Federal Courts Issue Employer-Friendly Rulings in FLSA Section 3(o) Donning and Doffing Cases

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Recently, two federal courts of appeal and one district court have ruled in favor of employers under Section 3(o) of the Fair Labor Standards Act, which excludes from compensable hours of work "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

These rulings from the Fourth and Fifth Circuits and a Tennessee district court are very favorable for employers with a unionized workforce who rely on Section 3(o) to exclude donning and doffing time from paid work time. The Fourth and Fifth Circuits have now joined the Eleventh Circuit in endorsing the position taken by the Department of Labor (DOL) in June 2002 and May 2007 opinion letters that the term "clothes" in Section 3(o) includes the protective safety equipment worn by employees in the meat packing and other industries. Only a single Court of Appeal, the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d. 894 (9th Cir. 2003), has taken a contrary interpretation of Section 3(o) which, as things now stand, represents the minority position. This is in sharp contrast to the situation that existed when the Supreme Court accepted certiorari in the *Alvarez* case but declined to consider the proper interpretation to be given to Section 3(o). Now it seems only a question of time before the Supreme Court agrees to resolve the issue whether Section 3(o) includes the protective equipment worn by employees in the meatpacking and other industries.

In *Sepulveda v. Allen Family Foods Inc.*, 591 F.3d 209 (4th Cir. 2009), the court ruled that donning and doffing personal protective equipment in a chicken processing plant was "changing clothes" under Section 3(o). The court held that the "standard safety equipment" at issue—steel-toed shoes, smocks, bump caps, aprons, gloves, sleeves, hairnets, ear plugs, arm shields, and safety glasses—easily qualified as clothing or clothing accessories under a standard dictionary definition. In this regard, the Fourth Circuit followed the Eleventh Circuit's similar ruling in *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007). The court also found that the act of layering protective gear on top of clothing falls within the definition of "changing" because it modifies a worker's clothing.

The *Sepulveda* court noted its definition of clothing was consistent with the DOL's June 6, 2002 and May 14, 2007 opinion letters, but the court clarified that its ruling was based on the express language of Section 3(o) and thus the court was not troubled by the different viewpoint expressed in the DOL's pre-2002 opinion letters. In a footnote, the *Sepulveda* court also rejected the plaintiffs' claim that Section 3(o) did not cover the "washing" of the safety equipment, which is a departure from the prevailing opinion that 3(o) cannot exclude equipment washing time. In the same footnote, the court rejected the plaintiffs' meal period donning and doffing claims because "it is part of a bona fide meal period, and, in the alternative, *de minimis*."

In *Allen v. McWane Inc.*, No. 08-41037, 2010 WL 47919 (5th Cir. Jan. 8, 2010), the court held that negotiation is not necessary to find that a "custom or practice" exists under 3(o) and that 3(o) is not an affirmative defense for which the employer bears the burden of proof. The Fifth Circuit joined the Third and Eleventh Circuits in holding that even where collective bargaining negotiations never included the issue of non-compensation for clothes changing time, a policy of non-compensation for changing time that has been in effect for a prolonged period of time, and that was in effect at the time a CBA was executed, satisfies 3(o)'s requirement of a "custom or practice under a bona fide" CBA. *Anderson v. Cagle's*, 488 F.3d 945, 958-59 (11th Cir. 2007) (policy of non-compensation had been in place for at least 10 years); *Turner v. City of Philadelphia*, 262 F.3d 222, 226 (3rd Cir. 2001) (policy of non-compensation had been in place for 30 years).

The Fifth Circuit also joined the Eleventh Circuit in holding that the plaintiff has the burden of proof as to whether or not a custom or practice under 3(o) existed because 3(o) is listed among the "Definitions" section of the FLSA and not among the "Exemptions" section. Thus, the Fifth Circuit became the second Court of Appeals to reject the Ninth Circuit's view expressed in *Alvarez v. IBP, Inc.* that 3(o) is an exemption to be narrowly construed against the employer.

In *Arnold v. Schreiber Foods*, the Tennessee district court followed the Fourth, Fifth, and Eleventh Circuits, and held that sanitary clothing and related items worn by dairy processing employees plainly falls within Section 3(o)'s definition of clothing. Case No. 09-cv-00744, 2010 WL 455248 (M.D. Tenn. Feb. 1, 2010). Although most of the ruling is favorable to employers, on one issue, it is not -- that is, whether, under the FLSA, activities excluded from paid time by Section 3(o) can under any circumstances start or end the continuous work day. Despite the fact that pre-shift donning time was not compensable under Section 3(o), the court held that such donning started the continuous work day, thereby making subsequent walk and waiting time compensable.

While these cases are, with the exception of the *Schreiber Foods* continuous work day ruling, positive developments for employers, there are two important 3(o) questions about to be considered by the Seventh Circuit which could reverse much of this momentum.

First, Kraft Foods has appealed a ruling from the Western District of Wisconsin that 3(o) does not apply in a hybrid action if the state law does not have a 3(o) counterpart that permits the exclusion of clothes changing time. The district court opinion is *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913 (W.D. Wis. 2009). On appeal, Kraft has argued that the Wisconsin state law, which has no counterpart to 3(o), is preempted by Section 3(o) or by Section 301 of the Labor Management Relations Act. This is an important appeal because it could make 3(o) essentially meaningless in many states if the Seventh Circuit does not find that it preempts state law that is silent with respect to the ability of parties to negotiate over the exclusion of clothes-changing time.

Second, an Indiana federal court has certified a 3(o) question for interlocutory appeal in *Sandifer v. U.S. Steel Corp.*, no. 2:07-cv-443 RM, 2010 WL 61971 (N.D. Ind. Jan. 5, 2010). The issue is whether, under the FLSA, activities that are excluded from paid time by Section 3(o) can under any circumstances start or end the continuous work day. In other words, the court is asking the

Seventh Circuit to determine if employers must pay for walk time or waiting time that follows or precedes non-compensable donning and doffing activities as part of the continuous work day.

Recently, as evident from *Schreiber Foods*, district courts have been sharply divided on the issue of whether an excluded 3(o) activity can nonetheless start the clock for purposes of walking and waiting time. Several courts have held that walk time and wait time after a 3(o) activity may still be compensable, although the DOL's May 14, 2007 opinion letter and cases like *Hudson v. Butterball*, 2009 WL 3486780 (W.D. Mo. Oct. 14, 2009) and *Sisk v. Sara Lee*, 590 F. Supp. 2d 1001 (W.D. Tenn. 2008) have held that a Section 3(o) activity does not start the continuous workday. The Seventh Circuit has the discretion to either accept this appeal and answer the question or deny this appeal until the lower court renders a final judgment on the entire case. It will be very interesting to see if the Seventh Circuit takes the appeal and, if so, what it decides.

On the whole, while these recent federal court decisions are very favorable for employers with unionized workers who have relied on FLSA Section 3(o), the Seventh Circuit is poised to decide two questions that have the potential to further solidify an employer's position or create further uncertainty in this area.