A Timely Analysis of Legal Developments

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The Wage and Hour Division of the U.S. Department of Labor recently issued an interpretation stating that "protective equipment" does not constitute "clothes" for purposes of the clothes-changing exclusion in the FLSA. The new interpretation also provides that even if clothes-changing is not compensable under the FLSA, it still will trigger the "continuous workday" rule if it is otherwise "integral and indispensable."

Department of Labor Issues Interpretation Narrowing Clothes-Changing Exclusion and Expanding Scope of Compensable Workday

By Laurent R.G. Badoux and Michael J. Lehet

Over the last several years, public and private employers have faced an increasing number of lawsuits under the Fair Labor Standards Act (FLSA), including claims seeking compensation for time spent donning and doffing required uniforms and protective equipment. Although most common in the food processing industry, donning and doffing litigation has also emerged in other areas, including law enforcement, private security forces, and certain manufacturing jobs.

Against this backdrop, the Wage and Hour Division of the U.S. Department of Labor (DOL) recently issued Administrator's Interpretation 2010-2. The interpretation is significant because it clarifies the DOL's current position on the definition of "clothes" under the FLSA, 29 U.S.C. § 203(o) ("Section 3(o)"). Importantly, the FLSA provides that pre-shift donning and post-shift doffing may be compensable if both "integral and indispensable" to the "principal" duties of employment. Section 3(o), however, excuses employers from compensating employees for "changing clothes" in certain circumstances. The interpretation also confirms the DOL's position on whether employers must compensate employees for time spent engaged in work-related activities after donning and before doffing items falling under Section 3(o). The process of issuing Administrator's Interpretations is novel, and this interpretation is only the second of its kind ever issued. As a result, it is hard to assess exactly how much weight courts will give to 2010-2. Although this interpretation lacks the force of law, courts undoubtedly will consider it as a relevant authority in analyzing pending or future FLSA claims.

Protective Equipment Not "Clothes" Under Section 3(o)

Section 3(o) provides that employers need not compensate employees for changing "clothes" if the activity is excluded from compensable time pursuant to "the express terms" of, or by a "custom or practice" under, a collective bargaining agreement. Phrased differently, if a collective bargaining agreement specifically states changing clothes is not compensable, or unionized employees acquiesce in an employer's

practice of not compensating them for changing clothes, the activity becomes non-compensable. Notably, this exclusion applies even if the donning and doffing are integral and indispensable to the employee's principal duties.

According to the DOL's new interpretation, "clothes" does not include protective equipment. In reaching this conclusion, the DOL reversed course and rejected its two most recent opinion letters on the topic. The first of these opinion letters, issued in 2002, provided that protective equipment worn by meatpacking plant employees did in fact constitute clothing for purposes of Section 3(o). The DOL affirmed this position five years later in a 2007 opinion letter. Nevertheless, the agency rejected the interpretation contained in these two opinion letters, concluding it was at odds with three earlier opinion letters, as well as the FLSA's legislative history and a number of recent judicial decisions, including the Ninth Circuit Court of Appeals ruling in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

Although the new interpretation does not provide a clear definition of "protective equipment," the opinion letters, legislative history, and cases cited by the DOL suggest that the term includes any type of covering worn for protection or safety (*e.g.*, helmet, goggles, ballistic vests), generally over regular clothes.

Relationship Between Section 3(o) Exclusion and Continuous Workday

The DOL and courts have long adhered to the "continuous workday" rule. Under this rule, the compensable workday begins the moment an employee engages in either a principal duty (*i.e.*, a task he or she is employed to perform) or an activity integral and indispensable to a principal duty. The compensable workday then continues until the final principal duty or integral and indispensable activity of the day. Consequently, activities engaged in during the interim remain compensable if pursued necessarily and primarily for the employer's benefit. If they are not, and instead the employee is relieved from duty and free to use the time for his or her own purpose, the compensable workday ends and does not begin until the next principal duty or integral and indispensable activity.

The DOL's new interpretation provides that even if clothes-changing is not compensable pursuant to Section 3(o), it still will trigger the continuous workday rule if it is otherwise integral and indispensable. As a result, employees will generally remain entitled to compensation for all work-related activities engaged in after donning and before doffing these clothing items. To be sure, this new interpretation depends upon the assumption that the act of changing clothes constitutes an integral and indispensable activity, but does not modify or even discuss the existing analysis for determining when an activity will be deemed integral and indispensable.

Practical Implications of Administrator's Interpretation 2010-2

The DOL's recent interpretation substantially affects employers with employees who don and doff protective equipment. Specifically, these employers may no longer be able to rely on Section 3(o) to avoid compensating employees for time spent changing into and out of protective equipment. Moreover, to the extent clothes-changing is excluded from compensation solely under Section 3(o), employers still may have an obligation to compensate employees for post-donning, pre-doffing activities, including waiting and travel time. Accordingly, it is recommended that employers promptly confer with legal counsel to assess whether their current compensation practices comport with the DOL's latest interpretation of the FLSA.

Laurent R.G. Badoux is a Shareholder, and Michael J. Lehet is an Associate, in Littler Mendelson's Phoenix office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Badoux at lbadoux@littler.com, or Mr. Lehet at mlehet@littler.com.