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Dollars Due for Donning and Doffing?

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With very few exceptions, all jobs require certain attire. Dressing for work is a fact of life, yet whether employees must be compensated for time spent dressing for work has emerged as an important question of law.

Since 1938, compensation for American workers has been governed, generally, by the Fair Labor Standards Act (FLSA). In 1947, Congress promulgated the Portal-to-Portal Pay Act, clarifying what constitutes compensable work time. Pursuant to this Act, work activities that occur prior to the commencement of, or subsequent to cessation of, an employee's principal duties are not compensable. There are two exceptions, however: when such activities constitute an integral and indispensable part of the employment, or when there is a custom or practice between the employer and employee to compensate the employee for such activities.

In the Supreme Court's first foray into the locker room, *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court addressed whether and when the FLSA requires employers to compensate employees for time spent putting on ("donning") and taking off ("doffing") required uniforms, safety gear, and equipment. The employees in *Steiner* worked at

a battery plant, handling dangerously caustic and toxic materials. They were "compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law require[d] their employer to provide." The Court held that even though these activities were preliminary and postliminary to the employees' principal activity, the time these employees spent changing and showering on the premises of their workplace was nevertheless "integral and indispensable" to their principal activity and therefore "work" requiring compensation under the FLSA.

In recent years, the Court's decision in *Steiner* has become the subject of intense analysis and debate, as employees across the nation increasingly have sought compensation for time spent donning and doffing uniforms and equipment. The particular circumstances of these claims are remarkably diverse, and public law enforcement in particular has seen a marked increase in litigation. In numerous cases, predominantly filed in the 9th Circuit, employee police officers contend that the time required to don and doff standard "Class B" police uniforms and associated equipment

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(such as a radio, handgun, handcuffs) and protective gear (including bullet-proof vests and "Sam Browne" belts) is compensable time under the FLSA.

The district courts in the 9th Circuit generally have split on this issue. Each group applies the *Steiner* "integral and indispensable" test, examining whether donning and doffing is necessary to principal work performed, i.e., the performance of police duties, and whether it is done for the benefit of the employer. However, whereas the first group focuses on whether the *uniform* itself is necessary and donned or doffed for the benefit of the employer, the second group focuses on the *location* where donning and doffing activities are performed, and whether changing at the station house is necessary and done for the benefit of the employer. Focus has proved outcome determinative: Courts in the first camp have held that donning and doffing the police uniform and equipment are compensable activities, while courts in the second camp have concluded that such activities are not compensable.

Applying the first prong of the *Steiner* test courts in the first camp emphasize the visual impact of the police uniform. In *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200 (N.D. Cal. 2007), the court opined that: "The officer's command presence-which the uniform fosters-is the first of many points along the continuum that police officers regularly use to enforce the law and obtain compliance from members of the public.... This distinguishing characteristic of the police uniform makes it necessary to the principal work performed." Thus, these courts have concluded that donning and doffing the police uniform is necessary to the officers' principal work activities.

Applying the second prong, these courts have determined that wearing uniforms benefits the employer for a variety of reasons, by assuring compliance with legal requirements, avoiding work slowdowns, minimizing potential for injury to officers, and ensuring officers

are kept safe. Because the wearing of the uniform benefits the employer, these courts reason that donning and doffing the uniform also benefits the employer.

Courts in the second camp apply the first prong of the *Steiner* test by asking whether the law, the employer, or the *nature* of police work mandate that an officer don and doff at the station. To date, no law or explicit workplace policy addressing donning or doffing at the station has been identified in any of the cases, leaving courts to focus on whether the nature of police work compels officers to dress at the station. Several factual considerations routinely come into play, including whether safety concerns exist, whether evidence shows any officers dress at home, and whether lockers are provided at the station.

Courts in the location camp almost uniformly have rejected the notion that safety concerns give rise to a de facto requirement to dress at the workplace. These courts have concluded that any such concerns can be (and are) mitigated easily and effectively. For example, in *Abbe v. City of San Diego*, 2007 U.S. Dist. Lexis 87501 (S.D. Cal. Nov. 9, 2007), the court opined that an off-duty officer wearing a jacket or "cover" over the uniform (as required by department policy) might be indistinguishable from any other law enforcement or security personnel, and firearm safety concerns could be mitigated by safe storage. Furthermore, because the evidence in all of these cases showed that some officers did in fact dress at home, courts that engaged in the location analysis were prone to conclude that the option to dress at home was not illusory.

Having found that officers were not required by law, the employer, or the nature of police work to don and doff at the station, and that the choice to do so was for the officers' convenience rather than the employer's benefit, these courts determined that donning and doffing is not integral and indispensable and thus not compensable.

On June 1, a 9th Circuit panel comprised of Judges Jonnie B. Rawlinson, Lloyd D. George, and Ronald Murray Gould heard oral argument in *Bamonte v. City of Mesa*, No. 08-16206, which raises the issue whether donning and doffing of police uniforms and equipment is compensable work under the FLSA. Although the district court in *Bamonte* lodged itself squarely in the location camp, where the 9th Circuit will fall is still an open question.

Existing law strongly suggests that the 9th Circuit will adopt the location camp analysis. First, in 2003, the 9th Circuit held that donning and doffing of protective gear was “integral and indispensable,” and thus compensable under the FLSA, because the employer required the gear in question to be donned and doffed on the employer’s premises. *Alvarez v. IPB, Inc.*, 339 F.3d 894 (9th Cir. 2003). Although the Supreme Court granted certiorari in *Alvarez*, the Court did not address the compensability of uniforms or equipment in its decision.

Second, in 2004, only a year after *Alvarez*, the 9th Circuit again addressed this issue in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). The employees in *Ballaris* were required to don and doff in the factory by company policy; moreover, the activity benefited the company by limiting contamination and ensuring the quality of the product. The 9th Circuit again held that these activities were compensable, cementing its view that “where the changing of clothes on the employer’s premises is required by law, by rules of the employer, or by the nature of the work,” the activity may be considered integral and indispensable to the principal activities. Conversely, when neither the law, nor company policy, nor the nature of the work requires changing on premises - as in *Bamonte* - application of the 9th Circuit’s prior analysis requires a finding that such activities are not compensable.

Further supporting the location analysis is an opinion issued by the Dept.

of Labor’s Wage and Hour Division advising that donning and doffing generally is excluded from the scope of principal activities that are compensable under the FLSA. As the Dept. of Labor’s opinion explains, “if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant.” Wage and Hour Advisory Memorandum No. 2006-2

Fueled in part by the Department’s opinion, a Circuit split has emerged regarding whether donning and doffing activities are compensable work. Last year, the Supreme Court denied certiorari in a trio of cases, which presented several issues on this subject including: whether there must be “exertion” in order for an activity to constitute “work;” whether the “uniqueness” of the clothing or equipment plays any role in determining whether donning and doffing activities are “integral and indispensable” to employees’ principal activities; and whether uniforms and/or protective gear constitute “clothes” for purposes of the FLSA’s “clothes changing” exception applicable to employees covered by a collective bargaining agreement, 29 U.S.C. Section 203(o). As yet, no clear consensus has emerged.

The 9th Circuit’s much anticipated *Bamonte* decision will add to the dialogue on these broader questions, and should provide necessary guidance to municipalities regarding compensation practices for public law enforcement officers.

Latham & Watkins represented the city in *Abbe v. City of San Diego*.

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