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APPEALS COURT UPHOLDS \$22M VERDICT AND REMINDS EMPLOYERS TO PAY WORKERS FOR “ACTUAL” TIME WORKING

Insights
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A federal appeals court held last Fall that employers must pay hourly employees for the actual time they spend completing activities – not just the “reasonable time” it should take to finish assigned tasks – upholding a \$22M jury verdict against a Pennsylvania employer. In addition, the 3rd Circuit Court of Appeals placed the burden on employers to prove that any unpaid working time falls within the trivial “*de minimis*” exception. What can employers learn from the decision in the *Dept. of Labor v. East Penn Manufacturing* case?

Employer Takes Strict Position on Paying Workers for Tasks

The DOL sued East Penn Manufacturing Company, which makes and recycles lead-acid batteries, under the Fair Labor Standards Act (FLSA) for allegedly failing to pay employees for all time spent changing and showering before and after shifts.

- Because their work involves hazardous materials, workers need to change into protective uniforms and don special gear before their shifts. They also need to take a shower when their shift was complete.
- East Penn didn’t record how much time workers actually spent changing and showering for the purposes of paying them. Instead, the company paid employees by granting them a five-minute grace period at the start of their shift, and a 10-minute post-shift grace period.

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- A government expert testified at trial, however, that the average worker spent more than 15 minutes at the beginning of the shift and 11 minutes after their shift to complete these tasks – both more than they were actually paid for.

After a trial, a jury found that East Penn shorted the pay of over 11,000 workers and awarded a verdict of roughly \$22.25 million in backpay.

East Penn filed an appeal with the 3rd Circuit Court of Appeals.

- Relying on a Supreme Court decision from the 1940s, East Penn argued that it was only required to pay employees for what it believed to be a *reasonable* amount of time, not the *actual* time they spent working.
- East Penn argued that being forced to pay workers for the actual time they spend completing tasks only rewards employees for dragging their feet or tending to personal matters during the workday.

Court Says Employer Needs to Pay Workers for Actual Time Spent Working

The 3rd Circuit Court of Appeals rejected East Penn's arguments, holding that the company was required to pay employees for the *actual* time they spent changing and showering. The court explained that the Supreme Court's decision from the 1940s that allowed employers to only pay for a *reasonable* amount of time addressed employees who were walking in a roundabout manner and "loafing" in between job activities that were not clearly work.

In contrast, East Penn admitted that the changing and showering activities at their facility constituted work, since employees interact with lead and other hazards on the job and thus needed to protect themselves before and after work. The appeals court said that East Penn could discipline or terminate employees who lollygag on the job, but not withhold their compensation.

Court Places Burden on Employer to Prove "Trivial" Defense

East Penn had one final argument to try to escape liability. It pointed to a court-created doctrine that excuses employers if workers spend a few seconds or minutes performing work

before or after their scheduled working hours. But the 3rd Circuit held that East Penn bore the burden of proving that any such unpaid time was actually *de minimis* or trivial, and that it failed to do so in this case. The court recognized that the line between “negligible” and “material” time is hazy, but ultimately joined the 7th, 9th, and 10th Circuits in placing the burden of proof on the employer.

The 3rd Circuit noted that, because it is an affirmative defense, employers must plead the *de minimis* exception in their original Answer. The court further cautioned against applying the exception when unpaid time is significant when aggregated over time. The 3rd Circuit explained that courts have awarded relief for claims that, when aggregated, amounted to a substantial claim, even if the amounts might be minimal on a daily basis.

What Does This Case Mean For Employers?

The 3rd Circuit did not create a bright-line rule for determining whether an activity does or does not constitute work. While the court did not prohibit the use of reasonable time, employers should carefully examine their policies, procedures, and pay practices, including whether they currently pay hourly employees reasonable time, to ensure that the amount paid equals or exceeds the actual time spent.

- Employers should also track and record all hours worked by employees to avoid potential recordkeeping violations under the Act.
- In wage and hour litigation, employers should consider including the *de minimis* exception in their Answer to preserve the defense.
- If the exception is not readily apparent at the outset of the case, employers should consider amending their Answer to add the defense.
- Since employers bear the burden of proving that unpaid time is *de minimis* in some jurisdictions, they should think carefully, throughout the duration of the case, about the evidence necessary to establish the defense.

The Bottom Line

We will continue to monitor developments from the courts and the Department of Labor’s Wage and Hour Division, so

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