Donning/Doffing Personal Protective Items: What About Mealtime? (Updated 06 06 14)

Insights
5.01.14

As we wrote in our January Labor Alert, the U.S. Supreme Court's ruling in *Sandifer v. United States Steel Corp*. interpreted the federal Fair Labor Standards Act's Section 3(o) to apply to putting on and taking off a variety of personal protective items. This paves the way for possibly excluding time spent in such "donning and doffing" from the scope of compensable FLSA worktime under many collective bargaining agreements.

The donning and doffing reviewed in *Sandifer* occurred at the beginning and end of the employees' shifts. But often an employee must also doff the items at the start of a meal period and then don them again before returning to work. Can this time also fall within the Section 3(o) exclusion?

The Seventh Circuit Says "Yes"
In *Mitchell v. JCG Industries*, the Seventh Circuit U.S. Court of Appeals (with jurisdiction over Illinois, Indiana, and Wisconsin) ruled in a 2-1 decision that these activities indeed *were* covered by Section 3(o). The court reached this result by interpreting the term "workday" in a broad and employer-favorable way.

Section 3(o) excludes from compensable hours worked "any time spent in changing clothes *at the beginning or end of each workday* which was excluded . . . by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee." [Emphasis added]. Mitchell and others argued that doffing and donning in connection with their 30-minute meal periods did not occur at the beginning or end of each "workday". Judge Richard Posner (who also wrote the appellate opinion affirmed by the Supreme Court in *Sandifer*) disagreed.

Judge Posner said, "If as we believe 'workday' includes 'worknight,' it may also include four-hour shifts separated by meal breaks." He concluded that the employees were "in effect working two four-hour workdays in an eight-and-a-half hour period."

Judge Posner acknowledged that the U.S. Labor Department views "workday" to mean, "in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b) . To him, the qualifying phrase "in general" allowed room for an exception. For additional support, he also noted that the FLSA does not require employers to provide meal breaks at all.

The Ruling's Alternative Basis

Judge Posner also wrote that the employees' doffing and donning at meal time could be excluded under the *de minimis* doctrine, by which he meant that the typical amount of time involved was too small to be compensable. Based in part upon an in-chambers experiment, the majority concluded that the doffing and donning probably took less than two minutes.

This alternative rationale is noteworthy, because *Sandifer* has been taken by some to undercut the *de minimis* concept. Judge Posner's opinion provides supporting ammunition to proponents of the principle.

But as we have cautioned in the past, the parameters of what is and is not a *de minimis* amount of work are vague, ill-defined, and unpredictable under the FLSA. No particular timeframe is necessarily small enough to be reliably considered *de minimis*, and in any event the per-occurrence amount of time is not all that the courts take into account.

The Bottom Line

For employers with union contracts whose employees engage in similar meal-period-related doffing and donning, *Mitchell* is a highly significant holding. However, the argument is not necessarily at an end.

Chief Judge Diane P. Wood stridently dissented based in part upon her view that the majority had ignored USDOL's "continuous workday" principle. Moreover, she was critical of the experiment that contributed to the majority's *de minimis* holding.

It seems likely that these matters will continue to be the subject of litigation for the foreseeable future.

UPDATED 06 06 14: The Seventh Circuit U.S. Court of Appeals has denied the plaintiffs' request to have the entire court reconsider the three-judge panel's ruling. This denial provoked an unusual and strongly-worded dissent from four of the judges, which in turn moved Judge Richard Posner to respond in a comparably-toned concurring opinion. Stay tuned for a probable effort by the plaintiffs to have the U.S. Supreme Court review the panel's decision.

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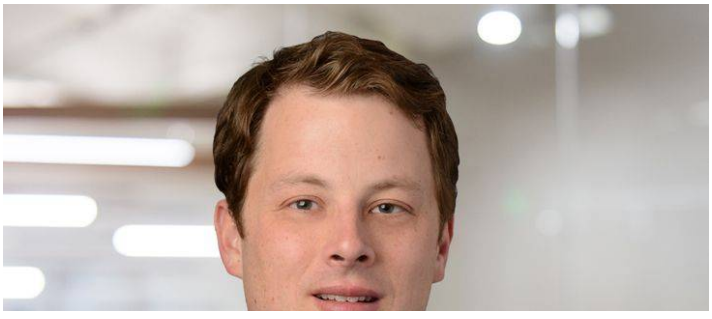

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