DOL Reverses Its Position On Donning And Doffing "Protective Equipment" In Union Setting

Insights
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In a pronouncement applicable to unionized workplaces, this week the U.S. Labor Department's Wage and Hour Division issued an Administrator's Interpretation stating that unionized employers cannot treat time spent donning and doffing certain "protective equipment" as unpaid time, even if an applicable union contract or practice treats the time as unpaid. This reverses DOL's previous positions published in opinion letters in 2002 and 2007. The new position revives DOL's earlier position in opinion letters from 1997-2001.

Section 3(o) of the federal Fair Labor Standards Act creates a special rule for unionized workplaces in connection with time spent "changing clothes . . . at the beginning or end of each workday." The provision permits an employer not to count this time as compensable FLSA hours worked, if this is done pursuant to "the express terms of or by custom or practice" under a collective bargaining agreement. 29 U.S.C. § 203(o).

The main question addressed by the new interpretation is whether this rule should apply to time spent donning and doffing "protective equipment." Citing statutory language, legislative history, and some recent court cases, DOL concludes, "it is the Administrator's interpretation that the § 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job."

In DOL's changed view, the FLSA does not permit industries such as meatpacking to rely upon a union contract or a practice in a unionized setting to exclude time spent donning or doffing "protective equipment (e.g., mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards and weight belts)" from an employee's compensable worktime. In recent years, some courts had already reached such a conclusion in the meatpacking industry, but other courts addressing the issue in poultry-processing or in a manufacturing setting have found that equipment donned and doffed by poultry workers or protective gear worn by manufacturing employees constitutes "clothes" under Section 203(o) and does not trigger compensable time if the union contract or practice excludes it.

A second conclusion reached in the new Interpretation also reverses a 2007 DOL position. In the past, DOL said that clothes-changing made noncompensable by Section 203(o) was not a "principal activity" that started the FLSA "workday," such that subsequent walking time would not be compensable. Saying that a majority of courts had rejected the 2007 position, the new Interpretation

compensable. Saying that a majority of courts had rejected the 2007 position, the new interpretation concludes: "Consistent with the weight of authority, it is the Administrator's interpretation that clothes changing covered by § 203(o) may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable."

It bears watching to see whether courts defer to the new Administrator's Interpretation under all the circumstances (particularly in light of DOL's inconsistent treatment of the issue over time). Our June 3 post discusses some of the factors courts will consider in deciding what weight interpretations like these should receive.