

MANUFACTURER STUCK WITH \$22M BACKPAY VERDICT AFTER SCOTUS DECLINES TO WEIGH IN: 6 LESSONS FOR EMPLOYERS

Insights
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A manufacturer will have to pay \$22M in alleged wage and hour violations now that the Supreme Court declined to consider its appeal. Last year, a federal appeals court upheld the sizable jury verdict, finding that the company improperly paid employees for time spent donning special gear and showering after working with hazardous materials. The employer had to pay hourly employees for the *actual time* they spent completing activities, not just the *reasonable time* it should take to finish assigned tasks, according to the 3rd US Circuit Court of Appeals. The manufacturer argued that federal courts are split on the proper legal standard and wanted the Supreme Court to step in to resolve the dispute, but SCOTUS declined to review the case on November 10. As a result, the 3rd Circuit's decision stands, and the employer is liable for the multi-million-dollar award. What are six key lessons employers can learn from this eye-popping verdict?

Employer Paid Set Rate for Prep Time

The US Department of Labor (DOL) sued Pennsylvania-based East Penn Manufacturing Company – which makes and recycles lead-acid batteries – under the Fair Labor Standards Act (FLSA). The company allegedly failed to pay employees for all time spent changing and showering before and after shifts. Here are the relevant facts:

- Workers need to change into protective uniforms and don special gear before their shifts since their work involves hazardous materials. They also need to take a shower when their shift is over.

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- East Penn didn't record how much time workers actually spent changing and showering for 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.
- 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 – 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 roughly \$22.25 million in backpay.

East Penn filed an appeal with the 3rd Circuit, making the following arguments:

- 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, in accordance with a decades-old Supreme Court decision.
- 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.

Reasonable Time vs. Actual Time

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 record established that employees interact with lead and other hazards on the job and needed to protect themselves before and after shifts. East Penn acknowledged that the changing and showering activities at their facility constituted work. So, the issue becomes how much time.

In determining the applicable standard, the appeals court rejected East Penn's position that the Supreme Court's precedent allowed employers to pay only for a *reasonable* amount of time, so workers weren't paid for just walking around and "loafing" between job activities. Instead, the appeals court said East Penn could discipline or terminate

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employees for slacking on the job but not withhold their compensation.

The 3rd Circuit recognized the "*de minimis*" exception for trivial amounts of time engaged in work related activities, but East Penn failed to meet its burden to satisfy *the de minimis* exception. The appeals court noted 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.

6 Lessons for Employers

1. Remember That Facts Matter: The 3rd Circuit did not create a bright-line rule for determining whether an activity does or does not constitute "work."

2. Carefully Review Policies: 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.

3. Evaluate Pre- and Post-Shift Activities: Review all required tasks employees perform before and after their shifts to ensure they're properly paid.

4. Track and Record All Hours Worked: This can help you avoid potential recordkeeping violations under the FLSA and state wage and hour laws – and defend lawsuits if filed.

5. Train Frontline Supervisors on Wage and Hour Rules: Knowledgeable supervisors can often spot and correct potential issues before they become a bigger problem.

6. Work with Counsel on Your Litigation Strategy: In wage and hour litigation, employers should consider including the *de minimis* exception in their answer to the complaint to preserve 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.

Conclusion

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

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