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From Door to Desk(top): The Portal-to-Portal Act in the Digital Age

Colin Pajda *

INTRODUCTION: THE COMPUTER AS WORKPLACE

In 1996, Judge Frank H. Easterbrook gave an address to law students at the University of Chicago entitled *Cyberspace and the Law of the Horse*, which he eventually adapted into an article.¹ In this article, Judge Easterbrook argues that, rather than develop a new field of law to handle cyberspace-based intellectual property claims, judges and attorneys should instead focus on adapting the existing structures of intellectual property law to problems arising from the digital distribution of materials via networks.² While Judge Easterbrook's concerns were with intellectual property law specifically, his proposal may apply to other areas of the law that are struggling to find resolutions to digital-based claims. Wage and hour litigation is one of these areas easily adaptable to Judge Easterbrook's conclusions.

Over the last decade, wage and hour suits by call center employees have greatly increased.³ These employees claim that their employers have

* J.D. (2018) Washington University School of Law.

1. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 UNIV. OF CHI. LEGAL F. 207. The analogy of "The Law of the Horse," Easterbrook explains, began with former University of Chicago Law Dean Gerhard Casper, who disapproved of courses entitled "Law and . . ." for being intellectually deficient. Rather than take a course entitled "Law and Horses," Casper and Easterbrook claim it is "[f]ar better for most students—better, even, for those who plan to go into the horse trade—to take courses in property, torts, commercial transactions, and the like, adding to the diet of horse cases a smattering of transactions in cucumbers, cats, coal, and cribs. Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses." *Id.* at 208.

2. *Id.* at 207-08 ("Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. . . . This leads directly to my principal conclusion: Develop a sound law of intellectual property, then apply it to computer networks.").

3. Manesh K. Rath, *Managing Risk Associated with Wage and Hour Class Actions*, in UNDERSTANDING FAIR LABOR STANDARDS ACT VIOLATIONS 53, 57 (2010) ("After [*IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)], we witnessed a rash of class actions filed against employers in hospitality, call centers, healthcare, manufacturing, and other industries where set-up and take-down time were significant."). Rath explains this uptick further, saying, "an increase in wage and hour collective actions can be attributed to an overall rise in employment litigation generally." *Id.* There are several reasons that these wage and hour suits have become more attractive to plaintiffs in recent years: "Wage and hour suits that can easily be styled as class actions when compared to more fact-

violated the Fair Labor Standards Act⁴ (“FLSA”) by not compensating them for the time it takes to boot up and shut down their computers before and after their work shifts.⁵ To determine whether this time is compensable or not, courts must decide if booting up and shutting down are “integral and indispensable” to the principal activity of the employees’ employment.⁶ The integral and indispensable test, which was developed by the Supreme Court in *Steiner v. Mitchell*⁷ in 1956 and more recently clarified in *Integrity Staffing Sols., Inc. v. Busk*⁸ in 2014, asks whether the activity is “an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”⁹

Under the integral and indispensable test, employers defend their practices by arguing that booting up before and shutting down after shifts are neither integral nor indispensable to employees’ work. They argue that, since employers could hypothetically dispense with these processes by not requiring password protection on computers or not having employees shut down computers at the end of their shifts, these activities do not meet the requirements of the integral and indispensable test.¹⁰ These factually

specific discrimination and wrongful termination claims; [a] favorable attorneys' fees provision under the Fair Labor Standards Act (FLSA); [a] provision in the FLSA that provides for liquidated damages in some instances; [w]age and hour claims often involve disputes between employees and management as to the basic facts of a claim, such as an employee's job description, making it necessary for many cases to go to jury trials. In contrast, other employment law claims can often be solved at a motions practice level.” *Id.*

4. 29 U.S.C. §§ 201-219 (2017).

5. Pamela A. Reynolds, *Employees Are Requesting Pay for ‘Booting Up’* 287 FAIR LAB. STANDARDS HANDBOOK FOR STATES, LOC. GOV'T & SCH. NEWSL. 3 (2009) (“There are a number of lawsuits pending around the country that argue employers who require hourly employees to boot up or shut down their computers off the clock, i.e., prior to the beginning of a work shift or after the end of a work shift, without pay are violating the FLSA. These lawsuits often involve employees who work in ‘call centers,’ meaning the employees’ duties involve placing or receiving phone calls to or from customers or other users.”).

6. *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 874 (8th Cir. 2012) (“Activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by 29 U.S.C. § 254(a)(1).”).

7. *Steiner v. Mitchell*, 350 U.S. 247 (1956).

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

9. *Id.* at 517.

10. *See generally Busk*, 135 S. Ct. 513 (holding that mandatory security screenings before and after employees’ shifts were not integral and indispensable to the employees’ productive work since the employer could have dispensed with the screenings without affecting the performance of the employees’ principal activities).

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intensive inquiries necessarily call into question what constitutes employees' "work," a term defined neither by the FLSA nor the Portal-to-Portal Act.¹¹ Instead, employers, employees, and judges must rely solely on past judicial interpretations when determining the extent of compensable "work." But the majority—if not all—of these interpretations rest on assumptions about *physical* work: pulling a lever on an assembly line, filing physical paperwork, and traveling to a workstation.¹² What these interpretations do not account for is the ever-quickening move from physical to digital "work." Instead, judges must try to force the realities of the modern digital workplace—for example, the computer-based call centers mentioned above—into the rigid mold of traditional, pre-digital employment law.

The optimal solution to this problem would be the amending and rewriting of traditional employment law to incorporate conceptions of both physical and digital work as well as their corresponding workplaces. This legislative intervention would most likely be exceedingly difficult in the current state of our Congress and, in any case, would not be timely enough to answer questions currently pending in our courts.

There is, however, a simpler, intermediary solution to the problem of call center wage and hour litigation, which takes into consideration distinctions between physical and digital work while avoiding the necessity of legislative action: Judge Easterbrook's solution, noted above.¹³ Instead of trying to develop new employment law for the digital workplace—which may be outdated in relatively few years¹⁴—the courts and the attorneys who inform them should focus on adapting current employment law to novel digital claims as they arise. While this

11. 29 U.S.C. §§ 251-262 (2017).

12. Reynolds, *supra* note 5, at 4 ("The FLSA, which was enacted in 1938 before the era of computers, does not offer much guidance. While the Act has been amended a few times, neither the amendments nor U.S. Department of Labor (DOL) regulations specifically address the meaning of 'work' in the high-tech business world. This task has largely been left to the courts. While employers are required to compensate their employees for all hours 'suffered or permitted' to work, the FLSA does not define 'work.' But the U.S. Supreme Court has stated that compensable work generally includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'") (internal citations omitted).

13. Easterbrook, *supra* text accompanying note 2.

14. Easterbrook, *supra* note 1, at 210 ("If we are so far behind in matching law to a well-understood technology such as photocopiers . . . what chance do we have for a technology such as computers that is mutating faster than the virus in *The Andromeda Strain*?").

adaptation is currently being undertaken, there is a nearly ubiquitous institutional error that is leading to inconsistent interpretations and decisions. That error is the analogizing of the computer to a *tool*. However, the more appropriate analogy for a computer is the *workplace*.

Consider the example provided by the Portal-to-Portal Act of 1947.¹⁵ The Portal-to-Portal Act exempts employers for compensating the ingress and egress of employees; that is, the “walking, riding, or traveling to and from the actual place of performance of the principal activity.”¹⁶ While the Act imagines physical ingress and egress—the walking of an employee from the parking lot to the door to the desk—it also gives courts a method of applying physical work laws to digital scenarios. In this analogy, the computer is not the tool of the worker, but the workplace itself; booting up and shutting down are not tasks, but digital forms of ingress and egress. By engaging in this analogy, courts would have a method for applying physical work laws to digital work, and therefore, a method for deciding compensable time in these cases.

This analogy would also give the courts a bright line rule for boot-up and shutdown time compensability, and employers would, in turn, have clear guidelines for what constitutes compensable time in a call center setting. Furthermore, since the Portal-to-Portal Act is a default rule, it can be contractually circumscribed. With this in mind, unions and employee groups—who would know that booting up and shutting down is not inherently compensable time under the FLSA—would be motivated to bargain for such compensation. This knowledge would encourage the parties to determine compensability during the contract stage of employment and relieve the courts of unwieldy call center class actions.

This Note will first trace the history of determining what constitutes compensable “work,” starting with the FLSA and the Portal-to-Portal Act, and then following their application through the three seminal cases of

15. 29 U.S.C. §§ 251-262 (2017).

16. 29 U.S.C. § 254(a)(1) (2017) (“[N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . . (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . .”).

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Steiner,¹⁷ *IBP, Inc. v. Alvarez*,¹⁸ and *Busk*.¹⁹ This Note will then analyze how these decisions might be applied to the problem of booting up and shutting down computers in call centers. This analysis begins by showing how the starting of computers can be viewed as non-compensable pre- and postliminary activities not “integral and indispensable” to the employees’ productive work, and then progresses into a discussion of how booting up and shutting down a computer can be viewed as a digital extension of physical ingress and egress. Finally, this Note will propose that, by viewing the booting up and shutting down processes as acts of moving between the workplace door and a workstation, courts can bypass the fact intensive inquiries regarding what actions are “integral and indispensable” to the work of a call center employee. This would provide clear guidelines to employers about what time needs to be compensated. Furthermore, since the Portal-to-Portal Act is a default rule and can be contractually circumscribed, unions and employee groups will be motivated to bargain for log-in compensation, knowing that booting up and shutting down time is not inherently compensable under the FLSA.

I. HISTORY: DEFINING “WORK”

In 1938 during the Great Depression,²⁰ Congress enacted the FLSA, establishing a national minimum wage and requiring overtime compensation for every hour of work over forty hours per workweek.²¹

17. *Steiner v. Mitchell*, 350 U.S. 247 (1956).

18. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

19. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014).

20. Harris Pogust & Andrew Sciolla, *Making Up for Lost Time*, 46 TRIAL 28, 29 (2010). (“Congress enacted the FLSA during the Depression in 1938 to protect workers’ rights and to aid in the interplay between management and laborers.”) (internal citations omitted).

21. 29 U.S.C. §§ 201-219. *See Alvarez*, 546 U.S. at 25 (“As enacted in 1938, the FLSA, required employers engaged in the production of goods for commerce to pay their employees a minimum wage of ‘not less than 25 cents an hour,’ and prohibited the employment of any person for workweeks in excess of 40 hours after the second year following the legislation ‘unless such employee receives compensation for his employment in excess of [40] hours . . . at a rate not less than one and one-half times the regular rate at which he is employed.’”) (internal citations omitted). *See also* Danuta Bembenista Panich & Christopher C. Murray, *Back on the Cutting Edge: “Donning-and-DoFFing” Litigation Under the Fair Labor Standards Act*, 58 FED. LAW., Mar./Apr. 2011 at 14, 14 (2011) (“Since its enactment, the FLSA has been subject to several amendments and expansions. But the law’s two basic requirements for nonexempt employees remain the same: they must be paid a specified minimum wage and they must be paid at a time-and-a-half premium rate for all time worked beyond

Although an employer could be held liable for violating these provisions, “FLSA did not define ‘work’ or ‘workweek,’ and [the Supreme Court] interpreted those terms broadly.”²² “Work” came to be defined as “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,”²³ while “workweek” was interpreted to “includ[e] all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.”²⁴ These early decisions, which included compensation for time spent traveling to underground work areas²⁵ and walking to work benches,²⁶ “provoked a flood of litigation.”²⁷

In response to this litigation and the large sums being awarded to plaintiff workers,²⁸ Congress found that the FLSA had “been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers.”²⁹ Congress worried that, under this interpretation, “the

40 hours in a workweek.”).

22. *Busk*, 135 S. Ct. at 516.

23. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (“[W]e cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning 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.”).

24. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946) (holding that the time spent walking from a time clock to the production floor and the time spent conducting the preliminary activity of donning non-protective gear was compensable).

25. *Tennessee Coal*, 321 U.S. at 598.

26. *Anderson*, 328 U.S. at 691–92.

27. *Busk*, 135 S. Ct. at 516 (“In the six months following this Court’s decision in *Anderson*, unions and employees filed more than 1,500 lawsuits under the FLSA.”).

28. *Id.* (“These suits sought nearly \$6 billion in back pay and liquidated damages for various preshift and postshift activities.”).

29. 29 U.S.C. § 251(a)(2017). *See also Alvarez*, 546 U.S. at 26 (“Based on findings that judicial interpretations of the FLSA had superseded ‘long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation,’ [Congress] responded with two statutory remedies, the first relating to ‘existing claims,’ and the second to ‘future claims.’ Both remedies distinguish between working time that is compensable pursuant to contract or custom and practice, on the one hand, and time that was found compensable under this Court’s expansive reading of the FLSA, on the other. Like the original FLSA, however, the Portal-to-Portal Act omits any definition of the term ‘work.’”) (internal citations omitted).

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payment of such liabilities would bring about financial ruin of many employers” and employees would “receive windfall payments . . . for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay.”³⁰ Therefore, Congress swiftly passed the Portal-to-Portal Act, exempting employers from compensating employees for two sets of activities:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.³¹

With the Portal-to-Portal Act, Congress “distinguishe[d] between activities that are essentially part of the ingress and egress process and those that constitute the actual ‘work of consequence performed for an employer.’”³² These provisions did not, however, mandate that other time must be compensable. But, “[t]wo years later, Congress added Section 203(o) to the FLSA to preserve the ability of employers and unions to bargain with respect to the compensability of time spent ‘changing clothes or washing at the beginning or end of each workday.’”³³ Furthermore, the Portal-to-Portal Act did not supply a definition for “work” absent from the FLSA, nor did it attempt to change the Court’s interpretation of “work.”³⁴

Shortly after Congress passed the Portal-to-Portal Act, the Department of Labor (“DOL”) promulgated regulations defining “workday” as “the

30. 29 U.S.C. § 251(a)-(b).

31. 29 U.S.C. § 254(a).

32. Franczek Radelet, *Unanimous Supreme Court Rules Employer Need Not Pay for Worker Security Screenings*: Integrity Staffing Solutions, Inc. v. Busk, WAGE & HOUR INSIGHTS (Dec. 9, 2014), <http://www.wagehourinsights.com/2014/12/unanimous-supreme-court-rules-employer-need-not-pay-for-worker-security-screenings-integrity-staffin/>.

33. Richard L. Alfred & Jessica M. Schauer, *Defining the Workday in the Modern Economy*, 29 No. 4 LAB. & EMP. L. 3, 2 (2012).

34. *Alvarez*, 546 U.S. at 28 (“[T]he Portal-to-Portal Act does not purport to change this Court’s earlier descriptions of the terms ‘work’ and ‘workweek,’ or to define the term ‘workday.’”).

period from whistle to whistle.”³⁵ These regulations also state that employees must be compensated for “[p]eriods of time between the commencement of the employee’s first principal activity and the completion of his last principal activity on any workday. . . .”³⁶ Although these regulations have not been amended since they were drafted in 1947, the DOL has periodically issued other guidance for interpreting the Portal-to-Portal Act.³⁷ Most recently issued in 2010, Interpretation No. 2010-2 dealt with the ability to bargain with respect to time spent changing clothes before and after an employee’s shift, stating “even where ‘clothes changing’ is excluded from compensable time by operation of Section 203(o) and a collective bargaining agreement, it may be a ‘principal activity’ that triggers the start of the workday.”³⁸

With the passage of the Portal-to-Portal Act in 1947, “employers have not been obligated to pay their employees for time spent traveling to and from the place where they perform their primary work functions or for any activity employees perform before or after their primary duties.”³⁹ The Court first had the opportunity to address the Portal-to-Portal Act in *Steiner v. Mitchell*.⁴⁰ In *Steiner*, the Court considered whether employees of a battery factory should be compensated for the time it took to don and doff required protective gear at the beginning and end of their work shift. In addressing this question, the Court held that “activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those

35. 29 C.F.R. § 790.6(a)(2011). See also Mark A. Shank & Bridget A. Blinn, *What Is Work? FLSA Pitfalls at the Beginning and End of the Workday*, 16 No. 2 HR ADVISOR: LEGAL & PRAC. GUIDANCE ART 3 (“The U.S. Department of Labor then adopted regulations to help clarify what counts as time worked. Essentially, activities that are ‘primarily for the benefit of the employer’ and that are ‘suffered or permitted by an employer’ constitute compensable work time. In the litigation context, courts apply a general rule that an employer is liable for off-the-clock work if the employer knew or should have known that the employee was working.”).

36. 29 C.F.R. § 790.6(a).

37. Alfred, *supra* note 33, at 2.

38. Alfred, *supra* note 33, at 2-3.

39. Pogust, *supra* note 20, at 31.

40. *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956) (holding compensable “time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide . . .”).

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activities are an integral and indispensable part of the principal activities for which covered workmen are employed.”⁴¹ The Court concluded that donning and doffing were “integral and indispensable” to the “principal activities” of the employees, and were therefore compensable under the FLSA and the Portal-to-Portal Act.⁴² In so finding, the Court held that “activities ‘integral and indispensable’ to a principal activity are themselves principal activities and are not excludable from work time under the Portal-to-Portal Act.”⁴³

After *Steiner*, “the application and understanding of ‘integral and indispensable part of the principal activities’ was inconsistent, at least until 2005,”⁴⁴ when the Court decided another donning and doffing case, *Alvarez*.⁴⁵ In *Alvarez*, the Court employed a three-part donning and doffing test to determine whether preliminary and postliminary activities are compensable: “Does the activity constitute ‘work’? Is the activity an ‘integral and indispensable duty’ of the job? Is the activity so insignificant in scope and duration as to be excluded from compensability as *de minimis*?”⁴⁶ Using this test, the Court held that IBP’s meat and poultry processing employees must be compensated “for time spent walking between the place where they don and doff personal protective equipment and the place where they actually process the meat or poultry.”⁴⁷ The Court reasoned that, since donning and doffing protective gear is integral and indispensable to the employees’ principal activities, the time spent walking between the changing area and the workstations is also integral and indispensable.⁴⁸ However, the Court also held that the waiting time

41. *Id.* at 256.

42. *Id.* at 249. See also Leah Avey, *Walk to the Line, Compensable Time: Cash in the Pockets of Employees*, 32 OKLA. CITY U. L. REV. 135, 147 (2007) (noting that the *Steiner* Court relied on the legislative history of the Portal-to-Portal Act for its interpretation of the “integral and indispensable” test, quoting in relevant part “that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity.”).

43. Alfred, *supra* note 33, at 2.

44. Pogust, *supra* note 20, at 28.

45. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (holding that time spent walking between changing and production areas is compensable under the FLSA, but that time spent waiting to receive personal protective equipment at the beginning of a work shift is not compensable).

46. Pogust, *supra* note 20, at 33.

47. *Id.*

48. *Alvarez*, 546 U.S. at 32, 37 (“IBP [did] not challenge the holding below that, in light of

before the employees don their first piece of protective gear is not compensable since it is the donning which marks the beginning of the continuous workday.⁴⁹

The “integral and indispensable” test begun in *Steiner* and developed in *Alvarez* was more recently clarified in *Busk*.⁵⁰ In October 2010, an employee in one of Amazon’s warehouses brought a class action against Integrity Staffing Solutions (“Integrity”), alleging violations of the FLSA and Nevada state law.⁵¹ *Busk* and the other warehouse employees claimed that they were not compensated for time spent waiting in line for mandatory security screenings at the end of their shifts. The district court dismissed the action for failure to state a claim, holding “that these screenings were not integral and indispensable but instead fell into a noncompensable category of postliminary activities.”⁵² The Ninth Circuit reversed the lower court’s ruling, reasoning that an employer has to compensate employees for postliminary activities “if those postshift activities are necessary to the principal work performed and done for the benefit of the employer.”⁵³ The defendants then appealed to the Supreme Court, which unanimously reversed the Ninth Circuit ruling. The Court began by clarifying the “integral and indispensable” test, explaining that an activity is “integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those

Steiner, the donning and doffing of unique protective gear are ‘principal activities’ under § 4 of the Portal-to-Portal Act.”).

49. *Id.* at 42.

50. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014). See Transcript of Oral Argument, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014) (No. 13-433), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-433_o758.pdf; Oral Argument, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014) (No. 13-433), https://www.supremecourt.gov/oral_arguments/audio/2014/13-433.

51. *Federal Law Bars Kentucky State Wage Law Claims Against Amazon, Judge Says*, 18 EMP. PRAC. LIABILITY VERDICTS & SETTLEMENTS, no. 7, 2016, at 19. See *Busk*, 135 S. Ct. at 515 (“The employer in this case required its employees, warehouse workers who retrieved inventory and packaged it for shipment, to undergo an antitheft security screening before leaving the warehouse each day. The question presented is whether the employees’ time spent waiting to undergo and undergoing those security screenings is compensable under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, § 251 *et seq.*”).

52. *Busk*, 135 S. Ct. at 516.

53. *Id.* (“The Court of Appeals asserted that postshift activities that would ordinarily be classified as noncompensable postliminary activities are nevertheless compensable as integral and indispensable to an employee’s principal activities if those postshift activities are necessary to the principal work performed and done for the benefit of the employer.”).

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activities and one with which the employee cannot dispense if he is to perform his principal activities.”⁵⁴ Applying the test to the facts of this case, the Court found that the required security screenings were non-compensable postliminary activities for two reasons. First, the screenings could not be considered principal activities because “Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.”⁵⁵ Second, the screenings could not be considered integral and indispensable to a principal activity because they were not “an intrinsic element of those activities [or] one with which the employee cannot dispense if he is to perform those activities.”⁵⁶ Since Integrity could have dispensed with the screenings, the Court reasoned that it was not intrinsic to the principal activity of the warehouse workers.⁵⁷ Along with clarifying the test, the Court’s decision in *Busk* also made “clear that the fact that an employer requires a particular activity does not make that activity integral and indispensable and, thus, compensable.”⁵⁸ Instead, the activity must be an “intrinsic element” of the principal activity.⁵⁹ The Court also rejected the plaintiffs’ assertions that Integrity could have lessened the time spent waiting in security lines, ruling that “[t]he fact that an employer could reduce the time spent on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that a worker is employed to perform.”⁶⁰

54. *Id.* at 517.

55. *Id.* at 518.

56. *Id.*

57. *Id.* (“The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees’ ability to complete their work.”).

58. Patrick Bannon, Rebecca DeGroff, Noah Finkel & Richard Alfred, *An “Integral and Indispensable” Supreme Court Win For Employers Regarding What Counts As Time Worked Under the FLSA*, WAGE & HOUR LITIG. BLOG (December 9, 2014), <http://www.wagehourlitigation.com/off-the-clock-issues/an-intrinsic-supreme-court-win-for-employers-regarding-what-counts-as-time-worked-under-the-flsa/>.

59. *Busk*, 135 S. Ct. at 517.

60. Jon D. Bible, *Integrity Staffing Solutions, Inc. v. Busk: Employee Time in Security Screenings Not Compensable Work under FLSA*, BUS. L. TODAY (March 2015), http://www.americanbar.org/publications/blt/2015/03/keeping_current_bible.html. Although outside of the scope of this Note, see *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007) for a discussion of how required security processes fall under the Portal-to-Portal Act’s ingress and egress

After *Busk*, courts will have to apply the “intrinsic element” test to other “integral and indispensable” contexts including “claims for compensation for computer ‘boot up’ time in call center environments.”⁶¹ While there is a history of donning and doffing cases that goes back as far as the Portal-to-Portal Act, “[m]ost of the cases involving the compensability of post-boot-up, pre-clock-in time and the end-of-the-day corollary have yet to reach a decision on the merits,”⁶² and are either settled or ongoing.⁶³

exemptions: “The activities required to enter and exit Indian Point—from waiting in line at the vehicle entrance through the final card-swipe and handprint analysis—are necessary in the sense that they are required and serve essential purposes of security; but they are not integral to principal work activities. These security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time. . . . Plaintiffs argue that the Portal-to-Portal Act 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 at sensitive facilities (and elsewhere) 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. Travel time was held to be ‘normal’ (and therefore outside the FLSA) in *Kavanagh v. Grand Union Co., Inc.*, even though the plaintiff (who performed mechanical services in defendant’s supermarkets) commuted five to nine hours a day depending on the supermarkets to which he was dispatched. Normal travel time ‘does not represent an objective standard of how far most workers commute or how far they may reasonably be expected to commute. Instead, it represents a subjective standard, defined by what is usual within the confines of a particular employment relationship.’ By the same token, security measures that are rigorous and that lengthen the trip to the job-site do not thereby become principal activities of the employment.” (internal citations omitted).

61. Patrick Bannon, Rebecca DeGroff, Noah Finkel & Richard Alfred, *supra* note 58 (“The ‘intrinsic element’ test should be applied by lower courts to many other contexts, including donning and doffing claims and claims for compensation for computer ‘boot up’ time in call center environments.”).

62. *Log-in and Log-off Time: You May Have to Pay Workers for Booting Up*, N.J. EMP. L. LETTER (May 22, 2015), <http://compensation.blr.com/Compensation-news/Compensation/Compensation-Administration/Log-in-and-log-off-time/> (“The courts that have ruled on compensability have come down both ways For example, in *Waine-Golston v. Time Warner Entertainment-Advance/New House Partnership*, decided in 2013, . . . [t]he U.S. District Court for the Southern District of California held that the logging in and off time was *de minimis* (i.e., minimal) and therefore noncompensable.”).

63. *See e.g.*, *Burch v. Qwest Commc'ns Int'l, Inc.*, 677 F. Supp. 2d 1101, 1109 (D. Minn. 2009) (plaintiffs “required to log into their computers and several software applications” before shift); *Fry v. Accent Mktg. Servs., L.L.C.*, No. 4:13CV59 CDP, 2013 WL 2403669, at *1 (E.D. Mo. May 31, 2013) (plaintiffs required to start computers, log in, and bring up programs before shift) (settled); *Pegues v. CareCentrix, Inc.*, No. 12-2484-CM, 2013 WL 1896994, at *1 (D. Kan. May 6, 2013) (plaintiffs “required to complete a number of critical tasks before they could clock in via defendant’s time-tracking software”) (ongoing); and *Davenport v. Charter Commc'ns, LLC*, No. 4:12CV0007 AGF, 2015 WL 1286372, at *1 (E.D. Mo. Mar. 20, 2015) (alleging breach of the FLSA by “failing to pay [employees] for the time it took them to access computer applications when beginning to work and to

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Furthermore, discovery for these cases can be especially time-intensive since the claims are frequently brought as collective actions under the FLSA.⁶⁴ Employers often try to settle these suits early, not only because of the cost associated with prolonged discovery and motion practice, but also due to the possibility of large jury awards should the employer be found at fault at trial.⁶⁵ Due to the widespread use of customer service call centers in large corporations and the variance in boot up times, courts must first decide whether large numbers of plaintiffs may sue in an FLSA collective action even when boot up times vary substantially.⁶⁶

II. ANALYSIS: THE TRADITIONAL APPROACH TO PRE/POSTLIMINARY ANALYSIS

Since the integral and indispensable cases have built on—rather than overturned—each other, traditional analysis follows the evolution of the test from *Steiner*'s “principal activities”⁶⁷ to *Alvarez*'s 3-part test⁶⁸ to

close down computer applications at the end of work”) (class decertified March 2017).

64. Jill S. Kirila, *Defense Strategies in Hybrid Wage and Hour Class Action Litigation*, in STRATEGIES FOR EMP. CLASS & COLLECTIVE ACTIONS 47, 52 (2012) (“Employees with claims under 29 U.S.C. Section 216(b) cannot bring a Rule 23 class action, but may instead join in a collective, opt-in action. Specifically, the FLSA provides that, in pertinent part, ‘[a]n action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.’ Under Section 216(b), similarly situated employees must opt into a collective action, and no employee is bound by the judgment unless the employee opts in . . . Most district courts typically apply a two-step certification procedure to FLSA collective actions, which includes conditional class certification, and possible later decertification.”) (internal citations omitted). *See also id.* at 49 (“There are several reasons for the exponential and continued increase in wage and hour class and collective actions, including the potential for large settlements, and the relative ease of litigation from a plaintiff’s perspective. The plaintiff must meet relatively low standards to conditionally certify a collective action, and a proliferation of ‘copycat suits’ has been targeting specific companies or industries.”).

65. *See generally* Rath, *supra* note 3 for a discussion of the difficulties in settling wage and hour collective actions. *Id.* at 55 (“Damages can be substantial in wage and hour collective action cases. In one notable example, *Braun v. Wal-Mart*, No. 19-CO-01-9790, slip op. at 1-2, 6-7 (Minn. Dakota County, June 30, 2008) . . . [t]he jury awarded \$140 million in damages plus an additional \$45 million in attorneys’ fees.”).

66. *Log-in and Log-off Time*, *supra* note 62 (“The courts are still wrestling with whether affected employees can sue as a class, particularly because the amount of time it takes to boot up and shut down or log in and log off can vary between individuals.”).

67. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

Busk's "intrinsic element."⁶⁹ Engaging in this traditional integral and indispensable analysis to determine compensability of boot-up and shutdown times in the call center context generally leads to the conclusion that boot-up and shutdown time should not be compensable. This, however, is not a clear-cut conclusion.

Beginning with *Steiner*, "activities performed either before or after the regular work shift . . . are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed."⁷⁰ In the context of call centers, this analysis becomes: Are the pre- and postliminary activities of booting up and shutting down integral and indispensable to the employees' principal activity of answering and managing service calls? Based on *Steiner*'s finding that donning and doffing protective gear for battery factory workers were integral and indispensable, it would seem that booting up and shutting down would be similarly considered compensable. Just as the *Steiner* workers could not begin their principal activity—manufacturing batteries—without donning protective gear, neither can call center employees begin answering and managing calls without first booting up their computers and pulling up the call and service applications. Therefore, booting up, at least, would seem integral and indispensable to call center workers, and therefore, under *Steiner*'s holding, a principal activity itself.⁷¹

However, employing *Busk*'s "intrinsic element" standard, which only sought to clarify the integral and indispensable test, just because something is required does not make it integral and indispensable. Indeed, the Supreme Court reversed the Ninth Circuit for holding that pre- and postliminary activities are compensable if they are "necessary to the principal work performed and done for the benefit of the employer."⁷² The Court then clarified the test, holding that an activity is integral and indispensable only "if it is an intrinsic element of those [principal] activities and one with which the employee cannot dispense if he is to perform his principal activities."⁷³ The Court found that required security

68. Pogust, *supra* note 20, at 28.

69. *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014).

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

71. Alfred, *supra* note 33.

72. *Busk*, 135 S. Ct. at 516.

73. *Id.* at 517.

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screenings were non-compensable pre- and postliminary activities because 1) “Integrity Staffing did not employ its workers to undergo security screenings,”⁷⁴ and 2) the screenings were not an intrinsic element of the principal activity of retrieving items from warehouse shelves because Integrity could have dispensed with the screenings.⁷⁵

Similarly, in the call center context, call center operators do not hire their employees to boot up and shut down computers, but to take and manage calls. Therefore, these activities are not in themselves principal activities. And although booting up and shutting down may seem like indispensable activities, that is not the case. Just as Integrity could have dispensed with the screenings at the expense of warehouse security, call center operators could dispense with booting up and shutting down by telling employees to leave the computers on and logged-in at the end of their shifts at the expense of computer security and operation quality. But the operators need not do this to argue that these activities are dispensable since “the fact that an employer requires a particular activity does not make that activity integral and indispensable and, thus, compensable.”⁷⁶

Finally, the application of *Alvarez*’s three-part test suggests that booting up and shutting down are compensable pre- and postliminary activities under traditional conceptions of “work.” Under this test, the Court must decide: “Does the activity constitute ‘work’? Is the activity an ‘integral and indispensable duty’ of the job? Is the activity so insignificant in scope and duration as to be excluded from compensability as *de minimis*?”⁷⁷ In *Alvarez*, the Court held that donning and doffing protective equipment and walking from the equipment room to the processing stations were compensable⁷⁸, but that the time waiting to don and doff gear was not compensable.⁷⁹ In the call center context, courts begin by asking whether booting up and shutting down constitute “work.” Under traditional conceptions that view the computer as a single, unified tool, the answer would seem to be “yes.” However, by taking into account the realities of the modern, digital workplace, the computer is seen as a self-

74. *Id.* at 518.

75. *Id.*

76. Patrick Bannon, Rebecca DeGross, Noah Finkel & Richard Alfred, *supra* note 58.

77. Pogust, *supra* note 20, at 33.

78. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

79. *Id.* at 42.

contained *workplace*, where each discrete function of the computer (booting up, logging in, starting applications, using applications, etc.) is an independent event. Under this framework, pressing the power button on a computer and entering log-in credentials is seen, not as the first act of “work,” but as the turn of a doorknob and the swiping of an employee badge. And, based on the analysis above, booting up and shutting down are not “integral and indispensable dut[ies] of the job,” but dispensable processes used to enhance security and efficiency, and not necessary in themselves. Finally, under all but the most extreme cases, the booting up and shutting down of a computer, the primary function of which is call tracking and loading management applications, will involve *de minimis* periods of time.

III. PROPOSAL: A NEW ANALOGY FOR THE DIGITAL AGE

As seen in the above analysis, applying the traditional integral and indispensable test to the problems of the digital workplace can be inconsistent and, at times, unsatisfactory. And in each case, parties to boot-up litigation must start fresh, asking under their particular facts: Does compensable time run from booting up? from logging in? or from opening a timekeeping application? What constitutes *de minimis* boot-up and shutdown time and does it differ based on brand of computer? operating system? or number of running applications?

There is, however, a simpler and more consistent way to adapt traditional work laws to the changing realities of the digital workplace: by analogizing the computer, not to a tool, but to a workplace. If we view the computer as a self-contained workplace and not simply as a single tool, it becomes easier to apply existing standards to digital work with more consistency.

Take, for example, the Portal-to-Portal Act’s exemptions for ingress and egress. When the computer is considered as a single tool, these exemptions have no application. But when the computer is viewed as a workplace, the Portal-to-Portal Act’s application becomes clear: booting up and shutting down are not the first and last acts of “work,” they are forms of travel—digital travel—which are exempted from compensability under the Portal-to-Portal Act. Subsection (a)(1) of the Act exempts “walking, riding, or traveling to and from the actual place of performance

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of the principal activity” from compensable time.⁸⁰ Driving to work, walking from the parking lot to the office door, and walking from the door to the desk are all forms of travel traditionally exempt under this subsection. By recognizing that “place of actual performance” of the principal activity of the employee’s work is increasingly no longer the desk, but the desktop, it is clear that boot-up, log-in, and shutdown time are simply other forms of travel that may also be exempt. Under this new model, digital activities are simply extensions of exempted actions: booting up is the employee traveling to the workplace, logging in is the trip from the door to the desk, and shutting down at the end of the day is simply leaving the place of work.

This reading of the Portal-to-Portal Act would give a clear and consistent rule for boot-up and shutdown litigation. Parties to such litigation would no longer have to argue whether boot-up and shutdown times are or are not non-compensable pre- and postliminary activities under subsection (a)(2) of the Portal-to-Portal Act, but would know from the beginning that they are forms of travel and directly excluded by (a)(1). While legislative recognition in the form of an amendment to the Portal-to-Portal Act or to the FLSA itself would be the most efficient application of this reading,⁸¹ an intermediary step would be for courts—and the attorneys who inform them—to begin adapting conceptions of digital work and travel into their decisions regarding boot-up and shutdown litigation. Furthermore, the implications of a bright line rule about the compensability of boot-up/shutdown time are three-fold: 1) it would decrease the amount of burdensome wage and hour collective actions;⁸² 2) it would encourage employees to bargain or demand that boot-up and

80. 29 U.S.C. § 254(a).

81. Christine D. Higgins, *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, 227 (2007) (“The best solution appears to be Congressional [sic] legislation . . . Congress should amend the Portal-to-Portal Act to include a section discussing commuting time which operates in accordance with the long-standing precedents and regulations.”).

82. Reynolds, *supra* note 5, at 4 (“Even though the issue has not been squarely decided by the courts, employers should evaluate their policies for defining work time that involves booting up. Employers can avoid potential litigation by requiring employees boot up only after the start of their work shift. Otherwise, employers must determine whether ‘booting up’ a computer is essential for the employees’ principal activities. Whether that time is compensable working time under the FLSA is highly fact dependent and will vary depending on the circumstances.”).

shutdown time be compensable under their employment agreements; and 3) it would begin a process by which conceptions of digital work could be integrated into other areas of employment law, such as digital employee privacy.

CONCLUSION: THE NEXT STEP IN ADAPTING WORK LAWS TO DIGITAL WORKPLACES

Boot-up and shutdown litigation is quickly becoming one of the primary wage and hour focuses of employees and plaintiffs' attorneys, and call centers are a common arena for this litigation. Applying the integral and indispensable test for determining whether these pre- and postliminary activities are compensable is difficult and inconsistent. The reason for these difficulties and inconsistencies is that this analysis attempts to force new problems of the modern digital workplace into the frameworks created under the assumptions of the traditional physical workplace.

It is clear that we need a new legal definition of "work"; one that recognizes and engages with the realities of the digital workplace. But to incorporate conceptions of digital work into our current work law, we do not need to start fresh from nothing. To the contrary, the easiest way to adapt traditional work laws to the growing number of digital workplaces is to map digital work onto existent paradigms developed for physical workplaces.

Relying on traditional models, our tendency is to think of the computer as a single tool—the lever of the idealized assembly line. However, if we instead choose to accept that “the actual place of performance of the principal activity”⁸³ in the modern workplace is no longer the physical desk but the digital desktop, then analysis becomes more straightforward. Booting up and shutting down become the Portal-to-Portal Act's ingress and egress, which are non-compensable; opening applications becomes a form of donning and doffing, which has generally been held to be compensable; and checking personal email or web-browsing—when permitted—becomes a break with the Internet browser becoming the breakroom, the compensability of which would be subject to employer

83. 29 U.S.C. § 254(a)(1) (2017).

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policy. These analogies accept that computers are not just tools which employees use to complete work, but are themselves self-contained workplaces with their own forms of ingress, egress, and work.

Engagement in this form of analogy would give courts the ability to adapt traditional employment laws to emerging digital problems. By using the more accurate analogy of computer-to-workplace rather than computer-to-tool, courts should be able to reach consistent decisions even as workplace technology continues to advance. Ideally, this analogy would also preclude the need for legislative reworking of traditional employment laws to incorporate digital concepts or, to the consternation of Judge Easterbrook, the need to develop a discrete area of the law for digital employment issues.

However, there would be advantages to legislative intercession, especially if we are concerned by the outcome of any of the suggested analogies. For example, Congress may choose to amend the Portal-to-Portal Act to specifically exclude computer boot-up and shutdown time from its compensability exemptions in order to require the employee to be compensated for that time. Should the legislature choose to begin amending employment law in an attempt to reflect digital workspaces, my proposal stands and retains its importance. Just as I urge the courts to move from considering the computer as a tool, so should the legislature adopt my analogy of the computer as workplace. We need to update the way we think about computers in the workplace, especially at a time when computers are increasingly becoming the workplace itself.