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Tenth Circuit Confirms That Time Devoted To Booting Up Work Computer and Launching Software Is Compensable Under the Fair Labor Standards Act

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The Tenth Circuit ruled that time devoted to booting up a work computer and launching certain software before clocking in is compensable under the Fair Labor Standards Act when these activities are integral and indispensable to an employee's principal work activities.

In a holding with potentially wide applicability, the Tenth Circuit ruled that time devoted to booting up a work computer and launching certain software before clocking in is compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. §§201-19 (FLSA), when these activities are integral and indispensable to an employee's principal work activities. *Peterson v. Nelnet Diversified Sols.*, — F.4th —, 2021 U.S. App. LEXIS 30273 (10th Cir. Oct. 8, 2021). The circuit court also held that, even when employees' individual and total aggregate claims are relatively small, an employer is not excused from providing compensation "[in] the absence of any significant practical administrative burden in estimating the amount of time involved." Id. at *36.

The Underlying FLSA Collective Action

Nelnet Diversified Solutions is a student loan company that employs call-center representatives (employees) who "service student loans and interact with debtors over the phone and through email." Id. at *3. Nelnet pays these employees "once they clock into the timekeeping system at their individual workstations." Id. But the employees must perform several preshift tasks before they can clock in. Id. Specifically, they must first wake up their work computers, insert a security badge, and enter their credentials. Id. The computer then automatically launches a software program, which in turn loads the timekeeping system. Id. Once the software is loaded, they have access to the timekeeping system and may clock into the system. Id.

A Nelnet employee filed an FLSA collective action—to which over 350

individual employees opted in—alleging that Nelnet failed to pay its call-center employees for time devoted to booting up their work computers and launching certain software before they clock in. Id. at *4. The parties filed cross-motions for summary judgment on whether these preshift activities were compensable work and, if so, whether the time the employees devoted to these activities was de minimis such that Nelnet need not compensate them for it. Id.

The district court resolved the first issue in favor of the employees, finding that the preshift activities were compensable. Id. The court reasoned that because the employees could not "dispense" with booting up their computers and launching software if they were to perform their principal work activities of servicing student loans and communicating with borrowers, the time spent preparing their computers was integral and indispensable to their work activities. Id. at *13-*14. But it concluded that the time required to do so was de minimis and therefore granted summary judgment to Nelnet. Id. at *4-*5. The court also granted Nelnet's motion to recover certain prevailing-party costs under F.R.C.P. 54(d). Id. at *5. The employees appealed, arguing that the time at issue is both compensable and not de minimis and that, even assuming Nelnet was entitled to summary judgment, the district court erred in awarding costs. Id.

Compensability and the 'Integral and Indispensable' Test

The FLSA requires employers to pay employees for their work, but it does not clearly define what kinds of activities qualify as compensable work. Id. at *6. The U.S. Supreme Court initially defined "work" broadly "as '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.'" Id. (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944)). But Congress narrowed this definition in the Portal-to-Portal Act of 1947, 29 U.S.C. §§251-62 (Act), which excludes any time devoted to "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"—in other words, commute time— from the definition of compensable work. Id. at *6-*7 (quoting 29 U.S.C. §254(a)(1)). The Act also excludes preliminary and postliminary activities, providing that the time devoted to "activities which are preliminary to or postliminary to [the employee's] principal activity or activities" is not compensable. Id. at *7 (quoting 29 U.S.C. §254(a)(2)).

The Act thus requires identifying both an employee's principal activities and activities that are an "integral and indispensable part of the principal activities." Id. (citing *Integrity Staffing Sols. v. Busk*, 574 U.S. 27, 33 (2014) (quoting *IBP v. Alvarez*, 546 U.S. 21, 29-30, (2005))). An activity is integral and indispensable if it is an intrinsic element of the principal activities and one with which the employee cannot dispense if the employee is to perform the activities. Id.

The Circuit Court Affirms the Compensability Decision

Nelnet urged the Tenth Circuit to affirm summary judgment on the basis that the employees' activities of booting up their computers and launching

software was not compensable work. Id. at *6, *9. In support, Nelnet relied on *Reich v. IBP*, 38 F.3d 1123 (10th Cir. 1994), in which the Tenth Circuit held that time devoted to donning a hard hat, safety glasses, earplugs, and safety shoes was not compensable because it did not satisfy the *Tennessee Coal* definition of work. Id. at *9. But in light of intervening Supreme Court case law decided after *IBP*, including *Busk* and *Alvarez*, the circuit court declined to apply the *Tennessee Coal* definition of "work," and it instead clarified that "the integral-and-indispensable inquiry [i]s the sole test governing compensability." Id. at *11.

Applying the integral-and-indispensable test, Tenth Circuit agreed with the district court that Nelnet's call center employees could not "dispense" with booting up their computers or launching software because their principal work activities—servicing student loans by communicating with debtors over the phone and by email—require access to email and the debtor information and payment history stored on their computers. Id. at *14-*15. The circuit court further rejected Nelnet's arguments comparing the employees' preshift activities to "waiting in line to punch a time clock." Id. *14-*16. It reasoned that "turning on a computer, entering passwords, and launching software is not analogous to waiting in line to punch a clock, particularly when—very much unlike a time clock—the computer itself is an integral tool for the work the individual is employed to perform." Id. at *16. The court therefore concluded that the employees' preshift activities of booting up their computers and launching software was compensable under the FLSA. Id. at *18.

The Circuit Court Rules the Time Was Not 'De Minimis'

Having affirmed the district court's conclusion that the employees' time spent booting up their computers and launching software was compensable, the Tenth Circuit next addressed whether Nelnet was excused from paying compensation under the de minimis test. Id. Courts balance three factors in determining whether work time is de minimis: (1) the practical administrative difficulty of recording the time; (2) the aggregate size of the claim; and (3) whether the employee performed the work on a regular basis. Id. at *19. Before performing this analysis, courts must first estimate the amount of time at issue. Id. There is no precise amount of time for which compensation may be denied as de minimis; instead, the employer bears the burden to show that the de minimis doctrine applies. Id.

Nelnet's expert calculated the median time from badge swipe to clock-in as a range from 1.6 minutes to 2.27 minutes, depending on the Nelnet location. Id. at *20. On appeal, the employees argued that the actual time ranged from four to six minutes. Id. But the Tenth Circuit agreed with Nelnet that the employees waived any challenge to Nelnet's expert's estimates because they neither obtained their own expert nor disputed any of Nelnet's time estimates. Id. Indeed, for summary judgment purposes, they *accepted* the expert's calculations. Id. at *20-*21. The circuit court thus declined to consider the challenge to Nelnet's time estimates, which was raised for the first time on appeal, with no plain-error argument. Id. at *21.

But, because Nelnet's expert was able to estimate the time at issue, the Tenth Circuit opined that the first de minimis factor weighed against Nelnet. Id. at *24-*28. In other words, “Nelnet failed to carry its burden of showing why it would be administratively burdensome to estimate the amount of time at issue[.]” Id. at *28.

As to the second factor, aggregation, the circuit court reviewed the district court's finding that the employees' total aggregate claim was $31,585, or about $125 per employee per year. Id. at *30-*33. The circuit court was “unprepared to dismiss” $125 per year individual claims as de minimis, particularly for low-wage workers, but it nonetheless concluded that the second factor did not weigh in favor of either party. Id. at *33.

Lastly, because every employee performed the same preshift activities before every shift for approximately the same amount of time (depending on the location), the Tenth Circuit concluded the third factor weighed strongly in the employees' favor and against finding the time at issue to be de minimis. Id. at *35.

“Balancing these three factors, [the Tenth Circuit] ultimately conclude[d] that the 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.” Id. at *36. The circuit court thus reversed the district court's order granting Nelnet summary judgment. Id. And because Nelnet was no longer the prevailing party, it reversed the award of costs. Id. at *37.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Steve leads the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Tina helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.

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