

## East Penn Verdict Is An FLSA Cautionary Tale For Employers

By **Benjamin Hinks and Danielle Lederman** (June 15, 2023, 2:50 PM EDT)

Last month, a federal jury returned a record \$22 million verdict for violations of the Fair Labor Standards Act, or FLSA.[1]

The case, *Su v. East Penn Manufacturing Co. Inc.*, was brought in the U.S. District Court for the Eastern District of Pennsylvania by the U.S. Department of Labor on behalf of more than 7,500 employees seeking unpaid overtime wages against East Penn Manufacturing Co. Inc., one of the world's largest battery manufacturers.[2]

The law at issue in this case — the FLSA — is the federal law that governs minimum wage, overtime pay, record-keeping and child labor standards for both private and public employers. Under the FLSA, employers must record hours worked by employees and pay employees at least the minimum wage for all hours worked in a workweek as well as time and a half an employee's regular rate for all time worked over 40 hours in a workweek.

Moreover, under the FLSA, time spent by employees on tasks such as donning and doffing work clothing or equipment and showering may be compensable, meaning that employers are required to pay employees for the time spent engaged in these activities.

Specifically, the U.S. Supreme Court held in *Steiner v. Mitchell* in 1956 that this donning and doffing time is compensable when such tasks are "integral and indispensable" to the principal activities of the employee's job.[3]

Although this donning and doffing concept is not a new rule, even large, sophisticated employers can still fall prey to the nuances of wage and hour law. As the recent verdict in East Penn shows, employers may pay a hefty price for noncompliance.

In East Penn, the DOL asserted claims that East Penn did not pay its employees for the time they spent changing into or out of uniforms and protective gear, and the time they spent showering. Notably, these protective measures were specifically undertaken to mitigate exposure to workplace hazards, such as lead and other chemicals.

The DOL argued that time spent performing these tasks must be counted as hours worked because that time was indispensable to the employees' work. East Penn's failure to appropriately account for this



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additional work time, the DOL asserted, resulted in employees working more than 40 hours per week without being paid overtime.

During the course of a 30-day trial, the jury heard testimony from dozens of workers regarding the performance of unpaid work and calculations of back wages, and considered volumes of records showing employee clock-in and clock-out times.

In the end, the jury concluded that East Penn was required to pay the affected workers additional compensation for their donning and doffing time as well as showering time, resulting in a landmark damages award.

This case presents numerous learning opportunities for employers concerned about navigating the hurdles of FLSA compliance.

### **Employers Should be Wary of Applying "Reasonable Time" Policies for Donning and Doffing**

Importantly, East Penn did not dispute that the time spent by its workers donning, doffing and showering on site was compensable.

Instead, East Penn argued in favor of its policy that allocated a set 15 minutes of compensable time for these tasks, which it deemed to be a reasonable amount of time. Specifically, in lieu of tracking and paying employees for the actual amount of time they spent performing these tasks, East Penn granted employees a five-minute grace period at the beginning of their shifts to don uniforms and equipment, and 10 minutes at the end of their shifts for doffing and showering.

The DOL argued that, as a matter of law, East Penn was required to record the time it took employees to don and doff their gear and shower and pay its uniformed employees for that time.

In a 2021 summary judgment ruling, the court found in favor of the DOL on its FLSA claim, noting that while a few circuit courts of appeals had adopted a "reasonable time" standard for calculating damages where no time records existed, in terms of liability, this "does not absolve an employer of its obligation under the FLSA to record and compensate for actual time."<sup>[4]</sup> Moreover, while the court determined that East Penn's practices violated the FLSA on summary judgment, it reserved the issue of damages for the jury to determine at trial.

### **Failing to Keep Complete Records Can Have Major Consequences**

The East Penn case should serve as a reminder to employers that failure to keep complete wage and hour records can exponentially increase liability exposure when it comes to FLSA violations.

The FLSA explicitly requires an employer to "make, keep, and preserve ... records of the persons employed by him and of the wages, hours, and other conditions and practices of employment."<sup>[5]</sup>

Indeed, at the summary judgment stage, in finding that East Penn violated the FLSA, the court emphasized East Penn's admission that it did not record the actual donning and doffing time of its employees.

While East Penn argued that the DOL was required to establish liability as to each individual in the class for whom it sought damages, the court struck down this argument, holding that representative evidence

is a permissible means of proving hours worked where the employer has failed to keep adequate records.

This ruling allowed the DOL to pursue a damages award against East Penn on behalf of thousands of employees in the class without having to prove the actual hours worked by each; instead, the DOL used the representative employees to prove violations on behalf of all employees in the class.

To ensure compliance with the FLSA, employers should be sure to utilize their timekeeping systems to accurately track the time spent by employees on donning and doffing activities.

### **Liquidated Damages Are the Norm Under the FLSA**

Employers should also be reminded that if they violate the overtime provisions of the FLSA, the law provides for payment of both the unpaid wages and the equivalent amount in liquidated damages, which effectively doubles the award.

In this case, in addition to the more than \$22 million awarded by the jury, the DOL is seeking liquidated damages against East Penn, which, if awarded, could see the final damages award rise to over \$44 million.

To avoid a liquidated damages outcome, employers are faced with the uphill battle of affirmatively establishing that they made a subjective, good-faith effort to comply with the FLSA and also had objectively reasonable grounds to believe their actions complied with the FLSA.

### **What Does This Jury Verdict Tell Us?**

Strategically, both the DOL and East Penn have framed this result as a relative win for their side. That is, the DOL touted the verdict as among the largest wage verdicts in its history. On the other hand, East Penn issued a public statement comparing the \$214 million in back wages originally sought by the DOL to the significantly lesser \$22.25 million verdict awarded by the jury.[6]

A major element of its defense, East Penn argued that any difference between what it paid its uniformed employees for "reasonable" donning and doffing time and what they would have been paid for their actual time spent on these activities was de minimis.

By contrast, the jury's award signifies that they found the employees suffered more than a trivial injury, and that East Penn was required to pay for its related violations of the FLSA.

Nevertheless, the jury did not find that East Penn acted in a knowing or reckless disregard for the law. Indeed, such a finding would have deemed East Penn's violation of the FLSA to be willful — effectively expanding the limitations period from two to three years and exposing the company to further liability.

In the end, the East Penn case serves as a cautionary tale that even brief donning and doffing activities, if not properly tracked and compensated, can result in serious liability.

More broadly, the case highlights the importance of compliance with federal, as well as state and local, wage and hour laws. Indeed, certain states and localities (e.g., Massachusetts) have wage and hour laws that carry even steeper penalties than federal law, such as treble liquidated damages.

Employers are encouraged to review their relevant pay policies and practices.

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[1] 29 U.S.C. §§ 203 et seq.

[2] *Su v. East Penn Manufacturing Co., Inc.*, Case No. 5:18-cv-01194.

[3] See *Steiner v. Mitchell*, 350 U.S. 247 (1956).

[4] *Walsh v. E. Penn Mfg. Co.*, 555 F. Supp. 3d 89, 98 (E.D. Pa. 2021), adhered to on denial of reconsideration, No. CV 18-1194, 2021 WL 4215503 (E.D. Pa. Sept. 16, 2021).

[5] 29 U.S.C. § 211.

[6] <https://www.eastpennmanufacturing.com/verdict-reached-in-dol-lawsuit-against-east-penn/>.