DRESSING FOR WORK: DO YOU HAVE TO PAY YOUR EMPLOYEES?

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Under the Fair Labor Standards Act ("FLSA"), employers are required to pay non-exempt employees at least minimum wage for each hour worked as well as overtime at the rate of time and one half the employee's regular rate of pay for every hour worked over forty hours. After the FLSA was passed, there was debate about when the workday started and ended and the period of time for which employers must compensate employees for "hours worked."

In 1947, the Portal-to-Portal Act was enacted as an amendment to the FLSA, and clarified that absent some custom or contract to the contrary, employers are not required to pay employees for time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or for "activities which are preliminary to or postliminary to said principal activity or activities. . ."

Since the Portal-to-Portal Act was enacted, however, the debate still rages over the issue of when the work day begins and ends and what types of activities are excludable from compensable work time. Over the years, this issue repeatedly has manifested in the form of "donning and doffing" cases; cases that debate whether or not employees who wear certain clothing or protective equipment as part of their job must be compensated for the time it takes to put that specialized clothing or equipment on and the time it takes to take it off.

In Steiner v. Mitchell, 350 U.S. 247 (1956), one of the first cases to address the compensability of "donning and doffing" following the enactment of the Portal-to-Portal Act, the United States Supreme Court was asked to determine whether employees at a battery plant needed to be compensated for time they spent changing clothes before starting work and changing clothes and showering at the end of the day. Employees were required to change clothes at the plant after arriving and before leaving, and shower, due to the toxic chemicals with which they regularly came into contact during the work day. The Court held that these activities were "integral" and "indispensible" to the "principal activities" of the battery plant employees and compensable under the FLSA.

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Other cases where employees have successfully claimed that they should be compensated for time "donning and doffing" protective gear or clothing include claims by employees at meat or poultry processing plants. In these cases, the Courts have focused on the specialized protective and sanitary gear and equipment the employees at those plants are required to wear, and the fact that they must obtain the equipment and gear at the place of employment at the beginning of their shift and remove it at the end of their scheduled shift. See e.g., IBP v. Alvarez and Tum v. Barber Foods, 546 U.S. 21 (2005); De Asencio v. Tyson Foods, Inc.,500 F.3d 361 (3rd Cir. 2007). In these cases, the Courts have held that the time spent donning or doffing the specialized protective and sanitary gear required by employees at these workplaces is work time for which employees must be paid.

Despite some clear case law leaning in favor of requiring employers to compensate employees for donning (and doffing) required protective gear at the worksite, the issue of compensability is fact intensive. Many different types of workplaces require specific uniforms and safety gear. However, not all employees who work at such workplaces must be compensated for putting on and taking off that gear at the beginning and end of their work shifts. In determining whether such time is compensable, courts look to: whether the activity constitutes "work", meaning, that the activity is controlled or required by the employer *and* the activity is primarily for the employer's benefit; whether the activity is "integral" and "indispensable" to the employee's primary duties; and whether the time spent on the activity is "de minimus".

As a practical matter, this means that whether or not time spent putting on/ taking off required equipment or protective gear is compensable depends on several factors. These include: whether the equipment is required by the employer; the type of equipment required to be worn; the circumstances under which it is obtained; and whether employers require employees to dress at the work site. For example, donning equipment that is non-unique and simple (e.g. basic protective equipment like safety glasses, hardhats, and hearing protection) may not be compensable, while donning more elaborate equipment like chain mail, or other, more heavy-duty protective gear of the type worn by employees at meat processing plants likely would be compensable. Employees who are not required to dress at work may not need to be compensated, while employers who require employees to don their protective gear at work may be required to compensate employees for the time it takes to put it on.

Finally, even if the activity is considered "work" that is integral to the employee's primary duties, employees may not need to be compensated if the time spent doing so is nominal ("de minimus"). Putting on a hard hat or a lab coat takes very little time, while donning multiple pieces of heavy protective gear may take a great deal of time. Despite the relative abundance of case law and precedent on these issues, these cases continue to work through the legal system. For example, in June, Tyson Foods and the U.S. Department of Labor reached a negotiated resolution in a donning and doffing case that was filed in 2002.

Another group of workers that have frequently challenged the exclusion of donning and doffing activities from compensation under the FLSA include

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police officers. In cases throughout the country, police officers have claimed that putting on their uniforms and certain protective equipment (e.g. ballistics vest, holsters, etc.) is compensable activity. Rulings in these cases have varied widely. See e.g., Maciel v. City of Los Angeles, 569 F.Supp.2d 1038 (C.D. Cal. 2008) (holding time spent donning and doffing that equipment is compensable under the FLSA); Abbe v. City of San Diego, 2007 WL 4146696 (S.D. Cal., Nov. 9, 2007) (holding that time spent donning and doffing police uniforms was not compensable time under the FLSA, as it did not need to be done at the police station and was not integral or indispensable to the principle activities of employment). Recently, however, the 9th Circuit weighed in on the issue in Bamonte v. City of Mesa, No. 08-16206 (9th Cir. 2010), and found that that because the officers had the option of donning and doffing their uniforms and gear at home, the activities were not compensable under the FLSA and the Portal-to-Portal Act.

In Bamonte, the City of Mesa, like most cities, required its police officers to wear specific uniforms and safety gear, but did not require the officers to get dressed/undressed at work. The City made facilities at the police station available to the officers if they preferred to don and doff and store the required gear at the police department, but the Court found that an officer's preference to do so did not change it into compensable time.

Employers who require employees to wear specialized clothing or protective equipment should consider whether or not donning and doffing such gear is compensable activity in the context of their workplace and ensure their pay practices are adequate. Specifically, employers should consider the type of gear they require employees to wear; whether they require employees to put on the clothing or protective equipment or gear at the work site or whether employees can do so at home; and how long it takes employees to put on the required equipment and gear. Employers who do not want to compensate employees for donning and doffing may want to consider adopting a policy specifically stating that employees are free to do so at home.

Although the issue of donning and doffing and whether or not such similar before work/after work activities are compensable has been a continuing source of litigation for decades. Recent high profile cases have brought the issue to the forefront of public (and employee) conscience once again. Employers should take care to ensure that they are properly compensating employees for all hours worked, including time spent on work-related activities before or after an employee's regular shift, if the activities are an integral and indispensable to their primary activities and the time spent is more than a nominal amount of time.

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