

FLSA Fashion: DOL Administrator's Interpretation of "Changing Clothes"

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It may seem odd, but what constitutes "clothes" and "changing clothes" matters under the Fair Labor Standards Act. Section 3(o) of the FLSA says time spent "changing clothes" at the beginning or end of the workday does not have to be paid, as long as the express terms or custom or practice under a collective bargaining agreement would not pay for that time.

The Department of Labor has not always provided clear direction regarding the Section 3(o) exception. From 1997 to 2001, during President Clinton's administration, the DOL took the position that personal protective equipment ("PPE"), especially that in certain safety-sensitive jobs, was **not** clothes; so, donning and doffing of PPE was compensable time and not subject to the exception. From 2002 to 2007, during President George W. Bush's administration, the DOL reversed itself. On June 16, 2010, under President Obama's administration, the DOL returned to its earlier position, as revealed in the second Administrator's Interpretation, 2010-2. Fashion follows the trendsetter (or the President).

In returning to its old view, the DOL says "clothes" do not include PPE required (a) by law, (b) by the employer, (c) or due to the nature of the job. Additionally, "changing clothes"—even those that are something less than PPE—may be compensable if considered a principal activity that starts and ends the work day. This Interpretation provides the worker with maximum possible coverage to be paid for "changing clothes." Anyone confused? Let's look at some examples.

Example 1: Employer provides line workers in a meat packing plant with mesh sleeves and gloves, plastic belly and arm guards, rubber gloves and boots, shin guards, wrist wraps, and weight belts. These are available when employees arrive for work and are turned in before they leave. Here, the clothes are required PPE, not "clothes;" and the time spent donning and doffing is likely compensable because it constitutes a principal activity that begins and ends the work day.

Example 2: Employer issues khakis and polo shirts with the company logo that retail sales employees must wear on the job. Employees are expected to arrive and leave work wearing the uniform and launder it at home. Here, changing clothes is not likely compensable because it does not constitute a principal activity that begins and ends the work day, and it is subject to the narrow Section 3(o) exception.

This is a bigger deal than it may appear. In April 2010, Pilgrim's Pride Corp. agreed to pay \$10 million to settle a consolidated class action brought by poultry workers in eleven states who had not been paid for time spent donning and doffing protective safety and sanitary clothing. More recently, on June 3, 2010, after a DOL investigation at one of its plants, Tyson Foods Inc. agreed to pay poultry processing workers \$500,000 in back wages for time spent changing protective and sanitary clothing, and washing and sanitizing themselves and said gear.