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Assessing The Risk:

Wage and Hour Tip Of The Week

Avoiding "Donning and Doffing" Off-the-Clock Challenges

TIP: Carefully consider whether any time spent by employees "donning" and "doffing" clothing or protective gear at the beginning and end of a work shift constitutes compensable time.

Employers across many different industries – manufacturing, healthcare, construction, and food processing, to name a few – require employees to wear specific protective gear or other attire during their workday. However, employers often do not consider whether they must pay their employees for the time spent putting on this attire ("donning") at the beginning of the shift or changing out of it ("doffing") at the end of the shift.

Under the FLSA, "preliminary" and "postliminary" activities, such as donning and doffing of gear or attire, constitute compensable time only where they are an "integral and indispensable" part of the employee's principal work activities. When examining whether an employee should be paid for this time, you should consider the following:

1. *Is donning and doffing the attire or gear an integral and indispensable part of the employee's principal activities?* While there is some variation in courts' application of the "integral and indispensable" test, courts generally find that time spent donning and doffing is compensable where it is necessary for the employee to perform the work and is performed for the benefit of, or is required by, the employer (or is required by law or by the nature of the employee's work).

2. *How much time is involved?* Even where an employee's donning and doffing of gear is integral and indispensable to his principal activities, the time spent may not be compensable if it is *de minimis*. Courts usually consider the following three factors to determine whether time is *de minimis*:

- The practical difficulty of recording the time involved
- The total amount of time involved
- The regularity of the work

Because courts apply these factors to the facts of each case, there is no "bright-line" standard for how much time can be *de minimis*. Courts generally aggregate the time spent performing each task (putting on protective gear, sanitizing equipment, etc.) and have consistently held that time is not *de minimis* if it exceeds ten minutes. However, even where the time is less than ten minutes, a court may find that it is not *de minimis* if it is a regular part of the employee's shift and is easily recorded.

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3. *Are the employees covered by a collective bargaining agreement that addresses donning and doffing of "clothes"?* The FLSA contains a provision allowing parties to a collective bargaining agreement to specify that time spent "changing clothes" is not compensable. However, federal courts and the DOL have taken differing views on the definition of "clothes," and in particular, whether protective gear (such as steel-toed work boots, protective gloves, and protective aprons) can be "clothes." This important issue is currently before the Supreme Court in *Sandifer v. U.S. Steel*, and we expect clarification of this issue in 2014.

The bottom line is that there is no bright-line test for determining whether employees should be paid for time spent donning and doffing, but there is a continuum. The more specialized the gear to your particular industry, the longer it takes to don and doff the gear, and the easier it is to locate time clocks near the donning and doffing area such that the time spent donning and doffing can be recorded, the more likely it is that a court or the U.S. DOL would find the donning and doffing time to be compensable under the FLSA. Thus, consider carefully where your workforce falls along the continuum in deciding whether to make donning and doffing time compensable.

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