to call in each hour, and were subject to call backs to tend to disabled residents). [↑](#footnote-ref-398)
398. FOH §31a01(b). [↑](#footnote-ref-399)
399. Lillehagen v. Alorica, Inc., 2014 WL 6989230, at \*10 (C.D. Cal. Dec. 10, 2014); FOH §31a01(c). [↑](#footnote-ref-400)
400. 29 U.S.C.§207(r)(1). [↑](#footnote-ref-401)
401. *Id*. §207(r)(2). *See also* FOH §31a01(b). [↑](#footnote-ref-402)
402. U.S. Dep’t of Labor, Wage & Hour Div.,Fact Sheet #73: Break Time for Nursing Mothers under the FLSA (rev. Apr. 2018), https://www.dol.gov/whd/regs/compliance/whdfs73.htm. [↑](#footnote-ref-403)
403. *But see* Lillehagen v. Alorica, Inc., 2014 WL 6989230, at \*10 (C.D. Cal. Dec. 10, 2014) (breaks to express milk were not compensable). [↑](#footnote-ref-404)
404. Fact Sheet #73, at 1. Similarly, remote workers must be totally relieved from duties while expressing milk or breastfeeding, or be compensated. *See* U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2023-1: Telework Under the Fair Labor Standards Act and Family and Medical Leave Act (Feb. 9, 2023). [↑](#footnote-ref-405)
405. *See* Tolene v. T-Mobile, USA, Inc., 178 F. Supp. 3d 674, 680 (N.D. Ill. 2016). [↑](#footnote-ref-406)
406. Lico v. TD Bank, 2015 WL 3467159, at \*3 (E.D.N.Y. June 1, 2015). [↑](#footnote-ref-407)
407. *See* Mayer v. Professional Ambulance, LLC, 211 F. Supp. 3d 408, 415 (D.R.I. 2016) (holding that plaintiff pled plausible claim that she was fired for requesting adequate break room for lactation purposes). Additionally, retaliation for failing to provide lactation breaks could be the basis for a Title VII sex discrimination claim. *See* Equal Emp. Opportunity Comm’n v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013). [↑](#footnote-ref-408)
408. 29 U.S.C. §218d. SeeChapter 1, §VII(I) [Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act]. [↑](#footnote-ref-409)
409. For more information, see U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (rev. Jan. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>, and U.S. Dep’t of Labor, Wage & Hour Div., *Frequently Asked Questions—Pumping Breast Milk at Work* (last visited Dec. 12, 2023), https://www.dol.gov/agencies/whd/nursing-mothers/faq. [↑](#footnote-ref-410)
410. 29 C.F.R. §785.19(a). [↑](#footnote-ref-411)
411. *Id*.; *see also* Chao v. Tyson Foods, Inc., 568 F. Supp. 2d 1300, 1308 (N.D. Ala. 2008) (recognizing that courts should “examine whether the … break is allotted ‘for the purpose of eating a regularly scheduled meal’”). *But cf.* Bates v. Department of Corr. of State of Kan., 81 F.3d 1008, 3 WH Cases2d 460 (10th Cir. 1996) (finding no requirement that mealtimes be “scheduled” and “occur at a regular time”). [↑](#footnote-ref-412)
412. 29 C.F.R. §785.19(a); *see* Blain v. General Elec. Co., 371 F. Supp. 857, 860–62, 20 WH Cases 85 (W.D. Ky. 1971) (holding that 18-minute meal period was not compensable where employees expressly chose period length and evidence indicated that employees had sufficient time to eat); *see also* WH Op. FLSA2007-1NA, 2007 WL 5130264 (May 14, 2007) (opining that FLSA did not require specific method of timekeeping regarding meal periods as long as employer maintained accurate records). [↑](#footnote-ref-413)
413. WH Op. FLSA2004-22, 2004 WL 3177871 (Nov. 22, 2004) (finding that 20-minute meal period for corrections officers was noncompensable where they were completely relieved of all working duties and employer, employees, and CBA were in agreement that 20 minutes was sufficient for employees to eat meal); WH Op., 2000 WL 33969986 (Sept. 25, 2000) (opining that employees of production operation did not have to be compensated for meal period of only 15 minutes where (1) employees were completely relieved of duty, (2) building had numerous readily accessible lunch rooms so that no employee was more than one minute’s walk from place to eat, (3) no eating establishments existed within 30-minute drive, and (4) employees requested shortened meal period because it was adequate and allowed them to end day earlier). [↑](#footnote-ref-414)
414. *See*

     *First Circuit:* Botero v. Commonwealth Limousine Serv., Inc., 2013 WL 3929785 (D. Mass. July 25, 2013) (denying summary judgment for employer where 30 minutes was automatically deducted from chauffeurs’ six-hour shift for meal period, because even if chauffeur was able to eat meal during shift, chauffeur remained on call and thus time was spent predominantly for benefit of employer).

     *Second Circuit*: Reich v. Southern New Eng. Telecomms. Corp., 121 F.3d 58, 63–65, 4 WH Cases2d 33 (2d Cir. 1997) (noting that restrictions on workers during meal period “transform an otherwise uncompensable meal break into one that is compensable” and focusing on whether employee was required to “work” during break).

     *Third Circuit:* Babcock v. Butler Cnty., 806 F.3d 153 (3d Cir. 2015) (finding that correctional officers received predominant benefit of meal period and therefore were not entitled to compensation); Lugo v. Farmer’s Pride, Inc., 802 F. Supp. 2d 598, 614 (E.D. Pa. 2011) (finding disputed issues of fact concerning whether poultry processing workers’ meal periods were predominantly for their benefit).

     *Fourth Circuit*: Roy v. County of Lexington, 141 F.3d 533, 535, 4 WH Cases2d 869 (4th Cir. 1998) (discussing scope of exemption under 29 U.S.C. §207(k) and compensability of meal periods for firefighters and law enforcement employees, but finding emergency medical service workers subject to 29 U.S.C. §207(a) and specifically adopting predominant benefit test of compensability as test separate from §207(k)).

     *Fifth Circuit*: Bernard v. IBP, Inc., 154 F.3d 259, 265, 4 WH Cases2d 1604 (5th Cir. 1999) (stating that “whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee” was question of fact); Naylor v. Securiguard, Inc., 2014 WL 1882442, at \*3, 2014 WH Cases2d 157 (S.D. Miss. May 12, 2014) (applying predominant benefit test in granting summary judgment for employer because requirement that security guards drive security vehicles away from their work station to eat lunch was “too insubstantial to be compensable” and using company vehicles on lunch breaks “can hardly be construed as a work duty”).

     *Sixth Circuit*: Hill v. United States, 751 F.2d 810, 812–14, 26 WH Cases 1623 (6th Cir. 1984) (adopting predominant benefit test, but inferring de minimis exception).

     *Seventh Circuit*: Barefield v. Village of Winnetka, 81 F.3d 704, 3 WH Cases2d 353 (7th Cir. 1996) (stating that predominant benefit test applied to all employees).

     *Eighth Circuit*: Guyton v. Tyson Foods, Inc., 767 F.3d 754, 763 (8th Cir. 2014); Henson v. Pulaski Cnty. Sheriff Dep’t, 6 F.3d 531, 534, 1 WH Cases2d 1057 (8th Cir. 1993) (stating that predominant benefit standard allows courts to look at facts in each case depending on type of business involved to determine if meal period is compensable); Lopez v. Tyson Foods, Inc., 690 F.3d 869, 881, 19 WH Cases2d 1005 (8th Cir. 2012) (finding that holding in *Henson* was not limited to on-call employees at issue there).

     *Tenth Circuit*: *Bates*, 81 F.3d at 1011 (stating that employee was “relieved from duty when the employee’s time is not spent predominately for the benefit of the employer”).

     *But cf.* Mitchell v. JCG Indus, Inc*.*, 745 F.3d 837, 842 (7th Cir. 2014) (referencing “completely relieved from duty” standard, but finding that having to change clothes during meal period was not inconsistent with poultry workers having been completely relieved of duty because of “how remote from this simple changing are the ‘duties’ listed in the regulation”). [↑](#footnote-ref-415)
415. *E.g.*,

     *Ninth Circuit*: Busk v. Integrity Staffing Sols., Inc., 713 F.3d 525, 531–32, 20 WH Cases2d 937 (9th Cir. 2013), *rev’d on other grounds*, 574 U.S. 27 (2014) (applying “completely relieved from duty” test, court found that 10 minutes spent “walking to and from the cafeteria and/or undergoing security clearances” was not compensable work time because it was not spent performing “any duty related to their job as warehouse workers”); Brennan v. Elmer’s Disposal Serv., Inc., 510 F.2d 84, 88, 22 WH Cases 118 (9th Cir. 1975) (“An employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work.”).

     *Eleventh Circuit*: Kohlheim v. Glynn Cnty., 915 F.2d 1473, 1477, 29 WH Cases 1673 (11th Cir. 1990) (holding that where employees were “subject to real limitations on their freedom during mealtime which inure to the benefit of” employer, meal period represented compensable work time); *Chao v. Tyson Foods*, 568 F. Supp. 2d 1306–08 (stating that Eleventh Circuit continues to apply “completely relieved from duty” standard to employees, other than those subject to exemption in 29 U.S.C. §207(k), but discussing developments since *Kohlheim*, including that other circuits were moving to predominant benefit test). [↑](#footnote-ref-416)
416. Armour & Co. v. Wantock, 323 U.S. 126, 4 WH Cases 862 (1944). [↑](#footnote-ref-417)
417. Skidmore v. Swift Co., 323 U.S. 134, 4 WH Cases 866 (1944). [↑](#footnote-ref-418)
418. *Armour*, 323 U.S. at 133 (“Whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.”); *Skidmore*, 323 U.S. at 140 (“[e]ach case must stand on its own facts”); *see also* *Henson*, 6 F.3d at 534 (stating that predominant benefit standard was “[e]stablished in the earliest Supreme Court cases interpreting the FLSA … [and] comports with the Supreme Court’s admonition to use a practical, realistic approach under the unique circumstances of each case when deciding whether certain activities constitute compensable work”); Akpeneye v. United States, 138 Fed. Cl. 512 (2018) (applying predominant benefit test, determining that federal law enforcement officials’ meal breaks were noncompensable because they were able to enjoy their breaks). See Chapter 5, White-Collar Exemptions, §III.C [Legal Principles That Govern the Analysis of the White-Collar Exemptions; Primary Duty]. [↑](#footnote-ref-419)
419. See Chapter 11, Government Employment, §V.C.2 [Special Provisions That Apply to Fire Protection and Law Enforcement Employees; Compensable Hours of Work Rules; Meal Time].

     *See generally*

     *Fifth Circuit:* Lee v. Coahoma Cnty., 937 F.2d 220, 30 WH Cases 764 (5th Cir. 1991).

     *Seventh Circuit:* Leahy v. City of Chi., 96 F.3d 228, 232, 3 WH Cases2d 801 (7th Cir. 1996).

     *Eleventh Circuit:* Avery v. City of Talladega, 24 F.3d 1337, 1345–47, 2 WH Cases2d 778 (11th Cir. 1994) (applying predominant benefit test in context of law enforcement employees subject to 29 U.S.C. §207(k) exemption). [↑](#footnote-ref-420)
420. Lamon v. City of Shawnee, 972 F.2d 1145, 1156–58, 30 WH Cases 1665 (10th Cir. 1992) (applying predominant benefit test in context of police officers who were subject to §207(k) exemption). *Lamon* interprets §553.223, which applies to a specific class of public employees; however, some courts have relied on *Lamon* in rejecting the “completely relieved from duty” standard. Section 785.19, unlike §553.223, does not contain the statement “[t]he employee is not relieved if he is required to perform any duties, whether active or inactive, while eating” and addresses “on-call” work. *See* Bates v. Department of Corr. of State of Kan., 81 F.3d 1008, 3 WH Cases2d 460 (10th Cir. 1996) (confirming that *Lamon* is limited to §207(k) employees, but applying predominant benefit test, and also holding that there is no requirement that mealtimes be “scheduled” and “occur at a regular time”). [↑](#footnote-ref-421)
421. *See* Dean v. Akal Sec., Inc., 3 F.4th 137 (5th Cir. 2021); Alonzo v. Akal Sec. Inc., 807 F. App’x 718 (9th Cir. 2020). [↑](#footnote-ref-422)
422. *Alonzo*, 807 F. App’x at 720. [↑](#footnote-ref-423)
423. *Dean*, 3 F.4th at 144. [↑](#footnote-ref-424)
424. 29 C.F.R. §785.19. [↑](#footnote-ref-425)
425. *Id*.; Thompson v. F.W. Stock & Sons, Inc., 93 F. Supp. 213, 216, 9 WH Cases 585 (E.D. Mich. 1950), *aff’d*, 194 F.2d 493 (6th Cir. 1952); Walling v. Dunbar Transfer & Storage, 3 WH Cases 284, 286–87 (W.D. Tenn. 1943). [↑](#footnote-ref-426)
426. 29 C.F.R. §785.19; *see* Bernard v. IBP, Inc., 154 F.3d 259, 266, 4 WH Cases2d 1604 (5th Cir. 1999) (granting compensation to meatpackers who remained on call to handle maintenance problems during lunch breaks even when meal breaks were not interrupted). [↑](#footnote-ref-427)
427. 767 F.3d 754 (8th Cir. 2014). [↑](#footnote-ref-428)
428. *Id.* at 763. [↑](#footnote-ref-429)
429. *Id.*; *see also*

     *Third Circuit:* Lugo v. Farmer’s Pride, Inc., 802 F. Supp. 2d 598 (E.D. Pa. 2011)(denying summary judgment to employer where triable issues existed over whether employer required poultry workers to don, doff, and wash certain personal protective items during meal periods and whether full 30-minute meal period was predominantly for workers’ benefit).

     *Fifth Circuit:* Dean v. Akal Sec., Inc., 3 F.4th 137 (5th Cir. 2021) (holding employer’s policy did not violate FLSA, not because it satisfied higher completely-removed-from-duty standard, but because employees received predominant benefit of meal period and thus it was not considered working time).

     *Eighth Circuit:* Lopez v. Tyson Foods, Inc., 690 F.3d 869, 880–81, 19 WH Cases2d 1005 (8th Cir. 2012).

     *Tenth Circuit:* Castenada v. JBS USA, LLC, 2014 WL 1796707, at \*3, 22 WH Cases2d 1747 (D. Colo. May 6, 2014) (finding that donning and doffing that shortened meal period did not render meal period compensable because predominant purpose of 30-minute break was to provide employees opportunity to eat); Garcia v. Tyson Foods, Inc*.*, 766 F. Supp. 2d 1167, 1182 & n.12 (D. Kan. 2011) (denying cross-motions for summary judgment due to lack of clear evidence as to what items were required by employer, how much time it took to don and doff items, and whether meal period could be enjoyed comfortably while wearing protective items). [↑](#footnote-ref-430)
430. Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 216 (4th Cir. 2009); *see also* Perez v. Mountaire Farms, Inc., 650 F.3d 350, 369–70, 18 WH Cases2d 1013 (4th Cir. 2011) (following holding in *Sepulveda* but questioning analysis, noting that, because entitlement to compensation under FLSA is factual in nature, better approach would be to examine type of activities involved and amount of time spent on such activities to determine whether performance of such activities predominantly benefited employer). [↑](#footnote-ref-431)
431. Busk v. Integrity Staffing Sols., Inc., 713 F.3d 525, 20 WH Cases2d 937 (9th Cir. 2013), *rev’d on other grounds*, 574 U.S. 27 (2014). [↑](#footnote-ref-432)
432. Buero v. Amazon.com Servs., Inc., 61 F.4th 1031 (9th Cir. 2023). [↑](#footnote-ref-433)
433. 29 C.F.R. §785.19(b); *see also* WH Op. FLSA2004-7NA, 2004 WL 5303035 (Aug. 6, 2004) (opining that 30-minute meal period was not compensable work time even though employees were restricted to small lunchroom, could not make phone calls, could not smoke, and could not leave employer’s premises where employees were complete relieved from duty, were provided sufficient time to eat, and were allowed to take their meals in uninterrupted manner). [↑](#footnote-ref-434)
434. 121 F.3d 58, 4 WH Cases2d 33 (2d Cir. 1997). [↑](#footnote-ref-435)
435. 121 F.3d at 66. [↑](#footnote-ref-436)
436. 801 F.3d 501 (5th Cir. 2015). [↑](#footnote-ref-437)
437. *Id*. at 507. [↑](#footnote-ref-438)
438. 207 F.3d 269, 5 WH Cases2d 1700 (5th Cir. 2000). [↑](#footnote-ref-439)
439. 154 F.3d 259, 4 WH Cases2d 1604 (5th Cir. 1998). [↑](#footnote-ref-440)
440. 154 F.3d at 265. [↑](#footnote-ref-441)
441. 145 F.3d 280, 4 WH Cases2d 1355 (5th Cir. 1998). [↑](#footnote-ref-442)
442. 52 F.3d 337 (table), 1995 WL 230315, at \*5 (10th Cir. Apr. 18, 1995) (unpublished). [↑](#footnote-ref-443)
443. *Id*.; *see also* Beasley v. Hillcrest Med. Ctr., 78 F. App’x 67 (10th Cir. 2003) (reversing summary judgment where court found that nurses’ evidence that they responded to calls, provided patient care, and watched monitors during lunches could support finding that their meals were primarily for hospital’s benefit). [↑](#footnote-ref-444)
444. 125 Fed. Cl. 454 (2016). [↑](#footnote-ref-445)
445. *Id*. at 464–66. [↑](#footnote-ref-446)
446. 990 F.3d 1373 (Fed. Cir. 2021). [↑](#footnote-ref-447)
447. *Id*. at 1380–81 (citing Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)). [↑](#footnote-ref-448)
448. *Id.* at 1381 (citing 29 C.F.R. §785.19(a)). [↑](#footnote-ref-449)
449. 775 F.3d 807 (6th Cir. 2015). [↑](#footnote-ref-450)
450. 33 F.3d 55 (table), 2 WH Cases2d 1088 (6th Cir. 1994). [↑](#footnote-ref-451)
451. 751 F.2d 810, 26 WH Cases 1623 (6th Cir. 1984). [↑](#footnote-ref-452)
452. 751 F.2d at 814. [↑](#footnote-ref-453)
453. 713 F.3d 525, 531–32, 20 WH Cases2d 937 (9th Cir. 2013), *rev’d on other* *grounds*, 574 U.S. 27, 23 WH Cases 2d 1485(2014). *But see* Naylor v. Securiguard, Inc., 801 F.3d 501 (5th Cir. 2015) (where traveling obligations before and after 30-minute lunch periods ate into 40% of employees’ time for meals, meal breaks were “more like rest periods and thus compensable under the FLSA”). [↑](#footnote-ref-454)
454. 807 F. App’x 718 (9th Cir. 2020). *Cf.* Dean v. Akal Sec., Inc., 3 F.4th 137 (5th Cir 2021) (holding meal periods during flights were not compensable because they were for employees’ predominant benefit and thus not considered working time); Gelber v. Akal Sec., Inc., 14 F.4th 1279 (11th Cir. 2021) (holding that because employer conceded that idle time on return flights was compensable travel time, employer could not claim that flights were predominantly for employees’ benefit, and thus meal breaks were compensable). [↑](#footnote-ref-455)
455. 819 F.3d 1237 (10th Cir. 2016). [↑](#footnote-ref-456)
456. *Id*. at 1249–51. [↑](#footnote-ref-457)
457. 149 F.3d 1125, 4 WH Cases2d 1297 (10th Cir. 1998). [↑](#footnote-ref-458)
458. *E*.*g*., Jones-Turner v. Yellow Enter. Sys., LLC, 597 F. App’x 293 (6th Cir. 2015) (emergency medical technicians required to respond to radio calls during meal breaks were not entitled to compensation for such breaks unless unable to take breaks due to high call volume); Nevett v. Renown Health, 2022 BL 147542, 2022 WL 1288754 (D. Nev. Apr. 18, 2022) (nurses’ meal periods were noncompensable even though nurses were required to remain on premises, carry phones or radios, and respond to emergencies). [↑](#footnote-ref-459)
459. 141 F.3d 533, 4 WH Cases2d 869 (4th Cir. 1998). [↑](#footnote-ref-460)
460. 141 F.3d at 545 (in event of responding to emergency, paramedics were paid for entire meal period). [↑](#footnote-ref-461)
461. 6 F.3d 531, 1 WH Cases2d 1057 (8th Cir. 1993). [↑](#footnote-ref-462)
462. 6 F.3d at 536; *see also* Hahn v. Pima Cnty., 24 P.3d 614, 7 WH Cases2d 434 (Ariz. Ct. App. 2001) (holding that corrections officers’ meal periods were noncompensable where, even though they were expected to respond to emergency situations, meal period was primarily for personal benefit of officers); Salon Enters., Inc. v. Langford, 31 P.3d 290 (Kan. Ct. App. 2000) (holding that evidence did not show that employee was required to be available for employer during meal period); Brand v. Comcast Corp., 135 F. Supp. 3d 713, 736–37 (N.D. Ill. 2015). [↑](#footnote-ref-463)
463. 925 F.3d 838 (6th Cir. 2019). [↑](#footnote-ref-464)
464. *Id.* at 854 (citing 29 C.F.R. §785.19 and Ruffin v. MotorCity Casino, 775 F.3d 807, 811–15 (6th Cir. 2015) (examining whether meal periods were compensable under FLSA as “work”)). [↑](#footnote-ref-465)
465. 29 C.F.R. §785.21, .22. [↑](#footnote-ref-466)
466. *Id.* §785.21. [↑](#footnote-ref-467)
467. *Id*. *See also* Perez v. La Bella Vida ALF, Inc., 2015 WH Cases2d 343475 (M.D. Fla. Oct. 19, 2015) (night-shift employees at nursing home for shifts of less than 24 hours were entitled to overtime for sleep time). [↑](#footnote-ref-468)
468. 29 C.F.R. §553.222 (governing sleep time for firefighters and law enforcement personnel); see Chapter 11, Government Employment. [↑](#footnote-ref-469)
469. WH Op. FLSA2019-10, 2019 WL 3345452 (July 22, 2019). [↑](#footnote-ref-470)
470. *See* Auer v. Robbins, 519 U.S. 452, 3 WH Cases2d 1249 (1997). [↑](#footnote-ref-471)
471. Browne v. P.A.M. Transp., Inc., 2020 WL 412126, at \*3 (W.D. Ark. Jan. 24, 2020); Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364, 395 (D. Mass. 2019) (applying *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), to the WHD opinion letter and determining that no deference was warranted). [↑](#footnote-ref-472)
472. Based on a 1988 DOL enforcement memorandum, however, the First Circuit has held that employees of long-term care facilities must provide care for 120 hours during a workweek in order for their sleep time not to be compensable. Giguere v. Port Res., Inc., 927 F.3d 43, 49–51 (1st Cir. 2019). [↑](#footnote-ref-473)
473. 29 C.F.R. §785.22(a); *see also*

     *Second Circuit:* Rodriguez v. Avondale Care Grp., LLC, 2018 WL 1582433 (S.D.N.Y. Mar. 27, 2018) (enforceable requirement existed, but question of fact existed as to whether employer had constructive knowledge that sleep and rest breaks were missed and not compensated).

     *Sixth Circuit:* Stanford v. Diligent Supportive Living, Inc., 2014 WL 1338093, at \*3 (S.D. Ohio Apr. 2, 2014) (granting summary judgment for in-home caregiver where employer paid flat rate for 49-hour continuous shift and parties “had no agreement, either expressed or implied, that sleep time would be excluded from the compensable hours during her shift”).

     *Seventh Circuit:* Sidell v. Residential CRF, Inc., 2010 WL 4723722, at \*5–7 (S.D. Ind. Nov. 12, 2010) (sleep-time exception applied where implicit agreement existed to exclude sleep time from salary computations and adequate sleeping facilities were provided).

     *Eighth Circuit*: Browne v. P.A.M. Transport, Inc., 2018 WL 5118449, at \*5 (W.D. Ark. Oct. 19, 2018) (sleep-time exception applied to truck drivers’ “sleeping berth” claims, holding 29 C.F.R. §785.22 controlling).

     *Tenth Circuit:* Hendricks v. Oklahoma Prod. Ctr. Grp. Homes, Inc., 159 F. App’x 875 (10th Cir. 2005) (holding that sleep time was noncompensable based on agreement between parties). [↑](#footnote-ref-474)
474. 29 C.F.R. §785.22(b); *see also* Hultgren v. County of Lancaster, 913 F.2d 498, 29 WH Cases 1569 (8th Cir. 1990) (time slept by workers on shifts of more than 24 hours at residential facility for mentally impaired individuals was compensable because their sleep was interrupted frequently). [↑](#footnote-ref-475)
475. 29 C.F.R. §785.22(b). [↑](#footnote-ref-476)
476. *See*

     *Third Circuit:* Beaston v. Scotland Sch. for Veterans’ Children, 693 F. Supp. 234, 239, 28 WH Cases 1501 (M.D. Pa. 1988) (stating that plaintiffs “are provided an opportunity for and usually obtain at least five hours of uninterrupted sleep per night”), *aff’d*, 869 F.2d 587, 29 WH Cases 1599 (3d Cir. 1989); Galloway v. George Junior Republic, 2013 WL 5307584, at \*15 (W.D. Pa. Sept. 19, 2013) (granting summary judgment in favor of employer where evidence showed that counselor at residential treatment facility could obtain six hours of sleep each night notwithstanding minor annoyances he had never previously complained about and that no other employees experienced).

     *Fourth Circuit:* Roy v. County of Lexington, 141 F.3d 533, 546, 4 WH Cases2d 869, 878 (4th Cir. 1998) (ruling that emergency medical paramedics and technicians were not entitled to compensation for eight-hour sleep periods where only 35% of the sleep periods were interrupted such that employees received less than five hours sleep).

     *Sixth Circuit:* Hill v. Family Tyes, Inc., 2015 WL 2236158 (E.D. Mich. May 12, 2015) (denying employer’s motion for summary judgment where plaintiffs alleged they were unable to get five hours of sleep per night); Benson v. Universal Ambulance Serv., 497 F. Supp. 383, 389, 24 WH Cases 1221 (E.D. Mich. 1980) (applying §785.22(b)), *rev’d and remanded on other grounds*, 675 F.2d 783, 25 WH Cases 485 (6th Cir. 1982).

     *Eighth Circuit:* Bouchard v. Regional Governing Bd. of Mental Retardation Servs., 939 F.2d 1323, 1329, 30 WH Cases 711 (8th Cir. 1991) (applying five-hour rule of §785.22(b)).

     *Ninth Circuit:* Sperry v. Securitas Sec. Servs., USA, Inc., 2014 WL 1664916 (N.D. Cal. Apr. 25, 2014) (denying summary judgment to employer because sleep-time period was only four hours). [↑](#footnote-ref-477)
477. 29 C.F.R. §785.22(a) (“Where no *expressed or implied agreement* to the contrary is present … sleeping time and lunch periods constitute hours worked.”) (emphasis added). *See* Braziel v. Tobosa Developmental Servs., 166 F.3d 1061, 1063, 5 WH Cases2d 97 (10th Cir. 1999) (“We agree with the district court both that an agreement to exempt sleep time from paid work under the FLSA can be implied, and that the undisputed facts in this case compel the conclusion that there was an implied agreement to do so.”); Watkins v. United Needs & Abilities, Inc., 2021 BL 260475, 2021 WL 2915265 (D. Md. July 12, 2021) (sleep time of employee who worked at home for disabled residents and who had to live on site for most of each week held noncompensable per an agreement because plaintiff had been informed of the arrangement upon accepting the position and had worked per that arrangement for two years without complaint); *Benson*, 497 F. Supp. at 389 (recognizing that, absent express or implied agreement to exclude sleeping time and meal periods, employer must compensate for hours in which employees were engaged in such activities). *But see* Service Emps. Local 102 v. County of San Diego, 60 F.3d 1346, 1356, 2 WH Cases2d 1412 (9th Cir. 1994) (holding that §785.22(a) “does not say such an agreement may be implied,” despite regulation’s clear language). [↑](#footnote-ref-478)
478. Johnson v. City of Columbia, 949 F.2d 127, 131, 30 WH Cases 1027 (4th Cir. 1991) (applying South Carolina law); International Ass’n of Firefighters Local 349 v. City of Rome, 682 F. Supp. 522, 529, 28 WH Cases 1150 (N.D. Ga. 1988) (citing Beebe v. United States, 640 F.2d 1283, 1291, 24 WH Cases 1189 (Ct. Cl. 1981)). The intention of the parties controls. *See International Ass’n of Firefighters*, 682 F. Supp. at 529 (citing Skidmore v. Swift Co., 323 U.S. 134, 4 WH Cases 866 (1944)). [↑](#footnote-ref-479)
479. *Fourth Circuit:* *Johnson*, 949 F.2d at 131 (“If the employee contemporaneously protested, the courts have found that there was no implied agreement between the parties.”).

     *Sixth Circuit:* Harrison v. City of Clarksville, 732 F. Supp. 810, 814, 29 WH Cases 1199 (M.D. Tenn. 1990) (“At the very least, to negate the inference of agreement to the exclusion, the employee must expressly object within a short period after learning of the employer’s intent to exclude the time.”).

     *Federal Circuit:* *Beebe*, 640 F.2d at 1291 (no implied agreement existed where employees “protested the deduction of sleep and meal time in computing their overtime pay”). [↑](#footnote-ref-480)
480. *See*, *e.g*., *Johnson*, 949 F.2d at 131 (“[I]f the employee did not protest and continued to work and receive paychecks, the courts have found that an implied agreement did arise between the parties.”); Sidell v. Residential CRF, Inc., 2010 WL 4723722, at \*1 (S.D. Ind. Nov. 12, 2010) (finding acquiescence where employee was paid for 16 hours of 24-hour day and employee failed to complain). However, employees are not required to quit their jobs or refuse pay in order to signal their protest. *See Beebe*, 640 F.2d at 1291. [↑](#footnote-ref-481)
481. *Johnson*, 949 F.2d at 130. Moreover, the exclusion is construed narrowly against the employer. *See id*. at 129–30. [↑](#footnote-ref-482)
482. Braziel v. Tobosa Developmental Servs., 166 F.3d 1061, 1063, 5 WH Cases2d 97 (10th Cir. 1999) (ruling that residential assistants implicitly agreed to noncompensability of sleep time at patients’ residences where they knew of policy at time of hiring and never grieved the policy); *Harrison*, 732 F. Supp. at 815 (“New hires have an opportunity before accepting employment to discover the terms of employment that are material to their decisions whether to take their jobs.”). [↑](#footnote-ref-483)
483. *Braziel*, 166 F.3d at 1063. [↑](#footnote-ref-484)
484. Johnson v. City of Columbia, 949 F.2d 127, 131–32, 30 WH Cases 1027 (4th Cir. 1991) (invalidating express agreement that employee signed in face of threatened termination). [↑](#footnote-ref-485)
485. Lee v. Flightsafety Servs. Corp., 20 F.3d 428, 432, 1 WH Cases2d 1665 (11th Cir. 1994) (“The terms of the contract bind the [employees], regardless of whether they like the provisions or how much they have complained.”). [↑](#footnote-ref-486)
486. 29 C.F.R. §785.23. *See also* WH Op. FLSA2019-1, 2019 WL 1225927 (Mar. 14, 2019). [↑](#footnote-ref-487)
487. 29 C.F.R. §785.23; *see* Wood v. Mid-Am. Mgmt. Corp., 192 F. App’x 378, 382 (6th Cir. 2006) (affirming trial court’s dismissal of maintenance technician’s claim for overtime because he failed to report overtime hours to supervisor, who was not on site to monitor his after-hours’ work); Bennet v. Carl’s Towing, LLC, 2005 WL 2101002 (W.D. Mo. Aug. 31, 2005) (holding that employee fell within “homeworker’s” exception set forth in 29 C.F.R. §785.23 and thus was not entitled to compensation for every hour of daily coverage shift, where employee was required to be at home and available to answer calls from tow-truck drivers during 15-hour shifts). The regulation provides the example of a switchboard operated out of a telephone operator’s home. 29 C.F.R. §785.23. [↑](#footnote-ref-488)
488. 29 C.F.R. §785.23. *See*

     *Third Circuit*: Krause v. Manalapan Twp., 486 F. App’x 310, 314 (3d Cir. 2012) (finding that agreement between police officers and township for time spent caring for police dogs at home was reasonable and noting that “a reasonable agreement need not match the actual number of hours worked”).

     *Fourth Circuit*: Balbed v. Eden Park Guest House LLC, 881 F.3d 285 (4th Cir. 2017) (reversing summary judgment for employer and directing trial court to consider whether agreement was “reasonable” by examining salary paid for number of hours worked by plaintiff innkeeper (and in-kind benefits), including whether plaintiff was “engaged to wait” or “waiting to be engaged” during certain hours); Garofolo v. Donald B. Heslep Assocs., Inc., 405 F.3d 194, 10 WH Cases2d 871 (4th Cir. 2005) (ruling that resident managers at self-storage facilities failed to show that agreement to compensate them for 40 hours per week for living on site and working irregular work schedule was unreasonable because agreement did not provide unreasonably short amount of time to perform assigned tasks).

     *Fifth Circuit*: Halferty v. Pulse Drug Co., 821 F.2d 261, 268–69, 28 WH Cases 322 (5th Cir. 1987) (explaining that agreement “should take into account not only the time spent [working] but also some allowance for the restriction on the employee’s freedom to engage in personal activities resulting from the duty” to work) (quoting WH Op. (Mar. 18, 1968)), *aff’d in part*, 864 F.2d 1185, 28 WH Cases 495 (5th Cir. 1989).

     *Eighth Circuit*: Gaby v. Omaha Home for Boys, 140 F.3d 1184, 1189–90, 4 WH Cases2d 865 (8th Cir. 1998) (applying standard and finding that agreement between house parents and group home was “reasonable” when it provided for 60 hours of pay per week, including overtime); Bouchard v. Regional Governing Bd. of Mental Retardation Servs., 939 F.2d 1323, 1329, 30 WH Cases 711 (8th Cir. 1991) (ruling that standard was consistent with Supreme Court’s admonition in *Skidmore v. Swift & Co*., 323 U.S. 134, 4 WH Cases 866 (1944)).

     *Ninth Circuit*: Leever v. Carson City, 360 F.3d 1014, 1019, 9 WH Cases2d 714 (9th Cir. 2004) (reversing summary judgment for employer where there was no showing that agreement to pay sheriff deputy $60 per week for caring for police dog at her home was based on approximation of hours necessary for such tasks); Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931 (9th Cir. 2004) (finding that §785.23 does not provide “exception” to paying overtime, but merely provides methodology to calculate actual hours worked, and that part of employees’ 24-hour shift’s on-call time was compensable, rather than all or none).

     *Eleventh Circuit*: Maldonado v. Alta Healthcare Grp., Inc., 17 F. Supp. 3d 1181, 1192 (M.D. Fla. 2014) (finding agreement unreasonable as matter of law where group home employer failed to compensate live-in staff for actual work during night shifts and deducted more than eight hours for sleep time).

     For a discussion of the recordkeeping requirements applicable to live-in domestic service employees who are exempt from overtime under 29 U.S.C. §13(b)(21), *see* Chapter 6, Other Statutory Exemptions, §III.I.1 [Section 213(b) Exemptions From the Overtime Requirements of the FLSA; Domestic Servants Who Reside in a Household; Recordkeeping Requirements]. [↑](#footnote-ref-489)
489. WH Op. FLSA2004-7, 2004 WL 2146927 (July 27, 2004). [↑](#footnote-ref-490)
490. 29 C.F.R. §785.23. [↑](#footnote-ref-491)
491. WH Op. WH-505, 1981 WL 179033 (Feb. 3, 1981) (quoting *Bouchard*, 939 F.2d at 1329); *see also* Shannon v. Pleasant Valley Cmty. Living Arrangements, 82 F. Supp. 2d 426 (W.D. Pa. 2000) (ruling that employees whose jobs required them to reside at group homes for seven-day shifts met “extended periods of time” requirement). [↑](#footnote-ref-492)
492. U.S. Dep’t of Labor, Wage & Hour Div., Hours Worked in Residential Care (Group Home) Establishments—Sleep Time and Related Issues—Enforcement Policy, 1998 WL 614199 (June 30, 1988). [↑](#footnote-ref-493)
493. *Id.*; *see also* WH Op. WH-505, 1981 WL 179033 (Feb. 3, 1981). [↑](#footnote-ref-494)
494. Bouchard v. Regional Governing Bd. of Region V Mental Retardation Servs., 939 F.2d 1323, 1328 (8th Cir. 1991) (discussing history behind creation of 1988 Policy); Ormsby 1 v. C.O.F. Training Servs., Inc., 194 F. Supp. 2d 1177, 1190, 7 WH Cases2d 1258 (D. Kan. 2002) (applying five-day standard and noting private sleeping quarters in finding agreement reasonable), *aff’d*, 60 F. App’x 724, 725–26 (10th Cir. 2003). *But see* Chao v. Jasmine Hall Care Homes, Inc., 2007 WL 4591438, at \*2–3, 13 WH Cases2d 310 (E.D. Cal. Dec. 28, 2007) (holding that employer could not rely on §785.23 where plaintiffs had to share bedroom with other employees). [↑](#footnote-ref-495)
495. FOH §31b20; *see also* 29 C.F.R. §785.23. [↑](#footnote-ref-496)
496. For a discussion on pre-employment training, see Chapter 3, The Employment Relationship, §III.C [Employee Status; Trainees, Interns, and Students]. [↑](#footnote-ref-497)
497. 29 C.F.R. §785.27. [↑](#footnote-ref-498)
498. *Id.*; WH Op., 2001 WL 1869962 (May 22, 2001) (opining that under 29 C.F.R. §785.27, off-duty time by officer voluntarily “riding with” road patrol deputy would not qualify as noncompensable because it would result in productive work). An independent exception to the general rule that training time is compensable, applicable only to state and local government employees, is found at 29 C.F.R. §553.26. *See* Misewicz v. City of Memphis, 771 F.3d 332 (6th Cir. 2014). See Chapter 11, Government Employment. [↑](#footnote-ref-499)
499. Integrity Staffing Sols., Inc. v. Busk, 574 U.S. 27, 23 WH Cases2d 1485 (2014). [↑](#footnote-ref-500)
500. 29 C.F.R. §785.28–.32; *see also* WH Op. 2020-15, 2020 WL 6542037 (Nov. 3, 2020) (voluntary training on vacation or paid time off days, or after normal hours is not compensable time, but Web-based training during normal shifts may be compensable). [↑](#footnote-ref-501)
501. *Id*. §785.28. [↑](#footnote-ref-502)
502. Price v. Tampa Elec. Co., 806 F.2d 1551, 27 WH Cases 1615 (11th Cir. 1987). [↑](#footnote-ref-503)
503. 806 F.2d at 1552; *see also* Kayser v. Southwestern Bell Tel. Co., 912 F. Supp. 2d 803 (E.D. Mo. 2012) (finding that time technicians spent at management-employee steering committee meetings was not compensable because meetings were not controlled or required by employer; employer did not select participants, determine extent of their participation, or discipline individuals for not participating); WH Op., 2001 WL 1592778 (May 3, 2001) (state-mandated training that was attended by local school district bus drivers was probably compensable). [↑](#footnote-ref-504)
504. WH Op. FLSA2009-15, 2009 WL 649017 (Jan. 15, 2009). [↑](#footnote-ref-505)
505. *Id*. In 1970, the Administrator similarly opined that telephone operators who were provided a typing course should be compensated for time spent practicing typing at home, reasoning that the home typing was required, not voluntary, because the failure to acquire a certain proficiency in typing would result in termination of employment. WH Op. WH-74, 1970 WL 26443 (Sept. 9, 1970). [↑](#footnote-ref-506)
506. Maynor v. Dow Chem. Co., 671 F. Supp. 2d 902 (S.D. Tex. 2009). [↑](#footnote-ref-507)
507. *Id.* at 918. [↑](#footnote-ref-508)
508. WH Op., 1997 WL 998038 (Sept. 15, 1997); WH Op., 1996 WL 1031798 (Sept. 9, 1996). [↑](#footnote-ref-509)
509. WH Op., 1997 WL 998038 (Sept. 15, 1997); WH Op., 1996 WL 1031798 (Sept. 9, 1996). [↑](#footnote-ref-510)
510. Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 722, 7 WH Cases2d 906 (2d Cir. 2001); *see also* Fowler v. Incor, 2009 WL 366342, at \*6 (E.D. Okla. Feb. 12, 2009) (finding that training was not voluntary where employer required training so that it could comply with its own licensing requirements). [↑](#footnote-ref-511)
511. Dade Cnty. v. Alvarez, 124 F.3d 1380, 4 WH Cases2d 225 (11th Cir. 1997). [↑](#footnote-ref-512)
512. 124 F.3d at 1385. [↑](#footnote-ref-513)
513. 29 C.F.R. §785.29. [↑](#footnote-ref-514)
514. *Id*.; *see, e.g*., Price v. Tampa Elec. Co., 806 F.2d 1551, 1552, 27 WH Cases 1615 (11th Cir. 1987) (finding that training on new equipment was not “directly related” to job duties where plaintiff did not have to use new equipment in his current position); Chao v. Tradesmen Int’l, Inc*.*, 310 F.3d 904, 911, 8 WH Cases2d 385 (6th Cir. 2002) (finding that occupational safety training was not directly related to skills needed for construction tradesworkers); *see also* Apple v. Atlantic Yards Dev. Co., 2014 WL 5450030 (E.D.N.Y. Oct. 27, 2014) (classroom training in preparation for potential future union work was not integral or indispensable to that future work). [↑](#footnote-ref-515)
515. *Alvarez,* 124 F.3d 1380. [↑](#footnote-ref-516)
516. *Id*. at 1385. [↑](#footnote-ref-517)
517. WH Op., 1986 WL 1171118 (Apr. 21, 1986). [↑](#footnote-ref-518)
518. *Id.* [↑](#footnote-ref-519)
519. 29 C.F.R. §785.31. [↑](#footnote-ref-520)
520. WH Op., 1980 WL 141338 (Oct. 23, 1980). [↑](#footnote-ref-521)
521. *Id.*; *see also* WH Op., 1999 WL 1788164 (Sept. 30, 1999) (opining that licensed vocational nurses required by state law to undergo 30 hours of nursing skills continuing education every two years need not be compensated for time spent in training). [↑](#footnote-ref-522)
522. WH Op. FLSA2009-1, 2009 WL 648993 (Jan. 7, 2009). [↑](#footnote-ref-523)
523. WH Op. FLSA2009-13, 2009 WL 649015 (Jan. 15, 2009). [↑](#footnote-ref-524)
524. WH Op. FLSA2009-15, 2009 WL 649017 (Jan. 15, 2009). *But see* Miller v. Citizens Fin. Grp., Inc., 2020 WL 571627 (D. Mass. Feb. 5, 2020) (time spent by bank employees studying outside of regular work hours for required licensing examinations is not compensable because employees were not engaged in productive activity for the bank while studying); Almanza v. United States, 127 Fed. Cl. 521 (2016) (holding that time spent by U.S. Border Patrol Agents studying after hours to pass exams to become canine instructors was not compensable). [↑](#footnote-ref-525)
525. 29 C.F.R. §785.30; *see also* Price v. Tampa Elec. Co., 806 F.2d 1551, 1552, 27 WH Cases 1615 (11th Cir. 1987) (holding that time spent on voluntary electronics course at home was not compensable). [↑](#footnote-ref-526)
526. 68 Fed. Cl. 212, 10 WH Cases2d 1687 (2005), *aff’d on other grounds*, 479 F.3d 1365, 12 WH Cases2d 699 (Fed. Cir. 2007). [↑](#footnote-ref-527)
527. *Id*., 68 Fed. Cl. at 257–61. *See also* Almanza v. United States, 127 Fed. Cl. 521 (2016) (holding that time spent by U.S. Border Patrol Agents studying after hours to pass exams to become canine instructors was not compensable). [↑](#footnote-ref-528)
528. WH Op. FLSA2006-5, 2006 WL 940661 (Mar. 3, 2006). [↑](#footnote-ref-529)
529. Walling v. Portland Terminal Co., 330 U.S. 148, 6 WH Cases 611 (1947); Walling v. Nashville, Chattanooga & St. Louis Ry., 330 U.S. 158, 6 WH Cases 615 (1947); see alsoChapter 3, The Employment Relationship, §III.C.2 [Employee Status; Trainees, Interns, and Students; Trainees]. [↑](#footnote-ref-530)
530. Bienkowski v. Northeastern Univ., 285 F.3d 138, 142, 7 WH Cases2d 1249 (1st Cir. 2002). [↑](#footnote-ref-531)
531. 285 F.3d 138, 7 WH Cases2d 1249 (1st Cir. 2002). [↑](#footnote-ref-532)
532. 310 F.3d 904, 8 WH Cases2d 385 (6th Cir. 2002). [↑](#footnote-ref-533)
533. 29 C.F.R. §785.32.The DOL has stated that the term “substantially meets” means “the program has been registered and approved by a State Apprenticeship Agency approved by the Bureau of Apprenticeship and Training or by the Bureau itself.” WH Op. WH-425, 1977 WL 53493 (July 22, 1977). [↑](#footnote-ref-534)
534. 29 C.F.R. §785.32; *see also* Herman v. Hogar Praderas de Amor, Inc., 130 F. Supp. 2d 257 (D.P.R. 2001) (holding that employer must pay “trainee” employees for two-day training period where employees performed duties of position with little or no instruction or supervision). [↑](#footnote-ref-535)
535. 29 C.F.R. §785.32. [↑](#footnote-ref-536)
536. 433 F.2d 109, 19 WH Cases 739 (1st Cir. 1970). [↑](#footnote-ref-537)
537. 433 F.2d at 110. [↑](#footnote-ref-538)
538. *Id*. at 112. [↑](#footnote-ref-539)
539. 387 F. Supp. 458, 22 WH Cases 88 (S.D. Tex. 1974). [↑](#footnote-ref-540)
540. 387 F. Supp. at 462. [↑](#footnote-ref-541)
541. *Id*. [↑](#footnote-ref-542)
542. 2010 WL 761210 (D. Md. Mar. 2, 2010). [↑](#footnote-ref-543)
543. *E.g.,*

     *Third Circuit:* Garcia v. Vertical Screen, Inc., 580 F. Supp. 3d 79 (E.D. Pa. 2022) (time to boot up computers used to sign in for the day and are then consistently used throughout the day is compensable).

     *Sixth Circuit:* Wilson v. Peckham, Inc., 2021 BL 279744, 2021 WL 3168616 (W.D. Mich. July 26, 2021) (time spent by call center employees to log into computer programs at beginning of shift, include timekeeping programs, and then work on computers throughout workday is compensable because it is akin to preparing a tool to use throughout workday).

     *Eighth Circuit*: Deutsch v. My Pillow, Inc., 2023 BL 142991, 2023 WL 3125549 (D. Minn. Apr. 27, 2023) (holding that booting up time to clock-in on same computer work is performed is integral and indispensable to principal activities and is therefore compensable).

     *Ninth Circuit*: Cadena v. Customer Connexx LLC, 51 F.4th 831 (9th Cir. 2022) (time waiting for computers to boot up for call center employees to sign in for work could be compensable integral and indispensable time because those computers were also used for employees’ work, unless it is found that time at issue is de minimis); Cadena v. Customer Connexx LLC, 107 F.4th 902 (9th Cir. 2024) (holding disputed questions of material fact as whether time employees spent booting up and shutting down computers was de minimis precluded summary judgment).

     *Tenth Circuit*: Peterson v. Nelnet Diversified Sols., LLC, 15 F.4th 1033 (10th Cir. 2021) (pre-shift “boot-up” time was integral and indispensable to employees’ jobs requiring use of computers and thus was compensable; rejecting defendant’s claim that booting up was akin to commuting, and thereby not compensable). [↑](#footnote-ref-544)
544. 29 C.F.R. §785.42; *see also* Leone v. Mobil Oil Corp., 523 F.2d 1153, 1164, 22 WH Cases 590 (D.C. Cir. 1975) (participating in Occupational Safety and Health Administration inspection did not constitute time worked); Kayser v. Southwestern Bell Tel. Co*.*, 912 F. Supp. 2d 803, 809 (E.D. Mo. 2012) (finding dispute of fact concerning custom or practice under CBA of compensating employees for attending grievances). [↑](#footnote-ref-545)
545. DeBraska v. City of Milwaukee, 189 F.3d 650, 5 WH Cases2d 982 (7th Cir. 1999) (holding that no compensation was owed for employee who attended preliminary disciplinary hearing where attendance was not mandatory and hearing was not determinative of employee’s discipline). [↑](#footnote-ref-546)
546. 29 C.F.R. §785.43. [↑](#footnote-ref-547)
547. *Id*. [↑](#footnote-ref-548)
548. 432 F.3d 749, 11 WH Cases2d 129 (7th Cir. 2005). [↑](#footnote-ref-549)
549. *Id*. *But cf.* Gibbs v. City of N.Y., 87 F. Supp. 3d 482 (S.D.N.Y. 2015) (finding that mandatory after-hours alcohol treatment sessions were not compensable “work” because, applying *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 135 S. Ct. 513, 23 WH Cases2d 1485 (2014), although plaintiffs were required to undergo counseling, plaintiffs, not employer, were primary beneficiaries of treatment and counseling sessions); Makinen v. City of N.Y., 53 F. Supp. 3d 676 (S.D.N.Y. 2014) (same); Todd v. Lexington Fayette Urban Cnty. Gov’t, 2009 WL 4800052 (E.D. Ky. Dec. 10, 2009) (distinguishing facts from those in *Sehie*, court noted that plaintiff was permitted to select his psychiatrist and attend Alcoholics Anonymous meetings that best met his needs and noting that counseling sessions were not required because of incident at work but rather while off-duty and at home). [↑](#footnote-ref-550)
550. WH Op. FLSA2018-20, 2018 WL 4562930 (Aug. 28, 2018). [↑](#footnote-ref-551)
551. 29 C.F.R. §785.44; *see also* Kayser v. Southwestern Bell Tel. Co., 912 F. Supp. 2d 803, 811 (E.D. Mo. 2012) (denying employer’s motion for summary judgment because evidence showed that plaintiffs performed charitable work on employer’s premises during normal working hours); WH Op. FLSA2006-18, 2006 WL 1836646 (June 1, 2006) (opining that employees of club could perform noncompensable volunteer work for cultural and sporting field trips or bingo games, provided services were not of same type of service employee was employed to perform and occurred outside of employee’s normal working hours); WH Op. FLSA2006-4, 2006 WL 561849 (Jan. 27, 2006) (concluding that volunteer activity that is truly voluntary, not coerced, and occurs outside of working hours is not compensable even where it is actively promoted or sponsored by employer); WH Op. FLSA2005-33, 2005 WL 3308604 (Sept. 16, 2005) (opining that time nonprofit university employees spent volunteering counted as hours worked if performed during normal working hours). [↑](#footnote-ref-552)
552. 29 C.F.R. §785.44. *See* WH Op. FLSA2019-2, 2019 WL 122592 (Mar. 14, 2019) (time spent volunteering outside of normal hours is noncompensable even if employee’s participation may result in a discretion). See also Chapter 3, The Employment Relationship, §III.B [Employee Status; Volunteers] and Chapter 11, Government Employment, §II [Coverage Issues]. [↑](#footnote-ref-553)
553. WH Op. FLSA2019-2. [↑](#footnote-ref-554)
554. *See also* Alminiana v. Lowe’s Home Ctrs., LLC, 2020 WL 5640511, at \*3 (W.D.N.C., Sept. 22, 2020) (“give back time” of up to eight hours for community service paid at regular rate is not hours worked for overtime purposes). [↑](#footnote-ref-555)
555. 29 C.F.R. §785.45. [↑](#footnote-ref-556)
556. *Id*. [↑](#footnote-ref-557)
557. 99 Fed. Cl. 430, 17 WH Cases2d 1180 (2011). [↑](#footnote-ref-558)
558. 99 Fed. Cl.at 459. [↑](#footnote-ref-559)
559. *Id.* (citing Bull v. United States, 479 F.3d 1365 (Fed. Cir. 2007), *aff’g* 68 Fed. Cl. 212, 10 WH Cases2d 1687 (2005), discussed in §IV.F.3 [Application of Principles; Lectures, Meetings, and Training Programs; Independent Training] of this chapter). [↑](#footnote-ref-560)
560. 29 C.F.R. §785.48. [↑](#footnote-ref-561)
561. *Id*. [↑](#footnote-ref-562)
562. *Id*. §785.47, .48. *See* Chapter 14, Recordkeeping. [↑](#footnote-ref-563)
563. 29 C.F.R. §785.48; *see, e.g*.,

     *Second Circuit:* Adams v. Bloomberg L.P., 2023 BL 314636, WL 1957681 (S.D.N.Y. Feb. 13, 2023) (holding that rounding policy based on badge swipes was neutral on face and in application since noncompensable preliminary activities continued after swipes); Vasquez v. Victor’s Café 52nd St., 2019 BL 363710, 2019 WL 4688698 (S.D.N.Y. Sept. 26, 2019) (absent any Second Circuit standard regarding rounding practices, applying Ninth Circuit’s standard; finding rounding policy, which was neutral on its face and did not result in systematic undercompensation, was permissible); Boone v. Prime Flight Aviation Servs., Inc., 2018 BL 58338, 2018 WL 1189338 (E.D.N.Y. Feb. 20, 2018) (granting summary judgment to employer, holding rounding policy must be neutral both facially and as applied, but need not be applied equally every pay period).

     *Fourth Circuit:* Bagrowski v. Maryland Port Auth., 845 F. Supp. 1116, 1120–21, 1 WH Cases2d 1655 (D. Md. 1994) (holding that practice of rounding down to zero any overtime of 30 minutes or less did not violate FLSA because overtime of 31 minutes or more was rounded up to one hour, and any employee who worked overtime of 30 minutes or less was permitted to leave early by like time the following day).

     *Eighth Circuit:* Houston v. Saint Luke’s Health Sys., 76 F.4th 1145 (8th Cir. 2023) (vacating summary judgment order for employer where triable issue of whether facially neutral rounding policy disadvantaged workers in application over time).

     *Ninth Circuit:* Corbin v. Time Warner Entm’t, 821 F.3d 1069 (9th Cir. 2016) (upholding lower court’s decision that defendant’s policy of rounding each call center employees’ time up or down to the nearest quarter hour complied with §785.48(b)); Gillings v. Time Warner Cable LLC, 538 F. App’x 712 (9th Cir. 2014) (reversing summary judgment in favor of employer on claims of two named plaintiffs because rounding policy appeared not to have been neutral in effect).

     *Tenth Circuit:* Aquilar v. Mgmt. & Training Corp., 948 F.3d 1270, 1287–89 (10th Cir. 2020) (reversing summary judgment for employer where plaintiffs created triable issue as to whether policy was neutrally applied through representative evidence showing 10 minute rounding policy disadvantaged workers 94 percent of the time).

     *Eleventh Circuit:* Gibson v. Outokumpu Stainless Steel USA, LLC, 2023 BL 94419 (S.D. Ala. Mar. 22, 2023) (plaintiff’s summary judgment motion granted holding that rounding policy that routinely resulted in no compensation for pre and post-shift “making relief” activity was improper); Contini v. United Trophy Mfg., Inc., 2007 WL 1696030, at \*4 (M.D. Fla. June 12, 2007) (granting summary judgment in favor of employer because rounding practice worked both to the benefit and detriment of employees by rounding time both up and down).

     *Cf.* Lacy v. Reddy Elec. Co., 2013 WL 3580309, at \*14 (S.D. Ohio July 11, 2013) (finding policy of exclusively rounding time up to scheduled start time facially unlawful). [↑](#footnote-ref-564)
564. WH Op. FLSA2019-9, 2019 WL 2914105 (July 1, 2019). [↑](#footnote-ref-565)
565. *Id*. at \*2 (citing 29 C.F.R. §785.48(b)). [↑](#footnote-ref-566)
566. *Id*. (citing WH Op., 1994 WL 1004879 (Nov. 7, 1994) and Corbin v. Time Warner Entm’t-Advance/Newhouse P’ship, 821 F.3d 1069, 1077–79 (9th Cir. 2016) (upholding policy of rounding to nearest quarter hour, which was “neutral on its face and as applied” to plaintiff-employee over several pay periods)). *See also* 29 C.F.R. §785.48(b). [↑](#footnote-ref-567)
567. 29 C.F.R. §785.48(a). *See, e.g.*,Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 933, 9 WH Cases2d 769 (N.D. Ill. 2003) (finding issues of material fact regarding timekeeping practices where evidence showed that procedures for rounding of time on Kronos time clock and manual editing of time records resulted in discrepancies of thousands of minutes of unpaid time). [↑](#footnote-ref-568)
568. While federal law recognizes the de minimisdoctrine, it has not been recognized under a number of state laws regarding overtime. *See generally* Wage and Hour Laws: A State-by-State Survey(Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-569)
569. 328 U.S. 680 (1946). [↑](#footnote-ref-570)
570. *Id*. at 693. [↑](#footnote-ref-571)
571. *Id*. at 692. [↑](#footnote-ref-572)
572. *Sixth Circuit:* McIntyre v. Joseph E. Seagram & Sons Co., 72 F. Supp. 366, 372 (W.D. Ky. 1947) (holding 10–20 minutes per day to be de minimis). Lasater v. Hercules Powder Co., 73 F. Supp. 264, 271 (E.D. Tenn. 1947) (applying de minimis rule from *Mt. Clemens* to preparatory time of employees).

     *Seventh Circuit:* Kellar v. Summit Seating, Inc., 664 F.3d 169, 176–77, 18 WH Cases2d 888 (7th Cir. 2011) (employee routinely performing same types of pre-shift activities every day made it possible to compute amount of time spent on such activities and therefore doing so was not “administratively difficult,” plus 10–40 minutes of pre-shift work performed each day was not de minimis; defendant could not point to any authority suggesting that more than 10 minutes per day could be deemed de minimis); Frank v. Wilson & Co., 172 F.2d 712, 716 (7th Cir. 1949) (holding five minutes of unpaid time employees spent in “preliminary activities” each day to be de minimis under *Mt. Clemens*); Howard v. Post Foods, LLC, 2022 BL 324134, 2022 WL 4233221 (W.D. Mich. Sept. 14, 2022) (granting summary judgment for defendant where minute or two plaintiffs spent donning safety glasses, earplugs, hairnets and beard nets, and sanitizing shoes, was de minimis and therefore not compensable).

     *Eighth Circuit:* Mitchell v. Stewart Bros. Constr. Co., 184 F. Supp. 886, 892 (D. Neb. 1960) (citing to *Mt. Clemens* as guidance regarding de minimis doctrine); McComb v. C.A. Swanson & Sons, 77 F. Supp. 716, 736–37 (D. Neb. 1948) (finding “approximately four minutes … before work and between five and six minutes at the end of the day’s tasks” to be de minimis).

     *Ninth Circuit:* Cadena v. Customer Connexx LLC, 2023 BL 173840, 2023 WL 3584254, at \*5 (D. Nev. May 22, 2023) (on remand from Ninth Circuit, granting summary judgment to defendants, finding time spent pre- and post-shifts turning on and off the computers was de minimis because “most employees testified it took mere seconds or a couple of minutes to turn the computer on and off,” it would be administratively difficult to measure the time across all affected employees for each log in and log out, and employees were able to seek adjustments where such activities took an inordinate amount of time); Tully v. Joshua Hendy Corp., 79 F. Supp. 709, 714 (S.D. Cal. 1948) (holding “occasional time spent for employer’s purposes during [30-minute] lunch period” de minimis).

     *But see* Addison v. Hurton Stevedoring Corp., 204 F.2d 88, 95 (2d Cir. 1953) (reversing district court’s determination that de minimis doctrine precluded recovery of less than $1.00 per week). [↑](#footnote-ref-573)
573. See Chapter 16, Litigation Issues, §VIII.D [Burden of Proof; Proving Exemptions and Other Defenses]. [↑](#footnote-ref-574)
574. 29 C.F.R. §785.47 (citations omitted). [↑](#footnote-ref-575)
575. 571 U.S. 220, 21 WH Cases2d 1477 (2014). [↑](#footnote-ref-576)
576. Sandifer v. United States Steel Corp., 678 F.3d 590, 593 (7th Cir. 2012). [↑](#footnote-ref-577)
577. *Sandifer*, 571 U.S. at 234. [↑](#footnote-ref-578)
578. *Id.* [↑](#footnote-ref-579)
579. *Id.* at 235. [↑](#footnote-ref-580)
580. *Id.* [↑](#footnote-ref-581)
581. 738 F.2d 1057, 26 WH Cases 1391 (9th Cir. 1984). [↑](#footnote-ref-582)
582. *Second Circuit*: Reich v. New York City Transit Auth*.*, 45 F.3d 646, 652, 2 WH Cases2d 833 (2d Cir. 1995).

     *Third Circuit*: De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007).

     *Fourth Circuit:* Perez v. Mountaire Farms, Inc., 650 F.3d350, 373 (4th Cir. 2011).

     *Sixth Circuit*: Brock v. City of Cincinnati, 236 F.3d 793, 6 WH Cases2d 1197 (6th Cir. 2001).

     *Seventh Circuit*: Kellar v. Summit Seating, Inc., 664 F.3d 169, 176, 18 WH Cases2d 888 (7th Cir. 2011); Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 927–28, 9 WH Cases2d 769 (N.D. Ill. 2003).

     *Ninth Circuit:* Corbinv. Time Warner Entm’t, 821 F.3d 1069 (9th Cir. 2016) (affirming summary judgment for defendant after analyzing call center plaintiffs’ off-the-clock claims using three *Lindow* factors to determine whether uncompensated work of one minute was de minimis).

     *Tenth Circuit*: Reich v. Monfort, Inc., 144 F.3d 1329, 1333–34, 4 WH Cases2d 1106 (10th Cir. 1998).

     *Eleventh Circuit*: Chao v. Tyson Foods, 568 F. Supp. 2d 1300, 1317 (N.D. Ala. 2008).

     *D*.*C*. *Circuit:* Lesane v. Winter, 866 F. Supp. 2d 1, 7–8 (D.D.C. 2011) (adopting three-part test and noting that Office of Personnel Management’s rule [5 C.F.R. §551.412(a)(1)] for federal civilian employees that time under 10 minutes is de minimis may not be faithful to three-part test).

     *Federal Circuit*: Bobo v. United States, 136 F.3d 1465, 1468 (Fed. Cir. 1998). [↑](#footnote-ref-583)
583. *Lindow*, 738 F.2d at 1063. *See* Boone v. Amazon.com Servs., LLC, 562 F. Supp. 3d 1103, 1121–22 (E.D. Cal. 2022) (discussing *Lindow*). [↑](#footnote-ref-584)
584. *Lindow*, 738 F.2d at 1062 (citing cases finding approximately 10 minutes de minimis). [↑](#footnote-ref-585)
585. *See*

     *Seventh Circuit:* Jones v. C & D Techs., Inc., 8 F. Supp. 3d 1054, 1065 (S.D. Ind. 2014) (determining that even 3.43 minutes was not de minimis because employer did not present any evidence that recording time would be administratively difficult).

     *Eighth Circuit:* Saunders v. John Morrell & Co., 1992 WL 531674, 1 WH Cases2d 885, 885–86 (N.D. Iowa Oct. 14, 1992) (finding that approximately three minutes per day was not de minimis).

     *Ninth Circuit:* *Lindow*, 738 F.2d at 1062 (stating that determination of compensability based on amount of time must be made with common sense, based on facts; *Boone*, 562 F. Supp. 3d at 1122 (holding that 10 to 15 minutes per day, on average, was not de minimis).

     *Tenth Circuit:* *Monfort*, 144 F.3d at 1334 (finding that 10 minutes of time was not de minimis).

     *But cf*. Hesseltine v. Goodyear Tire & Rubber Co., 391 F. Supp. 2d 509, 519, 10 WH Cases2d 1640 (E.D. Tex. 2005) (citing cases that found 10 minutes de minimis as matter of law and so holding on facts therein); Bull v. United States, 68 Fed. Cl. 212, 10 WH Cases2d 1687 (2005), *aff’d on other grounds*, Bull v. United States, 479 F.3d 1365, 12 WH Cases2d 699 (Fed. Cir. 2007) (finding that off-duty time spent laundering towels was not de minimis and awarding compensation). [↑](#footnote-ref-586)
586. *See*

     *Second Circuit:* Albrecht v. Wackenhut Corp., 379 F. App’x 65, 16 WH Cases2d 928 (2d Cir. 2010) (finding that arming up and down process of security guards that took less than one minute to complete was administratively difficult to record with reliable system for recording such time, was irregular in occurrence, and resulted in small amount of aggregate time so expended, and therefore determining that de minimis doctrine was applicable).

     *Third Circuit:* Brusstar v. Southeastern Pa. Transp. Auth., 1988 WL 85657, 29 WH Cases 152, 155–56 (E.D. Pa. Aug. 17, 1988) (holding that time was not de minimis because employer had no administrative difficulty in recording it).

     *Ninth Circuit:* Lindow v. United States, 738 F.2d 1057, 1063–64, 26 WH Cases 1391 (9th Cir. 1984) (finding that approximately seven to eight minutes spent each day before shift reading log book and exchanging information was de minimis because employer recorded time in 15-minute increments and it would be administratively difficult to track); Dole v. Enduro Plumbing, 1990 WL 252270, 30 WH Cases 196, 201 (C.D. Cal. Oct. 16, 1990) (holding that time spent working at place of business before and after work at job site was not de minimis because construction workers checked in and out at place of business). [↑](#footnote-ref-587)
587. *See*

     *Seventh Circuit:* Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 921 (N.D. Ill. 2003).

     *Ninth Circuit:* *Lindow*, 738 F.2d at 1063.

     *Tenth Circuit:* Peterson v. Nelnet Diversified Sols., 15 F.4th 1033 (10th Cir. 2021) (holding that the few minutes employees regularly spent booting up computers with software that tracks time and is used for administering loans amounted to significant amount of time when aggregated, and therefore compensable and not de minimis); Aguilar v. Management & Training Corp., 948 F.3d 1270, 1283–86 (10th Cir. 2020) (aggregate eight minutes of preliminary and postliminary time is not de minimis); Reich v. Monfort, Inc., 144 F.3d 1329, 1334, 4 WH Cases2d 1106 (10th Cir. 1998).

     *But see* Chao v. Tyson Foods, 568 F. Supp. 2d 1300, 1319 (N.D. Ala. 2008) (ruling that neither number of employees nor length of time covered by complaint has bearing on merits of de minimis defense). [↑](#footnote-ref-588)
588. *See* De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374–75 (3d Cir. 2007); WHD, Advisory Memo. No. 2006-2 (May 31, 2006). *But cf*. Chambers v. Sears Roebuck & Co., 428 F. App’x 400, 417–20 (5th Cir. 2011) (finding that time spent by appliance technicians on various activities, such as uploading assignments on laptop, loading van, pre- and post-trip vehicle inspections, and cleaning van were each de minimis when analyzed as separate and distinct activities, ignoring that activities in aggregate could take up to 30 minutes per day). [↑](#footnote-ref-589)
589. *Second Circuit:* Hernandez v. NJK Contractors, Inc., 2015 WL 1966355 (E.D.N.Y. May 1, 2015) (finding that unpaid working time occurred regularly when activities were conducted daily).

     *Fifth Circuit:* Hodgson v. Katz & Besthoff, #38, Inc., 365 F. Supp. 1193, 1197, 21 WH Cases 551 (W.D. La. 1973) (considering whether work “happened with a fair amount of regularity”).

     *Seventh Circuit:* *Farmington Foods*, 296 F. Supp. 2d at 921 (holding that unpaid working time was de minimis where it was “not a daily occurrence”).

     *Ninth Circuit:* Rutti v. Lojack Corp., Inc., 596 F.3d 1046, 1058–59, 15 WH Cases2d 1569 (9th Cir. 2010) (finding triable issue of fact as to whether time spent on daily, at-home modem transmissions of information on completed work assignments was de minimis). [↑](#footnote-ref-590)
590. 38 F.3d 1123 (10th Cir. 1994). [↑](#footnote-ref-591)
591. *Id*. at 1126. [↑](#footnote-ref-592)
592. 144 F.3d 1329 (10th Cir. 1998). [↑](#footnote-ref-593)
593. 144 F.3d at 1333. [↑](#footnote-ref-594)
594. *Id*. at 1332. [↑](#footnote-ref-595)
595. *Id.* at 1334. [↑](#footnote-ref-596)
596. 339 F.3d 894, 8 WH Cases2d 1601 (9th Cir. 2003). [↑](#footnote-ref-597)
597. 339 F.3d at 903–04. [↑](#footnote-ref-598)
598. 331 F.3d 1, 8 WH Cases2d 1293 (1st Cir. 2003). [↑](#footnote-ref-599)
599. IBP, Inc. v. Alvarez, 546 U.S. 21, 10 WH Cases2d 1825 (2005) (addressing both *IBP* and *Tum* in consolidated fashion). [↑](#footnote-ref-600)
600. On remand, the First Circuit in *Tum* also did not address the de minimis issue. [↑](#footnote-ref-601)
601. WHAM 2006-2 (May 31, 2006). The memorandum “advise[d] staff of the state of the law after the Supreme Court’s decision in *IBP v. Alvarez*, [546 U.S. 21, 10 WH Cases2d 1825 (2005)] (together with *Barber Foods v. Tum*).” *Id*. at 1. [↑](#footnote-ref-602)
602. *Id*. at 3. [↑](#footnote-ref-603)
603. *Id*. at 4. [↑](#footnote-ref-604)
604. 650 F.3d 350 (4th Cir. 2011). [↑](#footnote-ref-605)
605. *Id.* at 373. [↑](#footnote-ref-606)
606. *Id*.at 373–75. [↑](#footnote-ref-607)
607. 2009 WL 2591346 (N.D. Cal. Aug. 21, 2009). [↑](#footnote-ref-608)
608. *Id*. at \*6(citing Ballarisv. Wacker Siltronic Corp., 370 F.3d 901, 912 (9th Cir. 2004)). [↑](#footnote-ref-609)
609. 2011 WL 5242977 (N.D. Cal. Nov. 2, 2011). [↑](#footnote-ref-610)
610. *Id*. at \*15. [↑](#footnote-ref-611)
611. *Id*. [↑](#footnote-ref-612)
612. 738 F.2d 1057 (9th Cir. 1984). [↑](#footnote-ref-613)
613. *Id*. at 1063–64; *see also* Fast v. Applebee’s Int’l, Inc., 502 F. Supp. 2d 996, 12 WH Cases2d 1066 (W.D. Mo. 2007) (granting compensation for other overtime claimed, but finding that two to three minutes spent walking through restaurant prior to clock-in was de minimis, even if work was performed, because of practical difficulty of tracking it and because it was low in aggregate). [↑](#footnote-ref-614)
614. *Lindow*, 738 F.2d at 1064; *see also* Albrecht v. Wackenhut Corp., 2009 WL 3078880, 16 WH Cases2d 912 (W.D.N.Y. Sept. 24, 2009) (finding that arming up and down process of security guards that took less than one minute to complete was administratively difficult to record, was irregular in occurrence, and resulted in small amount of aggregate time, and therefore determining that de minimis doctrine was applicable), *aff’d*, 379 F. App’x 65 (2d Cir. 2010). [↑](#footnote-ref-615)
615. 667 F. Supp. 2d 1151 (C.D. Cal. 2009). [↑](#footnote-ref-616)
616. 339 F.3d 894, 8 WH Cases2d 1601 (9th Cir. 2003), *aff’d*, 546 U.S. 21, 10 WH Cases2d 1825 (2005). [↑](#footnote-ref-617)
617. *Farris*, 667 F. Supp. 2d at 1165. [↑](#footnote-ref-618)
618. *Id*. at 1166. The jury also found that some of the deputies spent 11 minutes donning and doffing equipment and 13 minutes preparing a patrol car, all of which was not de minimis because “10 minutes is the standard threshold for determining whether something is *de minimis*.” *Id*. [↑](#footnote-ref-619)
619. 428 F. App’x 400, 418–21 (5th Cir. 2011). [↑](#footnote-ref-620)
620. *See also* Hesseltine v. Goodyear Tire & Rubber Co., 391 F. Supp. 2d 509, 520, 10 WH Cases2d 1640 (E.D. Tex. 2005) (employees sought compensation for 10–15 minutes taken due to pre- and mandatory person-to-person shift changes because 10 minutes is de minimis as matter of law). [↑](#footnote-ref-621)
621. 45 F.3d 646 (2d Cir. 1995). [↑](#footnote-ref-622)
622. *Id*. at 653; *see also*

     *Second Circuit:* Clarke v. City of N.Y., 347 F. App’x 632 (2d Cir. 2009) (applying *Singh v. City of New York*, 524 F.3d 361, 13 WH Cases2d 865 (2d Cir. 2008), discussed in §III.C [Principles for Determining “Hours Worked”; The Continuous Workday Rule and the Concept of Principal Activities] of this chapter, and ruling that additional time added to commute to carry job-related materials, weighing about 15–20 pounds, was de minimis because transporting bag in car trunk or on train or bus allowed them to use their commuting time as they wished); *Singh*, 524 F.3d at 371–72 (citing dog-care cases in support of conclusion that “substantial administrative difficulty” presented by recording brief time in which carrying briefcases extended commute time of fire alarm inspectors rendered such time de minimis as matter law).

     *D.C. Circuit:* Levering v. District of Columbia, 869 F. Supp. 24, 29–30 (D.D.C. 1994) (finding that dog-care work performed during police handlers’ commute was not significant enough to require compensation under FLSA).

     *Federal Circuit:* Bobo v. United States, 37 Fed. Cl. 690, 3 WH Cases2d 1587 (1997) (finding that dog-care work performed during police handlers’ commute was not significant enough to require compensation under FLSA). [↑](#footnote-ref-623)
623. 1998 WL 240269, 4 WH Cases2d 1149 (D. Kan. Apr. 7, 1998). [↑](#footnote-ref-624)
624. 5 F. Supp. 2d 1161, 4 WH Cases2d 1156 (D. Kan. 1998). [↑](#footnote-ref-625)
625. *See* Stuntz v. Lion Elastomers, LLC, 826 F. App’x 391, 400–402 (5th Cir. 2020) (holding 10 to 15 minutes relating to “early relief” pre-shift activities during 12-hours shifts was a small fraction of workday and therefore de minimis). [↑](#footnote-ref-626)
626. Aiken v. City of Memphis, 190 F.3d 753, 759, 5 WH Cases2d 961 (6th Cir. 1999). [↑](#footnote-ref-627)
627. Hill v. United States, 751 F.2d 810, 815 (6th Cir. 1984). [↑](#footnote-ref-628)
628. Barvinchak v. Indiana Reg’l Med. Ctr., 2007 WL 2903911, at \*16–17 (W.D. Pa. Sept. 28, 2007). [↑](#footnote-ref-629)
629. 236 F.3d 793 (6th Cir. 2001). [↑](#footnote-ref-630)
630. *Id*. at 804–05. [↑](#footnote-ref-631)
631. *Id*. [↑](#footnote-ref-632)
632. 899 F.2d 1407, 29 WH Cases 1265 (5th Cir. 1990). [↑](#footnote-ref-633)
633. 899 F.2d at 1414; *see also* Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 869 (W.D. Wis. 2007) (holding that because defendant failed to submit any evidence of increased difficulty involved in compensating plaintiff employees for donning and doffing of personal protective equipment, court could not conclude that activities were de minimis as matter of law). [↑](#footnote-ref-634)
634. 181 F. App’x 829, 11 WH Cases2d 848 (11th Cir. 2006). [↑](#footnote-ref-635)
635. 181 F. App’x at 838–39. *See also*

     *Second Circuit:* Hernandez v. NJK Contractors, Inc., 2015 BL 127186, 2015 WL 1966355 (E.D.N.Y. May 1, 2015) (finding that time loading and unloading tools and supplies lasting 30 minutes twice per day, daily, was not de minimis); Landaeta v. New York & Presbyterian Hosp., Inc., 2014 BL 58493, 2014 WL 836991, at \*7 (S.D.N.Y. Mar. 4, 2014) (denying motion for summary judgment on de minimis defense because plaintiffs performed between 20–45 minutes of unpaid work every day and such time could have been recorded easily).

     *Fifth Circuit:* VonFriewalde v. Boeing Aerospace Operations, Inc., 339 F. App’x 448 (5th Cir. 2009) (ruling that following activities, if involving more than de minimis amount of time, were compensable as matter of law: performing substantive tasks on work computers such as checking work-related e-mails and conducting research pertinent to job assignments; checking specialized tools in and out of tool crib; preparing tool crib prior to shift; and putting away tools and cleaning up workstations at end of shift); Beans v. AT&T Servs., Inc., 2022 BL 173790, 2022 WL 1590475 (N.D. Tex. Apr. 8, 2022) (recommending summary judgment finding hours worked that were certain and definite and could be precisely recorded are not de minimis), *adopted sub nom.* 2022 WL 1592832 (N.D. Tex. May 19, 2022).

     *Seventh Circuit:* Koch v. Jerry W. Bailey Trucking Inc., 482 F. Supp. 3d 784 (N.D. Ind. 2020) (finding required 15 minutes pre- and post-shift for drivers to inspect vehicles, complete records, and other related activities were significant both on a daily and aggregate basis and therefore not de minimis); Hiner v. Penn-Harris-Madison Sch. Corp., 256 F. Supp. 2d 854, 861 (N.D. Ind. 2003) (time spent by school bus drivers inspecting their buses beyond 30 minutes of pay already required under CBA was not de minimis as matter of law, because it was time regularly spent and documented by parties); Gonzalez v. Farmington Foods, 296 F. Supp. 2d 912, 933 (N.D. Ill. 2003).

     *Eighth Circuit:* Saunders v. John Morrell & Co., 1992 BL 185, 1992 WL 531674, 1 WH Cases2d 885 (N.D. Iowa Oct. 14, 1992) (time that meatpacking plant employees spent cleaning safety equipment at end of each shift for average of three minutes was not de minimis because activity was regularly performed and was not so uncertain that it could not be tracked).

     *Ninth Circuit:* Boone v. Amazon.com Servs., LLC, 562 F. Supp. 3d 1102, 1121–22 (E.D. Cal. 2022) (holding time spent undergoing coronavirus screening was regularly performed, feasible to track, and significant in isolation or the aggregate and thereby not de minimis); Daprizio v. Harrah’s Las Vegas, Inc., 2010 BL 190694,2010 WL 3259920, 16 WH Cases2d 1531 (D. Nev. Aug. 17, 2010) (finding that daily 10–15 minute pre-shift meeting for casino dealers was not de minimis); Farris v. County of Riverside, 667 F. Supp. 2d 1151 (C.D. Cal. 2009) (finding, by jury, that 11 minutes spent donning and doffing equipment and 13 minutes spent preparing patrol car was not de minimis).

     *Tenth Circuit:* Peterson v. Nelnet Diversified Sols., LLC, 15 F.4th 1033 (10th Cir. 2021) (time spent booting up computer that takes one to two minutes not de minimis where it is regular daily activity and not administratively difficult to record); Brubach v. City of Albuquerque, 893 F. Supp. 2d 1216, 1235, 19 WH Cases2d 1614 (D.N.M. 2012) (finding that mandatory five-minute pre-shift briefing session was not de minimis because it was part of “fixed or regular working time”).

     *Eleventh Circuit:* Chao v. Tyson Foods, 568 F. Supp. 2d 1300, 1318–21 (N.D. Ala. 2008); Davis v. Charoen Pokphand (USA), Inc., 303 F. Supp. 2d 1272, 9 WH Cases2d 813 (M.D. Ala. 2004).

     *Cf.* De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374–75 (3d Cir. 2007)(remanding de minimis issue where jury had been instructed to consider only whether donning/doffing activities were de minimis and not whether that time, when aggregated with post-donning/pre-doffing walking time, was de minimis).

     Note that in *Chao v. Tyson Foods*, the court rejected the argument that the de minimis doctrine was inapplicable when considering the aggregate time spent by multiple workers over the time period covered by the complaint, but nonetheless found material issues of fact as to whether *each* employee spent substantial time *per day* on donning, doffing, and cleaning activities. 568 F. Supp. 2d at 1319–20. [↑](#footnote-ref-636)
636. 15 F.4th 1033, 1042–49 (10th Cir. 2021). [↑](#footnote-ref-637)
637. *Id.* at 1049. [↑](#footnote-ref-638)
638. 274 F.3d 706, 7 WH Cases2d 906 (2d Cir. 2001). [↑](#footnote-ref-639)
639. 274 F.3d at 719; *see also* Rutti v. Lojack Corp., Inc*.*, 596 F.3d 1046, 1057–58, 15 WH Cases2d 1569 (9th Cir. 2010)(vacating summary judgment and finding triable issue of fact as to whether time spent on daily, at-home modem transmissions of information regarding completed work assignments was de minimis). [↑](#footnote-ref-640)
640. 664 F.3d 169 (7th Cir. 2011). [↑](#footnote-ref-641)
641. *Id.* at 176–77. [↑](#footnote-ref-642)
642. 502 F. Supp. 2d 996, 12 WH Cases2d 1066 (W.D. Mo. 2007). [↑](#footnote-ref-643)
643. 502 F. Supp. 2d at 1006. *See also* Brubach v. City of Albuquerque, 893 F. Supp. 2d 1216, 19 WH Cases2d 1614 (D.N.M. 2012)(concluding as matter of law that mandatory five-minute pre-shift briefing period for security officers was not subject to de minimisexception). [↑](#footnote-ref-644)
644. *See*

     *Second Circuit:* Hernandez v. NJK Contractors, Inc., 2015 WL 1966355 (E.D.N.Y. May 1, 2015) (finding that time loading and unloading tools and supplies lasting 30 minutes twice per day, daily, was not de minimis); Landaeta v. New York & Presbyterian Hosp., Inc., 2014 WL 836991, at \*7 (S.D.N.Y. Mar. 4, 2014) (denying motion for summary judgment on de minimis defense because plaintiffs performed between 20–45 minutes of unpaid work every day and such time could have been recorded easily).

     *Fifth Circuit:* VonFriewalde v. Boeing Aerospace Operations, Inc., 339 F. App’x 448 (5th Cir. 2009) (ruling that following activities, if involving more than de minimis amount of time, were compensable as matter of flaw: performing substantive tasks on work computers such as checking work-related e-mails and conducting research pertinent to job assignments; checking specialized tools in and out of the tool crib; preparing tool crib prior to shift and putting away tools; and cleaning up workstations at end of shift).

     *Seventh Circuit:* Hiner v. Penn-Harris-Madison Sch. Corp., 256 F. Supp. 2d 854, 861 (N.D. Ind. 2003) (time spent by school bus drivers inspecting their buses beyond 30 minutes of pay already required under the CBA was not de minimis as matter of law, because it was time regularly spent and documented by parties); Gonzalez v. Farmington Foods, 296 F. Supp. 2d 912, 933 (N.D. Ill. 2003).

     *Eighth Circuit*: Saunders v. John Morrell & Co.,1992 WL 531674, 1 WH Cases2d 885 (N.D. Iowa Oct. 14, 1992) (time that meatpacking plant employees spent cleaning safety equipment at end of each shift for average of three minutes was not de minimis because activity was performed regularly and was not so uncertain that it could not be tracked).

     *Ninth Circuit:* Daprizio v. Harrah’s Las Vegas, Inc.,2010 WL 3259920, 16 WH Cases2d 1531 (D. Nev. Aug. 17, 2010) (finding that daily 10–15 minute pre-shift meeting for casino dealers was not de minimis); Farris v. County of Riverside, 667 F. Supp. 2d 1151 (C.D. Cal. 2009) (finding, by jury, that 11 minutes spent donning and doffing equipment and 13 minutes spent preparing patrol car was not de minimis).

     *Tenth Circuit:* Aguilar v. Management & Training Corp., 948 F.3d 1270, 1283–86 (10th Cir. 2020) ((time spent by security guards returning keys and equipment after shift was regularly performed and aggregated to a substantial sum, and therefore was not de minimis); *Brubach*, 893 F. Supp. 2d at 1235 (finding that mandatory five-minute pre-shift briefing session was not de minimis because it was part of “fixed or regular working time”).

     *Eleventh Circuit:* Chao v. Tyson Foods, 568 F. Supp. 2d 1300, 1318–21 (N.D. Ala. 2008); Davis v. Charoen Pokphand (USA), Inc., 303 F. Supp. 2d 1272, 9 WH Cases2d 813 (M.D. Ala. 2004).

     *See also* De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374–75 (3d Cir. 2007)(remanding de minimis issue where jury had been instructed to consider only whether donning/doffing activities were de minimis, and not whether that time when aggregated with post-donning/pre-doffing walking time was de minimis).

     Note that in *Chao v. Tyson Foods*, the court rejected the argument that the de minimis doctrine was inapplicable when considering the aggregate time spent by multiple workers over the time period covered by the complaint, but nonetheless found material issues of fact as to whether *each* employee spent substantial time *per day* on donning, doffing, and cleaning activities. 568 F. Supp. 2d at 1319–20. [↑](#footnote-ref-645)