

IF THE SHOE FITS: HOW FOOTWEAR POLICY MAY LEAD TO WAGE AND HOUR VIOLATIONS

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Hotel and restaurant employers commonly require employees to wear uniforms, some as simple as a shirt with company logo, others requiring a more complete look: jacket or blouse and pants or skirt, or dress. Some employers, however, fail to consider the consequences of imposing the cost of the uniform on an employee. Under the federal Fair Labor Standards Act (FLSA), an employer violates the law when a uniform deduction cuts into a non-exempt employee's minimum wage or overtime wages. Thus, an employer must carefully consider the amount of deduction and the impact it will have on an employee's statutorily protected wages.

But not every article of clothing constitutes a "uniform" under the FLSA. The U.S. Department of Labor (USDOL) has long maintained that certain clothing, although required by the employer, is of such a character that it may be reasonably worn outside the context of work and therefore is not a uniform. Shoes are an interesting case-study.

DOES THE SHOE FIT?

Many hospitality employers often require employees, such as culinary department workers, to wear a certain type of shoe during work hours. Perhaps the most popular variety is the dark-colored, non-slip shoe—widely used both for their appearance and for safety reasons.

Some employers may be surprised to learn that the USDOL takes the position that these shoes do not constitute a

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uniform under the FLSA. As a result, employers can impose the cost of such shoes even if the cost results in the employee receiving less than the minimum wage after such deduction.

BEFORE THE OTHER SHOE DROPS...

A word of caution before hospitality employers rush out to take advantage of this cost transfer. Experience in USDOL investigations teaches us that the agency does not give employers *complete* freedom regarding shoe deductions, even when it comes to dark-colored, non-slip shoes. For example, if you require employees to order a specific brand of shoe from a certain vendor when a comparable, less-expensive alternative is available, the USDOL may conclude that the shoe is no longer “basic street clothing.” The agency may reach the same conclusion if the employee already owns a pair of shoes but is told that they must order a new pair. Finally, the USDOL will be on the lookout for any ordering mechanism whereby the employer receives a fee or profit anytime an employee orders shoes through a designated vendor.

Many hospitality employers are familiar with Shoes for Crews, a manufacturer of non-slip shoes and other accessories. Shoes for Crews offers a corporate program to businesses which includes a “warranty” in the form of a \$5,000 payment if an employee wearing Shoes for Crews slips at work. The USDOL finds this warranty problematic. The agency has been known to take the position in investigations that this warranty constitutes a benefit to the employer that changes the legal characteristic of the shoe such that it becomes a uniform. Thus, according to USDOL, an employer participating in this Shoes for Crews corporate program may not impose the cost of the shoe on an employee if doing so cuts into the minimum wage or overtime wages. The agency has taken this position even when an employer has never asserted a claim for the Shoes for Crews warranty payment.

CONCLUSION: PUTTING YOURSELF IN YOUR EMPLOYEES’ SHOES

The cost of purchasing (or cleaning) a uniform can be problematic for employers, when the cost (or part of the cost) is borne by the employee. Setting aside whether there is a legal basis for the USDOL’s position on the shoe

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warranty program, hospitality employers should carefully review their policies as they relate to the cost of required clothing worn by employees.

For non-slip shoes, if you have decided to pass on the cost of these shoes to employees, consider giving the employee the option of purchasing shoes at a retailer of their choice or wearing already-owned shoes which are compliant with safety requirements. This is particularly true for employers that participate in the Shoes for Crews corporate program.

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