

## FLSA Alert

Feb-9-2010

### Federal Courts Issue Employer-Friendly Rulings in FLSA Section 3(o) Donning and Doffing Cases

Recently, two federal courts of appeal and one district court have ruled in favor of employers under Section 3(o) of the Fair Labor Standards Act, which excludes from compensable hours of work any time spent changing clothes or washing at the beginning or end of each workday **provided** such time was excluded from working time by the express terms or by custom or practice under a bona fide collective-bargaining agreement. 29 U.S.C. § 203(o).

Specifically, the Fourth and Fifth Circuits and a Tennessee district court have now joined the Eleventh Circuit in endorsing the position taken by the Department of Labor (DOL) in its June 2002 and May 2007 opinion letters that Section 3(o)'s use of the term "clothes" **includes** protective safety equipment worn by employees in meat packing and other industries. These rulings are significant not only because they render the contrary Ninth Circuit ruling, in *Alvarez v. IBP, Inc.*, 339 F.3d. 894 (9th Cir. 2003), the minority position, but also because they set up an opportunity for the Supreme Court to finally decide this issue, something which it refused to do when it previously decided the *Alvarez* case.

In *Sepulveda v. Allen Family Foods Inc.*, No. 08-2256 (4th Cir. Dec. 29, 2009), the Fourth Circuit ruled that donning and doffing personal protective equipment in a chicken processing plant was "changing clothes" under Section 3(o). Following the Eleventh Circuit's reasoning in *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), the court held that "standard safety equipment," such as steel-toed shoes, smocks, bump caps, aprons, gloves, sleeves, hairnets, ear plugs, arm shields, and safety glasses, easily qualifies as clothing or clothing accessories under a standard dictionary definition. The court also found that the act of layering protective gear on top of clothing falls within the definition of "changing" because it modifies a worker's clothing.

In the Fifth Circuit decision in *Allen v. McWane Inc.*, No. 08-41037 (5th Cir. Jan. 8, 2010), the court held that even where collective bargaining negotiations never addressed non-compensation for clothes changing time, any such policy that has been in effect for a prolonged period of time, and that was in effect at the time a CBA was executed, satisfies 3(o)'s requirement of a "custom or practice under a bona fide" CBA.

Additionally, last week, Judge Trauger in the Middle District of Tennessee followed the Fourth, Fifth, and Eleventh Circuits, and held that sanitary clothing and related items worn by dairy processing employees plainly falls within Section 3(o)'s definition of clothing. *Arnold v. Schreiber Foods*, No. 3:09-cv-00744 (M.D. Tenn. Feb. 1, 2010). Although most of the ruling is favorable to employers, on one issue, it is not -- that is, whether, under the FLSA, activities excluded from paid time by Section 3(o) can under any circumstances start or end the continuous work day. Despite the fact that pre-shift donning time was not compensable under Section 3(o), the court held that such donning started the continuous work day, thereby making subsequent walk and waiting time compensable.

While these cases are, with the exception of the above-mentioned continuous work day ruling, positive developments for employers, there are two important 3(o) questions about to be considered by the Seventh Circuit which could reverse much of this momentum.

First, in an appeal from *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913 (W.D. Wis. 2009), the Seventh Circuit will review whether a Wisconsin wage payment law, which mandates pay for donning and doffing even if a CBA says otherwise is preempted by 3(o) or by Section 301 of the Labor Management Relations Act. This is an important appeal because it could make 3(o) essentially meaningless in states where no state law preemption is found.

Second, the Seventh Circuit is currently deciding whether to accept an interlocutory appeal in *Sandifer v. U.S. Steel Corp.*, No. 2:07-cv-443 RM (N.D. Ind. Jan. 5, 2010). Namely, the court is being asked to decide if employers must pay for walk or wait time that follows or precedes non-compensable donning and doffing activities. As evident from *Schreiber Foods*, district courts have been sharply divided on this issue and a ruling here requiring that walk time before and after non-compensable donning and doffing be compensable would severely restrict 3(o)'s applicability.

We will be watching for these decisions. For more information in the meantime, please contact Joe Tilson, Jeremy Glenn, Anna Wermuth, or any other MBT labor and employment lawyer at (312) 474-7900.

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