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Tenth Circuit Rules Donning and Doffing Protective Equipment Held to be Compensable

By [Staci Ketay Rotman](#) on July 11, 2011



The question of whether to pay employees for putting on protective gear has plagued employers for years. While the federal courts are divided over this issue, at least five Appellate Courts – the Fourth, Sixth, Seventh, Eleventh and now the Tenth Circuits – have held that personal protective equipment is included within the meaning of “clothes” under Section 203(o) of the FLSA, and thus not compensable. [Salazar v. Butterball](#).

Section 203(o) excludes “any time spent changing clothes or washing” from “the hours for which an employee is employed” if such time “was excluded ... by the express terms or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.” The Plaintiffs in this case were required to “don and doff” aprons, frocks, gloves, plastic sleeves, hard hats, certain footwork, arm guards and other items before and after their shifts and breaks. The collective bargaining agreement was silent as to donning and doffing pay and the past practice was not to pay production employees for this time.

Similar to the recent district court case we reported on about 8 months ago ([McDonald v. Kellogg](#)), the Tenth Circuit refused to defer to the DOL’s 2010 Opinion Letter that found Section 203(o) does not cover such protective equipment, noting the agency’s shifting interpretations on this subject over the years. The Court determined that the equipment the Plaintiffs were required to wear was not so cumbersome, complicated or otherwise different from traditional clothing to fall outside the definition of “clothes.” The Court also found there was a continued custom or practice of nonpayment for donning and doffing. As a result, the Court determined that the time spent donning and doffing such equipment was compensable.

While there seems to be a recent trend of decisions finding similar protective equipment to be “clothes” under Section 203(o) and, therefore the time spent donning and doffing not compensable, employers must be cognizant of the law in their Circuit. It is also important to remember that claims under state laws may result in a different outcome.

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