Can I Get Paid for That?: The Compensability of Commuting Time


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I. INTRODUCTION

Carla wakes up in the morning, makes herself a cup of coffee, and then boots up her computer to check her work email. Her boss requires her to check her email before coming to work in order to get her daily assignments. After checking her email, Carla maps out her stops as an insurance adjuster; it takes her about twenty minutes to

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do this. Carla then finishes getting ready for work and makes the thirty minute commute to the central office where she is paid hourly. When does Carla’s workday begin? Should she be paid for commuting time because she checked her email? Should she get paid for the time it takes her to get ready? It might seem logical that Carla’s workday should not begin until she reaches the office, but this apparent answer has been put into question after the United States Supreme Court decision in *IBP, Inc. v. Alvarez*.¹

In *Alvarez*, the Court expanded the compensable workday by holding that any preliminary activity which is “integral and indispensable” to the principal activity commences the compensable workday and is not exempt under the Portal-to-Portal Act.² The expansion of the workday leads to the question of whether employers outside the context of *Alvarez* must begin paying their employees for time spent commuting to and from work when an employee undertakes an “integral and indispensable” preliminary activity outside the workplace, or performs an “integral and indispensable” postliminary activity upon reaching home.³ In other words, in situations like the above example, Carla’s act of checking her email could potentially be considered an activity which begins the workday, which means that all activities conducted after that point are compensable. Such an extension seems to undermine the Congressional purpose of the Portal-to-Portal Act and could effectively re-create the excessively litigious climate between employer and employee that the Act was meant to contain.⁴

Part II of this Note examines the history of the Portal-to-Portal Act and discusses the contradictory holdings of the First and Ninth Circuit Courts of Appeals which led to the Supreme Court’s grant of certiorari on the issue. Part II will also address the Supreme Court’s opinion in *IBP, Inc. v. Alvarez*. Part III explains the repercussions of the *Alvarez* decision in areas outside of donning and doffing, focusing on the issue of whether and when commuting time should be compensable. In addition, Part III also considers the possibility of federal legislation to clarify the area of commuting time under the Portal-to-Portal Act. Finally, this section gives suggestions as to what employers should presently do in order to combat unwanted liability after *Alvarez*.

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² *Id.* at 37; Portal-to-Portal Act, 29 U.S.C. §§ 251–62 (2000). It could be argued that Carla’s act of checking her email was an “integral and indispensable” activity because she was required to do so in order to continue her work day.
⁴ For a complete discussion of the purpose and the background of the Portal-to-Portal Act, see *infra* section II.A.
II. HISTORY AND BACKGROUND

A. History of the Portal-to-Portal Act

The Fair Labor Standards Act of 1938 ("FLSA") implements standards for employment law issues such as minimum wage, overtime, and employment of minors.\(^5\) By putting these standards into practice, the hope was to guarantee a certain quality of life for employees.\(^6\) The primary purpose of the FLSA "was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."\(^7\) The FLSA holds employers liable for failing to meet the standards set out by the Act.\(^8\) The Portal-to-Portal Act restricts the definition of what constitutes the compensable work day, thereby limiting the liability of employers.\(^9\) Indeed, Congress passed the Portal-to-Portal Act in response to the Supreme Court's 1946 decision in Anderson v. Mt. Clemens Pottery Co.\(^10\)

In Anderson, the Supreme Court greatly expanded the compensable work day under the FLSA. In that case, employees at a pottery plant brought an action against their employer for overtime compensation for time spent walking to workstations after they clocked in, putting on protective clothing, and preparing their machines for work.\(^11\) The employees believed the method of computing compensable time "did not accurately reflect all the time actually worked and that they were thereby deprived of proper overtime compensation guaranteed them by [the FLSA]."\(^12\) The special master appointed by the district court found that the time in question did not require compensation because the employees failed to show the time was spent working.\(^13\) The Court held that all of the activities in question were compensable, stating; "Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation."\(^14\) The Court reasoned that this result occurred because the employees were under the control of the employer during these times.\(^15\)

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6. Id. § 202 (2000).
9. Id.
11. Id. at 683.
12. Id. at 684.
13. Id. at 684–85.
14. Id. at 690-91.
15. Id. at 691.
ployees' workday therefore included all activities that occurred after they clocked into work.16

As a result of Anderson, thousands of employees flooded the courts with litigation with claims in excess of $5,785,204,606 by January 31, 1947.17 At the time Congress addressed the issue, the largest settlement by an employer was $4,656,000.18 As a response to the mounting liability of employers, Congress began hearings to find a solution.19 Officials of the Navy, Army, and IRS testified that government finances would be greatly affected by the numerous lawsuits.20 Following the hearings, Congress stated that Anderson had expanded the FLSA too far, interfering with "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation."21 Congress' solution was the passage of the Portal-to-Portal Act,22 which states in relevant part:

(a) Activities not compensable. Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) 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, and

(2) activities which are preliminary to or postliminary to said principal activity or activities.23

The purpose of the Portal-to-Portal Act was "to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit

16. Id. at 691-92.
17. See H.R. Rep. No. 71 (1947), reprinted in 1947 U.S.C.C.S. 1029, 1031. From July 1, 1946 (the Anderson decision was released in June) to January 31, 1947, there were 1,913 federal cases filed seeking recovery of wages in light of the Anderson interpretation of the FLSA. The dollar amount listed is the sum of 1,515 of these cases which listed a specific amount sought for recovery. 398 cases did not list a specific amount, so the dollar figure for federal cases would actually be somewhat higher than $5,785,204,606 that was specifically pled. This figure also does not include recoveries sought in similar state cases.
18. Id. at 1032. When taking inflation into account, the size of this award was exceptionally large.
20. Id.
the jurisdiction of the courts." The Act eliminated employer compensational liability for employee activities discussed in *Anderson* such as walking to work stations and preparing for principal activities like donning necessary work gear.

**B. Steiner v. Mitchell**

The Portal-to-Portal Act did not reach the Supreme Court for nearly a decade after its passage. When it did, the Court created an exception to the Portal-to-Portal Act in its 1956 decision, *Steiner v. Mitchell*. *Steiner* dealt with battery plant employees who wore protective clothing and showered after work shifts to protect themselves from exposure to toxic materials. The showering and changing took place at the worksite. Unless the employees underwent these protective measures, lead poisoning could occur from regular contact with the toxic materials. If these precautions were not taken at the worksite, the employees could pass the harmful effects of lead poisoning on to their families. The employees believed that they should be compensated under the FLSA for these protective measures even though they occurred preliminary and postliminary to their principal activities. They argued that since these activities were "integral and indispensable" to their employment, the Portal-to-Portal Act should not apply.

The Court found for the employees and held that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).

The Court examined several factors surrounding the circumstances of employment at the plant, including: "medical and industrial expert testimony as to the effectiveness of plant ventilation, state statutory and insurance requirements to provide clothes-changing and showering facilities, danger to employees' families from contact with work clothes, and testimony that employees were required to take a shower at the close of the workday." It also reasoned that Congress had not

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24. *Id.* § 251 (2000).
27. *Id.* at 248.
28. *Id.*
29. *Id.* at 250.
30. *Id.* at 249.
31. *Id.* (emphasis added).
33. *Id.*
meant to deprive employees of compensation in such instances where the activity in question was “integral and indispensable.” The Court further substantiated its holding with legislative history of a discussion between Senator Cooper and Senator McGrath, which stated that in passing the Act, Congress did not mean to prevent recovery in such situations where the activity was an integral part of the employee’s principal activity.

The exception to the Act was narrowly construed by courts, which limited the exceptions to situations where it was required due to “vital considerations.” It was thought that the exception only applied to situations where the health of the employees was at risk. Other courts viewed the exception more broadly and applied it to circumstances where the employer required such activities before or after the principal activity occurred. These conflicting views led to varying judicial decisions and uncertainty as to the breadth of the Steiner exception.

C. Court of Appeals’ Decisions

The United States Supreme Court did not re-address the Steiner exception for nearly fifty years. It finally tackled the issue after a circuit split occurred between the Court of Appeals for the Ninth Circuit in IBP, Inc. v. Alvarez and the Court of Appeals for the First Circuit in Turn v. Barber Foods, Inc.

1. The Ninth Circuit Court of Appeals: IBP, Inc. v. Alvarez

The Ninth Circuit addressed the Steiner exception in 2003 when meat packing employees brought a suit against their employer for unpaid wages under the FLSA in IBP, Inc. v. Alvarez. At the plant, employees disassembled animal carcasses and cut them into pieces in preparation for sale. Due to the nature of this job, employers re-

34. Id.
35. Steiner, 350 U.S. 247 app. at 256-57.
37. See Aguilar, 36 Fed. Cl. at 566.
39. Compare Barrentine v. Arkansas-Best Freight Sys. Inc, 750 F.2d 47, 50 (8th Cir. 1984) (stating that the Steiner exception should be read liberally when deciding what activities are “integral and indispensable”), with Aguilar, 36 Fed. Cl. at 566 (stating that the exception should be read narrowly to only include situations of vital health interests similar to those discussed in Steiner).
40. 339 F.3d 894 (9th Cir. 2003), aff’d, 546 U.S. 21 (2005).
42. Alvarez, 339 F.3d at 897.
43. Id. at 898.
quired employees to don and doff protective gear before reporting to the factory floor. However, the employer did not compensate employees for the following activities: time spent waiting to don protective clothing, donning protective clothing, walking from the changing rooms to the factory floor, walking back to the changing rooms from the factory floor to take off protective clothing, or time spent doffing the clothing. The employees requested compensation for these times, stating that the activities were "integral and indispensable."

The Ninth Circuit held that "donning and doffing of job-related protective gear" and waiting and walking were compensable because the activities met the "integral and indispensable" exception set forth in Steiner. It came to this conclusion by first finding that the time in question constituted "work" under the FLSA because the activities were done under the control of and as required by the employer. It reasoned that the preliminary and postliminary activities were "necessary to the principal work performed and done for the benefit of the employer" and therefore required compensation. The court went on to differentiate between unique and non-unique protective gear, stating that employees should not be compensated for donning and doffing non-unique gear, such as "hardhats and safety goggles" because the time it took to put on and take off such items was *de minimis* as a matter of law.

The Ninth Circuit effectively expanded the continuous workday rule by holding that "the workday commenced with the performance of a preliminary activity that was 'integral and indispensable' to the work, and . . . any activity occurring thereafter in the scope and course of employment was compensable."

44. *Id.* at 898 n.2. The employees were also required to prepare their slaughtering or processing tools before reporting to the factory floor and "[at the end of every shift employees must clean, restore, and replace their tools and equipment."

45. *Id.* at 899-900.

46. *Id.* at 901.

47. *Id.* at 903-04.


49. *Id.* at 903.

50. *Id.* According to Black's Law Dictionary something is *de minimus* if it is "1. Trifling; minimal. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 464 (8th ed. 2004). The United States Supreme Court did not make mention of the de minimis doctrine within its opinion of *IBP v. Alvarez*. It also made no distinction between unique and non-unique protective gear.

51. *Alvarez*, 339 F.3d at 906.
2. The First Circuit Court of Appeals: Turn v. Barber Foods, Inc.

The First Circuit also addressed the Steiner exception in association with donning and doffing in Turn v. Barber Foods, Inc. The employees in Turn worked at a chicken processing plant. The employers paid the employees beginning when they clocked in at the factory floor. Before reaching the floor, the employer required the employees to put on "lab coats, hairnets, earplugs, and safety glasses." The employees also had the option of wearing "gloves, aprons, and sleeve covers." The employees sued for lost wages for the time spent donning and doffing protective gear, the time spent walking from changing areas to the factory floor, and the waiting time in relationship to donning and doffing.

The First Circuit drew a different distinction between necessary protective gear and unnecessary protective gear. It held that donning and doffing of necessary protective gear was compensable, but the donning and doffing of any non-required gear was not. It referred to the Ninth Circuit's reasoning which stated that donning and doffing of required gear fell under the Steiner exception because it was an "integral and indispensable" activity and done for the "benefit of the employer." It then held that compensating the employees for the time it took to put on and take off non-required gear exceeded the Steiner exception.

The court proceeded to address whether the time spent walking to and from the changing rooms to the factory floor was compensable. The employees argued that walking time was compensable because it occurred during the workday, which they believed started when the first "integral and indispensable" activity occurred. The court was hesitant to adopt such an argument because it did not know how other courts would interpret this holding. It stated such a holding could cause the "absurd" result of employers having to pay employees from the time they donned clothing at home to the time they reached the

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52. 360 F.3d 274 (1st Cir. 2004), rev'd in part, 546 U.S. 21 (2005).
53. Id. at 277.
54. Id.
55. Id. at 278.
56. Id. at 279-80. The First Circuit majority made no reference to the de minimis doctrine. It might be questioned whether any of the employees' time spent donning and doffing would have been compensable if this doctrine had applied since the time spent donning and doffing "coats, hairnets, earplugs, and safety glasses" would seem to be quite minimal. Id. at 277.
57. Id. at 279.
59. Id.
It reasoned that such a broad ruling would run contrary to Congress’s intent in passing the Portal-to-Portal Act and undermine its purpose. It therefore held that time spent walking was not compensable under the FLSA because it was explicitly excluded under the Portal-to-Portal Act. Similarly, the court found that all waiting time was non-compensable because “otherwise an almost endless number of activities that precipitate the employees’ essential tasks would be compensable.” In particular, it held that time waiting to punch the time clock was not compensable because “[t]here [was] no indication that any of the time spent waiting [was] controlled by the employer.”

D. *IBP, Inc. v. Alvarez*

Although the First and Ninth Circuits agreed that time spent donning and doffing protective gear was compensable, the discrepancies in the Circuits’ holdings led to the United States Supreme Court’s unanimous decision addressing the issues of walking and waiting time in *IBP, Inc. v. Alvarez.* The Court reached its conclusions by examining the primary issue of whether time spent walking to and from dressing rooms to the work floor constituted compensable work time under the FLSA, or whether the time was excluded under the Portal-to-Portal Act. The Court also addressed the secondary issue of whether time spent waiting to don and doff clothing was compensable.

The Court began by describing the history of the Portal-to-Portal Act, its effect on the workday, and definitions of terms such as “workday.” The Court did not suggest a change to these defini-

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60. *Id.* at 280-81. The reaction to the possibility of making walking time compensable led to the concern discussed in this note as to whether the logical next step would be to make commuting time compensable. It is important to observe that commuting time could only become compensable if an “integral and indispensable” preliminary or postliminary activity comes before or after the commute.

61. *Id.* Its purpose being to contain the litigious environment created after *Anderson.* See *supra* notes 17–21 and accompanying text.

62. *Id.* at 281.

63. *Id.* at 282.

64. *Id.* at 281-82.


66. *Id.* at 24.

67. *Id.* at 26–29.

68. “[W]orkday’ is generally defined as ‘the period between the commencement and completion on the same workday of an employee’s principal activity or activities.’” *Id.* at 29 (quoting 29 C.F.R. § 790.6(b) (2005)).
Next addressed was the question of whether walking time was compensable. IBP argued that an intermediate category of activities should be formed for tasks, such as walking, which occurred after a preliminary activity: the company believed that this time should not be compensable. The Court refused to create an intermediate category, stating that it was unlikely that Congress intended such a result. It also found that federal regulations on the topic did not convincingly conclude that such time was not compensable. It then distinguished *Alvarez* from *Anderson*, pointing out that in *Anderson* the walking time came before the principal activity, whereas in *Alvarez* the walking came after the principal activity of donning and doffing. The Court stated that their opinion would not make time spent walking from the time clock to where “principal activities” occurred compensable.

For these reasons, the Court held that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under § 4(a) of the Portal-to-Portal Act.” It used *Steiner* as the foundation of its reasoning, stating that the decision held not only that “integral and indispensable activities” were compensable under the FLSA, but also that they were “principal activities.” It then found that walking time was compensable under the continuous workday rule because it occurred after the first principal activity and before the last. In reaching this conclusion, the Court upheld the Ninth Circuit’s opinion, while the First Circuit’s opinion was affirmed in part and reversed in part. The Court did not address what other types of activities would now be considered compensable or whether its holding was limited to factory decisions as illustrated in *Alvarez*.

The Supreme Court partially overruled *Turn* by holding that time waiting to doff was compensable because it occurred after the “principal activity,” and therefore it was part of the workday under the continuous workday rule. However, it went on to state that the time

69. *Id.* at 28-9.
71. *Id.* at 34.
72. *Id.* at 34-5 (citing 29 C.F.R. § 790.7(c) (2005)).
73. *Id.* at 35.
74. *Id.*
75. *Id.* at 37.
77. *Id.* at 37. (“Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is excluded from the scope of [the Portal-to-Portal Act], and as a result is covered by the FLSA.”).
78. *Id.* at 42.
79. *Id.* at 34-35.
80. *Id.* at 34.
the employees spent waiting to don was not compensable because it constituted a "preliminary activity."\textsuperscript{81} The Court found "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under \textit{Steiner}.''\textsuperscript{82} It reasoned that the employer in \textit{Tum} did not require its workers to be in the changing area to wait to don the protective gear, and this activity was two-steps removed from the employee's activity on the factory floor.\textsuperscript{83} In reaching its decision, the Court left some issues unresolved which will require further consideration.\textsuperscript{84}

III. ANALYSIS

Although the Supreme Court likely intended courts to interpret \textit{IBP, Inc. v. Alvarez} narrowly, ambiguities to the holding have emerged—the most prominent of which deals with the extent of the Court's holding.\textsuperscript{85} The holding states that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act."\textsuperscript{86} What the Supreme Court meant by "any" is unclear other than it did not mean the holding to extend to situations discussed in \textit{Anderson}.\textsuperscript{87} Also, the types of preliminary and postliminary activities vital enough to the "principal activity" to constitute "integral and indispensable" are difficult to determine by examining the opinion.\textsuperscript{88}

Due to these ambiguities, there is a strong possibility that \textit{Alvarez}'s holding will be interpreted broadly by the courts. This, in turn, will extend it to situations outside of donning and doffing discussed in \textit{Alvarez}, which could circumvent the purpose of the Portal-to-Portal Act.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{81} Id. at 40–41.
\item \textsuperscript{82} \textit{IBP, Inc. v. Alvarez}, 546 U.S. 21, 40-41 (2005).
\item \textsuperscript{83} Id. at 41-42.
\item \textsuperscript{84} The primary issue which will be discussed in this Note is what now qualifies as part of the workday.
\item \textsuperscript{85} See Neville F. Dastoor and Shane T. Muñoz, \textit{Labor and Employment Law: IBP v. Alvarez}, 80 FLA. BAR. J. 37, 40 (Feb. 2006). This analysis will not address the issue of \textit{Alvarez}'s impact on the \textit{de minimis} defense. The Ninth Circuit's \textit{IBP} decision addressed the difference between unique and non-unique protective gear, finding that time spent donning and doffing non-unique protective gear was not compensable because the time it took to do so was \textit{de minimis}. 339 F.3d 894, 904 (9th Cir. 2003). However, the Supreme Court did not address the issue of the difference between unique and non-unique protective gear and did not make reference to the \textit{de minimis} defense in \textit{Alvarez}.
\item \textsuperscript{86} See supra note 75.
\item \textsuperscript{87} See supra note 73.
\item \textsuperscript{88} This Note will not directly address this issue.
\end{itemize}
A. Warnings

Courts might interpret the Supreme Court's decision in *Alvarez* to mean that any preliminary activity begins the workday. Such an interpretation could lead to the conclusion that travel time after such an activity is compensable. It appears that the First Circuit decided not to find walking time compensable largely because they were afraid that such a holding would lead to compensability of activities that were clearly restricted under the Portal-to-Portal Act.

In his concurring opinion in *Turn*, Chief Judge Boudin expressed this very concern. By looking to the history of the Portal-to-Portal Act, he concluded that making this time compensable went against the Act's objective of making such time non-compensable and would re-create the litigious environment that followed *Anderson*. Boudin feared that such a holding would lead to employers paying for commuting time in situations such as traveling to a mine site, which was historically not compensable under the Portal-to-Portal Act.

IBP addressed Judge Boudin's hesitation in finding waiting and walking time compensable within its appellate brief. IBP stated that finding such time compensable would increase employer liability which would conflict with the purpose behind the Portal-to-Portal Act—to decrease employer liability. IBP also argued that the Congressmen and Senators who passed the Act intended compensation only for such activities which employees were employed to perform. IBP reasoned that allowing compensation for waiting and walking time would force the conclusion that the employees were employed for these services.

During oral argument, Chief Justice Roberts seemed to imply that finding such time compensable would impact precedent in other areas when he referred to the "canine cases" where police officers wished to be compensated for time spent outside of their workday where they fed, walked, and groomed police dogs. This line of cases found that the time was compensable, but that such time did not make the commuting time to work compensable.

91. *Id.* at 285-86.
92. *Id.* at 284. More on this issue will be discussed infra at section III.B.
93. Reply Brief of Petitioner at 1, IBP, Inc. v. Alvarez, No. 03-1238 (U.S. Sep. 6, 2005).
94. *Id.* at 18.
95. *Id.* at 12 (citing S. REP. No. 80-48, at 47 (1947)).
96. *Id.* at 18.
98. *See* Bull v. United States, 68 Fed. Cl. 212 (Fed. Cl. 2005). In this case, the court found time compensable for time Customs and Border Protection Service Agents
If courts broadly interpret Alvarez, it will increase employer liability because an employer will need to compensate an employee for time previously excluded under the Act. The Court clearly believed that Alvarez's result was a logical application of the Steiner exception. The question now exists whether the Supreme Court meant commuting time to be compensable under this precedent.

B. Commuting Time as Part of the Workday

The court system has already felt the consequences of the Alvarez decision. Employees are applying the standard to issues outside the realm of donning and doffing and even to the service sector. Employees are asking to be compensated "for the time it takes to boot up a computer and read materials, or to put on sterile gear for work with medicines." The decision has also created ambiguity in the area of commuting time. Before Alvarez, some courts found commuting time to be compensable in situations where an "integral and indispensable activity" occurred before the commute. Cases decided after Alvarez have found that time spent commuting is not compensable under the continuous workday rule, even though it appears that the commute is a necessary part of the employment and conducted under the power of the employer. It is clear from looking at the purpose and language of the Portal-to-Portal Act that commuting time should not be compensable except in the rare occasion where the employee conducts his commute after reporting to a central location and where the actual commute is an "integral and indispensable activity."

99. See Jerry C. Newsome and K. Alex Khoury, Labor and Employment, 57 MERCER L. REV. 1159, 1161 (2006) (stating "the Supreme Court's emphasis on the 'continuous workday' method of computing a worker's compensable time will require employers to pay their employees for more of their nonproductive time while at work." Id.).


103. Smith v. Aztec Well Servicing Co., 462 F.3d 1274 (10th Cir. 2006).

104. See supra notes 23 and 24. The language of the Portal-to-Portal Act states that employers are not required to compensate their employees for time traveling to the actual place of performance. Also, the Act explains that "preliminary" and "postliminary" activities are not compensable. Commuting seems to be within this category.
In light of *Alvarez*, one should examine the potential outcome of compensability of commuting time. Courts could likely come to opposite conclusions by attempting to apply the standard in *Alvarez*. An illustration of this exists in the following hypothetical:

Carla, a damage appraiser is compensated by her employer for activities such as checking her email, responding to messages, and planning a route for her daily appraisals. After Carla completes these activities, she commutes to her first job. After finishing her last appraisal, Carla also receives payment for activities completed at home like “checking email and voice mail, making phone calls, completing estimates, and downloading and reviewing [her] assignments for the next day.” During her job, Carla drives her own vehicle and pays for her own gas. Should the employer pay Carla for the time she commutes to her first adjustment and for the commuting time home after the last adjustment?

Utilizing the analysis in *Alvarez*, it seems that this time would be compensable under the new expansion of the workday. The preliminary activities appear “integral and indispensable” to the job which would begin the workday under the continuous workday rule. The activities are necessary because if Carla did not perform them she could not proceed with her assignments for the day. The activities also take more than a couple of minutes to complete which means they would likely not be considered *de minimis*. Furthermore, it appears that the employer views the activities as important because he values them enough to compensate Carla for them.

However, even though it seems that the situation meets the elements of the *Alvarez* test, it is not certain whether the new extension of the workday would apply. The time might not be compensable under some of *Alvarez*’s reasoning. For instance, *Alvarez* stated that just because a preshift activity is necessary does not mean that it fits under the “integral and indispensable” exception to the Portal-to-Portal Act. The fact that the application of the test creates no level of certainty and possible conflicting results suggests that the exception should be better articulated in order for consistent application.

Application of the exception aside, it seems that compensating the employees for the time it takes them to drive to the first appraisal would overly extend the Supreme Court’s holding. In the case of *Alvarez*, not only were the preliminary and postliminary activities “integral and indispensable to the workday,” but they were also conducted

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105. This hypothetical is strongly based on *Dooley*, 307 F. Supp. 2d at 239. This case came out after the Ninth Circuit’s decision and before the Supreme Court’s decision in *Alvarez*. The court in *Dooley* based its decision on the Ninth Circuit’s reasoning in *Alvarez*, 339 F.3d 894 (9th Cir. 2003). The court found that the commuting time was compensable because "once the workday begins, workers' time must be compensated under the FLSA until the end of the workday." *Dooley* at 244.

106. *Dooley*, 307 F. Supp. 2d at 244.

on the same premises. *Alvarez, Anderson*, and *Steiner* are similar in that all of activities were conducted within the same confines.\(^{108}\) This leads to the possible conclusion that in order for the exception to apply, the employees must find themselves in a location where all activities—principal, preliminary, and postliminary—occur in the same place.

Also, the Court looked at the length of time it took to do the activities in question, and made a point of discussing the short duration of the walking time:

> [F]or processing division knife users, the largest segment of the work force at IBP's plant, the walking time in dispute here consumes less time than the donning and doffing activities that precede or follow it. It is more comparable to time spent walking between two different positions on an assembly line than to the prework walking in *Anderson*.\(^{109}\)

In comparison, the insurance adjuster's commute might take as long as a half an hour. This large amount of time is distinguishable from the relatively short periods discussed in *Alvarez*. If a court found that compensation of Carla's time was necessary, the holding would seemingly exceed the *Alvarez* holding which dealt with short amounts of time. In addition, this means that if *Alvarez* applied, the employer would be forced to pay Carla an additional hour per day for time that appears to be explicitly not compensable under the Portal-to-Portal Act.\(^{110}\) Congress stated within the Act that an employer does not have to compensate his employee for time spent "traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform."\(^{111}\)

The above hypothetical also indicates one of the flaws in the Supreme Court's reasoning in *Alvarez*. IBP believed that the Court needed to create three categories—compensable preliminary and postliminary activities, unpaid intermediate activities such as walking time, and compensable principal activities.\(^{112}\) In *Alvarez*, the Supreme Court held that the "integral and indispensable activity" started the compensable workday primarily because it did not think there were grounds to create a third category.\(^{113}\) If the court in the

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108. *Alvarez* was at a meat-packing plant. *Steiner* was at a battery manufacturing plant. *Anderson* was at a pottery plant. The Supreme Court has not addressed the *Steiner* exception in a setting outside of the industrial setting.


111. See supra note 23.


113. As discussed supra note 71, the third category would be time that occurred after the preliminary activity but before the principal activity. IBP's lawyer agreed that the preliminary and postliminary activities were compensable under the *Steiner* exception, but he argued that the Court should in effect create a third category which would prevent compensability for activities that fell under the
hypothetical found the time the employee spent driving to the first appraisal site and the returning from the last appraisal site as not compensable, it would fall in the intermediate category which the Supreme Court expressly declined to create.\(^{114}\)

The possibility of having an intermediate category makes sense in some instances, but not in others. As illustrated in Alvarez, it would be impractical for the time clock to have stopped for the five minutes it took to walk to the work station. However, when dealing with Carla’s commuting time, it does seem sensible to have an intermediate category since the time in question is much more significant.

The above hypothetical further illustrates that the possibility exists for there to be at least five hours of commuting time a week.\(^{115}\) For example, assume Carla works forty hours a week before the addition of commuting time. Also, for purposes of this hypothetical, assume Carla makes twenty dollars an hour. As discussed by the FLSA, employers are required to pay their employees time and a half for any time worked over forty hours per week.\(^{116}\) This means that every week the employer pays Carla an additional fifty dollars for commuting time, which equals $2,600 a year, or 6% of her annual income.\(^{117}\) The liability to the employer would increase further if Carla and ten other employees joined in an action against the employer for lost wages. Assuming they each make a commute of at least a half hour both ways, they could bring a collective action for $30,000 in unpaid wages.\(^{118}\) This would increase the liability of the employer and would go against the commonly held notion that commuting time is not compensable.\(^{119}\) It is possible employees might abuse such holdings.\(^{120}\) This illustrates the necessity of having a third category of time that is

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\(^{114}\) See supra note 112. This third category would conflict with the continuous workday rule because it would create a gap in the workday. The Supreme Court’s holding can be interpreted that once the workday has begun; it cannot be broken up by an activity that would otherwise not be compensable under the Portal-to-Portal Act.

\(^{115}\) This is not taking into consideration time delayed due to traffic accidents, getting gas, etc.


\(^{117}\) This part of the hypothetical is based on a 52 week year. It does not take vacation time into account.

\(^{118}\) This expansive type of litigation is exactly what the Portal-to-Portal Act sought to avoid. In fact, the House Committee report on the issue used a markedly similar hypothetical to prove the extent of employer liability. See H.R. Rep. No. 71 (1947), reprinted in 1947 U.S.C.C.S. 1029, 1031.

\(^{119}\) See Reich v. New York City Transit Auth., 45 F.3d 646 (2d Cir. 1995).

\(^{120}\) For example, the employee strikes a deal with the employer to do preliminary or postliminary activities at home and brings an action for the commuting time following or preceding the activity.
not compensable in order to prevent extended and unforeseen liability to employers.

In addition, if courts found that the commuting time discussed in the hypothetical was compensable, they would have missed one of the foundational justifications the Supreme Court relied on to find that the time in *Alvarez* was compensable. In affirming the Ninth Circuit's opinion, the Court reasoned that walking time was compensable because the employees were under the control of the employer.\textsuperscript{121} Although determining whether an employee is under the control of his employer is a question of fact, it seems probable that the employee is not under such control when he is driving his own vehicle, paying for his own gas, and when an employee can frolic and detour. If we were to change the hypothetical so that the employee drove a company vehicle or had his mileage reimbursed by the employer, there would be a far better argument that he would be under the control of the employer during his commute.

The above hypothetical gives an example of a situation where courts could find commuting compensable by interpreting *Alvarez*. If this becomes the norm, a logical extension could be that all commuting time is now compensable. Such an understanding would fully confirm the fear that Chief Judge Boudin noted.\textsuperscript{122} The possibility still remains that the Supreme Court meant for *Alvarez* to be interpreted broadly, requiring compensation in these situations. Although this expansive interpretation seems unlikely, if this is the case, the Supreme Court used *Alvarez* to effectively repeal the specified sections of the Portal-to-Portal Act and took employers back to a litigious post-*Anderson* environment.

Even though the hypothetical makes it appear that no commuting time should be compensable, limited situations exist where such compensation might be appropriate under the *Steiner* exception. *Burton v. Hillsborough County, Fla.*\textsuperscript{123} illustrates one such situation. That case addressed county employees' driving time. The county employees drove throughout the county inspecting work sites. They drove county vehicles which they were required to pick up every morning before they went to their first inspection. The vehicles contained tools necessary for the inspectors' jobs and also served as "satellite office[s]."\textsuperscript{124} The county did not start paying the employees until they arrived at the first worksite. The employees brought an action against the

\textsuperscript{121} IBP, Inc. v. Alvarez, 546 U.S. 21 (2005). See also Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1288 (10th Cir. 2006). The court found that the commuting time in question is not compensatory because the employees are not under control of the employer.

\textsuperscript{122} Tum v. Barber Foods, Inc., 360 F.3d 274, 284 (Boudin, J. concurring).

\textsuperscript{123} 181 Fed.App'x 829 (11th Cir. 2006).

\textsuperscript{124} Id. at 831.
county for overtime compensation for the time they spent driving in county vehicles. The county argued that commuting time was not compensable under the Portal-to-Portal exception of FLSA.¹²⁵

The court held that the commuting time was compensable.¹²⁶ In its reasoning, the court pointed to a federal regulation which stated that the time in question should be compensated.¹²⁷ It also differentiated between this type of commute and "home-to-work and work-to-home travel," stating that the latter was not compensable in accordance with the regulation because "normal travel from home to work [whether at a fixed location or at different job sites] is not worktime’ because it is ‘an incident of employment,’ and is therefore not compensable."¹²⁸ It reasoned that the purpose of the employees going to a central location to pick up vehicles was for the convenience of the employer. By leaving cars at that location, the risk of vandalism lessened and the employers also avoided expenses "associated with potential abuse of the vehicles for personal or unofficial use."¹²⁹

Going to the central location to get the vehicle closely resembles the activities of donning and doffing, and therefore, it makes sense that this activity would be treated as an "integral and indispensable" activity within the workday under Alvarez.¹³⁰ In addition, the actual commute in this case could be considered an "integral and indispensable activity" since the employee had to drive the county vehicle in or-

¹²⁵ Burton is different from the hypothetical because in Burton: 1) The employees had to report to a central location before they started their commute and 2) The employer owned the vehicle and paid for all expenses associated with the vehicle. In Burton, the employees had to undergo two commutes—the commute from their home to the central location, and from the central location to the first job site. Id.
¹²⁶ Id. at 838.
¹²⁷ 29 C.F.R. § 785.38 (1961):
When an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.
¹²⁹ Id. at 837.
¹³⁰ Id. (Note that coming to such a holding does not take into consideration the possibility that the Steiner exception was only meant to be applied in factory settings. If Steiner only applies in those instances, this case would likely fall under the Portal-to-Portal Act; therefore, the time in question would not be compensable even though it appears to be an “integral and indispensable” activity.)
order to have the necessary tools for the job, and the vehicle served as an office for the employee.131

_Burton_ differs from the above hypothetical in that a federal regulation exists that states such time should be compensable, whereas the same federal regulation states that "home-to-work and work-to-home travel" should not be compensable.132 Even though the employee in the above hypothetical conducts preliminary activities at home, the employee's commute time is still the type of work time considered not compensable under the federal regulation. The existence of the federal regulation illustrates a situation where a direct application of _Alvarez_ would violate long standing principles and regulations. Furthermore, the preliminary work is not done so much for the convenience of the employer, but for the employee. It also appears that the amount of control the employer has over the employee in the hypothetical is markedly different from the control illustrated in _Burton_.133

Solutions need to be established to deal with the above situations which would lead to consistency and acceptance of precedent. Employees should not have to question what parts of their workday should and should not be compensable under the Portal-to-Portal Act.

C. Solutions

Possible solutions based on judicial and legislative action exist to deal with many of the above situations.

1. Judicial Interpretation

The Supreme Court should better articulate what constitutes "integral and indispensable activities" and address the issue of when commuting time would be compensable. It is unclear whether the Court meant the holding in _Alvarez_ to only apply to cases where the employee remained on the premises for the duration of all activi-

131. *Id.* at 837–38.

132. It should also be recognized that home-to-work and work-to-home travel has long been held to be not compensable due to the Portal-to-Portal Act. In a 1957 law review article, it was stated that "[t]he language of this section and the legislative history of the act indicate that the walking, riding or traveling time referred to in this section is that which takes place in the course of the employee's trips between his home and the actual place where he works." James A Matthews, Jr., _Wage and Hours—Portal to Portal Act of 1947—Preliminary and Postliminary Activities_, 2 _VILL. L. REV._ 246, 249 (1957).

133. _But see Sec'y of Labor v. E.R. Field, Inc._, 495 F.2d 749, 751 (1st Cir. 1974). In that case, the employer required the electrician to report to the employer's shop before traveling to the first worksite. That case illustrates that if, in the above hypothetical, the employer had required the adjuster to report to a central location before going to his first jobsite that his commute time would more likely be compensable.
The best solution would be to have the Court address a case where compensation for commuting time is the primary issue. A good candidate for the Court would be a case that examines the commuting time of mine workers. However, this solution seems unlikely and would take many years and an onslaught of litigation before it reached the Justices' attention. By this time, the litigious environment between employer and employee may have reached the extreme situation that forced the passage of the Portal-to-Portal Act. As a result, Congressional legislation is a more suitable solution.

2. Legislative Action

The best solution appears to be Congressional legislation. If Congress believes that commuting time should be included within the Portal-to-Portal Act, it should articulate that belief within the Act. However, it seems unlikely that Congress would choose to amend the Act in this direction given the legislative history of it, the regulations that discuss the Act, and case law which has predominately held that commuting time is not compensable. In addition, doing so would likely increase liability.

Instead, Congress should amend the Portal-to-Portal Act to include a section discussing commuting time which operates in accordance with the long-standing precedents and regulations. The amendment could state:

Home-to-work and work-to-home travel shall not be compensable even if a preliminary or postliminary activity occurs at the employee's home. In order for commuting time to be compensable, the employee must first report to a central location of the employer, and the commute must be conducted under substantial control of the employer. An employer may compensate an employee for preliminary and postliminary activities conducted at home, but these activities do not effectively begin or end the workday under the continuous workday rule.

This clear expression of how commuting time should be treated would lead to predictable outcomes. The commuting time in the hypothetical would not be compensable because the employee has not reported to a central workplace before going to her first job of the day. It

134. See supra section II.D.
135. Compare Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1287–90 (10th Cir. 2006) (In Smith, the employees traveled an hour to mines every morning with their work group. Although the employer did not make the commute with the work group mandatory, the route to the mines was such that unless the employee had an SUV, the roads were impassable. The court found that the commute time did not qualify as an "integral and indispensable activity."), with Burton v. Hillsborough County, Fla., 181 Fed.App'x 829 (11th Cir. 2006) discussed supra. Are the two cases really that different?
136. See supra sections II.A & III.B.
seems most likely that the employee is not under substantial control of the employer during her commute, but this remains a question of fact for the fact-finder. Under this proposed amendment to the Act, an employee would still receive compensation for the time he spent doing preliminary and postliminary activities necessary to his job.

This proposed amendment would also make it clear that commuting time is compensable in situations like Burton. The employee reported to a central location by showing up at the lot to pick up the county vehicle. The commute is likely under the substantial control of the employer since the employee is driving a county vehicle which operates as his satellite office. These two examples show how amending the statute would solve the existing problem and create predictable solutions in the area of commuting under the Portal-to-Portal Act.

3. Employer Solutions Today

Presently, employers should take great precautions to avoid the possibility of litigation after Alvarez. They need to re-examine their payment practices to assure that they pay employees for intervals of time spent after an “integral and indispensable activity” has been conducted.138 As stated throughout this Note, what constitutes an “integral and indispensable activity” which effectively begins the workday is unclear, so employers should err on the side of caution. It is clear that activities similar to donning and doffing start the compensable workday. Employers should ask themselves whether the activity appears more like a donning and doffing or more like the clocking-in discussed in Anderson.139

If an employer finds that such period of time exists where it should be compensating employees, it should re-examine the situation and determine if an alternative exists which would shorten this time.140 In a situation like the hypothetical discussed above, the employer could have a home base located in a central location of the adjustment area. The employer could then require the adjusters to report to that location to check their email, plan their routes, and check their messages. If having the employees report to a central location is not an option, the employers should not compensate their employees for time spent performing preliminary and postliminary activities. As discussed above, compensating employees for this time makes it more likely that the courts would view the activity as “integral and indispensable.”

139. This seems like a difficult distinction to make. However, it appears that the Court found that such a distinction was possible to establish. See IBP, Inc. v. Alvarez, 546 U.S. 21, 35 (2005).
140. For example, the employer could place the locker rooms closer to the plant floor.
IV. CONCLUSION

Carla boots up her computer, gets her work assignments, and plans her map for the day. She then jumps into her car and turns on the radio news channel, catching up on the day's current events. As news clips of war, kidnapping, and environmental destruction flash across the airwaves, Carla thinks about issues closer to home. Most importantly she asks herself, "Can I get paid for this?"

While Congress might not be able to create world peace, stop crime, or save the world from global warming, it could easily answer Carla's question. Legislative action would be the best alternative to curb the possibility of a mountain of litigation that will likely ensue in the wake of IBP, Inc. v. Alvarez. Although most workers want to get paid for the commute to and from work, such a result would put substantial liability on the employer and would create the possibility of employee abuse. If action does not occur, courts could find that when Carla boots up her computer to check her work email her workday has begun.