

## **The Department of Labor Makes It Easier for Employees to Sue for Donning and Doffing**

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**By David L. Barron and Michael S. Kun**

On June 16, 2010, the U.S. Department of Labor (“DOL”) issued an “Administrator’s Interpretation” addressing the compensability of time employees spend changing clothes and equipment before and after work (commonly referred to as “donning and doffing”). The Interpretation reversed opinion letters on the subject issued by the Bush administration in 2002 and 2007, and lowered the standard for employees to seek compensation for such activities.

The Interpretation addressed two issues. First, the Interpretation notes that Section 203(o) of the Fair Labor Standards Act (which allows employers to negotiate with a union to exclude from compensable time certain donning and doffing activities) should be narrowly interpreted. The DOL concluded that time spent changing clothes (which can be lawfully excluded under the express terms of, or by custom or practice under, a collective bargaining agreement) does not include time spent donning and doffing safety or protective equipment in meat packing and other industries. Second, the DOL opined that even non-compensable time spent changing clothes would constitute the start of the continuous work day, thus making any walking or waiting time after that point compensable.

Employers in industries where workers regularly change clothes, wear safety equipment, or clean up after work – including the meat packing, health care, construction, and manufacturing industries – should take note of this important change in the DOL’s position. Although the Interpretation is aimed primarily at unionized workforces, it has much broader implications.

In addition, companies with employees who regularly change clothes, wear safety equipment, or have responsibilities cleaning up after work should do the following:

- Review any applicable collective bargaining agreements to determine the scope of any agreed-upon exclusion (or limitation) of employee compensation for donning and doffing time, and seek legal advice on whether such provisions would be enforceable or lawful in light of the Interpretation.
- Conduct an attorney-client privileged audit of payroll practices to confirm the point at which employees don any protective equipment or change clothes, and

whether employees are being compensated for all time after this point until the employees change back into street clothes or remove the protective equipment.

- Prohibit employees from changing into any specialized work clothing (such as gloves, smocks, or special boots) or donning any safety equipment before their shift starts or the intended start of the work day to avoid triggering an obligation to pay employees for all time thereafter (even if they are simply walking or waiting and not performing any work).
- Review the location of changing areas and their proximity to time clocks to ensure that any walking time after employees have started their work day by donning specialized clothing or equipment is adequately captured in the payroll system.

For more information about this *Act Now* Advisory, please contact the Co-Chairs of the Firm's Wage and Hour Sub-Practice Group:

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