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FLSA Update: Clothes-Changing Exception Does Not Apply to Protective Gear

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On June 16, 2010, the Department of Labor issued one if its newly-introduced "administrator interpretations" to provide guidance on whether protective gear counts as "clothes" under Section 203(o) of the Fair Labor Standards Act (FLSA). Under that section of the FLSA, time spent "changing clothes or washing at the beginning or end of each workday" is excluded from compensable time under the FLSA if it is excluded by custom or practice under a collective bargaining agreement. According to the Department's latest interpretation, protective clothing and equipment is not considered "clothes" under this exception, and therefore unionized employees must be paid for time spent putting on and taking off such equipment.

The definition of "clothes" as applied to Section 203(o) has been the subject of varying Department of Labor interpretations over the years. From 1997 through 2001, the Department opined that protective gear could not be considered "clothes" subject to the Section 203(o) exception. In 2002, however, the Department issued an opinion letter reversing its position and stated that "clothes" did, in fact, include protective gear. (Wage and Hour Opinion Letter, June 6, 2002, FLSA2002-2.) The 2002 opinion letter relied on, among other things, the definition of "clothes" from two dictionaries. In 2007, the Administrator reaffirmed this position. (Wage and Hour Opinion Letter, May 14, 2007, FLSA2007-10).

The Department's latest interpretation withdraws both the 2002 and 2007 opinion letters, and reverts to the 1997 position that protective gear is not subject to the Section 203(o) exception. In doing so, the Department, while admitting that the provision's legislative history is "sparse," nevertheless states that "the 'clothes' that Congress had in mind in 1949" when it passed the provision "hardly resemble the modern-day protective equipment commonly donned and doffed by workers." (Administrator's Interpretation No, 2010-2, June 16, 2010.) It further explicitly states that, in its opinion, the Section 203(o) exemption *does not* apply to protective equipment worn by employees that is "required by law, by the employer, or due to the nature of the job." (Id.)

The latest Administrator Interpretation also concludes that clothes-changing could be considered a "principal activity" under the Portal to Portal Act, 29 U.S.C. §254, and therefore any subsequent activities, including walking and waiting, are compensable time even if the clothes-changing itself is not compensable under Section 203(o). The Department reasoned that under the Supreme Court's decision in *IBP v. Alvarez*, 546 U.S. 21 (2005), activities that are "integral and indispensable" are principal activities, and activities occurring after the first principal activity and before the last principal activity are compensable, even if the activity itself falls under the Section 203(o) exception. Therefore, even if the clothes-changing itself is not compensable under Section 203(o), if it constitutes an "integral and indispensable" principal activity under the Portal to Portal Act, it still begins the workday, and any subsequent activities must be compensated. The practical application of this interpretation is that an employer who is not required to pay an employee for clothes-changing under Section 203(o) would still have to pay the employee for any time spent walking to his station after he finished changing clothes.

Based upon the Department's recent interpretation, many employers who have been relying on past Department opinions may need to adjust their compensation practices to ensure employees are being paid for time spent donning and doffing protective equipment, as well as time spent walking to his or her worksite from a locker room after changing clothes, even if the clothes-changing itself was excluded from working time under a collective bargaining agreement. Otherwise, employers could be subject to an investigation for FLSA violations, regardless of any contrary provisions contained in the employer's collective bargaining agreement. If you have any questions as to how the policy should be applied to specific situations, please contact Dinsmore & Shohl for guidance.