FINAL TRANSCRIPT

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**ACC - Redefining and Expanding the Compensable Workday – Implications and Practical Application of the Supreme Court's Recent Decision in IBP, Inc. v. Alvarez

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PRESENTATION

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Welcome. I am James Baine moderator of today's webcast entitled Redefining and Expanding the Compensable Workday; Implications and Practical Applications of the Supreme Courts Recent Decision in IBP, Inc v. Alvarez. Today's program is sponsored by the Employment and Labor Law Committee of ACCA and the law firm of Jackson Lewis.

Today's presenters are as follows. Frank Jackson is assistant general counsel of Blue Cross Blue Shield of Michigan, where he leads the employee relation section of the opposite general counsel. Mr. Jackson graduated from Wayne State University with a BA degree and received his law degree from the University of Michigan Law School. He also graduated from the Command and General Staff college of the US Army. Frank is the immediate past chair of the Employment and Labor Law Committee of ACCA, a member of the Wayne County Civil Service Commission and a member of the Board of Visitors of both the University of Michigan Law School and Oakland University School of Nursing.

Chris Lauderdale practices labor and employment law with the Greenville, South Carolina office of Jackson Lewis. He graduated from Sanford University with a BA degree and received his law degree with honors from the University of Georgia. Mr. Laurderdale as well as our other presenter Mr. Wylie, were Amicus counsel for the National Chicken Counsel, American Meat Institute and the National Association of Manufactures in their Amicus brief before the supreme court of the United States in IBP, Inc v. Alvarez. David Wylie received both his BS degree and his and law degree from the University of Alabama. He is a partner in the Greenville, South Carolina office of Jackson Lewis. Mr. Wylie is past chair of the Employment and Labor Law Specialization Advisory Board of the South Carolina Supreme Court Commission on Continuing Lawyer Competence. He also is the immediate past chair of the South Carolina State Chamber of Commerce Safety and Health Committee and former general counsel of the Greenville Chamber of Commerce. Mr. Wylie is listed in Best Lawyers in America for labor and employment law. He is also labor counsel for the National Chicken Council and the National Turkey Federation. If anyone has a question please send it to James_Baine@murphyoilcorp.com. Today's presentation will be available for replay three hours after the end of the presentation and will remain available for one year.

Frank Jackson - *Blue Cross Blue Sheild - Assistant General Counsel*

My name is Frank Jackson, and I am going to begin the presentation. This is a very interesting, yet archaic area of the law and can cause snares to lawyers.

According to the US Department of Labor, federal FLSA lawsuits have grown -- and I want to [grab] one right now -- have grown from approximately 1500 per year in the 1990s to approximately 3000 in the year 2003. Of collective actions, which are the class action equivalent, have tripled since 1997. Since 2001, collective actions have out numbered employment discrimination cases. In these cases involving collective actions, involve a great deal of money. According to David [corpus] of the [Ogletree] law firm in Atlanta, in 2005 we have cases involving judgements of $210 million, $135 million, $448 million, $37 million and $30 million dollars. These cases can grab any employer if one does not pay attention to the restrictions of the Fair Labor Standards Act.

Basically, the Fair Labor Standards Act has some basic requirements, and I will urge you to go to slide 2. The Fair Labor Standards Act requires that all employers who are engaged in commerce have a minimum wage of $5.15. Quite often the states have different rates, generally they are higher. Although, their are two states, Alabama and Tennessee, which have no minimum wage act. According to the Fair Labor Standards Act, all employers must pay time and a half for employees who work in excess of forty hours a week.

Generally there are three major issues facing employers. One, if an employee are properly classified as an hourly employee as opposed to an exemptible employee -- go to page/3. There are four types of exempted employees. The executive, administrative, professional and outside sales. Those types of employees are not required to receive overtime pay. The second issue facing employees are employers. Our hourly employees-- allows required by supervisors to work off the clock. That is, our employees [a law] that required to work beyond forty hours without getting paid. The third type of issue facing employers are admitted and unpaid activities, do they constitute compensable time. It is this third issue that the Alvarez case was involved, and created a great deal of interesting new law. The FLSA, and I suggest you go to slide 4, requires an employers who fail to pay overtime to be liable to the employee, when employees affected are all unpaid overtime compensation. And in addition, an equal amount has liquidated damages.

In almost all cases, courts will try and liquidate the damages. According to the Portal to Portal Act, which amended the FLSA, there are some times in which a court using some discretion, hence not award liquidated damages, but those cases are rare. Some state statutes allow limitations going back longer than two years, it depends upon which state and [beware] of California. Unlike class action lawsuits, there are criminal prosecution available -- it is criminal prosecution available -- with a fine of $10, 000 -- and go to slide 5. You can also, if you are willfully violating the law, have a six month prison term. It is a good idea to be careful of the FLSA.

Collective actions are different that class action lawsuits -- go to slide 6. Collective actions have unique opt-in provision. Unlike rule 23, class action lawsuits, the named plaintiffs must provide representation only after a court has declared that their is a group of similarly situated employees. There is generally a two step approach allowed to determine if their are employees who are similarly situated. The named plaintiffs would have to search that their is such a group and provide some quantum of evidence supporting this assertion. The court will use a relatively low standard determent, if in fact their is such a group and assuming that the court so finds, it will allow the plaintiff to send notices to any individual who fits this category. Assuming that their are individuals who fit that category, they will be given an opportunity to opt-in. If they opt-in, in writing, then discovery follows and prior to trial the defendant is allowed the opportunity to challenge the certification of the collective nature of the case. This is generally done by motion. The defendant, if he wins, will then try the case using only the named plaintiffs as plaintiffs. If, on the other hand, the plaintiff wins then it becomes a collective action and will proceed for all individuals who opt-in.

The dangerous part about this, is that, for those individuals who don't opt-in, but could have, they are not precluded from bringing their own lawsuit at a later date. That can give -- for those who are fans of Bill Murray -- can give the idea of Groundhog Day, the movie, only without the happy ending. If you go to slide 7, you will see the three most common off the clock claims. They are improperly defining compensable work, poor record keeping and supervisory misconduct. Examples of not classifying work as compensable would be caring for tools as part of ones principle activity such as a firefighter, taking care of the hoses or guns like police officers, doing charitable work when requested or required by the employer, emergency worker travel time, rest periods of twenty minutes or less or waiting for work after reporting or while on duty. Examples of non-compensatory work time is charitable work done voluntarily outside of working hours or meal periods involving no duties lasting a half an hour or longer. The key is common sense and a close attention to the regulations. These [inaudible] factors are involved in poor record keeping. the regulations and the act require that employers maintain accurate records for both exempt and non-exempt employees. Quite often, that does not take place and when that does not take place and litigation follows, the course generally follow the assertions of the employees.

A third category is supervisory misconduct. Now I break that down as tow types of misconduct. Intentional misconduct and unintentional misconduct. Intentional misconduct is when a supervisor will intentionally not pay an individual for overtime work when he or she knows about it, is willfully violating the law. Unintentional is when an individual allows, say a secretary,

to work the lunch or beyond forty hours and the secretary not request any payment, but quite often, two years later, as she is leaving out the door, she may file a lawsuit seeking all off the clock claims.

Today, we are going to be looking at the category of doffing and donning. I urge to go slide 8. You will see in slide 8, some recent faces involving millions of dollars.

The Alvarez case changed the law, changed where employers thought they were doing and with that I will turn it over to Chris.

Chris Lauderdale - *Jackson Lewis - Attorney*

Thank you Frank. Good afternoon to everybody. You would think that after the Fair Labor Standards Act has been in existence for seventy years, we would have a very good handle by now on what is and what is not compensable work, but what we are going to be talking about, really, there were two very significant cases in 1956 and then there was one in November, the Alvarez case, which dramatically redefined how the compensable workday is going to be defined going forward.

I want to say something up front, just to give you a little preview of where the conclusion goes in this presentation and that is that the Alvarez case opens the door to the argument that any employer whose employees put on any type of required protective gear, possibly something as non burdensome and time consuming as putting on a pair of earplugs or ear protection, is required to compensate that employee from the time that gear is put on, until it is taken off. Even if, say that employee has to put that ear protection on prior to walking in a plant maybe walk for five or ten minutes to get to his or her assigned work area. That may be an extreme example, but I think that is what the Alvarez case has opened us up to and why it has required really all employers whose employees wear any type of protective gear and particularly those whose employees walk over fairly long distances to get to their place of performing their normal work, to evaluate their exposure in these cases.

If you will go to what is -- I just want to -- I will check periodically to make sure we are on the right slide, but we should be on the next slide which is Defining Compensable Work has Historically been Complicated By, and there are three things. There have been court decisions that have gone both ways over the years, that are somewhat hard to reconcile, and we are going to talk about quite a few of those as we build up to the supreme courts decision in November in Alvarez.

The Department of Labors wage and hour regulations are a absolute deplorable mess and they are that way because what the Department of Labor has done between say the 1940s and mostly by the 1970s, anytime they found some legislative history that they liked, either arriving out of the Fair Labor Standards Act or the Portal to Portal Act in 1947, anytime they found a court decision that they liked and anytime they developed an enforcement position they wanted to put in the [regulations], they just added those things sort of haphazardly over a period of about thirty years. What we are left with is some very contradictory regulations that are really hard to rely on, and I always caution clients to be very careful about taking any one statement and any one [regulation] and relying to heavily on it, because there is probably something somewhere else that contradicts that, and that is very true with regard to the compensability of pre-shift and post-shift, donning and doffing and other types of activity. The DOLs enforcement position has sort of waffled a little bit over the years, but now that enforcement position which is the first principle activity or continuous workday rule, has now been endorsed by 90 decision of the supreme court. For a long time, the DOLs first principle activity rule was at odds with a whole lot of court decisions that are now more or less useless to us in the wake of Alvarez. For many years, the Department of Labor has been pushing this first principle activity rule, now they have finally gotten the best endorsement they could hope to get on that.

Go to the next slide. When we look at the question of whether something that somebody does on the premises of their employer is compensable or not, it is sort of a three stage analysis that has been traditionally been applied. The first question is, does it work? As you will see in a minute, there is no real, clear definition of work under the Fair Labor Standards Act itself.

Secondly, in the wake of the Portal to Portal Act which came along in 1947, and we will talk it a little bit more in a minute, you got to ask whether it is preliminary or post preliminary to a principle activity. The Portal to Portal Act created this distinction

between preliminary and post preliminary activities on one hand, and principle activities on the other hand. The Alvarez decision has, in my view, has rendered that distinction very much meaningless.

The Third question is, is it de minimus? There is a long line of cases going all the way back to the 1940s which have found that activities that require so little in amount of time and involve such small amounts of money, that they are difficult to record, the courts have routinely found those to be de minimus. I have been involved in these donning and doffing cases in the poultry industry since about 1998, at least three circuits have heard these cases and up until the supreme courts opinion in Alvarez, the poultry companies had won every one of those cases. In some cases, it had been found that the donning and doffing and walking and related activities were preliminary and post preliminary and therefore non compensable under the Portal to Portal Act. In other cases the courts of appeals found that the activities might not be preliminary or post preliminary, but they were de minimus. Alvarez has now cast a lot of doubt on how you define preliminary and post preliminary activities and has cast some doubt over the continued viability of the de minimus [stance] and that is one of the things we are going to be talking about.

You will advance to the next visual. When you give way to the question of whether it is work, and there have been some cases that have addressed these types of activities , along the lines of whether there even work to be considered in the first instance. There is the case involving the meat packer that went to the tenth circuit back in the early 90s that addressed the work issue at some length. The FLSA itself does not define hours worked. Your employee is defined under the act is to suffer or permit to work, whatever that means, typical new deal legislative clarity, that is how they defined it. The supreme court came along in 1944 and gave us the best definition we have got, and that is physical or mental exertion whether burdensome or not and controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. That is about as good as it is going to get. There was another case that came out in 1944 called Armour versus Wantock, and I am sure all employees everywhere were relieved to find out that exertion was not necessary for an activity to be considered work. In other words, the Department of Labor has said for many years there are circumstances in which an employer pays its employees to do nothing or to be engaged to wait. The regulations in cases many times have made the distinction between an employee who is engaged to wait and one who is waiting to be engaged. That is going to become significant now in the wake of Alvarez because and employee who comes in and puts on some protective and then does nothing but wait for his productive shift to start arguably must be compensated for that time. We will talk at the end about some ways to limit exposure to claims from employees who are not doing anything, productive anyway.

You go to the next slide, we get a supreme court issued decision and we should be looking at Anderson versus Mt. Clemens Pottery " this was a earth shattering decision" at the time. What the supreme court essentially found in this case is everything employees do once they set foot on the employers property is compensable. They are there to work, if they are putting on some kind of protective gear, when they talked about finger cots and aprons and things like that, you are walking from the time clock to the place where they did their work, waiting in line to pick up some required gear, waiting in line to punch the time clock. The court found all of those things to be compensable.

Define work as you see it here all the time during which an employee is necessarily required to be on the employees premises on duty or at a prescribed work place. That definition only lasted a year, because congress immediately in-acted the Portal to Portal Act, if you really want to torture yourself you can go read that act in the legislative history that went behind it, but there were congressional findings that this holding by the supreme court would create billions of dollars in unanticipated liability for all types of industries, and because of that to avoid that fate congress in-acted the Portal to Portal Act. You know, billions of dollars, that was real money back in 1947. That led us to the Portal to Portal Act, where congress attempted to define what is and is not compensable activity and specifically sought to exclude things that are preliminary or post preliminary to principle activities. If you just came to this language -- and go to the next slide please which is the Preliminary, Post Preliminary slide -- if you just showed up from another country or another planet and read the statute, I think you would read that statute that principle activity is what you are paid to do. If you are a coal miner your principle activity is mining coal, if you are manufacturing something on a [lave] your principle activity is operating a lave, and that sort of make sense. I really do think that is what congress intended.

The Portal to Portal Act specifically says that walking, riding or traveling to and from the actual place of performance of principle activity is a preliminary and post preliminary activity. That is to [highlight] walking, riding or traveling because that is the specific issue the court was looking at in Alvarez, although, the impact of the decision is much broader than that. We have this very broad definition of what is compensable activity in the Anderson v Mt. Clemens Pottery decision by the supreme court in 1946 and then immediately congress reacts with this statute which seems to pretty clearly try to limit the impact of the Anderson decision and there were many, many cases interpreting the Portal to Portal Act over four or five decades, recognizing the fact that the Portal to Portal Act was a direct congressional response to how the supreme court defined compensable activities in Anderson and was specifically aimed at returning that opinion.

Go to the next slide. Nevertheless, the supreme court comes along, and I said there were two cases, in the 1950s one of those was Steiner v. Mitchell and you should be looking at the Steiner v Mitchell slide. What the supreme court really did in Steiner was create a gapping hole in the Portal to Portal Act.

However, the Steiner case for a long time was viewed as a very unique case. It involved manufacturing storage batteries, the employees were exposed to lead, and acid and other things which would burn your skin and things that you did not want to get on you and you did not want to take home at the end of the day. The employees in Steiner v Mitchell were required to change clothes at the end of their shift and shower and the supreme court looked at that -- if you will look at the next slide -- created on its own the succession to the Portal to Portal Act said any type of activity that is integral and indispensable to a principle activity is also compensable. In the Alvarez case you are obviously going to see a lot of discussion of Steiner and what it means to be integral and dispensable. What the court found in that case was that the showering and the clothes changing were integral and indispensable to the manufacture of batteries and therefore was compensable. That is a little hard to reconcile to the Portal to Portal Act, but that is what the court said.

You go to the next slide. There is another case, it is actually Mitchell v King Packing, they got the names reversed. This a companion case to Steiner and I mentioned it because I do not think it is holding was as controversial, but what the court found there in this case was decided the same day as Steiner. This was a beef packing, meat packing company. They found the cleaning of knives was integral and indispensable and therefore compensable. I mentioned that case so as not to overlook -- in addition to donning and doffing protective gear, anything else that employees do prior to their shift, and Frank mentioned this earlier, cleaning tools, obtaining tools, logging onto a computer before they leave their house in the morning to get their assignments, could potentially, in light of Alvarez be viewed as starting the workday. I will come back to that at the end. As I have said, cases have routinely viewed the Steiner exception to the Portal to Portal Act as very limited in the Tum v Barber Food case which is a companion case to IBP v Alvarez in the supreme court. The first circuit there very wisely distinguished Steiner, noting how unique the dangers were. Another case which was rice v IBP which ultimately went to the tenth circuit and also involved meat packing characterized the Steiner case as very narrow and closely tied to the extreme facts in that case.

We are going to look at the DOL regulation which should be one or two slides. There is a cover slide that says US DOL regulations. You should now be on 29 CFR section 790 -- which are --790.a, which are part of the wage and hour regulations that I mentioned. I am not going to cover a lot of regulations as I said, I do not want to rely on them to much, but I want to show you the state of the regulations before the Alvarez case came out. Here is the regulation which the Department of Labor obviously developed after Steiner, to define what it viewed as principle activity. It really just parrots the Steiner holding, but if you look at what is highlighted there in yellow, if an employee in a chemical plant cannot perform his principle activity without putting on certain clothes, changing clothes are an employees premises at the beginning and ending of the workday it would be an integral part of that employees principle activity. However, and this is very important, it is going to be very important in cases to follow. Changing clothes is merely a convenience to the employee and not directly related to his principle activity, then it that case it would a preliminary and post preliminary activity. Let me give you an example. Not to long after the Steiner case was decided, there were at least two cases that I know of involving carbon manufacturing. Anybody who has been around carbon manufacturing knows that it is gritty, dirty stuff and it tends to get on you. Otherwise, carbon is a very abundant element in the universe and it is not going to hurt anybody. The employers in those cases were indifferent as to whether the employees washed at the end of their shift or change their clothes, if they wanted to carry all of that carbon home they did not care. In those cases the courts

have held that because the employer was not requiring the employees change clothes, because their was no health and safety reasons to change clothes or to shower, that it fell into the later [inaudible] there, just being a convenience to the employee.

Look at the next regulation, 790.7 which is the next slide. You see here how it gets somewhat contradictory and why I think a lot of employers relied on these regulations prior to Alvarez at their peril. [Inaudible] no categorical list of preliminary and post preliminary activity, except those named in the act can be made, since such activities under one set of circumstances may be preliminary or post preliminary and may under others be principle. You go on down, when we get to Steiner it is somewhat hard to reconcile what the regulations say here with what the court held in Steiner if you look down the in F, walking or riding by an employee between the plant gate and the employees [inaudible] or other actual place of performance of principle activity is generally preliminary post preliminary. You will see if you have read Alvarez, if you go to the next slide you will some discussion of footnote 49, which is a foot note to 790.7. There is quite a bit of discussion about this at the oral argument and the word necessarily particularly was bought to the courts attention and the presenters were asked about this. This does not necessarily mean, however, that travel between wash room or clothes changing place and the actual place of performance of the specific work the employee is employed to perform would be excluded from the type of travel to which section 4a refers, and what that means is this does not necessarily mean that travel between wash room and the clothes changing place would not be preliminary, post preliminary activity. Again, if you came here from another country and started reading these regulations you would think, clearly I do not have to pay my employees for walking from a locker room or clothes changing place to their work bench or to their work location, but in light of Alvarez, these regulations does not really help us very much, and according to the court it did not help us before that.

You go to the next slide. I will go through just a few examples of things that were found to be preliminary or post preliminary prior to Alvarez and then go on over to the next slide There was one case involving Panama Canal Locomotive Engineers, it is a railway that run along Panama Canal. These engineers would check in at work location, get their work assignment and walk sometimes as much as fifteen or twenty minutes to get to their locomotive everyday. That was found to be a non-compensable preliminary and post preliminary walking [job].

There is an old case involving General Motors and employees were required to put on some type of protective gear and automotive plants tend to be very large physically, required to walk some distance to their work station. That was found to be preliminary and post preliminary. An extreme case, employees working on the Chesapeake bridge when it was being built, would spend as much as an hour riding from the shore to whatever location they were working that day, it was seventeen miles long, and that time was found to be non-compensable as preliminary and post preliminary travel time. As I said earlier, [typical] processing employees, typically wear things like light weight bump cap, [inaudible] protection, a hair net, smock, sometimes rubber boots, sometimes not and gloves at a minimum. With the exception of the night circuit almost every case that addressed the compensability of donning and doffing that type of gear found it to be non compensatory. Even in meat plants where employees were some heavier gear, because they are working with larger animals the employees that were not required to wear heavy weight protective clothing, their donning and doffing activities were found to be non-compensable.

There is [fairly recent cases] involving donning and doffing of sanitary garments while manufacturing surgical equipment which was designed not to keep the employees clean, but to keep the product clean. We have been seeing and will continue to see more and more cases like that, where employees are required to wear some type of outer garment to keep the workplace clean and to keep the product sanitary or sterile in some cases.

Other cases -- if you go to the next slide -- were preliminary and post preliminary cases were found to be really integral indispensable [course] to the Steiner case with storage battery manufacturing, cumbersome protective clothing, which has been in meat packing plants, employees who were dealing with sometimes 1200 pound animals that they are slaughtering, wear things that would be akin to what a hockey player or a football player might wear. Belly guards, arm guards, shin guards, big [inaudible], things like that. Those that had been routinely been found to be integral and indispensable under Steiner and then even light weight protective gear was found to be compensable by some of the employees in the Steiner case [inaudible].

You go to the next slide, we come to de minimus defense, which is the third question you have to ask yourself in evaluating if some type of activity is work or is compensable work. Generally, there is no regulation on this. There are a few cases. There is no statute that sets ten minutes as a standard, but that is how it was applied for many, many years. It was actually the Anderson v Mt. Clemens Pottery case in 1946 by the supreme court that created the de miniumus defense. It has persisted in cases in which employers have prevailed in these donning and doffing cases, most of the time it has come down to the de minimus defense. Of course, it is an affirmative defense that must be raised and proved. It is probably not going to get you out of case on summary judgement, although, it has happened.

The question that Alvarez answers for us is whether walking and waiting time associated with the donning and doffing must be included in determining whether the total amount of time spend is de minimus, as we will say the court said yes with regard to walking and no with regard to waiting.

If you go to the next slide their are a few couple of other issues that -- before we get into Alvarez a couple of other things to think about and to think about how Alavarez affects these issues, go to the next slide, one would be how the Alvarez case is going to affect meal periods. The conclusion that donning, doffing and associated walking time is compensable has to be considered when evaluating whether employees are getting an adequate amount of [inaudible] from duty, to have a bona fide meal period, which can be unpaid. If you are talking about a paid meal period, then that is no problem, but an unpaid meal period, employees must be completely relieved of duty. They are spending some of that time donning, doffing and walking in the wake of Alavarez, then that meal period has to be considered at risk I think employers have to re-evaluate how their paying for that.

In the next slide, there is one other legal defense that is out there that is a creature of the Portal to Portal Act, but only affects unionized work force. It is section 2030 of the Portal to Portal Act, says that were the employer and the union have similar practice regarding how employees are to be compensated for donning, doffing protective clothing and washing up, that practice can be asserted as an affirmative defense to that claim and [abide] employees for compensability of that time. In other words, you can have an agreement with that union that says we are going to pay you five minutes a day of washing up and changing time and that would be a complete defense. If you show that the union had purposed on a payment of some amount of time to compensate employees for that time and through the course of bargaining you declined to agree to that proposal, that also would be a complete defense. To assert this defense, you are not required to reach some agreement with a union that provides compensation for employees, just required to show that you have an established customer practice that was the product of collective bargaining and maybe you pay people for that time and maybe you do not. If something -- at least for unionized employers -- there is a defense out there that can potentially protect you from the kind of cases that are going to be spawned by Alvarez.

If you go to the next slide. Let us now look at Alvarez, finally. It is a long build up to it, but I do think that it is important to know the history, to try to understand how the court got to this result. It was the first case argued before Cheif Justice Roberts, on October 3rd. The specific question before the court was whether the walking and waiting time associated with compensable donning and doffing activities was compensable. The parties in Alvarez did not challenge the compensability of the donning and doffing activities themselves and they did not challenge the Steiner holding. If you have read the opinion you will see the court makes note of that.

There are two lower court holdings that were companion cases in Alavarez. Alvarez v IBP which came out of the night circuit. They found donning and doffing of what the night circuit calls unique gear to be compensable and for the first time ever that I am aware of the night circuit endorsed the Department of Labors continuous workday rule and concluded that because of the continuous workday rule once an employee is engaged in some compensable donning and doffing, walking time which followed that activity was also compensable.

The Tum case involved poultry processing where employees where putting on and taking off much lighter weight protective gear, things like I mentioned earlier smokes, bump caps, boots and gloves. That case actually went to the jury. The court allowed the jury to consider whether that time was compensable or not. The jury found it to be de minimus. However, the court excluded

from the calculation walking time and also excluded waiting time. The significance of what the night circuit and ultimately the supreme court did with the continuous work day rule really can not be overstated. Because it leads to what I mentioned earlier that employ who [slips] on a required piece of protective clothing regardless of how burdensome a task that is arguably in the wake of Alvarez that starts the clock running, that activity brackets the workday. Eventhough that employee may go sit down and wait for his shift to start or may drink a cup of coffee or smoke a cigarette before he actually starts doing any work.

Go to the next slide. Obviously, the court previous opinion in Steiner is what the court hung its hat on here. I think there was a lot of discussion when John Roberts was going through the confirmation process about [inaudible] and I guess that is what led us to this result here. As I said earlier, the Steiner decision created a gapping hole in the Portal to Portal Act and then congress did not do anything about it for fifty years. So, we get around to the Alvarez case and the court looks at it and says well we rendered this decision in 1956 and congress has not seen fit to over rule us legislatively so we will just carry it on out to its logical conclusion. Interestingly, in the oral argument, Justice Scalia made the comment that he believed Steiner was an erroneous decision. That got us all kind of hopeful that we would at least get a good decent out of this case, but we did not. It takes the Steiner integral and indispensable exception, it made very clear that preliminary and post preliminary activities that are integral and indispensable are themselves principle activities. Even though they might be though of as preliminary and post preliminary. It really broadens the category of what is thought to be principle activity and what are therefore compensable. That is one bad thing [inaudible]

Go to the next slide. The next thing is I said the court vigorously endorsed the Labor Departments continuous workday rule. That rule is not really contemplated by the Fair Labor Standards Act or the Portal to Portal Act. It has been the unfortunate position of the Department of Labor for quite a while, but it is now the law of the land, unless congress where to do something about it. The implications of that is, once you do something that is a principle activity, in other words putting on some required piece of safety equipment, that starts the workday and any walking time that follows that is compensable.

Go to the next slide. The court did do one good thing, they found that waiting time associated with donning and doffing is not compensable and what employers had run up upon in these cases is they get these wildly varying claims from employees about how long they had to wait in line to obtain sanitary or protective gear at the beginning of the work shift. As I said, there are some work places in which employees have to maintain a sanitary environment. Because of that, they have to pick up some type of outer garment at the beginning of the work day that is clean every morning or at the beginning of every shift particularly in plants like poultry processing plants were there is a large number of employees, you have got these crazy claims about how long a person has had to wait to obtain that. The court said that waiting to obtain protective gear is not compensable. There is a question about whether that logic would apply to any waiting time that occurs incident to donning and doffing of protective gear before and after a meal and rest period. Because it the Department of Labors position and I think this the way the supreme court pretty clearly reads it in Alvarez, that the Portal to Portal Act does not have any application within the confines of the work day. In other words, once the workday starts, you turn off the portal-to-portal act until the workday ends. So that again may be something you have to take into account in evaluating whether or not employees are getting an adequate amount of time for meal and rest periods.

We go to the next slide. What I think is significant, the good thing I take away from this is that walking time and donning and doffing time are measurable activities. It is certainly possible to time study those activities and determine exactly how much time it should take to perform those tasks.

Waiting time, on the other hand, and we've seen this over and over in litigation, is a highly subjective kind of activity in terms of how much time does it take to do it. And you get widely varying testimony dependent upon really the subjective recollections of employees about how much time they spend on average waiting to obtain effective gear. And that's something that almost no employer is probably measuring.

Go to the next slide. Courts, like a lot of significant Supreme Court decisions, the Alvarez case, leave some questions unanswered. On the one hand, the de minimis defense was created by the Supreme Court, as I said, almost 60 years ago in the Mt. Clemens Pottery Case. The Supreme Court could have overruled it, I suppose, in Alvarez, but did not.

Very many cases have been decided in the employers' favor since Steiner and even back to the Mt. Clemens Pottery Case, based upon the de minimis defense. I think the position that the Department of Labor will take from this point forward, and certainly the position that plaintiffs' lawyers will take in litigation is that the Alvarez decision does away with the de minimis defense. That once you say that putting on a compensable garment or a required sanitary garment at the beginning of the day starts the clock running, there is no occasion to consider that activity an isolation to sort of slice and dice the workday to say, "Well, is that donning and doffing activity really de minimis or not?"

And it leads you to a situation where, as I said earlier, maybe somebody puts on a piece of protective gear, maybe an overcoat, and it takes two seconds to put on an overcoat. But the employee must then enter a workspace and walk a long distance to get to his or her workstation. The fact that it only took two seconds to put on that overcoat doesn't allow application of the de minimis defense, at least that's what I think will be argued.

I am aware of a case in which a group of telephone operators have sued their employer claiming that each morning they have to stop at a locker and put on a telephone headset, which is pretty much about as lightweight a piece of gear as you could imagine. They go by their locker, pick up their headset, and then their claim is they have to walk 10 minutes or 15 minutes to get to their workstation or to their telephone. And they are alleging that putting on that headset makes that walk compensable.

I think we will see cases like that and I think certainly de minimis defense -- that whether the de minimis defense survives or not is an open question. It may be raised in the remand of the Tum case, because the Tum case has now been remanded and there will be an opportunity, at least, if the case is not settled and goes to the court, for the court to address whether the de minimis defense has survived in light of Alvarez.

So I think in terms of defending past practices, I think we want to apply the de minimis defense until some court tells us not to. I think in determining what employers want to do going forward, I think you have to question whether you want to rely on it or not.

Another issue, if you'll go to the next slide. If has always been the DOL's position that if an employee can put on or take off protective garments or gear away from the workplace, if an employee has that option, then that activity is not compensable and putting on protective gear or garments at home or someplace else does not make travel time to work compensable.

I do think this may be challenged in private litigation, though, and probably that will likely come up in the context of police officers, fire fighters, paramedics. People like that who drive state vehicles home at the end of the day and keep their police cruisers at home, which I think is a fairly common practice. But then they get up in the morning and they put on protective gear, they get in their police car, and they drive to their daily roster meeting down at the police station.

I think we will see cases arguing that putting on that gear at home and then getting in the police cruiser and driving to work makes that drive time compensable. That issue has been litigated quite frequently. Generally that kind of travel time has been found to be non-compensable, but I think Alvarez creates an opportunity to challenge that.

And I think there's some other context in which that will be challenged. For example, employees who begin their workday at home who maybe have to call in to pick up their assignments or log on to their computer to get their assignments for the day and then drive in some company vehicle to their first assignment. I think the compensability of that driving time will now be challenged.

If you'll go to the next slide, I've kind of jumped ahead a little bit, but I think in private litigation it will certainly be argued that the de minimis rule is no longer viable. I think the DOL's position regarding donning and doffing activities away from work will also be challenged in private litigation.

If you'll go to the next slide, also, I mentioned the 203(o) defense for unionized employers. Plaintiff's lawyers assert that the 203(o) defense only applies to clothes changing and showering activities and does not apply to walking time. So for any employer

that will be looking to rely upon that defense, be prepared that it will probably be asserted to the extent -- particularly where there's significant amounts of walking time involved. And that could be something like construction employers where your worksite changes everyday.

I'm aware of quite a few employers who have already gotten letters from unions representing their employees looking to bargain over these issues. And obviously the union is looking to take advantage of this decision, but that also creates an opportunity for employers to get in and negotiate about that and as I've said, you don't have to reach an agreement that the union likes or that the employees like, you just have to show that you've bargained not to compensate people for that time.

If you have unionized employees, and some unions are more up to speed on this than others, but it is certainly an issue that may come up in bargaining.

If you go to the next slide, just a quick review regarding the DOL's enforcement position. I think I've covered their enforcement position pretty thoroughly already, but obviously the continuous workday rule now has the [inaudible] of the Supreme Court.

The DOL will take the position that any item that is required by the employer, by federal regulations, by customer requirements, any type of protective gear that is required, is integral, and indispensable. But as of today it is still their position that if the employee has the option to don or doff that item at home, then that time is not compensable.

If you go to the next slide, a couple of other related pitfalls under the Fair Labor Standards Act that result in claims for uncompensated overtime like this. What I mean by unauthorized overtime is often you will see policies that say that employees are only allowed to work overtime when they are properly authorized to do so.

That's fine, but you can't enforce that policy by not paying employees for unauthorized overtime. If employees work overtime, whether it's authorized or not, you've got to pay them time and a half for it. You're certainly free to discipline somebody for working overtime without authorization, but you can't withhold overtime pay.

Automated meal period deductions have created some very, very significant liabilities for employers and very recently. And again, we're dealing with the issue of -- what typically will happen is it's very, very common for employers to have an eight-hour workday with a 30-minute unpaid meal break or some set period of time with an automatic deduction for say a 30-minute meal period.

If in practice employees aren't relieved of duty for that 30 minutes, it results in claims under both federal and state law for compensation during those times. And obviously Alvarez, to the extent employees are donning, doffing, walking, or doing any of those related compensable activates within the confines of an unpaid meal period, it puts that meal period at risk.

Another related issue that's very common with automated timekeeping systems is to allow employees to punch in some period of time prior to the beginning of their shift, maybe even some period of time after the end of their productive shift.

In some workplaces employers have allowed what I refer to as long punches, allowing employees to punch in 15 or maybe even 30 minutes prior to the start of their productive shift, just to avoid lines at the time clock.

Well the Alvarez decision sort of compounds the normal problem that creates because if an employee shows, "Look, I clock in 20 minutes before my shift starts and I put on some garments," it is more likely that that time will be found to be compensable and you as an employer are left to defend your timekeeping practices with your own payroll and timekeeping records which supports the employee's case better than they do your case.

So long punches, sometimes they're necessary because of the number of employees who have to punch a time clock within a short period of time. But it's advisable, even before the Alvarez decision, to limit those as much as possible.

Some of what I think are the possible targets for donning and doffing claims; call centers, as I said we're already aware of one case involving operators.

Any type of clean room environment. And the reason there is because it's always clear in that type of environment an employee has to don or doff that protective gear outside of the work area, which makes any walking time to get to their work station compensable.

I mentioned police officers, firemen, et cetera. They are one of the most frequent sources of FLSA complaints.

Any type of operation that is physically large and has long walking distances -- the Alvarez decision on walking time obviously creates some liability there.

Any situation in which employees have to put on any type of required equipment or carry equipment to their worksite.

And then I mentioned employees who begin their workday at home. There have been quite a few cases involving insurance claims adjustors who work in the field, claiming that they pick up their first assignment on their computer at home and then begin their workday and that that should start their workday.

Having sort of identified the problem, if you'll go to the next slide which should be "Avoiding Donning and Doffing Claims," I'll share with you what is sort of our standard advice for minimizing exposure to these claims.

One of the first things I find that most employers don't know or don't have a firm grasp on what their employees really are required to wear. So I encourage them to take an inventory of what is actually required and maybe even consider what should or should not be required.

And there are several different sources for that. It may be an employer requirement, it may be an OSHA requirement, it may be a customer requirement or an ISO 9000 requirement; any of those types of things. It doesn't matter why it's required, but if it's required then you've got to evaluate where and when employees are putting it on.

I think, too, if there's some language in the case and in the regs that say even if it's not technically required, if it's required by the conditions the employees work in as a practical matter, they couldn't work without it, even if you're indifferent as to whether they're wet or cold or whatever the environment may be, which I'm sure you're not, then that too may be compensable.

If there are items that the employees are clearly required to don and doff and that can't be donned or doffed at home, then I think every employer should consider providing some compensable time. It's a smart thing to do to go ahead and perform a time and motion study and determine how much that compensable time should be.

The DOL refers to that as plug time and there are really two ways to capture that time and to properly compensate people for that time. One is to provide plug time. In other words, if you did a time and motion study and you found that employees donning, doffing, walking activities totaled to five minutes, then pay them five minutes in addition to their normal productive shift.

If it's possible to locate your time clock and your gowning and de-gowning and locations such that the time clocks can capture that time, that's really the preferred method. DOL will frequently tell employers that you have to get control of your own time clock, meaning that you should locate your time clocks so that they capture these activities.

Sometimes that's possible and sometimes it's not. Reorganizing the workplace a lot of times is easier said than done and the DOL really doesn't have much appreciation for that.

It may be necessary to enact or to put into place policies that prohibit donning and doffing before or after compensated time periods and control employees' activities with work rules. Maybe the hardest thing about coming into compliance with the Alvarez decision is not moving time clocks or deciding how much to pay people, but changing employees' work habits.

Some employees may have the habit to come in, go to the locker room, get the gear they need that day, and then go have a cup of coffee last thing before they go to work. You may have to get some of those habits under control because it's going to expose employers to liability. And there may be some resistance to that by some employees because old habits die hard.

I think it's very important, and obviously this varies state by state, but very important to make sure meal periods are adequate and that donning, doffing, walking activities aren't encroaching on the meal period. And then where the opportunity presents itself and you have a unionized workforce, if you haven't already, it's a wise thing to address that in negotiations and to establish that defense for unionized employees.

And if you go to the last slide, it's very important if you're going to have those kinds of polices to control employees' behavior, to get them publicized, will be useful in defending a case. Managers and employers both need to be trained from orientation on regarding your donning and doffing practices.

Where it's possible and practical to do so, it's always a good practice to have employees review and certify their time entries. It's also good to make sure managers and supervisors understand these issues and understand the assumptions upon which your timekeeping is based.

It's a very good policy and practice to have a reporting and complaint procedure for employees who have any issues regarding their paychecks or compensable time. It's a good idea to audit to make sure that meal periods are being observed, that rules regarding when employees can don and doff are being observed.

I'll often find in these cases that what's going on on the plant floor is different then what corporate management expects.

And with that, that sort of takes us to the end of my presentation. If there are any questions we'll certainly be glad to handle those.

James Baine - *Murphy Oil Corporation - Attorney*

Chris, we need to mention, I think, that David is on the line, isn't he?

Chris Lauderdale - *Jackson Lewis - Attorney*

Yes. He's here, although he's a little under the weather.

James Baine - *Murphy Oil Corporation - Attorney*

That's the reason he hasn't participated in the webcast.

And you did mention that there are a few states that you might need to look at with regard to donning and doffing if you wanted to look at the law.

Chris Lauderdale - *Jackson Lewis - Attorney*

Well, not surprisingly, California is certainly one and there have been some very significant verdicts and decisions in California recently that one would want to be concerned with. California has sort of a unique penalty provision tied to their meal break statute.

James Baine - *Murphy Oil Corporation - Attorney*

Well, we want to thank you. And this concludes our program. Thank you so much.

Chris Lauderdale - *Jackson Lewis - Attorney*

Thank you.
