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such principal activity or activities. For purposes of this subsection, the 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.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an 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.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

[12 FR 7655, Nov. 18, 1947, as amended at 76 FR 18860, Apr. 5, 2011]

### § 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were:

(1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable

[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the Act); and, if his Act or omission is willful, subjects him to criminal penalties (section 16(a) of the Act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the Act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek 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'' (*Tennessee Coal Iron & R.R. Co.* v. *Muscoda Local*, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (*Armour & Co.* v. *Wantock*, 323 U.S. 126, 132–134; *Skidmore* v. *Swift & Co.*, 323, U.S. 134, 136–137).

worktime, independently of contract, custom, or pratice;[19] and

(2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute ''walking, riding, or traveling'' of the kind described in the statute, or other activities ''preliminary'' or ''postliminary'' to the ''principal activity or activities'' which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's ''principal activities'' in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that ''the employer shall not be so relieved'' if such activities are so compensable;[21] it does not matter in such a situation that they are so-called ''portal-to-portal'' activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;[23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, ''preliminary'' or ''postliminary'' activities which take place outside the workday ''before the morning whistle'' or ''after the evening whistle'' are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46–49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292–2300.

[20] Senate Report, pp. 46–49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269–4270.

[21] Section 4(b) of the Act (quoted in §790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181–2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297–2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also §790.12.