

BRINGING HOME THE BACON: MEALTIME DONNING AND DOFFING UNDER THE FLSA IN THE MEAT PROCESSING INDUSTRY

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I. INTRODUCTION

Imagine working 40–50 hours a week in a factory where floors are slippery with grease, blood, and fat. Your workroom is always either extremely cold or hot. Supervisors regularly yell at your coworkers to work faster, despite the fact that your coworkers make upwards of 20,000 cuts to raw meat on a never-ending conveyor belt. These images may conjure up visions of the early 20th-century slaughterhouses in Upton Sinclair's *The Jungle*, but unfortunately, these conditions remain a reality for most workers in the meat and poultry industry. The meat and poultry industry has been referred to as “the most dangerous factory job in America,”¹ and its workers are also likely the “most exploited” workers in the manufacturing industry.² However, in the past decade, meat and poultry workers have attempted to assert their right to fair pay by bringing wage-and-hour suits against unscrupulous employers.³ This

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1. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 14 (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

2. Robert Albritton, *Eating the Future: Capitalism Out of Joint*, in POLITICAL ECONOMY AND GLOBAL CAPITALISM: THE 21ST CENTURY, PRESENT AND FUTURE 43, 58 (Robert Albritton, Bob Jessop & Richard Westra eds., 2010) (describing the conditions of the modern packing-house worker and stating that since the era of slavery in colonial times, food production has been associated with the most exploitative of work conditions).

3. Prior to 2001, just a handful of cases were brought by food-processing workers. The U.S. Secretary of Labor actually brought the first major reported case in *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993), *aff'd*, 38 F.3d 1123 (10th Cir. 1994). It was

surge in litigation has also prompted widespread disagreement in a number of jurisdictions about whether employees should recover lost wages from time spent donning and doffing protective gear.

This Article explores the authority split regarding the compensability of donning and doffing at meal breaks and argues that the Fair Labor Standards Act (FLSA) requires that employers pay employees for time spent donning and doffing when such time reduces the length of unpaid meal breaks. Part II explores the various tests courts have developed to determine whether employees should be compensated for time spent donning and doffing. Part III reviews the two common situations involving mealtime donning and doffing. Part IV reviews the four different tests courts apply to determine liability for mealtime donning and doffing and explains why courts should apply the “continuous workday” rule articulated in *IBP, Inc. v. Alvarez (Alvarez II)*.⁴

II. SUITS ON SUITS

A. *Employees Must Put On and Take Off the Gear*

Many employees have to dress for work, but donning and doffing cases under the FLSA generally involve more than simply putting on a tie or uniform. Donning and doffing usually involve putting on and taking off personal protective equipment (PPE) and clothing.⁵ The Supreme Court has defined clothing in broad terms—“items that are designed and used to cover the body and are commonly regarded as articles of dress”⁶—but has clarified that other items, “such as some equipment and devices,”⁷ are excepted. For meatpacking factory workers, donning and doffing is an exceptional substantial burden because of the amount of PPE and clothing required in their line of

not until 2001 that plaintiffs throughout the country began filing their own suits. See *Felix de Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 661 (E.D. Pa. 2001) (litigating employee action for minimum wage and overtime violations brought under the Fair Labor Standards Act (FLSA)).

4. *IBP, Inc. v. Alvarez (Alvarez II)*, 546 U.S. 21, 32 (2005). Courts must still determine whether donning and doffing actually occurred and whether the donning and doffing in question is “*de minimis* as a matter of law.” *Id. But cf. infra* note 100 (casting doubt on a flippant use of the *de minimis* doctrine).

5. *Id.* at 30, 32 (citing Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 86–87 (1947) (codified as amended at 29 U.S.C. § 254 (2012))).

6. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014).

7. *Id.* at 878.

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work.⁸ Even with the correct PPE and clothing, meatpacking workers are subject to some of the highest injury rates in the manufacturing industry.⁹ Thus, safety gear is extremely important to protect the health of these workers. The hazards surrounding these workers probably help explain why much donning and doffing litigation involves the meatpacking industry, despite the fact that donning and doffing is a common but less burdensome activity in most other industrial and manufacturing jobs.¹⁰

B. Donning and Doffing Must Be Compensated When It Is Work

Ultimately, the FLSA answers whether an employer must compensate an employee for donning and doffing. It requires that the employer compensate the employee for “all of the time which the employer requires or permits employees to work.”¹¹ However, the FLSA’s language does not actually define what “work” means.¹² Courts generally rely on precedent to determine whether an activity is work,¹³ but precedent is also ambiguous. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, the U.S. Supreme Court held that work meant “physical or mental exertion (whether burdensome or not) controlled or

8. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-96, WORKPLACE SAFETY AND HEALTH: SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED 25 fig. 6 (2005), available at <http://www.gao.gov/new.items/d0596.pdf> (illustrating “Safety and Other Equipment Worn by Meat and Poultry Production Workers”).

9. *Id.* at 28; see also NEBRASKA APPLESEED, “THE SPEED KILLS YOU”: THE VOICE OF NEBRASKA’S MEATPACKING WORKERS 3 (2009), available at http://neappleseed.org/wp-content/uploads/downloads/2013/01/the_speed_kills_you_100410.pdf (concluding that actual injury rate exceeds officially reported rate).

10. *Is the Meatpacking Industry Getting Safer?*, UNITED FOOD & COM. WORKERS INT’L UNION (June 10, 2012), <http://www.ufcw.org/2012/01/10/is-the-meatpacking-industry-getting-safer/>. The Department of Labor’s Wage and Hour Division focuses on low-income industry in its regulations and investigations. See *No More Scoffing at Donning and Doffing*, INBUSINESS (Feb. 2010), <http://www.ibmadison.com/In-Business-Madison/February-2010/No-More-Scoffing-at-Donning-and-Doffing/> (“There are more class and collective wage and hour suits filed than class discrimination cases of all the various sorts filed together. This is a very hot area.”).

11. *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 5 (1st Cir. 2003), *on reh’g*, 360 F.3d 274 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom., Alvarez II*, 546 U.S. 21 (2005).

12. James Watts, Comment, *Dressing for Work Is Work: Compensating Employees Under the Fair Labor Standards Act for Donning and Doffing Protective Gear*, 87 U. DET. MERCY L. REV. 297, 300 (2010).

13. *Alvarez v. IBP, Inc. (Alvarez I)*, 339 F.3d 894, 902 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005) (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)).

required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”¹⁴ Nevertheless, in the same year, the Court cautioned against relying on that language and implied that exertion may not always be necessary.¹⁵ This ambiguity explains why courts are so tempted to be adventurous with new solutions toward adjudicating donning and doffing claims.¹⁶ Notably, in *Sandifer v. U.S. Steel Corp.*, the Court never mentioned exertion in its analysis.¹⁷ Most appellate courts have ruled that meat and poultry employees are not entitled to compensation for donning and doffing,¹⁸ although several jurisdictions have allowed these claims to go forward.¹⁹

The first major court decision to evaluate donning and doffing under the FLSA in the meatpacking industry, *Reich v. IBP, Inc.*, granted the claim for donning and doffing but only for the workers who were required to don the most burdensome gear in the plant.²⁰ The court denied FLSA coverage to employees donning the less sophisticated “hard hats, earplugs, safety footwear, and safety eyewear” because such donning was not considered strenuous enough to constitute work.²¹ However, later cases have cast aside the question of whether exertion is actually necessary for the integral-and-indispensable analysis.²²

14. *Tenn. Coal, Iron & R. Co.*, 321 U.S. at 598.

15. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (“Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.”).

16. *See infra* Part IV.

17. *See generally Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014).

18. *See, e.g., Salazar v. Butterball, L.L.C.*, 644 F.3d 1130, 1134 (10th Cir. 2011); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 211 (4th Cir. 2009), *cert. denied*, 131 S. Ct. 187 (2010); *Anderson v. Cagle’s, Inc.*, 488 F.3d 945, 959 (11th Cir. 2007).

19. *See, e.g., Frank v. Gold’n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 WL 2780504, at *9 (D. Minn. Sept. 24, 2007); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 366–68 (4th Cir. 2011).

20. *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) (holding that knife-wielding workers should receive compensation for donning and doffing unique PPE and that non-knife-wielding workers should not receive compensation for donning and doffing standard PPE, which was not uniquely required by the dangers of the various production jobs). The U.S. Secretary of Labor’s case opened the doors for many plaintiff attorneys to follow suit. *See supra* note 3 and accompanying text.

21. *Reich*, 38 F.3d at 1124–25. The knife-wielders’ unique PPE included “a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards.” *Id.*

22. *See infra* Part II.C.

C. The Preliminary and Postliminary Activity: To Be Compensated, Donning and Doffing Must Also Be Integral and Indispensable to Work Performed

Although “work” is not well defined, the Portal-to-Portal Act of 1947 (PPA) places significant limits on what constitutes work under the FLSA.²³ The PPA allows employers to avoid compensating employees either for an employee who merely moved to or from the place of principal activity or for “activities which are preliminary to or postliminary to said principal activity or activities.”²⁴ In *Alvarez II*, the Supreme Court stated that donning and doffing is compensable under the FLSA as amended through the PPA if it is integral and indispensable to a principal activity.²⁵ Moreover, an activity is integral and indispensable if it “[1] must be necessary to the principal work performed and [2] done for the benefit of the employer.”²⁶ However, some activities that are integral and indispensable may nevertheless take up an insubstantial amount of time, making them not compensable because they are considered *de minimis*.²⁷

The Supreme Court first decided whether an activity is integral and indispensable in *Steiner v. Mitchell*, holding that changing clothes was integral and indispensable in instances when employees had been exposed to highly toxic and caustic materials.²⁸ In a later decision, the Court similarly held that knife sharpening in a meatpacking plant was

23. 29 U.S.C. § 254(a)(2) (2012). Congress passed the PPA to curtail the Court’s interpretation of the FLSA in the case of *Anderson v. Mt. Clemens Pottery Co.*, where the Court had allowed donning and walking-time claims brought by employees from a pottery factory. See Christine D. Higgins, Note, *Can I Get Paid for That?: The Compensability of Commuting Time Post-IBP*, Inc. v. *Alvarez*, 546 U.S. 21 (2005), 86 NEB. L. REV. 208, 210–11 (2007) (quoting 29 U.S.C. § 251 (2000)) (explaining that Congress believed *Anderson* to be a violation of “long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation”). Nevertheless, Congress did not specifically exclude all donning and doffing activities from compensation and continued to allow claims that were “compensable under contract, custom, or practice.” H.R. REP. NO. 326, at 12 (1947) (Conf. Rep.).

24. 29 U.S.C. § 254(a)(2).

25. *Alvarez II*, 546 U.S. 21, 37–42 (2005) (excluding from the scope of the FLSA employees who were waiting to don and doff and not actually participating in donning and doffing).

26. *Alvarez I*, 339 F.3d 894, 902–03 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005). See *Alvarez II*, 546 U.S. at 25; *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

27. See *infra* Part IV.E.

28. *Steiner*, 350 U.S. at 256.

integral and indispensable.²⁹ Although the *Alvarez II* Court stated that plaintiffs do not need to show “exertion” in proving that an activity is integral and indispensable,³⁰ lower courts have distinguished *Alvarez II* and disallowed claims because of an absence of exertion in donning and doffing.³¹

D. Butchering the Law: Courts Are Divided Regarding Whether Donning and Doffing Are Integral and Indispensable

Whether employees are able to recover for donning and doffing turns, in part, on the timing.³² In *Perez v. Mountaire*, the Tenth Circuit held that poultry employees’ donning and doffing was integral and indispensable because it was both necessary for their work and primarily benefitted their employer.³³ But the court lamentably dismissed the workers’ mealtime donning and doffing claims.³⁴ The *Perez* court rested its decision on *Sepulveda v. Allen Family Foods, Inc.*,³⁵ holding that mealtime donning and doffing was part of a “bona fide meal period” as a matter of law even though the break was less than 30 minutes and the time spent donning and doffing was approximately 7 minutes.³⁶ Although the *Perez* court believed that the employees should be

29. *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956).

30. *Alvarez II*, 546 U.S. at 25 (“[E]xertion’ was not in fact necessary for an activity to constitute ‘work’ under the FLSA.”) (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)).

31. *See, e.g., Reich v. IBP, Inc.*, 38 F.3d 1123, 1125–26 (10th Cir. 1994) (granting only claims for knife wielders because donning and doffing of unique PPE was “heavy and cumbersome, and it require[d] physical exertion, time, and a modicum of concentration to put [it] on securely and properly”).

32. *See Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 881 (2014). *Sandifer* held that because “the vast majority of the time” was spent donning and doffing clothes, not PPE, the entire time was appropriately excluded from compensation under the bargaining agreement regardless of how much time was spent donning and doffing PPE only. *Id.* The integral-and-indispensable analysis, however, was not at issue. *Id.*

33. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 366–68 (4th Cir. 2011) (finding that it was necessary because donning gear was required by OSHA and the USDA and was for Mountaire’s benefit in “protect[ing] the products from contamination, help[ing] keep workers’ compensation payments down, keep[ing] missed time to a minimum, and shield[ing] the company from pain and suffering payments”).

34. *Id.* at 369.

35. *Id.* at 360 (citing *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009)).

36. *Perez*, 650 F.3d at 369, 372 (citing *Sepulveda*, 591 F.3d at 216–17 & n.4). “In resolving this issue as a matter of law, the [c]ourt in *Sepulveda* appears to have departed from [precedent] . . .” *Id.* at 370.

compensated for mealtime donning and doffing under the continuous workday rule, since such donning and doffing occurred during the designated meal period, the court determined that it was not compensable.³⁷ While several courts have disagreed with *Perez*,³⁸ no federal appellate courts have expressly allowed mealtime donning and doffing claims under the FLSA.³⁹

Not every jurisdiction has replicated the *Perez* court's rash decision. However, meat and poultry employees asserting FLSA claims probably benefited from *Perez* because the employees in *Perez* had a relatively lighter burden than the knife wielders in *Reich*.⁴⁰ Comparing *Reich* to *Perez* reveals that almost all aggrieved meat and poultry line employees can now be granted a donning and doffing FLSA claim because virtually all employers must prescribe more stringent USDA-mandated hygienic donning and doffing activities than were required at the time *Reich* was decided.⁴¹ This requirement implies that all line workers are now likely to satisfy the exertion requirement for work set by *Reich*, at least as a matter of law for summary judgment.⁴²

37. *Id.* at 363, 369 (stating that if it were an issue of first impression, the court would have applied the continuous workday rule to allow compensation for mealtime donning and doffing).

38. *See* Lugo v. Farmer's Pride Inc., 802 F. Supp. 2d 598, 614 (E.D. Pa. 2011) (denying summary judgment on mealtime donning and doffing claims); *see also* Bouaphakeo v. Tyson Foods, Inc., No. 5:07-CV-04009-JAJ, 2011 WL 3421541, at *9-10 (N.D. Iowa Aug. 4, 2011).

39. The Supreme Court did not discuss whether donning and doffing is compensable because it was not presented. *See Alvarez I*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).

40. *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1124 (10th Cir. 1994).

41. In 1996, the USDA required that virtually all line workers and anyone working with product services perform hygienic practices that had not been required at the time of *Reich*. *See* Pathogen Reduction, 61 Fed. Reg. 38,806 (July 25, 1996) (codified at 9 C.F.R. § 416.5 (2014)).

42. *See Bouaphakeo*, 2011 WL 3421541, at *1, *9. One could still argue, however, that, although taken together all hygienic practices required by animal-processing-line employees require exertion, the *Reich* doctrine of exertion is applicable only to each discrete task. But the integral-and-indispensable nature of each donning and doffing activity is the closest guide to a rule on whether the donning and doffing will be compensated. *See* Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 A.B.A. J. LAB. & EMP. L. 363, 376 (2011) ("This paradigm seems to make the exercise of identifying 'work' obsolete except to the extent that the first and last principal activities of the day constitute work."); *see also* De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 373 (3d Cir. 2007).

Because the PPA does not apply to meal claims,⁴³ one would suspect that mealtime claims for donning and doffing would be easy to bring under the FLSA. However, mealtime donning and doffing claims have not fared any better than start-and-end-of-day claims because of wide differences in state law and disagreements in the circuits regarding interpretations of federal law.

E. State and Federal Laws Differ for Mealtime Donning and Doffing

The FLSA requires compensation for “all of the time which the employer requires or permits employees to work.”⁴⁴ However, the FLSA does not actually define work.⁴⁵ As mentioned above, with the substantial effort of employees to comply with USDA guidelines, it is difficult to argue that the amount of effort required in donning and doffing does not constitute work. Nevertheless, courts hesitate to grant compensation for plaintiffs’ time under the FLSA when donning and doffing occurs at lunch.⁴⁶ Under the FLSA, bona fide meal periods may not be compensable;⁴⁷ as a result, some courts believe that mealtime donning and doffing is not compensable either.⁴⁸

Although donning and doffing undoubtedly shorten an employee’s mealtime, federal law does not prescribe the length of a bona fide meal period.⁴⁹ Consequently, some courts dismiss federal FLSA claims for mealtime donning and doffing due to the lack of a bright-line standard dictating how long a bona fide meal period must be,⁵⁰ with a few notable

43. See *Lugo*, 802 F. Supp. 2d at 603.

44. *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 5 (1st Cir. 2003), *on reh’g*, 360 F.3d 274 (1st Cir. 2004), *aff’d in part, rev’d in part sub nom., Alvarez II*, 546 U.S. 21 (2005).

45. *Watts*, *supra* note 12, at 300.

46. See, e.g., *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217 n.4 (4th Cir. 2009) (“[E]mployees seek compensation for the time they spend during their lunch breaks donning and doffing a few items, washing, and walking to and from the cafeteria. This time is non-compensable, however, because it is part of a bona fide meal period . . .”) (citation omitted).

47. 29 C.F.R. § 785.19(a) (2014).

48. See, e.g., *Sepulveda*, 591 F.3d at 216–17 & n.4.

49. Although an interpretive bulletin states that “30 minutes or more is ordinarily long enough” and that special circumstances are required for breaks shorter than 30 minutes, that bulletin is “not binding.” *Hill v. United States*, 751 F.2d 810, 813 & n.2 (6th Cir. 1984).

50. See, e.g., *Sepulveda*, 591 F.3d at 216–17 & n.4; see also *Blain v. Gen. Elec. Co.*, 371 F. Supp. 857, 862 (W.D. Ky. 1971) (denying a donning and doffing claim where lunch was only 18 minutes); *but cf. Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1350–51 (10th Cir. 1986) (allowing full length of mealtime to be calculated in overtime

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exceptions.⁵¹ In contrast, many state FLSAs specify the required length of a bona fide meal period.⁵² Thus, donning and doffing claims have fared better under state wage-and-hour laws with a defined meal period.⁵³ However, this Article argues that a bright-line meal period standard is not necessary to find that plaintiffs should be compensated for mealtime donning and doffing work due to the continuous workday rule.

III. THE NEED FOR UNIFORMITY IN FLSA MEALTIME DONNING AND DOFFING

In contrast to the bona fide meal compensation exception, the continuous workday rule offers a more logical standard for determining the compensability of donning and doffing for meal claims.⁵⁴ The continuous workday rule was articulated in *Alvarez II*, where the Court found that the time between the start and end of work is work.⁵⁵ However, this solution has not been widely adopted. This Part analyzes how courts have adjudicated donning and doffing claims under two different schemes: when a claim is brought under state law with a bright-line 30-minute requirement, and when the law is ambiguous about required meal length.

A. Bright-Line Tests Favor Employees

Situation One: Employers are required to provide lunch breaks at least 30 minutes in length. An employer does not pay for any

compensation when plaintiff often ate hurriedly).

51. See *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir. 1985), *overruled by* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130–31 & n.1 (1988) (“To qualify as a bona fide noncompensable [meal] break, the respite must be uninterrupted and at least thirty minutes in duration, and the employee must be completely relieved from duty.”).

52. For example, Washington requires 30-minute meal breaks. WASH. ADMIN. CODE § 296-126-092 (2013).

53. See, e.g., *Alvarez I*, 339 F.3d 894, 914 (9th Cir. 2003), *aff’d*, 546 U.S. 21 (2005) (finding that under Washington law, meat packing employees were “owed compensation for the full thirty-minute period where [the employer] intruded upon or infringed the mandatory thirty-minute term to any extent”).

54. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 369 (4th Cir. 2011) (“If we were writing on a clean slate, we would hold that based on the district court’s factual findings, these activities are not part of the ‘bona fide meal period’ but are compensable as ‘work’ under the continuous workday rule.”) (citing *Alvarez II*, 546 U.S. 21, 29 (2005); *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 545 (4th Cir. 1998)).

55. See *Alvarez II*, 546 U.S. at 29 (2005) (citing 29 C.F.R. § 790.6(b) (2005)).

*donning and doffing during the lunch break. Consequently, employees are denied part of their lunch break.*⁵⁶

When a statute requires an employer to provide a lunch break, *Alvarez v. IBP, Inc. (Alvarez I)* provides persuasive reasoning why an employer would probably have to pay for the whole 30-minute time period described in this situation.⁵⁷ However, state mealtime law can vary greatly,⁵⁸ and the court in *Alvarez I* took great care to base its rationale not only on the plain language of the regulation but also on the interpretation of the Washington State Department of Labor and Industries.⁵⁹ The court also based its decision on the policy of the Washington FLSA as evidenced by administrative history,⁶⁰ which could be distinguished in states lacking similar agency directives. Nevertheless, the jurisprudence around these issues implies that the all-or-nothing approach is not favored and that courts avoid punishing an employer for taking a few minutes away from the worker.⁶¹ Courts are much more likely to apply the *de minimis* doctrine instead.⁶²

B. Killing Time

*Situation Two: No bright-line 30-minute lunch is required, but the employer automatically deducts 30 minutes from daily earnings, even though several minutes are spent donning and doffing.*⁶³

56. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 212, 216 n.4 (4th Cir. 2009).

57. *See Alvarez I*, 339 F.3d at 913–14.

58. *Compare* GA. CODE ANN. §§ 10-1-571 to -576 (2012) (no mealtime required), with N.Y. LAB. LAW § 162 (McKinney 2012) (“Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noon day meal.”).

59. *Alvarez I*, 339 F.3d at 911.

60. *Id.* at 914.

61. *Cf. Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (holding that to avoid liability for liquidated damages under the FLSA, employers must prove “good faith” compliance by “produc[ing] plain and substantial evidence of at least an honest intention to ascertain what [FLSA] requires and to comply with it”); *see also Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 380–81 (4th Cir. 2011) (Wilkinson, J., concurring) (stating that the court seeks to avoid an all-or-nothing approach).

62. *See, e.g., Perez*, 650 F.3d at 380–81. *See infra* Part IV.E for a critique of the *de minimis* doctrine.

63. *See Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 312, 314–15 (Minn. Ct. App. 2011); *Frank v. Gold’n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007

Many employers, especially in the meat and poultry industry, automatically deduct 30 minutes from an employee's start time, and only allow 30 minutes for a break period.⁶⁴ This situation is much more common than Situation One because most state FLSAs allow bona fide meal breaks of less than 30 minutes.⁶⁵ Still, courts disagree about whether such a break is bona fide and thus not subject to pay under the federal FLSA. However, in most jurisdictions, whether a meal is bona fide turns on a few issues, namely: Was the activity during meal breaks work or merely preliminary or postliminary activity? Were meal breaks of less than 30 minutes permitted in the jurisdiction? Is the employee free to do what he or she wants on the meal break?

IV. ALL AMUCK IN SCRAMBLED SITUATIONS

A. *Mealtime Donning and Doffing Is Work Under the Continuous Workday Rule Announced in Alvarez II*

Courts should simply determine whether mealtime donning and doffing is work or *de minimis*. The Eighth Circuit in *Hertz v. Woodbury Cnty., Iowa*, explained that meal periods are not exemptions from the FLSA but are simply defined out of the FLSA because they do not constitute work time.⁶⁶ The *Hertz* decision clarified that claims for mealtime donning and doffing should not be evaluated differently than any other claim for unpaid work.⁶⁷ The Supreme Court's rationale in *Alvarez II* bolsters this interpretation because activities like donning and doffing are merely preliminary or postliminary at the start or end of the day but rise to the level of work when they occur between the start and end of the day.⁶⁸ In other words, because mealtime donning and doffing

WL 2780504, at *6 (D. Minn. Sept. 24, 2007).

64. See, e.g., *Rios*, 793 N.W.2d at 314.

65. *Minimum Length of Meal Period Required Under State Law for Adult Employees in Private Sector*, Wage and Hour Division, U.S. DEP'T OF LABOR tbl. (Jan. 1, 2014), <http://www.dol.gov/whd/state/meal.htm>.

66. *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 783–84 (8th Cir. 2009). “In essence, a claim for unpaid mealtime work is no different than other overtime claims where it is the plaintiff's burden to show (1) that the plaintiff has performed compensable work and (2) the number of hours for which the plaintiff has not been properly paid.” *Id.* at 783.

67. *Id.*; see also 29 U.S.C. § 203 (2012) (defining “employ” and “hours worked”).

68. See *Alvarez II*, 546 U.S. 21, 28–30 & n.3 (2005) (stating that “postdonning and predoffing walking time is specifically excluded by § 4(a)(1)” of the PPA).

is work under the continuous workday rule (the integral-and-indispensable test), other tests to determine whether donning and doffing is compensable are not necessary.⁶⁹ Plaintiffs would likely succeed in most claims if the continuous workday rule guided courts so long as they could prove the donning and doffing happened and was more than *de minimis*.⁷⁰

The continuous workday rule contrasts starkly with the *Sepulveda* decision, which portrayed mealtimes as totally non-compensable so long as they are bona fide.⁷¹ At least one case has noted the serious weaknesses of applying the reasoning in *Sepulveda* instead of the continuous workday rule.⁷² Although applying the continuous workday rule and simply looking to whether the activity happened and is not *de minimis* would bring much needed continuity and predictability to wage-and-hour law,⁷³ this approach has not been widely adopted. Rather, most courts have settled on one of three other standards described below to determine whether donning and doffing at lunchtime is compensable.

B. Reading the Statute May Not Be Enough

Plain statutory interpretation is one proposed solution to determine whether donning and doffing is compensable at mealtime.⁷⁴ In *Frank v. Gold'n Plump*, a federal district court interpreted Minnesota's meal provision, Rule 5200.0120, to be a replica of 29 C.F.R. § 785.19, except that the state rule is binding in applying Minnesota's FLSA while the federal regulation is binding when applied to the federal FLSA.⁷⁵ In this

69. See *id.* (explaining that the PPA “had no effect on the computation of hours that are worked ‘within’ the workday”); 29 C.F.R. § 790.6 (2014) (stating that the provisions of § 4 under the PPA “have nothing to do with the compensability under the Fair Labor Standards Act”).

70. See *Alvarez II*, 546 U.S. at 32.

71. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 & n.4 (4th Cir. 2009).

72. See *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3421541, at *9 (N.D. Iowa Aug. 4, 2011) (“This court fails to see how this logic would not extend to the donning and doffing activities performed by plaintiffs when their 30 minute unpaid meal period starts.”).

73. Cf. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 380–81 (4th Cir. 2011) (Wilkinson, J., concurring) (stating that the “caselaw in this area is itself a mush”).

74. This may be true, as described below, for both state and federal regulations. See *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir.1985), *overruled by*, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130–31 & n.1 (1988) (citing 29 C.F.R. § 785.19 and stating that a bona fide mealtime “must be uninterrupted and at least thirty minutes . . . and the employee must be completely relieved from duty”).

75. See *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 WL

case, the court decided that because the Minnesota FLSA rule was binding under its plain language, regardless of federal precedent, and the rule stated that 30 minutes was usually enough for a bona fide meal break, 30 minutes was therefore required absent special circumstances.⁷⁶ Because the employer in *Gold'n Plump* could not show special circumstances, the court granted the employees compensation for the entire meal break.⁷⁷ However, courts disagree about whether showing special circumstances is necessary to find that a break of less than 30 minutes is warranted.⁷⁸

Although the simplicity of *Gold'n Plump* is appealing, its approach is problematic because many mealtime regulations do not clearly state what the length of time a meal must be. Courts often reasonably interpret the same mealtime regulations differently. For example, courts in *Rios* and *Gold'n Plump* reached opposite conclusions interpreting the same rule.⁷⁹ These differing conclusions highlight the need to use a different legal rule to promote predictability in the law, considering the lack of binding precedent from federal and state supreme courts.

C. Completely Relieved? Not Even on Your Lunch

Instead of answering whether the PPA should guide or simply interpret the regulation at issue, most courts use one of two competing standards: (1) the “completely relieved from duty” test⁸⁰ or (2) the “predominantly for the benefit of the employer” test.⁸¹ The completely-

2780504, at *7 (D. Minn. Sept. 24, 2007) (stating that the Minnesota rule is almost a “verbatim” copy of 29 C.F.R. § 785.19).

76. *Id.* at *8–9.

77. *Id.* Later, *Rios*, which had very similar facts, rejected this approach and awarded no lost time to the plaintiffs. *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 314–15 (Minn. Ct. App. 2011). *Rios* rested its analysis on the argument that Minnesota did not require a bright-line 30-minute meal. *Id.*

78. *Rios* did not consider the employees’ argument that, under the Minnesota Fair Labor Standards Act, meal breaks of less than 30 minutes were not deductible from hours worked because the employees failed to argue this claim before the trial court. *Rios*, 793 N.W.2d at 314–15.

79. Compare *id.* (finding that 30-minute meal breaks are required by statute), with *Gold'n Plump*, 2007 WL 2780504, at *9 (finding “‘special conditions’ excused Gold'n Plump from providing the thirty-minute meal break ordinarily required”).

80. See *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 n.1 (4th Cir. 1985), overruled by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130–31 & n.1 (1988); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975); *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975).

81. See *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 545 (4th Cir. 1998).

relieved-from-duty test requires that employers give compensation for all meal periods that are not totally uninterrupted and free.⁸² Although this test comes directly from the language of 29 C.F.R. § 785.19(a), only a minority of jurisdictions apply it.⁸³ Assuming that donning and doffing were proven to be integral and indispensable in Situation One (where an employer automatically discounts time and still requires donning and doffing to happen at lunch), an employee should be able to recover for the entire length of the lunch because he or she would be performing work while on lunch.⁸⁴

If courts refuse to apply the continuous workday rule to mealtime donning and doffing, the completely-relieved-from-duty test provides a logical alternative because of its foundation in the plain language of the regulations at issue. However, this approach suffers from the same problems as the bright-line test above: it requires an all-or-nothing award for the entire lunch period. Again, these types of awards are disfavored by courts because of their punitive, rather than compensatory, nature.⁸⁵

D. Who Really Benefits?

The predominantly-for-the-benefit-of-the-employer test is adopted by most jurisdictions.⁸⁶ This rule instructs courts to “focus[] upon the limitations and restrictions placed upon the employees, the extent to which those restrictions benefit the employer, the duties for which the employee is held responsible during the meal period, and the frequency in which meal periods are interrupted.”⁸⁷ Jurisdictions following this rule might give plaintiffs a harder time recovering lost wages because it does

82. 1 LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE & PRACTICE § 6:14 (2013).

83. *O'Hara v. Menino*, 253 F. Supp. 2d 147, 154–55 (D. Mass. 2003) (stating that the test is used in the Eleventh Circuit but not in most others).

84. *See, e.g., Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *15 (E.D. Wash. May 16, 2005) (“Employees are not completely relieved of duty while they are donning and doffing Therefore, the donning and doffing is work and it is compensable.”).

85. *See Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3421541, at *9 (N.D. Iowa Aug. 4, 2011); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 380 (4th Cir. 2011) (Wilkinson, J., concurring); *Donovan*, 780 F.2d at 1115 n.1.

86. *Cf. O'Hara*, 253 F. Supp. 2d at 154–56 (describing the evolution of the standard as a response to the Supreme Court's admonition that lower courts look to the realities of each case).

87. *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 266 (5th Cir. 1998).

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not allow for the bright-line guidance articulated by *Alvarez I.*⁸⁸ Employers, too, probably would not like an unreliable fact-intensive inquiry that juries must apply when considering this rule.⁸⁹ The fact that courts disagree about who bears the burden when deciding whether the lunch should be compensable further complicates application of this rule.⁹⁰

Because of the administrative difficulty in interpreting whether a break is predominantly for the benefit of the employer and because of uncertainty about who bears the burden of proof, this test should be abandoned for the continuous workday rule. The fact that the predominantly-for-the-benefit-of-the-employer test also suffers from the same all-or-nothing dilemma as the completely relieved from duty test bolsters this conclusion.⁹¹

E. De Minimis Should Not Be De Facto

Though simply stated, the *de minimis* test is fact-intensive and may not be reduced to a “mathematical certainty.”⁹² To qualify for the exception, employers must show that the time in question “is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.”⁹³ To determine whether an activity is *de minimis*, courts must look at three factors articulated in *Lindow v. United States*: (1) the “administrative difficulty of recording the time”; (2) the aggregate amount of additional time; and (3) the regularity of the additional work.⁹⁴ Even in circumstances where employees can show that donning and doffing should be compensated due to one of the above rules, the *de*

88. See *supra* Part III.A.

89. *O’Hara*, 253 F. Supp. 2d at 150.

90. Compare *Bernard*, 154 F.3d at 265 (“The employer bears the burden to show that meal time qualifies for this exception from compensation.”), and *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 544 (4th Cir. 1998) (“[T]he burden rests with the County to demonstrate its entitlement to the mealtime and sleeptime exemptions . . .”), with *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 784 (8th Cir. 2009) (“[T]he employee bears the burden to show that his or her mealtimes were compensable work.”).

91. See *Bernard*, 154 F.3d at 264–65 (stating that the employer has the burden of proving whether the mealtime is exempted).

92. *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984). However, multiple courts have found activities taking up to ten minutes per day might be *de minimis*. *Id.*

93. *Id.* at 1063.

94. *Id.* at 1062–63.

minimis defense may nevertheless bar compensation for donning and doffing under the FLSA.⁹⁵

In *Reich v. Monfort, Inc.*, the court held that donning and doffing is administratively difficult to determine because of the varying length of time employees take to perform the activity and the requirement of monitoring them.⁹⁶ However, the court in *Monfort* found that the second factor weighed in favor of the employees because both the amount of time for individuals and the total number of workers affected must be considered for the aggregate prong of the *de minimis* factors.⁹⁷ The court also found that the final factor weighed in favor of the employees because the donning and doffing took ten minutes and was performed daily.⁹⁸

Despite the three *de minimis* factors articulated in *Lindow*, courts sometimes skip the analysis and only look at the total amount of time involved in the activity in question.⁹⁹ For instance, *Sandifer* rejected applying the *de minimis* standard to a start-and-end-of-day claim involving “trifles” that would “convert federal judges into time-study professionals.”¹⁰⁰ Nevertheless, courts probably apply the *de minimis* exception to avoid determining whether a break is long enough to be bona fide because in a majority of states the question of whether meal breaks must be 30 minutes is unclear.¹⁰¹

Additionally, courts probably apply the *de minimis* exception where bright-line mealtimes are in place, or are inferable, because they fear

95. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), *superseded by statute*, 29 U.S.C. § 203(o), *as recognized in Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014).

When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Id.

96. *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998).

97. *Id.*

98. *Id.*

99. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 & n.4 (4th Cir. 2009).

100. *Sandifer*, 134 S. Ct. at 880 (“If the statute in question requires courts to select among trifles, *de minimis non curat lex* is not Latin for *close enough for government work.*”).

101. *See Sepulveda*, 591 F.3d at 216 & n.4.

exposing employers to massive liability.¹⁰² In jurisdictions with bright-line mealtime, defendant employers who require donning and doffing during what would otherwise be a mealtime would have to compensate their employees for an entire 30 minutes.¹⁰³ However, just because donning and doffing is compensable at lunchtime does not mean that the employer would have to pay for an entire 30 minutes of work.¹⁰⁴ Some courts mistakenly believe that they will have to apply the all-or-nothing approach and provide compensation as if the employee worked the entire term of the bona fide meal period.¹⁰⁵ But *Hertz* suggests that the mealtime claim should be treated no differently than if the donning and doffing claim occurred without any of the complications of the mealtime issue.¹⁰⁶

Further, the *de minimis* exception should not apply in today's sophisticated workplace. Although the *Monfort* decision applied the first factor of administrative difficulty in favor of the employer,¹⁰⁷ closed-circuit recording systems can easily determine exactly how long it takes to don and doff PPE. The employer could then average that time for the pay period. Further, the aggregate amount of time, even if just three minutes a day, can result in several hours of uncompensated work and even overtime over a year.¹⁰⁸ Additionally, employers could just as easily deduct three to ten minutes of their employees' time in jurisdictions without the bright-line 30-minute break. Only the smallest of employers

102. No courts have expressly stated this; it is inferable.

I admit to some discomfort applying any sort of balancing act where the Fair Labor Standards Act does not appear to provide one. . . . [I]f one is to undertake in this case the sort of *de minimis* inquiry mandated by *Anderson* and the decisions of our own and sister circuits, it cannot lead to some stark all-or-nothing disposition in favor of either management or labor.

Perez v. Mountaire Farms, Inc., 650 F.3d 350, 380 (4th Cir. 2011) (Wilkinson, J., concurring).

103. *See supra* Part II.B.

104. This is probably because of the decision in *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115 (4th Cir. 1985), *overruled by* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130–31 & n.1 (1988).

105. *See, e.g.*, *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 314–15 (Minn. Ct. App. 2011) (stating that the lower court did not address the distinction between whether a 30-minute break was required or deductible).

106. *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 783–84 (8th Cir. 2009). The mealtime issue would only be significant where there was a bright-line required time.

107. *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998).

108. *Id.*; *see also supra* note 92 and accompanying text.

without adequate resources to enact the above policies should be able to make a viable defense under the *de minimis* doctrine.

V. CONCLUSION: IN JURISDICTIONS WITHOUT BRIGHT-LINE MEAL LENGTH PERIODS, COURTS SHOULD ANALYZE WHETHER DONNING AND DOFFING ARE COMPENSABLE WORK REGARDLESS OF WHETHER THEY HAPPEN AT LUNCH

Courts should adopt the continuous workday rule as required by *Alvarez II* in interpreting mealtime donning and doffing claims.¹⁰⁹ This means that such FLSA claims would be limited to the three to ten minutes per day that the employee dons and doffs at lunch. Although plaintiffs will no longer enjoy the benefits of windfall under *Alvarez II*, plaintiffs will likely succeed in a greater number of wage-and-hour claims for mealtime donning and doffing under this rule; that is, as long as plaintiffs can prove that the donning and doffing actually occurred and was not *de minimis*.

The compensation collected for those few minutes of lunch is very modest, but this solution is more equitable for the defending businesses than the all-or-nothing approach of the various other tests such as the predominantly-for-the-benefit-of-the-employer test, which penalizes employers for not compensating meal breaks. Employers would benefit from the continuous workday rule because of its predictability and limitation on liability. At the same time, the rule would ensure fairer treatment of a class of meat and poultry processing workers that continue to experience high rates of exploitation. Nevertheless, even with ambiguity in this area of law, wage-and-hour claims for donning and doffing in the construction and pharmaceutical industries will still likely increase because meat and poultry employers are, with increasing frequency, settling donning and doffing claims. These settlements demonstrate the high likelihood that courts will require donning and doffing to be compensated absent unusual circumstances.

109. See *Alvarez II*, 546 U.S. 21, 29 (2005).