

December 31, 2014

## Sagafi Considers Limited Scope of *Integrity Staffing*, Questions Likelihood of Collective Bargaining for Private Sector Workers



JAHAN C. SAGAFI (INTERVIEWED BY KATARINA E. KLENNER)

**BLOOMBERG BNA:** [Editor's note: The U.S. Supreme Court unanimously decided Dec. 9 that hourly warehouse workers weren't entitled to compensation under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, for post-shift time spent waiting to undergo and undergoing mandatory, anti-theft security screenings. Reversing the judgment of the U.S. Court of Appeals for the Ninth Circuit, the court held that "an activity is 'integral and indispensable' if it is an intrinsic element of the employee's principal activities and one with which the employee cannot dispense if he is to perform his principal activities." It concluded the screenings at issue were noncompensable postliminary activities because they weren't "integral and indispensable" to the employees' principal duties of retrieving and packaging products for shipment to customers of online retail giant Amazon.com. *Busk v. Integrity Staffing*

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*Solutions, Inc.*, 713 F.3d 525, 20 WH Cases 2d 937, 2013 BL 99089 (9th Cir. 2013), *rev'd*, 23 WH Cases 2d 1485, 2014 BL 344253 (2014).]

What was your reaction to the U.S. Supreme Court's 9-0 decision? Did you expect a unanimous ruling?

**Sagafi:** In light of *IBP, Inc. v. Alvarez*, 546 U.S. 21, 10 WH Cases 2d 1825 (2005), which was also unanimous, and the fact that the Departments of Justice and Labor joined as amici for the employer, this outcome was very likely. By definition, unanimous opinions are usually easy calls (*Brown v. Board* being the exception that proves the rule). Here, the decision was fairly easy in part because of its limited holding and narrow applicability—hence the four-page opinion.

Justice Clarence Thomas reasserted the longstanding "integral and indispensable" test found in *IBP*. He also reiterated the line the court has drawn in various cases: *IBP* (poultry plant workers' time spent donning and doffing and walking between the locker room and the production area was compensable, but time spent waiting to don or doff was noncompensable), *Steiner v. Mitchell*, 350 U.S. 247, 12 WH Cases 750 (1956) (battery plant employees' pre- and post-shift time spent showering and changing clothes was compensable), and *Mitchell v. King Packing Co.*, 350 U.S. 260, 12 WH Cases 755 (1956) (meatpackers' time spent sharpening knives outside shifts was compensable).

**BLOOMBERG BNA:** In reversing the Ninth Circuit's decision and rejecting the appellate court's alternative to the "integral and indispensable" test (i.e., whether activity at issue is "necessary" to warehouse employees' primary work and is performed for the employer's primary benefit) as overbroad, the court focused on the relationship of the security clearance process to the principal activities the employees were employed to per-

form. Justice Thomas explained, “[A]n activity is not integral and indispensable to an employee’s principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities.” This statement makes clear not all preliminary and postliminary activities that employers mandate are necessarily “integral and indispensable” for FLSA purposes.

What do you make of the court’s narrowed definition? How does it affect an employee-plaintiff’s pleading burden?

**Sagafi:** Because the court was simply confirming a well-established test (and rejecting the Ninth Circuit’s alternate interpretation in the process), the core concept of the FLSA as a remedial, humanitarian statute that shouldn’t be interpreted “narrowly” or “grudgingly,” as the supreme court earlier noted, remains in full effect.

The key questions in *Integrity Staffing* are what are the job’s “principal activities,” and what activities are “integral and indispensable” to those principal activities because all of those activities are compensable. The list of such activities—donning and doffing clothing, preparing or cleaning tools, etc.—is long. For example, at oral argument, Justice Elena Kagan expressed concern about a cashier required to spend 20 minutes closing out the register. Justice Antonin Scalia deftly came to the worker’s aid, noting that such activities would be part of the job (and hence compensable). In her concurring opinion, Justice Sonia Sotomayor took care to note that there can be multiple principal activities (i.e., the analysis is more flexible than the primary duty test).

I don’t think that this will affect pleading significantly because good lawyering has always called for detailed complaints, even before *Iqbal* and *Twombly*. Of course, there are limits to what workers and their advocates can know before formal discovery as employers tend to have dramatically superior access to information. They have the records and most of the evidence. So *Integrity Staffing*, like *IBP* before it, simply requires that the complaint plausibly allege unpaid work that is “integral and indispensable.” The nature of the activities (both the alleged unpaid work and the core principal activities) will determine the answer to that question.

**BLOOMBERG BNA:** Although the court’s holding may foreclose retail employees’ FLSA claims for time spent clearing security, in what other work settings could employees allege pre- or post-shift security screening is “an intrinsic element” of their principal activities and, thus, is compensable time?

**Sagafi:** That’s a good question. *Integrity Staffing* addresses a small subset of employment scenarios—i.e., where the worker performs tasks that benefit the employer but aren’t integral (or “intrinsic”) and indispensable. It’s hard to think of examples beyond security checks. What could employers reasonably require employees to do that is so unrelated to the core work they’re performing? Recording time, shutting down systems for the day, starting up, putting on and taking off

uniforms or gear, cleaning up and preparing tools—all of those activities have been deemed compensable as “integral and indispensable.” Even the Solicitor General’s office lawyer offered drug testing as an example of a process so intrusive and time consuming as to be compensable. So this is a very fact-specific determination, as the Justices made clear in their multiple examples scattered throughout the short opinion.

**BLOOMBERG BNA:** How do you think this ruling will influence federal courts’ consideration of pending FLSA claims for time spent donning and doffing protective gear, booting up and shutting down computers, traveling and performing other required pre- and post-shift tasks?

**Sagafi:** It’s hard to see this decision having much impact at all. All of those activities are likely compensable under the well-established standard. I imagine that employers will argue for a narrow interpretation of “integral and indispensable,” but that interpretation will run up against the supreme court’s earlier guidance that the FLSA must not be interpreted narrowly and is intended to protect workers.

**BLOOMBERG BNA:** What fairness concerns does the decision raise? Do you foresee the ruling will incentivize employers to require employees to perform more uncompensated non-principal activities?

**Sagafi:** The rule is unfortunate because security checks do benefit the employer and can’t be controlled by the employee. (So Justice Sotomayor’s statement that “the employees could skip the screenings altogether” without diminishing safety or effectiveness misses the point—of course employees can’t just skip *required* activities.) Under the *Integrity Staffing* rule, the employer has no incentive to conduct security checks efficiently or quickly. It’s hard to picture how an employer could require employees to perform more uncompensated non-principle, non-integral activities. However, employers are very creative and face tremendous temptation to increase profits by paying workers less, so perhaps we will see an increase in uncompensated work as employers attempt to push the boundaries of what the court will tolerate.

It’s interesting to look to the origins of the “integral and indispensable” rule. The court created the rule in *Steiner* in 1956 and was trying to ensure a broad application of the FLSA. The colloquy between the Senators quoted at the end of *Steiner* shows that Congress, too, was trying to ensure broad worker protections in passing the Portal-to-Portal Act. One Senator distinguishes between compensable activities integral to the job (like donning protective clothes) and noncompensable activities that are “merely a convenience to the employee.” Taking that approach, you can see how those Senators might have adopted the Ninth Circuit’s “for the benefit of” approach. After all, what is the point of paying workers other than to compensate them for labor they have provided for their employers’ benefit?

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At oral argument, Chief Justice John Roberts asked whether the supposedly powerless workers simply could band together to force the employer to pay them through collective bargaining. While that's always a theoretical possibility, the reality is that unions are few and, sadly, weak. And it's extremely difficult to unionize. Less than seven percent of the private workforce is unionized. Unions have been withstanding a sustained assault since the Reagan years. So while union power

can begin to level the playing field that's tilted so steeply toward employer interests, it's a solution available to very few people. Government enforcement is important, but with budget cuts squeezing already limited resources, private enforcement is the main solution. It's a very American approach—to leave workplace rights in the hands of the people, who go to the free market to find private lawyers to assert their interests. And we'll be there for those people.