

Compensation for Donning and Doffing Protective Gear

The United Food and Commercial Workers International Union represents 1.3 million workers in North America, primarily in the grocery, retail, and meatpacking industries.

In many industries, such as meat packing, food processing, and chemical production, employees spend a substantial amount of time donning and doffing required safety equipment. Unfortunately, Bush Department of Labor (DOL) actions have undermined their right to compensation for this time. The new administration should correct these actions by issuing new opinion letters, reinstating and revising withdrawn opinion letters, and withdrawing opinion letter FLSA2002-2 dated June 6, 2002, and a portion of opinion letter FLSA2007-10 dated May 14, 2007.

The Portal-to-Portal Act amended the Fair Labor Standards Act (FLSA) only to except payment for time spent in work activities defined as preliminary and postliminary and not compensable by contract, custom, or practice. 29 CFR §790.3(a)(2); §790.7(a). The Portal Act is inapplicable to an activity determined to be a principal activity. 29 CFR §790.7(a). Therefore, DOL should issue an opinion letter clarifying that an activity outside the regular workday must first be examined to determine whether it is a principal activity.

In addition, DOL should issue an opinion letter clarifying that the term “principal activity” defined at 29 CFR §790.8(b) covers all activities which are an “integral” part of a principal activity, including activities which are “indispensable” to an integral activity. The regulations do not establish a wholly separate condition for establishing a principal activity, as certain cases have incorrectly held.¹ 29 CFR §790.8(c). An example given in the regulations is that changing clothes on an employer’s premises when required by law, the employer’s rules, or by the nature of the work can qualify as an integral part of a principal activity. 29 CFR §790.8(c). Accordingly, an opinion letter should repudiate case misinterpretation of existing regulations.

Furthermore, DOL should issue an opinion letter distinguishing clothes changing (which may or may not be a principal activity depending on the circumstances) from donning and doffing protective gear or equipment which are clearly outside the common definition of clothing. Several cases interpreting 29 U.S.C. §203(o) erroneously treat any article which covers any part of the body as clothing. The opinion letter should establish a common sense definition of what articles are not within the definition of clothing. Specifically, the opinion letter should clarify that protective gear such as mesh gloves, belly guards, or shin guards do not constitute clothing because they have protective functions which exceed that of clothing. The opinion letter should also stress that the analysis of whether an article donned before or doffed following regular working hours constitutes protective gear, must begin with an examination of whether its use is required by law, the rules of the employer, or by the nature of the work. 29 CFR §790.8(c). These objectives should be accomplished by reinstating opinion letters: Cleaning Protective Gear/Hours Worked (issued January 15, 2001 and

¹ See, e.g., *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592-93 (2d Cir. 2007).



withdrawn by the June 6, 2002 opinion letter) and Hours Worked/Cleaning, Putting on Safety Gear (issued December 3, 1997 and withdrawn by the June 6, 2002 opinion letter) and making sure they are consistent with the objectives set forth here.

Finally, DOL should issue an opinion letter clarifying the definition of the term “practice” under the FLSA so that it is consistent with the term “practice” as commonly understood under the National Labor Relations Act (NLRA).² Under the NLRA and arbitration decisions, a practice develops when a course of conduct exhibits clarity and consistency, longevity and repetition, acceptability, and mutuality.³ Past practices may be repudiated by either party through timely notice before or during negotiations. Upon notice that a party repudiates a practice, the other party must negotiate a written contractual term to prevent the discontinuance of the practice. The few cases interpreting “practice” under the FLSA ignore these established bargaining principles and their misinterpretations should be repudiated. An opinion letter should be issued to clarify that the term “practice” under the FLSA is consistent with the definition of term under the NLRA, so that unions will not suffer inconsistent obligations under the FLSA and NLRA.

In coordination with issuing the opinion letters suggested above, the Secretary should immediately withdraw opinion letter Hours Worked/Changing Clothes or Washing, FLSA 2002-2 issued June 6, 2002.⁴ Additionally, the Secretary should withdraw the portion of opinion letter FLSA2007-10 dated May 14, 2007, which states that clothing includes heavy protective equipment and is therefore subject to §203(o).

Eventually, the changes brought about by the new, reinstated, and withdrawn opinion letters suggested here can be made permanent by issuing clarifying regulations.

² In opinion letter FLSA2007-10 dated May 14, 2007, the Secretary states that DOL takes no position on what constitutes a custom or practice.

³ Richard Mittenthal, *Arbitration and Public Policy: Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators: Past Practice and the Administration of Collective Bargaining Agreements* 30, 32-33 (Spencer D. Pollard ed., 1961).

⁴ The June 6, 2002 opinion letter, FLSA 2002-2, refers to an opinion letter dated February 18, 1998 which the 2002 opinion letter withdrew. Although, a search for the 1998 opinion letter was unsuccessful, it should be reviewed for reinstatement.