

Boosting Efficiency at All Levels of Government



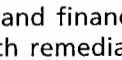
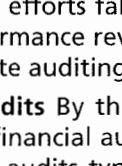
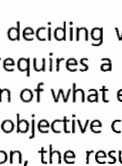
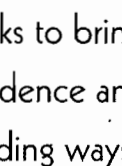
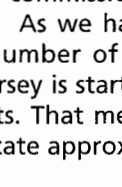
By Matthew Boxer
State Comptroller

When Governor Jon Corzine proposed creating the Office of the State Comptroller, he did so with a clear goal in mind: to bring greater efficiency to the operation of all levels of government in New Jersey.

Local government officials across our state share that same goal. They strive to balance the need to provide high caliber services with the need to keep those services affordable.

With that in mind, the Office of the State Comptroller looks to bring a spirit of impartiality, independence and cooperation to its mission of finding ways to save taxpayer dollars.

Our efforts are not designed to catch public officials in a game of "gotcha." Rather, our intent is to work with government entities to point out deficiencies so they can be corrected. We hope public entities will use our audits, program reviews, reports on best practices and our training capabilities to take proactive measures to keep costs low and fix small inefficiencies before they mushroom into larger ones.



The jurisdiction of our office is broad and includes state agencies, public institutions of higher education, independent state authorities, municipal governments, county governments and boards of education. It also includes all of the various local government units with contracting power, such as local parking authorities, bridge commissions, improvement authorities and park commissions.

As we have found in our efforts so far, the number of such government entities in New Jersey is startling—more than 1,900 government units. That means we have a government unit in this state approximately every four miles.

The Office of the State Comptroller looks to bring a spirit of impartiality, independence and cooperation to its mission of finding ways to save taxpayer dollars.

As a result, deciding where to focus this office's efforts is crucial and requires a clear delineation of priorities. Our determination of what entities to audit or review is based on a number of objective criteria, including the size of the budget in question, the results of previous audits, referrals from other government agencies and other credible information.

Our office's efforts fall into the following areas: financial audits, performance reviews, contracting oversight, coordination of state auditing agencies and training.

Financial Audits By the close of summer, this office was engaged in financial audits of a number of local and state entities. The audits typically begin with a review of prior financial audits and then involve an examination of internal controls and financial practices and procedures. They conclude with remediation plans for fixing any deficient

practices. Especially in the current fiscal climate, we believe it is critical to promote financial practices that will yield the greatest efficiencies in the operation of state and local governments. We will continue to work toward that goal.

Performance Reviews Performance reviews are another key component of our mission. Traditionally, New Jersey has lagged behind other states as well as the federal government when it comes to looking at the performance of taxpayer-funded government programs. Rather than simply asking whether our programs are working or adhering to guidelines, our performance reviews examine whether the program can be administered more effectively and whether the amount of taxpayer dollars spent on the program is warranted.

It is important for us as public servants to continually re-evaluate whether a program's benefits justify the tax dollars being dedicated to the program. Particularly at a time when public entities are being confronted with increasing taxes and/or decreasing services, every dollar spent should be scrutinized.

Contract Review The statute creating the Office of the State Comptroller also charges the office with oversight responsibilities concerning government contracting. Specifically, it requires any government unit seeking to award a contract worth more than \$10 million to present the proposed contract to this office for review at least 30 days before any advertisement is placed. Separately, public entities are also charged with reporting information on

contracts between \$2 million and \$10 million no later than 20 business days after the contract is awarded.

Earlier this year, we sent letters to government units in New Jersey informing them of these responsibilities. In providing notice to this office of these large-dollar contracts, public entities are asked to identify the type of goods or services that are being procured, the anticipated cost of the procurement and the selection process that will be used to select the vendor.

The contract review is not focused on whether entering into a particular contract is sound public policy – that is a question for elected officials. Instead, we simply look at whether the contracting process is legally appropriate. If it is not, the statute sets forth possible remedial options.

Coordination In addition to performing our own audits, this office serves as a coordinating agent for other state audits, including those performed by other state agencies. We meet periodically with those agencies to exchange information and avoid duplication.

Training The Office of the State Comptroller also provides technical assistance and training regarding best practices in financial management systems and in strengthening internal controls to prevent the misuse of public funds.

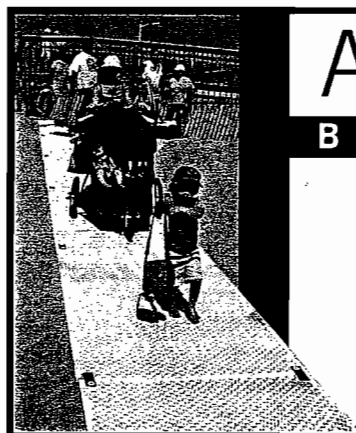
Similarly, the office is charged with providing guidance on the selection and rotation of external auditors. We did just that with our first public report, which advised all public entities to select auditors through a competitive bidding process at a minimum of every five years. We also called on pub-

lic entities to switch to a new auditor at least every 10 years and refrain from hiring auditing firms that have made political donations in the previous year.

The external auditing system is crucial to the financial health of local governments in New Jersey. Aside from the millions of dollars public entities pay outside auditors, we ask these firms to play a primary role in reviewing and analyzing the spending of billions of taxpayer dollars.

In reviewing New Jersey's external auditing system, we asked every public entity two important questions: how long has your current auditor been in place and what process did you use to hire that auditor? We found hundreds of public entities are hiring outside auditors without ever opening the selection process to competition, and then retaining those auditors for far too long—in some cases, 40, 50 and even 60 years. Our review showed such practices have substantial repercussions for the quality of audits being produced.

To be sure, the relationship between public entities and the Office of the State Comptroller will not always be a comfortable one. No one enjoys being audited, including us. But the relationship between this office and New Jersey governments need not always be an adversarial relationship either. Welcoming a team of auditors into Municipal Hall might be a less than joyful experience, but so are visits to the dentist or the doctor's office. Yet dentists and doctors help find problems early, before they become bigger problems. Our office aims to do the same—and we're even willing to make house calls. ▲



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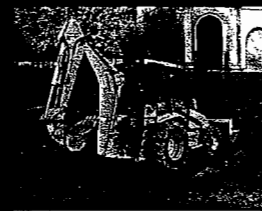
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An Innovative Public-Private Partnership Saves Woodbridge Township Taxpayers \$700,000



By John E. McCormac, CPA,
Mayor, Woodbridge Township
& Charles H. Sarlo, Esquire,
DMR Architects



Public-Private Partnership is a solution coming into vogue in New Jersey. Widely used in Europe for a number of years, this concept is generally only considered for new buildings, infrastructure projects and certain large-scale municipal partnerships. In a unique and innovative “coming together” Woodbridge Township and DMR Architects, teamed up and created a hybrid public-private partnership that has saved Woodbridge Township taxpayers more than \$700,000—with the possibility of additional savings.

By taking on the role of general contractor, a role traditionally filled by public bid, Woodbridge Township saved taxpayers nearly 40 percent of the cost to comply with a New Jersey state directive requiring development and implementation of a municipal court security policy. Woodbridge Township was able to assume this role because DMR Architects, an architectural firm with a vast amount of public sector experience, partnered with the Township to provide valuable guidance under an enhanced construction and administrative role.

The initial project came about as a directive from the Administrative Office of the Courts regarding municipal court security. Woodbridge Township hosts a municipal court on the first floor of its town hall with additional

space for the court’s auxiliary functions. Since the building was not designed for this purpose, the Township was running into several problems - one of which was crowd control and excessive loitering in the first floor hallway which was impeding access for guests and visitors to the municipal building’s other service departments. As a result, DMR Architects was retained to perform a feasibility study in order to not only implement the township’s security plan, which had been filed to comply with the state’s directive, but to reconfigure the town hall’s first floor layout to eliminate congestion due to the number of people who were in and out of the municipal court during morning and evening court sessions.

The results of the feasibility study and the construction cost estimate, which included reconfiguring over 50 percent of the first floor of the town hall, made it evident that the budget established by the township for the construction project could not accommodate both objectives. Rather than eliminate the reconfiguring of the first floor layout, Mayor John E. McCormac proposed an innovative solution. The Mayor suggested that the township act as the general contractor on the project and perform a large portion of the capital improvements outlined in the feasibility study with in-house personnel.

Normally, public projects are bid as a single bid package under the Public Contract Law notwithstanding that several trades are involved. Since Township personnel were performing a portion of the capital improvements on the project, multiple bid packages were created for the heating and air conditioning systems and advanced electrical work. With multiple bid packages, bids are more refined because the work required by each trade is clearly detailed. The end result is fewer hidden costs, minimizing expensive change orders, and decreasing lengthy punch list items that so often derail project timelines.

DMR Architects prepared the construction documents to reflect Woodbridge Township as the single contractor. As the general contractor, the township assumed the responsibility for the quality of all work, as well as completing the project on-time and on-budget. While the township's personnel were well equipped and experienced to undertake the majority of the construction, there was a concern with respect to ensuring that all of the responsibilities as a general contractor were fulfilled. In order to alleviate this concern and further reduce risk of project delays and cost overruns, DMR Architects assumed an enhanced

construction/administration role. In this role, DMR Architects updated the township administration with weekly briefing reports and monitored the township personnel in their efforts. This was a critical element, when you consider that the township was assuming three roles; that of the project owner, the general contractor and a majority of the trades. And, as importantly, with this public-private partnership the role of the project architect was altered. Under a more traditional approach for municipal projects, a department head is generally assigned to be the point person between the project architect and the administration. If the assigned department head is not knowledgeable about construction, the flow of information between all the parties involved can be impeded, making the work of the project more challenging.

Township employees proved to be a valuable asset to the project. They were able to develop a phasing plan and created swing space, ensuring that none of the court's critical functions were affected by the construction. The use of township employees also reduced the cost of the project because they were able to work continuously, whereas a general contractor would not have

been able to perform with daily regularity. A significant part of the construction work was started and completed by township employees prior to the bid award for HVAC and electrical work, shortening the overall time frame of the project and minimizing disruption to the public and to Court operations.

Woodbridge Township officials and DMR Architects took an innovative approach to handling this public project. By assuming new responsibilities and collaborating, they demonstrated a successful public-private partnership, which greatly benefited the taxpayers of Woodbridge Township. Undoubtedly, there are other opportunities across the state for similar partnerships between public and private sectors. ▲

Charles H. Sarlo, Esq., is Vice President and General Counsel of DMR Architects, Hasbrouck Heights, one of the largest and most respected full-service architectural firms in New Jersey and the New York Metropolitan region. Mr. Sarlo has over 25 years of experience in law, engineering, construction, and development.

Mayor John McCormac was elected Mayor of Woodbridge Township in 2006. A certified public accountant, Mayor McCormac previously served as New Jersey State Treasurer, supervising 12 divisions and 3,500 employees. Mayor McCormac is life-long resident of Woodbridge and has more than 14 years of serving the public.

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A Four-Day Week Works in Gloucester



By Cindy Rau-Hatton
Mayor, Gloucester Township

Local governments across our nation are altering their work schedules to save money, energy and resources. Here in New Jersey, mayors are facing monumental challenges due to drastic reductions in state aid, unfunded state mandates, and the additional financial pressures of rising fuel and energy costs as well as the declining state of the economy.

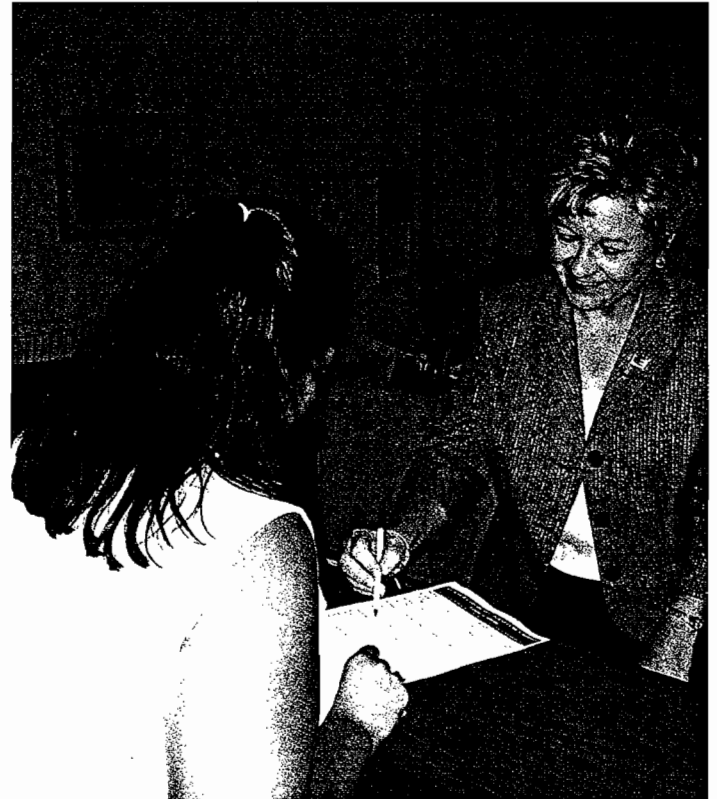
With all of these unprecedented financial pressures at the local government level, mayors must find new, creative ways to "do more with less" while continuing to provide residents with the services they expect and deserve. We are at the bottom of the food chain; there's no one else to whom we can pass these costs.

As Mayors face these difficult financial times,
we all need to find ways to be
energy efficient and improve services.

A recent Brigham Young University study estimates that one-sixth of cities with populations about 25,000 have opted for an extended four-day work week. After careful consideration, Gloucester Township has chosen this path.

As mayor of a 24.5 square mile municipality, with a population of 68,000 residents and still growing, the drastic cut in state aid is having a deleterious effect on our ability to provide current services. Previous to our four-day work week, Gloucester Township offered a five-day (10-hour day) flexible schedule. Employees either worked Monday through Thursday or Tuesday through Friday. Often, this left shortages in staffing on Monday and Friday. Compounding the problem was a 10 percent to 15 percent reduction in our workforce. Thus, working around employees' vacation and personal time schedules seriously hampered adequate staffing.

After analyzing each department, we concluded that a four-day (10 hour workday) schedule consolidated and maximized our workforce. This schedule provided adequate coverage, continuity and cohesion within the departments, saved on overtime costs, and better served the needs of our residents. Fridays had always been our least busy public day and our residents have been receptive to our new four-day week. The extended hours of 8:00 a.m. to 5:45 p.m. allow



Gloucester Mayor Cindy Rau-Hatton helps a citizen during the township's extended business day.

our residents to conduct municipal business before or after their own work hours. The only department not affected by the new work schedule is the police department, who continue to effectively operate 24-7.

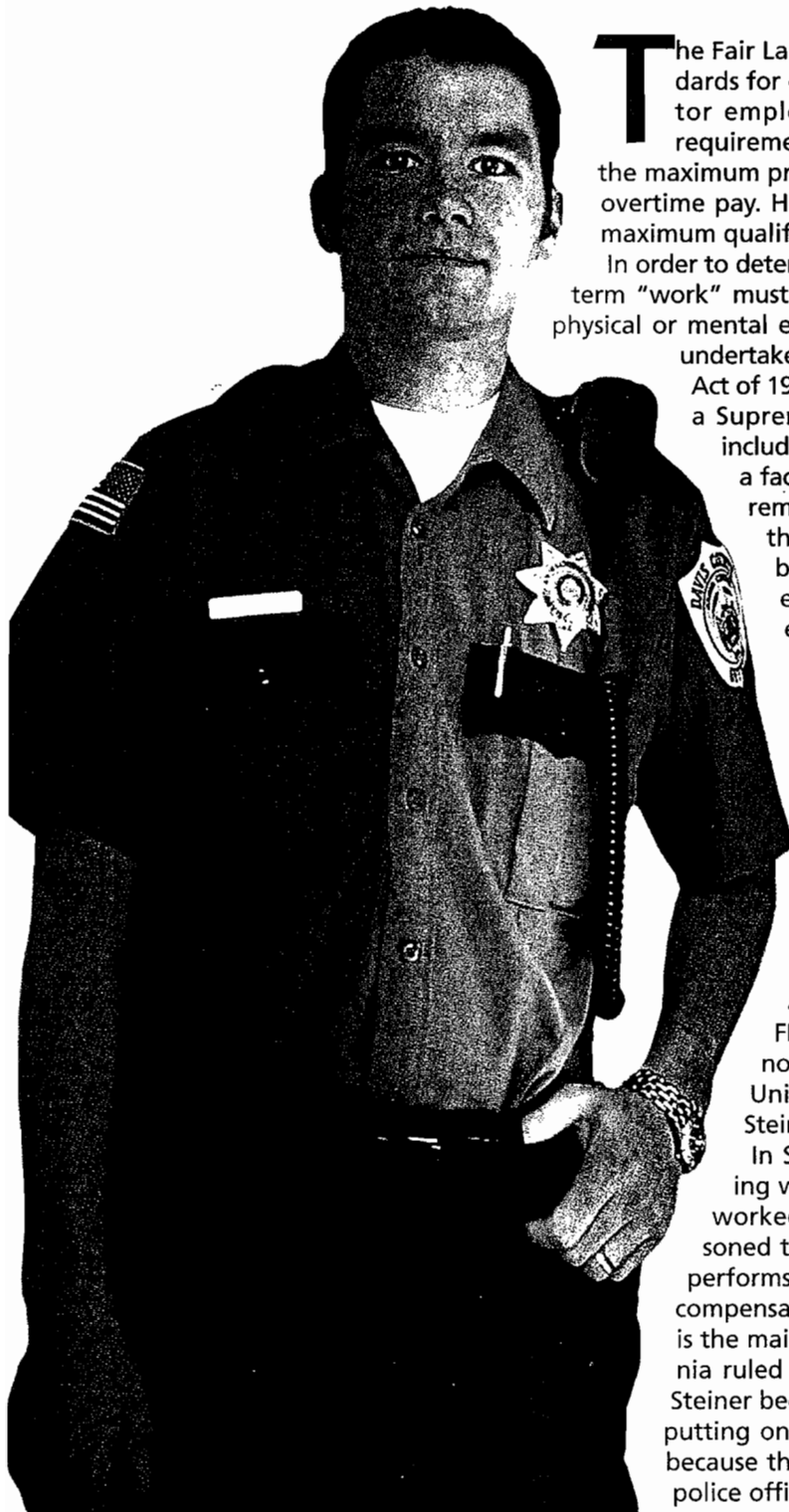
In addition to adequate staffing, the new four-day work week provides energy savings. By shutting down buildings on Fridays, we anticipate a 15 to 20 percent reduction in utility bills, resulting in a savings of approximately \$35,000. With the major impact of a 26 percent increase in gas costs as well as an 80 percent increase in diesel fuel costs, Gloucester Township faces a \$250,000 fuel cost increase. Every effort must be made to minimize this impact.

Gloucester Township's new work schedule was implemented on June 30, 2008, with positive results. As mayors face these difficult financial times, we all need to find ways to be energy efficient and improve services. The four-day, 10 hours a day, work week appears to be working well in Gloucester Township. ▲

Overtime Pay and the Fair Labor Standards Act



By Brian W. Kionick
Genova, Burns & Vernoia



The Fair Labor Standards Act of 1938 (FLSA or the Act) establishes standards for overtime pay and minimum wage for public and private sector employers. Section 7(a) of the Act deals with overtime pay requirements. To comply with section 7(a) all work weeks that exceed the maximum prescribed amount of 40 hours must be compensated for with overtime pay. However, not all "work" performed in excess of the 40-hour maximum qualifies an employee for overtime pay.

In order to determine when the law requires an employer to pay overtime the term "work" must be defined. The type of "work" referred to by the FLSA is physical or mental exertion that is controlled or required by the employer, and undertaken for the main benefit of the employer.¹ The Portal-to-Portal Act of 1947 is an amendment to the Act that was passed in response to a Supreme Court case where the court ruled that the workweek included "the time employees spent walking from time clocks near a factory entrance to their workstations."² The Portal-to Portal Act removes from the category of work that is compensable, work that was done "preliminarily" and "postliminarily," meaning before or after the main employment activity.³ In other words, employers are generally not required to compensate employees for activities done before work such as getting ready for work, showering, getting dressed, or commuting. They are also not required to compensate employees for changing out of their work clothes or commuting home.

Recent court decisions have further examined the type of "work" that qualifies as triggering compensation under FLSA:

Circuits Split on Whether Suiting Up Constitutes Work

A police officer in San Leandro brought a suit seeking a declaration that the 25 to 35 minutes he spent putting on and taking off his uniform and equipment was "work" and compensable under FLSA. The United States District Court in California agreed. The District Court ruled that putting on and taking off a police uniform could be compensable under FLSA. Even though changing ones clothes and showering are not ordinarily compensable under the Portal-to-Portal Act, the United States Supreme Court had carved out an exception in *Steiner v. Mitchell*.

In *Steiner*, the Supreme Court held that showering and changing were compensable activities for battery plant employees that worked in a highly toxic environment.⁴ The Supreme Court reasoned that an activity that takes place before or after an employee performs the activity that is the main purpose of their employment is compensable if it is "integral and indispensable" to that activity which is the main purpose of their employment. The District Court in California ruled that just as showering and changing were compensable in *Steiner* because they were "integral and indispensable" activities, so to putting on and taking off a police uniform are compensable activities because they are "integral and indispensable" to being a San Leandro police officer. The District Court further explained that it looked to the

Ninth Circuit for precedent in determining which activities qualify as "integral and indispensable."

The District Court employed the two-pronged standard set by the Ninth Circuit in *Alvarez v. IBP, Inc* for determining whether a "preliminary" or "postliminary" activity is "integral and indispensable". The two prongs are whether the activity was necessary to the work performed and of benefit to the employer.⁵ The District Court determined that uniforms were necessary because an officer cannot perform all of his or her duties without the uniform and because the uniform and equipment kept the officers safer. The District Court went on to explain that the uniforms benefited the employer, the San Leandro Police Department (SLPD), because they made the officer's job safer and more efficient.

In *Gorman v. Consol. Edison Corp.*,⁶ the Second Circuit was presented with a case similar to that of the San Leandro police officer, relating to the donning and doffing of protective gear by nuclear power station employees. Unlike the California District Court's decision regarding police uniforms, the Second Circuit ruled that the acts of putting on and removing protective gear were not integral to the main employment activity and consequently not compensable. The Second Circuit did not use the two-pronged standard of necessary and for the benefit of the employer that the Ninth Circuit used to interpret the "integral and indispensable" exception to the Portal-to-Portal Act. Instead, the Second Circuit explicated "integral and indispensable" as necessary and "intrinsicly connected with" or "essential to completeness."

The Second Circuit interpreted indispensable as necessary and listed the following examples as demonstrative of the meaning of integral or "intrinsicly connected with": the sharpening of a knife to the act of carving a carcass; turning on the power and testing an x-ray machine to the act of taking x-rays; feeding, training and walking the dog to the work of a k-9 officer. In footnote four of their decision, the Second Circuit differentiated between the employees in the nuclear containment area who were compensated for putting on and taking off their specialized gear and the other employees that were not compensated for putting on and taking off their ordinary protective gear. The Second Circuit viewed the former as paral-

leling the battery plant employees in *Steiner*, where changing was necessary for the health and hygiene of the employees due to the extremely toxic environment, and the latter as more akin to the regular act of changing ones clothing, which is not compensable under the Portal-to-Portal Act.

The Third Circuit joined into the fray with the case of *De Ascencio v. Tyson Foods, Inc.*⁷ In *De Ascencio* former employees at a chicken processing plant brought an FLSA action to recover wages for time spent donning and doffing work gear. Most employees wore: "a smock, hairnet, beard net, ear plugs, and safety glasses. Additional sanitary and protective items that certain employees [wore] include[d] a dust mask, plastic apron, soft plastic sleeves, cotton glove liners, rubber gloves, a metal mesh glove and rubber boots." Tyson's witness claimed it took employees six to ten minutes per employee per shift to don and doff their equipment. The employee's expert estimated that it took a little over 13 minutes. The donning and doffing took place six times a day, before and after the employees' paid shifts and before and after their two daily meal breaks. First a jury trial found in favor of

the employer. The employees appealed and the appellate court reversed and remanded. The Third Circuit Appellate Court held that the jury instruction given at the trial was impermissible and that "the donning and doffing activity in this case constitutes 'work' as a matter of law." The Third Circuit Appellate Court asserted a preference for an *Alvarez* like definition of "integral and indispensable," as did the District Court in the *San Leandro* case.

Both the District Court in the *San Leandro* police officer case and the Third Circuit Court of Appeals in *De Ascencio* declined to adopt the standard of "integral and indispensable" articulated by the Second Circuit in *Gorman*. The Second Circuit's approach is more stringent with regard to which activities qualify as work that is compensable and consequently more employer friendly. An activity could be "integral and indispensable" by the Ninth and Third Circuits' standard of necessary to the work performed and beneficial to the employer, but not "integral and indispensable" by the Second's Circuit's standard of necessary and "essential to the completeness" of the main employment activity; thereby making that same



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activity compensable in the Ninth and Third Circuits and not in the Second. Consequently, the definition of a "preliminary" or "postliminary" activity that is so "integral and indispensable" that it is compensable depends on the circuit.

On November 8, 2005, the United States Supreme Court affirmed the Ninth Circuit's ruling in *Alvarez v. IBP*. However, the United States Supreme Court, on June 9, 2008 declined review in both *De Ascencio* and *Gorman*. In doing so the Supreme Court affirmed the use of "integral and indispensable"

as the standard of "preliminary" and "postliminary" activities which are compensable under FLSA but also allowed the contradictory standards for defining "integral and indispensable" to stand.

New York City Fire Alarm Inspectors Excess Baggage New York City fire alarm inspectors, who carried around 15 to 20 pounds of files, claimed that the burden of carrying around the files while commuting before and after work and while on the job, qualified as "work" for the purposes of overtime pay. They argued that their commutes took longer because of the encumbrance of the files. The Second Circuit ruled that carrying files while commuting was not compensable because the burden on the fire alarm inspectors was minimal and carrying the files did not transform their commute into actual work.⁸ Though the fire alarm inspectors are carrying the files for the benefit of their employers, the mere fact of their doing so, does not alter the reality that their commutes are their own to read, listen to music, or do errands as they would if they were not carrying the files. Therefore, the carrying of files falls outside the scope of "work" covered by FLSA.

No Overtime Pay Necessary for Shift Substitutions The U.S. Department of Labor (the DOL) issued an opinion, FLSA 2008-2, in response to a query regarding public agency employees of the same classification substituting shifts for one another. Specifically, the public agency wanted to know whether it needed to directly compensate the employee that accrued extra hours of labor by means of the shift substitution. Interpreting 29 U.S.C. § 207 (p)(3), the DOL responded that employers would not be responsible for directly compensating public agency employees that voluntarily covered another employee's shift. However, employers could be liable to compensate an employee that covers so many shifts that their normal hourly wage would fall below minimum wage. In that sense the employer would not be paying the employee overtime for shift substitutions but rather the employer would be paying the employee in order to be in compliance with FLSA's minimum wage standard.

The scenario in which the public agency employer would be required to directly compensate the employee that covers so many shifts that their standard pay falls below minimum wage is unlikely to ever occur since shift substitutions need to be done both voluntarily and with the

approval of the employer. Thus, ordinarily the matter of compensation for time worked during a shift substitution is "a matter of agreement between the two employees involved in the substitution."

Who considers what "work" is compensable under FLSA? Whether or not work related activities ought to be considered "work" and compensable under the Act varies by jurisdiction. The matter of whether donning and doffing ought to be compensable highlighted the differences of opinion between the circuits. Consistent with their more stringent standard for determining what activities ought to be compensated the Second Circuit ruled against the fire alarm inspectors. Though they had no gear to put on and take off, they did have files to pick up, carry around, and drop off. Just as the donning and doffing of nuclear power station employees was found by the Second Circuit as non compensable, so was the carrying of files by the fire alarm inspectors. The Third and Ninth Circuits on the other hand share a preference for a more lenient standard that finds ancillary work activities compensable as long as they are necessary and for the benefit of the employer.

Finally, where public agency employees of the same classification, are allowed to substitute shifts for one another, the work done by the employee during the substituted shift is not considered compensable work. The wages of both the employee who covered the shift and the employees whose shift was covered remain unaffected. ▲

Brian W. Kronick is a partner with Genova, Burns & Vernoia in Livingston, New Jersey, and practices in the area of labor and employment law on behalf of employers. Summer Associate, Bonnie Fire, assisted in preparing this article.

1 *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, 152 A.L.R. 1014 (U.S. Ala. Mar 27, 1944) (No.409).
 2 *Anderson*, 328 U.S. at 691-92.
 3 29 U.S.C. § 254(a).
 4 *v. Mitchell*, 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267 (U.S.Tenn. Jan 30, 1956) (NO. 22).
 5 *Alvarez v. IBP, Inc.*, 339 F.3d 894, 148 Lab.Cas. P 34,731, 8 Wage & Hour Cas.2d (BNA) 1601, 03 Cal. Daily Op. Serv. 6961, 2003 Daily Journal D.A.R. 8739 (9th Cir.(Wash.) Aug 05, 2003) (NO. 02-35042, 02-35110).
 6 *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 154 Lab.Cas. P 35,296, 12 Wage & Hour Cas.2d (BNA) 1104 (2nd Cir.(N.Y.) May 30, 2007) (NO. 05 6546 CV, 06 2241 CV).
 7 *De Ascencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3rd Cir. 2007).
 8 *Sing v. City of New York*, _____ F.3d _____, 2008 WL 1885327, 13 Wage & Hour Cas.2d (BNA) 865 (2nd Cir.(N.Y.) Apr 29, 2008) (NO. 06-2969-CV).

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