Update: Court Might Have Rejected Donning/Doffing "Administrator Interpretation" Without Citing It. A Subtle Dig?

Insights
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We previously posted about the U.S. Labor Department's Administrator Interpretation saying that unionized employers cannot exclude time spent donning and doffing certain protective equipment from compensable "hours worked," even if an applicable union contract or practice treats the time as unpaid.

On August 2, 2010, the 7th Circuit U.S. Court of Appeals held that unionized workers at a Kraft Foods plant could sue under Wisconsin state law for wages relating to their time spent donning and doffing certain safety gear and other items at work. They made their claim even though Kraft and the union had earlier agreed that this time would be non-compensable under the federal Fair Labor Standards Act's Section 203(o). *Spoerle v. Kraft Foods Global, Inc.*, 16 W.H. Cases2d (BNA) 711 (7th Cir. 2010).

Before reaching that conclusion, the court said that the workers had no FLSA claim in light of the agreement between Kraft and the union. The workers argued that Section 203(o) did not permit the union/employer agreement, contending that "protective gear is not 'clothing' under 203(o)." The Court of Appeals said that this argument "is a loser for the reasons given in *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009). We agree with *Sepulveda* and need not repeat its analysis."

The Court's August 2 decision does not mention the June 3 Administrator Interpretation (which specifically criticized *Sepulveda*'s rationale). Whether the 7th Circuit's decision should be taken as a rejection of the Administrator Interpretation is unclear, but it is tempting to see it that way.

In stating what was to be resolved on appeal, the Court described a limited question: "[W]hether Section 203(o) preempts state law that lacks an equivalent exception." Given that narrow issue, the Court need not have said much (or perhaps anything) about the workers' separate argument that "protective gear is not 'clothing' under 203(o)." Nevertheless, the Court *did* mention that argument, emphatically called it "a loser," and then went even farther by applauding the *Sepulveda* decision.

Was the Court not-so-subtly calling the Administrator Interpretation on this point "a loser" too?