changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ''preliminary'' or ''postliminary'' activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

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

§ 790.9 "Compensable * * * by an express provision of a written or nonwritten contract."

(a) Where an employee engages in a ''preliminary'' or ''postliminary'' activity of the kind described in section 4(a) of the Portal Act and this activity is ''compensable * * * by an express provision of a written or nonwritten contract'' applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,[68] and does not relieve the employer of any obligation he would otherwise have under that Act to include time spent in such activity in computing hours worked.[69]

(b) The word ''compensable,'' is used in subsections (b), (c), and (d) of section 4 without qualification.[70] It is apparent from these provisions that ''compensable'' as used in the statute, means compensable in any amount.[71]

(c) The phrase ''compensable by an express provision of a written or nonwritten contract'' in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.[72] The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words ''compensable by an express provision'' indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not ''compensable by * * * a written or nonwritten contract'' within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one ''between such employee,[72] his agent, or collective-bargaining representative and his employer.''[73] Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by ''contract'' of an activity, for purposes of section 4.

§ 790.10 "Compensable * * * by a custom or practice."

(a) A ''preliminary'' or ''postliminary'' activity of the type described in section 4(a) of the Portal Act may be ''compensable'' within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,[74] and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305–2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296–2297, 2298.

[68] See § 790.4.

[69] See §§ 790.5 and 790.7.

[70] The word is also so used throughout section 2 of the Act which relates to past claims. See §§ 790.28–790.25.

[71] Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[72] See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181–2182.

[73] The terms ''employee'' and ''employer'' have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

[74] See § 790.4.