# All Employers Must Heed Md. Paid Commuting Time Ruling

By **Kirsten Eriksson and Elisabeth Hall** (September 16, 2022)

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In a July 13 decision, Maryland's highest court held that the federal Portal-to-Portal Act, or PPA, has not been adopted or incorporated into Maryland wage laws or regulations.

The Maryland Court of Appeals' holding that "what constitutes 'work' under Maryland law is not limited to what is compensable work under the [federal] PPA and [Fair Labor Standards Act]" should cause concern among Maryland employers, who may be required to pay their employees additional wages for time spent under a broader state definition of "work" than what is compensable at the federal level.

Employers in other states should also take note of this decision, because other states have wage and hour laws very similar to Maryland's, which raises the concern that an expansion of what constitutes "work" could be on the horizon more broadly.

**The Decision**

The decision from the Maryland Court of Appeals was a consolidated opinion addressing two related cases: Mario Ernesto Amaya v. DGS Construction LLC and Juan Carlos Terrones Rojas v. F.R. General Contractors Inc., collectively referred to herein as "Amaya."

In these cases, the employee-plaintiffs were construction workers who were directed by their employers to report to a designated off-site parking lot each day, and then ride from the parking lot to their respective construction sites and back, in buses supplied by their employers.

The workers were not paid for their wait or travel time coming or going from the parking area, which averaged approximately two hours per day.

As a result, the workers brought claims for unpaid wages and overtime wages under the Maryland Wage and Hour Law., or MWHL, and state wage payment laws, as well as unjust enrichment claims for the times that they waited and traveled between the parking area and construction site.

The primary issue before the Maryland Court of Appeals in these cases was whether time spent by the employee-plaintiffs waiting for rides at a parking area, and time subsequently spent traveling to and from the construction sites where they performed physical labor, constituted compensable hours of work under Maryland law.

Notably, the cases were brought in state court under only the MWHL, apparently in recognition of the fact that under the federal FLSA and its subsequent amendment by the PPA, the time would not be compensable.

Both the trial courts and the intermediate appeals court had found the time was not compensable, on the theory that Maryland law mirrored and incorporated federal law with respect to the compensability of travel time.

Ultimately, however, the Court of Appeals held that the PPA has not in fact been incorporated into Maryland law and therefore, compensable hours of work under Maryland law is not limited to what constitutes compensable work under federal law.

As a result, the court reversed and remanded the cases to resolve genuine disputes of material fact as to whether the employees were required to report to the parking area, whether the parking area was the employers' premises or a prescribed workplace, or whether the employees were required to be on duty, and therefore were engaged in compensable hours of work under state law.

These issues will now have to be decided by a fact-finder at trial.

**Pre-Shift and Post-Shift Activities Under the FLSA and the PPA**

The origin of this issue in wage and hour law dates back to the 1940s, not long after the enactment of the FLSA.

The FLSA established the standards for employers to pay minimum wage and overtime for hours worked in excess of 40 hours in each workweek.

Unfortunately, the FLSA did not define the term "work," which was left to the courts as litigation under the FLSA ensued. In 1944, the U.S. Supreme Court defined "work" 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.[1]

Shortly thereafter, it defined the statutory "workweek" 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."[2]

As a result of these expansive definitions, courts were flooded with lawsuits by employees, many — if not most — of which sought compensation for pre-shift and post-shift activities.

Congress quickly declared an emergency and enacted the PPA in 1947 to clarify and define an employer's obligation to pay employees for activities performed before and after an employee's principal activities.

Specifically, the PPA provides that an employer is not required to pay employees for pre- and post-shift activities that:

- Are preliminary or postliminary to the principal activity or activities the employee is employed to perform, including walking, riding, or traveling to and from work;
- Take place before or after an employee's performance of all their principal activities in the workday; and
- Are not compensable, during the portion of the day when they occur, under any contract, custom or practice.

While litigation continued under the PPA for many years, in 2014, the Supreme Court issued a unanimous decision in Integrity Staffing Solutions Inc. v. Busk,[3] holding that the time spent by employees working at the warehouse to go through security screening after their

shift was not compensable.

The court held that the test for whether an activity performed pre- or post-shift was compensable depended on whether it was integral and indispensable to the employee's principal activity, meaning that it must be "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[4]

The key, according to the Supreme Court, is that "[t]he integral and indispensable test is tied to the productive work that the employee is employed to perform."[5] Since a post-shift security screening was not required for the employees to perform their duties at the warehouse, the court held they did not need to be compensated for the screenings.

The decision was hailed as a major victory for employers, and brought needed clarity to the question of what activities were compensable under federal law.

**State Laws May Require a Different Result**

While the Integrity Staffing decision certainly reduced the number of claims filed relating to pre-shift and post-shift work, such litigation did not disappear — rather it often moved to the state courts.

Most notably, lawsuits continued to be filed under California law, which has no parallel to the PPA, nor has it adopted definitions of compensable time that are derivative of or identical to the FLSA. Similar states with more favorable state law also continued to see litigation.

But not so in Maryland, at least until now.

The MWHL provides, like the FLSA, that employees must be paid at least a minimum wage for hours worked, and must be paid time and a half for hours over 40 in a workweek. Like the FLSA, those terms are not defined in the statute.

The regulations interpreting the MWHL, however, define "hours of work" to mean "the time during a workweek that an individual employed by an employer is required by the employer to be on the employer's premises, on duty, or at a prescribed workplace."[6]

Notably, this is exactly the language used by the Supreme Court in Anderson v. Mt. Clemens Pottery Co. in 1946, and there has never been a legislative enactment in Maryland along the lines of the language in the PPA.

However, the MWHL was not enacted until 1965, well after the enactment of the PPA and its limitation on compensation for pre- and post-shift activities had become widely accepted under federal law.

In fact, numerous prior court decisions have held that the requirements under the MWHL mirror those of the FLSA, with the Maryland Court of Appeals going so far as to call the Maryland law the "State parallel to the Fair Labor Standards Act" in Poe v. IESI MD Corp. in 2019.[7]

Accordingly, there were many who understood, or at least assumed, that the FLSA and Maryland law were aligned on this issue — that is, until the Amaya decision was rendered.

Since there are many state laws that, like Maryland's, parallel and are either expressly or

impliedly modeled on the FLSA, it is certainly possible that other states could follow suit.

**Employer Takeaways**

In light of Amaya, Maryland employers can no longer assume that travel to and from the actual place of performance of the employee's principal employment activity is not compensable.

Rather than being automatically excluded, the question of whether these activities need to be compensated will now turn on whether they constitute work, which will depend on factual questions about whether the employee is "required by the employer to be on the employer's premises, on duty, or at a prescribed workplace."

Employers with employees in Maryland should evaluate and potentially modify their existing pay practices to ensure that employees are being properly paid for all travel time and other preliminary and postliminary activities constituting hours of work in accordance with state law.

Employers may want to review communications with employees, and train managers relating to communications with employees about when and where they report to work.

The decision could also affect other pre- and post-shift activities, such as security screenings, COVID-19 testing or temperature checks, or other work-related activities that occur outside of an employee's normal shift.

Employers would be wise to review all activities that employees perform before and after their shifts to determine whether those activities need to be paid.

If an employer determines that certain pre- and post-shift activities must be paid, it should explore whether operational changes are possible to improve efficiencies and reduce the amount of time spent.

Employers nationwide should see the Amaya decision as a wake-up call, and should similarly review their pay practices to determine whether they have employees who are performing activities before or after their shifts that could become compensable under state law if a decision like Amaya were to occur in their jurisdiction.

It may also be, just as in 1947, that legislative action occurs to relieve employers of this burden. Employer groups may seek to address this issue with state legislatures through a request to specifically amend state law to adopt the PPA or similar language to avoid this result.

While the impact of the Amaya decision remains to be seen, it would be prudent for employers to proactively review their employees' pre- and post-shift activities, and to conduct an analysis of applicable state laws where they operate, to perform a risk analysis and make changes to avoid potential liability.

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[1] Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944).

[2] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–691 (1946).

[3] Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27 (2014).

[4] Id. at 33.

[5] Id. at 36 (citations omitted).

[6] COMAR 09.12.41.10.

[7] Poe v. IESI MD Corp., 243 Md. App. 243, 250 (2019).