SCREENING FOR INTEGRITY: WHAT'S MISSING FROM *INTEGRITY STAFFING SOLUTIONS, INC. V. BUSK*

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I. INTRODUCTION

Fire killed one hundred and forty-five garment workers, mostly young women, on March 25, 1911, when the Triangle Shirtwaist Factory burned.[1] The girls died from the effects of the fire, they suffocated, or they jumped from the eighth, ninth, and tenth floors.[2] This event occurred prior to today's conceptions of workplace safety;[3] it occurred because the Triangle Factory bosses locked the stairwells to prevent employee theft.[4]

In 2011, an Amazon warehouse in Pennsylvania, staffed by Integrity Staffing Solutions (ISS) employees, was the target of an Occupational Safety and Health Administration (OSHA) inspection after health care professionals notified OSHA of heat-related ailments suffered by ISS employees.[5] Temperatures inside the warehouse exceeded 110 degrees; instead of opening the doors to allow for air circulation, Amazon paid to keep paramedics and ambulances standing by to treat dehydration and heat stroke.[6] Amazon locked the doors to prevent employee theft.[7]

In *Integrity Staffing Solutions, Inc. v. Busk*, the Supreme Court analyzed whether ISS must pay employees for time spent in security screenings prior to leaving for the day, "under the Fair Labor Standards Act of 1938 (FLSA), as amended by the Portal-to-Portal Act of 1947" (PPA).[8] Amazon mandates the screenings, conducted to prevent theft; the screening resembles a T.S.A.-

[1] THE GILDED AGE AND PROGRESSIVE ERA 236 (W.A. Link & S.J. Link, eds., 2012).

[2] C. Hinojosa, *Triangle Shirtwaist Factory Fire in* 4 ENCY. OF AM. ENVTL HIST. 1284 (K.A. Brosnan ed. 2011).

[3] 29 C.F.R. § 1910.36 (2014) (design and construction requirements for exit routes).

[4] *Supra* note 1.

[5] Spencer Soper, *Inside Amazon's Warehouse*, THE MORNING CALL, Sept. 18, 2011, http://www.mcall.com/news/local/amazon/mc-allentown-amazon-complaints-20110917-story.html.

[6] *Id*.

[7] *Id*.

[8] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 515 (2014) [hereinafter *Integrity Staffing*].

style search at an airport, and can take up to twenty-five minutes to complete.[9] The Court ruled the time spent in screening was not compensable.[10] This Comment argues the Court's decision in *Integrity Staffing* is overly narrow and poor public policy, as it hearkens back to the era of dangerous, oppressive sweatshops and "deprives [the] working man of that which is the only thing he has to sell— his hours or minutes of labor."[11]

The Court's decision was the result of a broad interpretation of the PPA. In Part II, this comment reviews how Congress intended the courts to interpret the FLSA liberally, and the PPA, narrowly.[12] To this end, since the inception of the PPA, the courts have created exceptions from the exemptions for employee compensation.[13] This Comment argues, in Part III, the ruling in *Integrity Staffing*, was an incorrect application of the PPA.[14] In Part IV, this Comment will call for legislative action as a solution.[15] Barring that, a return to the Court's own four-factor test in *Steiner v. Mitchell*, is required.[16] Interpreted as Congress intended, the PPA will not require employers to pay for travel time, but the FLSA does require employers to pay employees for required work.[17]

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[9] *Id.*

[10] *Id.*

[11] Anderson v. Mt. Clemens Pottery Co., 60 F. Supp. 146, 150 (E.D. Mich. 1943) *rev'd*, 149 F.2d 461 (6th Cir. 1945) *rev'd*, 328 U.S. 680 (1946).

[12] § 790.2(a) (The PPA was not "to change the general rule that the remedial provisions of the [FLSA] are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited . . . .").

[13] Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 ABA J. LAB. & EMP. L. 363, 382 (2011) (stating exceptions include compensating the doffing and donning of protective gear, and for preparation of equipment used on the job).

[14] *See* discussion *infra* Part III.

[15] *See* discussion *infra* Part IV A.

[16] *See* discussion *infra* Part IV B.

[17] Alfred & Schauer, *supra* note 13 at 382 (concluding the PPA intended to exclude commute time).

II. BACKGROUND

The Fair Labor Standards Act (FLSA) of 1938 was New Deal-era legislation, providing comprehensive reform of the workplace, regulating the minimum wage, child labor, the forty-hour workweek, and overtime pay.[18] In 1946, due to vagueness in the statutory language, the Supreme Court "expanded the definition of work, by holding that time spent by employees . . . traveling from the entrance of the facility to their work stations was compensable time."[19] Led by labor unions, employees sued for over $6,000,000,000 in back wages.[20] At the center of the controversy was the coal industry - vital to the war effort and the country's overall stability.[21] These suits forced Congress to amend the FLSA with the Portal-to-Portal Act (PPA) in 1947.[22]

A. Out the Front Door, Parking Lot, Car, Goodbye! The Portal Act Crisis

Ironically, the FLSA does not define the term "work."[23] Therefore, in the absence of guidance, "early Supreme Court cases defined the term broadly."[24] Starting in the mid-1940s, employers were required to compensate employees for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."[25]

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[18] Mario R. DiNunzio, DOCUMENTS DECODED: THE GREAT DEPRESSION AND NEW DEAL 284 (2014).

[19] Alfred & Schauer, *supra* note 13 at 366.

[20] Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 96 (1991).

[21] Linder, *supra* note 20 at 83.

[22] 29 U.S.C. § 251 (2012) (detailing the congressional findings and declarations of policy for the PPA).

[23] § 785.6 (The Act, however, contains no definition of "work.").

[24] Patrick M. Madden and Mark A. Shank, *Determining Hours Worked*, 18 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, Jul.-Aug. 2012, Art. 2; *see* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U. S. 590 (1944) ("Employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."); *accord* § 785.7.

[25] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91, (1946).

This characterization encompassed activities previously considered noncompensable: travel to worksites, pre-work preparations, and post-shift activities such as waiting or cleaning.[26]

Employers, besieged by lawsuits, brought their complaints to Congress – now much more pro-business than the Congress who passed the FLSA in 1938.[27] Congress declared the judiciary's interpretations of the FLSA created "wholly unexpected liabilities, immense in amount," resulting in bankruptcy for the nation's industries as "employees would receive windfall payments . . . for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay."[28] Congress passed the PPA "to meet the existing emergency" brought on by the judiciary's interpretation of the FLSA.[29]

The PPA eliminated employer liability for "portal to portal claims" incurred prior to May 14, 1947.[30] It defined "traveling to and from the actual place of performance" and "activities which are preliminary to or postliminary to" the "principal . . . activities the employee is employed to perform," as noncompensable.[31] However, the PPA did not alter the judicially constructed rules defining the workday or the workweek.[32] The workweek is "all the time during which an employee is necessarily required to be on the employer's premises,"[33] and the workday is the

[26] Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 166 (1945) (holding time spent by coal miners traveling underground to and from place of work, or from portal to portal, constitutes work and is included within compensable workweek contemplated by FLSA).

[27] Linder, *supra* note 20 at 138.

[28] § 251(a).

[29] § 251(b).

[30] §§ 252(a), (e).

[31] § 254(a)(1)-(2).

[32] §§ 785.7, 785.9(a).

[33] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91, (1946).

time between commencement and cessation of principal activities.[34] The regulations state that under this rule, "the workday may thus be longer than the employee's scheduled shift . . . or time on the production line."[35] The PPA merely made exceptions for preliminary and postliminary activities, placing them at risk for noncompensability.[36]

B. The Portal Act and the Regulations

Prior to the PPA, the analysis in wage and hour cases was, "whether time is spent predominantly for the employer's benefit or for the employee's."[37] The post-PPA statutory analysis is (1) to determine if the activity in question is an act of travel to or from the place of performance of the principal activities, and (2) once at that place, not preliminary or postliminary to the performance of those principal activities.[38] Employers have no obligation to compensate for commute time, or the time it takes to cross the employer's property to reach the front door.[39] Furthermore, employers may choose not to compensate preliminary activities, such as the time it takes to walk from the door to the workstation; likewise postliminary activities - there is no requirement of compensation for the time it takes to walk from the workstation to the door.[40]

The regulations provide additional tests for use in determining principal activities.[41] Principal activities comprise "all activities which are an integral part of a principal activity," and

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[34] § 785.9 (internal punctuation omitted).

[35] *Id.*

[36] § 785.7; Br. for Resp't at 15, Integrity Staffing Solutions, Inc. v. Busk, No. 13-433 (U.S. 2014).

[37] Armour & Co. v. Wantock, 323 U.S. 126 (1944).

[38] § 251(a); § 254(a)(1)-(2).

[39] § 785.34.

[40] *Id.*

[41] § 790.8(b)-(c).

"activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance."[42] A court must conduct the integral/indispensable analysis from the point of view of the employer; if an employee is unable to perform principal activities without performing certain preparatory or subsequent activities, those become an integral part of the employee's principal activity.[43] However, if the employee performs these activities as a convenience to themselves, those activities would not be compensable.[44]

In the 1960s, the Wage & Hour Division of the Department of Labor (DOL) promulgated expanded FLSA regulations to define, among other things, what it means to be "on" and "off" duty.[45] An employee is off-duty when "completely relieved" during a period "long enough to enable him to use the time effectively for his own purposes."[46] An employee's time is his own only once "he is definitely told in advance that he may leave the job."[47] Indeed, courts have found hours "during which employees are required to be present at the work site but must . . . wait to satisfy the procedures imposed by the employer," are FLSA-compensable.[48]

The PPA "is not free from ambiguity and the legislative history of the Portal-to-Portal Act becomes of importance."[49] Congress intended the PPA to be "narrowly construed," and primarily intended to address the wage crisis of the mid-1940s, not to extinguish any rights created by the

[42] *Id.*

[43] § 785.24(b) (providing examples of compensable preparatory and concluding activities).

[44] § 790.8(c).

[45] §§ 785.15-.16.

[46] § 785.16(a).

[47] § 785.16.

[48] Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1269, 1290 (M.D. Fla. 1999).

[49] Steiner v. Mitchell, 350 U.S. 247, 254 (1956).

FLSA, the provisions of which were "to be given a liberal interpretation."[50] The PPA alleviates employers' liability "in certain circumstances" from the penalties imposed by the FLSA for not properly compensating employees, but the general requirements of the FLSA still exist.[51] Furthermore, if an activity would have been FLSA-compensable time worked if Congress had not passed the PPA, then the regulatory analysis on "whether it is to be included or excluded in computing hours worked under the law . . . depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment."[52] Unless a "contract, custom or practice" exists which relieves the employer of the duty of compensating their employees, the time spent in those activities – whatever they may be – counts as hours worked.[53]

C. The Court finds its way: Steiner v. Mitchell *and* Mitchell v. King Packing

In *Steiner v. Mitchell*, the Supreme Court took up the new parameters of labor law as set down by the PPA.[54] In *Steiner*, battery factory employees needed to put on heavy protective gear each morning, prior to interacting with toxic acids.[55] After work, safety mandated careful removal of the contaminated equipment followed by a shower.[56] The employer, literally interpreting the PPA, refused to pay employees for the ten minutes to don the equipment and the twenty minutes to safely remove and decontaminate it at the end of their shift.[57]

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[50] A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); *accord* 29 C.F.R. § 790.2(a).

[51] § 790.2(a) (The FLSA requires employers eliminate "labor conditions detrimental to the . . . health, efficiency and general well-being of workers.").

[52] § 790.5(a).

[53] *Id.*

[54] *Steiner*, 350 U.S. at 247.

[55] *Id.* at 251.

[56] *Id.* at 249.

[57] *Id.* at 252.

Similarly in *Mitchell v. King Packing, Co.*, the employer required meatpacking employees to sharpen work knives before or after their paid shifts.[58] Without the sharp knives integral to their trade, their work was less effective, and fell short of the employer's standards.[59] Even so, the employer would not pay for the time spent preparing the equipment for optimal work.[60]

In both cases, the employer argued the preliminary and postliminary activities were not principal activities, and therefore noncompensable.[61] The Supreme Court disagreed, in two opinions issued on the same day in 1956.[62] In *Steiner*, the Supreme Court concluded employees were entitled to compensation for preliminary and postliminary safety measures.[63] In *Mitchell*, the court found knife sharpening an "integral part of and indispensable to the . . . activities for which they were principally employed."[64] However, the Court was careful not to overstep its bounds as it had a decade earlier; in deference to the legislature, the Court exhaustively detailed the legislative history of the PPA, ensuring their Opinion aligned with Congressional intent.[65]

The Court listed four factors in determining if a preliminary or postliminary activity was integral and indispensable to the primary activities, and therefore compensable.[66] First, the activities "are made necessary by the nature of the work performed."[67] Second, the activities

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[58] Mitchell v. King Packing Co., 350 U.S. 260, 262 (1956).

[59] *Id.*

[60] *Id.*

[61] Steiner 350 U.S. at 251-52; Mitchell, 350 U.S. at 261.

[62] Steiner v. Mitchell, 350 U.S. 247 (1956) *and* Mitchell v. King Packing Co., 350 U.S. 260, 262 (1956).

[63] *Steiner*, at 256.

[64] *Mitchell*, 350 U.S. at 263.

[65] *Steiner*, 350 U.S. at 255-56.

[66] *See Steiner*, 350 U.S. at 253; *see also Mitchell*, 350 U.S. at 263.

[67] *Steiner*, 350 U.S. at 252.

fulfill "mutual obligations" between employers and employees."[68] Third, the activities "directly benefit [employers] in the operation of their business."[69] Finally, the activities are "closely related to other duties performed by (petitioners') employees as to be an integral part thereof and are, therefore, included among the principal activities . . . ."[70]

D. The PPA in the 21st Century

Prior to *Integrity Staffing*, the most recent FLSA/PPA case heard by the Supreme Court was *IBP, Inc. v. Alvarez*.[71] Here, the court analyzed whether time spent walking from locker rooms – after donning specialized work attire – to the factory floor was compensable.[72] The Court determined donning protective gear, prior to engaging in work in a slaughterhouse, met the integral/indispensable test. Additionally, the Court intertwined this finding with the "continuous workday" doctrine,[73] stating the employer could not merely compensate the employee for the donning/doffing of their equipment and then not compensate them for the time spent walking between the changing room to the work floor, and back. The continuous workday begins at the first principal activity and ends at the last principal activity.[74]

In 2007, the Eleventh Circuit Court of Appeals heard the case of *Bonilla v. Baker Concrete*.[75] Here, airport-based construction workers sued their employer under the FLSA, claiming the time

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) [hereinafter *Alvarez*].

[72] *Alvarez*, 546 U.S. at 24.

[73] *See Alvarez* 546 U.S. at 28.

[74] *See Alvarez*, 546 U.S. at 22 (Declining to create a third category of activities that "are integral and indispensable to a principal activity and thus not excluded from coverage . . . but are not themselves principal activities.").

[75] Bonilla v. Baker Concrete Const., Inc., 487 F.3d 1340 (11th Cir. 2007).

spent going through airport security should be compensable.[76] The court ruled this was not integral/indispensable and therefore not compensable.[77] The determinative factors were, (1) "whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer."[78] The court found since the Federal Aviation Administration (FAA) required the security screenings, the activity was not for the employer's benefit, rendering the time spent in security noncompensable.[79] The employees appealed, and coming just two years after *Alvarez*, the Supreme Court denied certiorari.[80]

The Court's precedents in *Steiner* allowed for compensation of post-shift activities;[81] the *Bonilla* court used these factors carefully to make their determination that pre-shift security was not compensable where a third party required the screening.[82] In addition to considering the necessity of the activity in question as it relates to the employee's primary activities, both cases critically discuss whether the work activity in question is of benefit to the employer.[83] Combined with the precedent of the continuous workday, these factors provide guidelines for employers and employees analyzing the compensability of preliminary and postliminary activities.[84]

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[76] *Bonilla*, 487 F.3d at 1344.

[77] *Id.* at 1345.

[78] *Id.* at 1344.

[79] *Id.* at 1345.

[80] Bonilla v. Baker Concrete Const., Inc., 552 U.S. 1077 (2007).

[81] *See supra* note 66 and accompanying text.

[82] *See Bonilla*, 487 F.3d at 1345, *accord* Gorman v. Consol. Edison Corp., 488 F.3d 586, 594 (2d Cir. 2007) ("the security measures at entry are required . . . for everyone entering the plant . . . employee[s] . . . and . . . visitors.").

[83] *Bonilla*, 487 F.3d at 1344; Steiner v. Mitchell, 350 U.S. 247, 255 (1956).

[84] IBP, Inc. v. Alvarez, 546 U.S. 21, 29-30 (2005) (discussing the continuous workday and the *Steiner* exceptions).

III. ANALYSIS – INTEGRITY STAFFING V. BUSK

In *Integrity Staffing*, the employees of ISS, temporary workers in an Amazon warehouse, were required, once off the clock, to undergo a security screening, arranged to prevent theft.[85] The employees argued the FLSA entitled them to compensation for this time.[86] The employer argued the security screenings were postliminary, and noncompensable under the PPA, even if it took up to 25 minutes.[87] The Supreme Court decided the case looking strictly at the PPA.[88] This was inadequate for determining whether a security screening is compensable activity for a warehouse worker.[89] The Court's decision neglected to account for pertinent FLSA regulations and created opportunities for employers to abuse PPA exemptions for defining hours worked.[90]

A. The Majority Opinion: If They Made these Tests any Easier, They Wouldn't be Tests

The Court states, "[a]t issue here is the exemption for activities which are preliminary to or postliminary to said principal activity or activities."[91] However, this already assumes the PPA

[85] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 515 (2014).

[86] *Id.* at 515-16.

[87] *Id.* at 515.

[88] *Id.* at 518.

[89] Br. for Resp't at 14, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014) ("The compensability of a particular activity under the FLSA turns on two distinct questions: whether it constitutes "work" within the meaning of the FLSA, and whether a claim for compensation for that "work" is precluded by section 254(a) . . . .).

[90] Reich v. New York City Transit Auth., 45 F.3d 646, 650-51 (2d Cir. 1995) ("[A]n employer could impose significant, time-consuming duties on the employee to be performed at home, before and after the main body of the workday, as well as during the commute, and be exempted from payment for those duties because they were not sufficiently related to the employee's principal duties performed during the workday. We think that such an interpretation would exaggerate the effect of the Portal-to-Portal exemptions, and would substantially undermine the purposes of the Fair Labor Standards Act by creating loopholes capable of significant abuse.").

[91] *Integrity Staffing*, 135 S. Ct. at 517.

applies, without an FLSA analysis.[92] On its face, it appears as if the security screenings are postliminary – they come after the employee completes his work.[93] However, that is a cosmetic distinction, created when ISS chose to put the time clock prior to the security screening (it could just as easily come after; a time clock does not necessarily come before a security screening). This posture required the employees to counter-argue their claim on the grounds of the PPA.[94]

Assuming the security screenings are part of "walking, riding or traveling,"[95] the facts of *Integrity Staffing* do not address the same concerns that motivated the authors of the PPA.[96] The 90th Congress was concerned with judicial decisions regarding the compensability of time coal miners spent in the coal car, traveling from the surface to the face of the mine, where the miners did their primary work.[97] If an Amazon warehouse is analogous to a coalmine, ISS argues the security screenings are analogous to the ride in a coal car from the mine face back to the surface and Congress passed the PPA specifically to render that trip noncompensable.[98] However, coal industry employees in the 1940s benefitted from strong collective bargaining agreements,

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[92] *See* note *supra* 12 and accompanying text.

[93] Reply Br. for Pet'rs at 7, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014).

[94] Br. for Resp't at 15, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014).

[95] § 254(a)(1).

[96] 93 CONG. REC. 2306 (1947) (colloquy between Sens. Pepper and Donnell) ("The whole reason for the proposed legislation is because of the decisions of the Supreme Court of the United States in three cases-the Tennessee case, the Jewell Ridge case, and the Mount Clemens case. Under those three cases rights were given or recognized and claims were filed for the recovery of money . . . and the whole purpose of the pending legislation is to take those rights away, and to make those claims invalid . . ." "It was exactly as the Senator has said, in order to . . . forever cancel and make void these suits which have been filed based upon that decision of the Supreme Court . . . .").

[97] *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161 (1945), Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

[98] § 790.7(a).

allowing them to negotiate for higher wages to compensate for non-paid travel time.[99] The PPA's explicit language is only custom, contract, or practice may render compensable an employee's travel, or preliminary and postliminary activities.[100] This language, borne out by the legislative history of the PPA, assumes a strong union presence, bargaining for other benefits, in exchange for noncompensable travel time.[101] To operate the PPA in absence of these considerations violates the spirit of the act.[102]

To support the argument, the Court discusses the definition of principal activities as laid out by *Alvarez*, *Steiner*, *Mitchell* and various DOL regulations.[103] However, the discussion is limited to choice selections of the cases,[104] omitting the additional factors listed in both *Steiner*[105] and *Alvarez*, which gave those rulings depth and nuance.[106] Definitions of the words *integral* and *indispensable*, isolated from context and coming from a 1930's dictionary, are similarly discouraging.[107]

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[99] Linder, *supra* note 20 at 73 (1991).

[100] § 254(b).

[101] 93 CONG. REC. 2298 (1947) (statement of Sen. Cooper referring to travel upon the premises of the employer) ("[T]he coal mining industry is organized by union membership to the extent of 95 percent . . . . It is my opinion that in those organized fields provision will be made in contracts for compensation for the time referred to.").

[102] § 251(a) (Congressional finding that without the PPA in place to amend the FLSA, "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers would be created.").

[103] *See* discussions *supra* Parts II.C and II.D.

[104] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 517 (2014) (citing *Alvarez*, 46 U.S. 21, 29-30).

[105] *See* notes *supra* 66-70.

[106] *See* discussions *supra* Parts II.C and II.D.

[107] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) *aff'd*, 326 U.S. 404 (1945) (opinion of L. Hand, C.J.) ("But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.").

B. The Decision: Flip the Script

In deciding the ISS security screenings are noncompensable, the Court relies on a DOL Opinion Letter, written in 1951.[108] A government contractor, working with "rocket-powder," searched employees entering the facility, for safety, and upon leaving the facility, "for the purpose of preventing theft."[109] The Court presents this letter as decisive confirmation that post-shift screenings for preventing theft are noncompensable.[110] However, this overlooks the safety aspects addressed in the 1951 letter and the general incompatibility of a comparison between a 1950s-era "turn out your pockets" style-screening, and the time-consuming process of metal detectors and backscatter imaging available today.[111]

Additionally, the DOL wrote this Opinion Letter prior to the Court's ruling in *Steiner*; however, *Steiner* and the Opinion Letter analyze similar facts - preliminary and postliminary safety activities for employees who interact with dangerous materials.[112] The Steiner court found safety checks closely related to primary activities and considered them compensable. Additionally, Opinion Letters, while persuasive, are not mandatory authority to the Court.[113] Had

[108] *Integrity Staffing*, 135 S. Ct. at 518-19.

[109] *Id.*

[110] *Id.* at 519 ("The Department drew no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft—neither were compensable . . . .").

[111] Br. of the U.S. as Amicus Curiae Supporting Pet'r at 29, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014) ("Workers were required to . . . obtain their badge and time card, then walk 150 to 300 feet to . . . where they were searched for spark-producing devices" and "items which have a direct bearing on the safety of the employees and the Ordnance Works," and "then walk to a bus that would carry them 3/4 to 1 1/2 miles to their work sites.").

[112] *See* note *supra* 63.

[113] Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in formats such as opinion letters are entitled to respect . . . but only to the extent that those interpretations have the power to persuade . . .) (internal citations and punctuation omitted).

the government contract employees discussed in the Opinion Letter sued under the FLSA, the Court of the 1950s may well have found the security screening compensable.[114]

Finally, Court inverts history when criticizing the Ninth Circuit Court of Appeals in calling for an "employer requirement" test; [115] however, such a test is exactly what the drafters of the PPA intended.[116] The Court stated the Ninth Circuit "focused on whether the particular activity was required by the employer rather than whether it was tied to the productive work that the employee was employed to perform."[117] The concern was this "would sweep into 'principal activities' the very activities that the Portal–to–Portal Act was designed to exclude from compensation."[118] However, this view runs contrary to the legislative history of the PPA[119] and excludes the Supreme Court's own expansion of "principal activities" over the years.[120]

Of the four *Steiner* factors, the Court focused solely on integrality, giving passing mention to necessity, and completely disregarding mutuality of obligation and corporate benefit.[121] This shift of focus halted decades of expansive and thoughtful judicial decision making on the PPA.[122]

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[114] Br. of the Am. Fed'n of Labor and Congress of Indus. Orgs.as Amicus Curiae in Support of Resp't at 24, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014).

[115] *Integrity Staffing*, 135 S. Ct. at 519 ("a test that turns on whether the activity is for the benefit of the employer is similarly overbroad").

[116] 93 CONG. REC. 2290 (1947) (Statement of Sen. McCarran) ("Employers were suddenly faced with huge claims which they had not anticipated.").

[117] *Integrity Staffing*, 135 S. Ct. at 514.

[118] *Id.*

[119] 93 CONG. REC. 2298 (1947) (statement of Sen. McGrath) ("his arrival is what governs [compensable time], rather than the beginning of his activity").

[120] *See* note *supra* 84 and accompanying text.

[121] *Integrity Staffing*, 135 S. Ct. at 519.

[122] Madden & Shank, *supra* note 24 ("[T]he Portal-to-Portal Act did not change the Supreme Court's earlier definitions of the term "work." . . . . [A]ctivities that are primarily for the benefit of the employer and that are suffered or permitted by an employer constitute compensable work time. . . . In *IBP*, the Supreme Court reaffirmed

The *Mitchell* Opinion concluded prep-work not compensable even in the pre-PPA 1940s was compensable by the 1950s.[123] By the 1960s, the regulations were very clear: an employer may not avoid compensating employees for any "practically ascertainable period of time he is regularly required to spend on duties assigned to him."[124] If this Supreme Court found the requirement employees submit to a security screening is not a duty, it defies the intent of the FLSA to insist it is also not optional.[125]

C. America, Post-Integrity

The Court set a dangerous precedent in *Integrity Staffing*, providing a loophole for employers to control, but not compensate, employees for required activities that occur near the start or end of a work shift.[126] A security screening has been carved out because it is "more like" the process of egress – the "walking, riding, or traveling" which is expressly not compensable.[127] However, the courts, and society, and our business culture have progressively chipped away at the activities

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the DOL's position in relation to two key concepts (integral and indispensable activities, and the continuous workday rule) that impact what counts as work and when work time starts and ends. ") (internal citations omitted).

[123] Leah M. Avey, Note, *Walk to the Line, Compensable Time: Cash in the Pockets of Employees*, 32 OKLA. CITY U.L. REV. 135, 147-148 (2007).

[124] § 785.47 (referencing Glenn L. Martin Neb. Co. v. Culkin, 197 F.2d 981, 987 (8th Cir. 1952) ("holding that working time amounting to $1 of additional compensation a week is 'not a trivial matter to a workingman.'").

[125] *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944) (The FLSA is "remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner."); *see also* 93 CONG. REC. 2303-04 (1947) (statement of Sen. Ferguson) ("I was speaking of the situation . . . where workers are required to be present minutes ahead of time. It may be said that they do it voluntarily. Practically every worker does what he or she is directed to, for the simple reason that he must work in order to live . . . . in the past unorganized workers have been required to do just that kind of thing-to start work earlier than they are paid for and at the end of the day to work longer than they are paid for . . .").

[126] Linder, *supra* note 20 at 76.

[127] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 520 (2014) (Sotomayor, J., concurring) ("The searches were part of the process by which the employees egressed their place of work, akin to checking in and out and waiting in line to do so—activities that Congress clearly deemed to be preliminary or postliminary.").

excluded from compensation under the PPA.[128] Employers are not motivated to minimize the periods for which employees are required to undertake uncompensated activities.[129] Today, a security screening of five to twenty-five minutes is permissible.[130] One must ask if the Court tolerates screenings taking forty-five minutes, or consider the Court's response if the screener on duty becomes unavailable. Would employees be unable to leave, and essentially locked in?

IV. SOLUTION

In the 1940s, Congress had no conception there could be a non-integral, yet time-consuming, postliminary activity that did not involve travel; an *egress process* or a twenty-five-minute security check with full body imaging was unimaginable.[131] The regulations, based on the legislative history of the PPA, are clear.[132] The workday commences when "an employee is required to report at the actual place of performance of his principal activity at a certain specific time;"[133] it follows that the workday terminates when an employee is required to quit the actual place of performance of his principal activity at a certain time.[134] The legislature stayed away from drawing a bright line and left it to the courts to ensure the uncompensated time would be

[128] Rachel Felton, Note, *IBP, Inc. v. Alvarez: Has the Supreme Court Placed Employers on the Cutting Block?* 26 J.L. & COM. 129, 149-50 (2008).

[129] Reply Br. for Pet'r at 24, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014) ("[T]he time necessary for most preliminary or postliminary activities could be reduced by greater employer expenditures, and yet Congress expressly made that time non-compensable.") (internal citations omitted).

[130] *Integrity Staffing*, 135 S. Ct. at 519.

[131] Gorman v. Consol. Edison Corp., 488 F.3d 586, 593 (2d Cir. 2007) (The PPA "was enacted when the time-consuming security measures at issue may not have been envisioned, and there is some force to the observation that security measures . . . are becoming increasingly invasive, layered and time-consuming. But the text of the statute does not depend on the purpose of any preliminaries, or how much time such preliminaries may consume.").

[132] 93 CONG. REC. 2298 (1947) (statement of Sen. McGrath) ("[H]is arrival is what governs, rather than the beginning of his activity.").

[133] § 790.6(b).

[134] *See* § 203(g) ("Employ" includes to suffer or permit to work.); *see also* Madden & Shank, *supra* note 122.

reasonable.[135] President Truman, announcing his approval of the PPA said, "I am sure the courts will not permit employers to use artificial devices such as the shifting of work to the beginning or the end of the day to avoid liability under the law."[136] However, the reticence displayed in *Integrity Solutions*, betrays the President's trust.

A. Legislative Action: We are Now Ready to Begin

Congress must act. One option is to amend the PPA to include the original *Steiner* factors.[137] Another, more problematic option would be to create a third category of principal activities[138] to include as "work" the 21st century security screenings unplanned for by the 90th Congress.[139] The *Integrity Staffing* decision leaves workers vulnerable to well informed employers looking to cram as much into the pre/postliminary periods as possible, thereby lowering their labor costs.[140]

A final option would be to amend the PPA to exclude portal claims altogether, in essence, repeal it.[141] Mid-20th Century coalminers had inexact methods of clocking out when their primary activities ended, deep at the bottom of a mineshaft; in the modern world, with time clock

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[135] *Gorman*, 488 F.3d at 594 n.7 ("Three factors bear upon the determination of whether the time spent in a particular activity is *de minimis:* (1) the administrative difficulty of recording the time; (2) the size of the claim in the aggregate; and (3) whether the tasks occur regularly.") (internal citations removed).

[136] HARRY S TRUMAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS APPROVAL OF H.R. 2157, THE PORTAL-TO-PORTAL ACT OF 1947, H.R. DOC. NO. 80-247, at 2.

[137] *See* discussion *supra* Part II C.

[138] *See* note *supra* 74.

[139] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 520 (2014) (Sotomayor, J., concurring, citing 29 C.F.R. 790.7(g)) ("I understand the Court's analysis to turn on its conclusion that undergoing security screenings was not itself work of consequence that the employees performed for their employer.").

[140] Br. for Resp't at 14-15, Integrity Staffing Solutions, Inc. v. Busk, No. 13-433 (U.S. 2014) ("A receptionist could be required to come in early and make coffee without pay . . . . The arguments advanced in this case are replete with such broader implications.").

[141] Linder, *supra* note 20 at 179-80.

applications on hand-held devices, employers can easily keep time with great specificity.[142] To this end, some states have already expanded their definitions of work, to include job-related activities that begin immediately before or after their shift.[143] This provides clarity for citizens, and prevents all parties from taking advantage of the PPA's ambiguities.[144] The policy behind the FLSA is still the "general well-being of workers"[145] If the PPA no longer conforms to that goal, Congress must amend the law.

B. The Courts: No Hard Feelings

ISS employees were sufficiently unhappy about the lack of compensation for the time spent in security screenings that they sued their employer; likewise, ISS was adamant in its refusal to compensate the employees.[146] The solution to this impasse, proposed by the Court in Justice Thomas' Opinion, is for the ISS employees to sit down at the negotiating table with ISS.[147] The PPA carves out an exemption for contracts and customs that allow for compensation for PPA excluded activities.[148] However, there is no comparable custom of screening for warehouse workers.[149] Additionally, ISS employees are temporary workers; ISS is an employment

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[142] Press Release, Infinisource, Infinisource's NXG series sets new time clock standard (Jan. 22, 2015) (http://www.prnewswire.com/news-releases/infinisources-nxg-series-sets-new-time-clock-standard-300023899.html) (last visited Feb. 1, 2015).

[143] MD. CODE REGS. 17.04.11.02(B)(1)(g) ("Work time includes time during which an employee: Participates in activities that are job-related immediately before the beginning or immediately after the end of an assigned shift.").

[144] Dep't of Pub. Safety & Corr. Servs. v. Palmer, 886 A.2d 554, 561 (Md. 2005) (holding time spent clearing security is work time for employees of a correctional institution).

[145] § 202.

[146] Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 515 (2014).

[147] *Id.* at 519.

[148] § 252(a)(2).

[149] Br. for Resp't at 51, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014) ("None of the amici . . . asserts that it, or even a single one of its members, engages in a similar practice. Integrity does not contend that such time consuming searches are or ever were standard practice at the nation's plants and offices.").

agency.[150] These individuals receive close to minimum wages, with no guarantee of the duration or availability of any employment assignment.[151] They have no relationship to each other and no relationship to Amazon, the owner of the warehouse who requires the screenings.[152] The Court discussed these facts during oral arguments.[153] Proposing negotiation, a far-fetched impossibility, as the solution to this issue was an abdication of leadership on the part of the Court. If presented with the opportunity, the Court may consider an explicit overturn of *Integrity Staffing*, and return to the Congressionally-intended reading of the FLSA found in *Steiner*.[154]

V. CONCLUSION

The fruits of *Integrity Staffing* are none too sweet for the American worker. The nation will see an increase in employers mandating employee participation in activities that just so happen to occur before or after the cessation of principal activities.[155] Congress' temporary concern for "the financial ruin of many employers and . . . the capital resources of many others,"[156] has turned into a permanent wedge between employers and employees. Following Congress' original intent for the PPA is necessary to preserve the protections the FLSA granted workers, avoiding a resurgence of conditions found in the days of dangerous and oppressive sweatshop labor.

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[150] Br. for Pet'r at 12, *Integrity Staffing*, 135 S. Ct. 513, No. 13-433 (U.S. 2014) ("Respondents . . . are former Integrity employees who were placed by Integrity on temporary assignments working at Amazon warehouses in Nevada filling orders placed by Amazon.com customers. They were paid on an hourly basis by Integrity.").

[151] *Id*.

[152] *Id.*

[153] Transcript of Oral Argument at 38-39, *Integrity Staffing*, 135 S. Ct. 513 (2014) (No. 13-433).

[154] *See* discussion *supra* Part II C.

[155] Mark Tabakman, *Another FLSA Off-the-Clock Case: Employees Allegedly Ordered Not To Report Time* (Jan. 29, 2015), http://wagehourlaw.foxrothschild.com/2015/01/articles/class-actions/another-flsa-off-the-clock-case-employees-allegedly-ordered-not-to-report-time/.

[156] § 251(a).