


OCTOBER 28, 2022 | WAGE & HOUR COMPLIANCE

Ninth Circuit – Time Booting Up Computer is Compensable

Under the Fair Labor Standards Act (“FLSA”), an employer must pay non-exempt employees for all time in a  workday, which means the period between the time employees commence their first “principal activity” each day and when they complete all principal activities. On October 24, 2022, the United States Court of Appeals for the Ninth Circuit (“the Ninth Circuit”) held that this includes the time it takes to boot up a computer and all activities that follow once it is booted up, including clocking in, until the computer is turned off.

The decision was very fact-specific but provides insight as to how the Ninth Circuit and other courts may evaluate similar time spent by other employees for whom computer-use is an integral and indispensable part of the work they were employed to perform.

Facts and Background of the Case

In the case, *Cadena v. Customer Connexx LLC*, employees brought a collective action against their employer Customer Connexx LLC (“Connexx”) for failure to pay them for all time worked, specifically the time spent booting up and turning off their computers. The employees worked as call center agents and their primary responsibilities were to provide customer service and scheduling support for customers of an appliance recycling business over the phone. In this case, however, the call center agents operate a phone program called “Five9” through their computers rather than an actual phone and this is how they make all their calls.

Importantly, before beginning their daily work tasks, employees had to clock in using a computer-based timekeeping program, which meant awakening or turning on their computers, logging in, and opening up the time keeping system. Employees do not have assigned computers, so they must take this first step from whatever state in which the computer has been left from its prior use. Once the computer has booted up, employees load various programs and call scripts, and confirm their phones are connected. At the end of the shift, they close out programs in use, clock out, then log off or shut down their computers. Per the employees, booting up the computer could take anywhere from a minute to twenty minutes and shutting down the computer can take between a minute to 15 minutes.

The lawsuit was filed with the United States District Court for the District of Nevada (“District Court”) and it included violations of the FLSA and Nevada law. The District Court granted summary judgment in favor of Connexx, finding that “[s]tarting and turning off computers and clocking in and out of a timekeeping system are

not principal activities” for which Connexx hired these employees. The Court decided that those tasks “are not integral and indispensable to the employees’ duties as call center customer service agents” and compared the situation to waiting in line to physically clock in/out, which has been determined to be non-compensable time. The employees appealed the Order of the District Court to the Ninth Circuit, which unanimously reversed the decision.

Ninth Circuit’s Analysis under the FLSA

The Ninth Circuit disagreed with the conclusion of the District Court for several reasons based on its application of the Portal-to-Portal Act, which amended the FLSA back in 1947, to the specific circumstances of this case. Per the Portal-to-Portal Act, employers are not liable to pay employees for “activities which are preliminary to or postliminary to said principal activity or activities.” Accordingly, the United States Supreme Court has held that employers must only pay for time spent performing activities before or after the regular work shift where “those activities are an integral and indispensable part of the principal activities for which covered workmen are employed.” In other words, those activities determined to be “integral and indispensable” are also “principal activities” under the Portal-to-Portal Act.

Here, the Ninth Circuit agreed with the District Court that the principal activities of call center agents are “answer[ing] customer phone calls and perform[ing] scheduling tasks.” With these principal activities in mind, the Ninth Circuit explained that the key question in evaluating how the FLSA should apply to the time booting up and shutting down computers is:

whether turning on and off the computers is integral and indispensable to the employees’ principal activities of receiving customer phone calls and scheduling appliance pickups.

In answering that question, the Ninth Circuit explained that because these employees’ duties cannot be performed without turning on and having functioning computers, the time spent turning on computers is integral and indispensable to the employees’ duties and compensable under the FLSA. The Ninth Circuit also clarified that this includes the time spent waiting for the computer to boot up as this is part of the continuous workday that begins after the first principal activity is performed and continues until the last principal activity.

In explaining its disagreement with the District Court, the Ninth Circuit noted that the District Court evaluated the wrong question – whether “engaging with a computer and loading a timekeeping program to clock in” is a principal activity (i.e., integral and indispensable). The Ninth Circuit agreed that clocking in is *not* integral to performing the employees’ principal tasks, but because it occurs after turning on the computer, which the Ninth Circuit found *is* a principal activity, it is included in the continuous work day as compensable time and is not actually relevant to the key inquiry.

In sum, although the Ninth Circuit recognized in its decision that not all activities an employer requires an employee to perform are compensable under the FLSA, it made clear that where “the required activity bears such a close relationship to the employees’ principal duties that employees cannot eliminate the required activity and still perform their principal duties, the activity is compensable.” Based on its holding, the Ninth Circuit reversed the District Court’s grant of summary judgment and sent the case back to the District Court to decide the remaining issues in the case, including whether time spent turning on and off computers is *de minimis*.

What Does This Mean for Employers

Although the precedential impact of this decision only applies to employers within the jurisdiction of the Ninth Circuit, it is joined by the United States Court of Appeals for the Tenth Circuit in finding that booting up computers is integral and indispensable under very similar facts – call center representatives who service student loans and interacted with debtors by phone using a computer program and through email. And the main justification for finding this time compensable under the FLSA is based in an interpretation of the Portal-to-Portal Act which could very well be implemented and relied on by other courts in interpreting similar questions under the FLSA. Thus, employers should consider whether they have non-exempt employees whose principal activities rely so heavily on use of a computer that eliminating the process of booting up the computer would prohibit them from performing those activities. If so, booting up the computer could be considered integral and indispensable and be compensable time under the FLSA.