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9th Circuit Denies Compensation For Dressing at Work

By Colleen Smith and Aryn Thomas

Employers take note: “Donning and doffing” – an employment law catchphrase referring to the act of putting on and taking off one’s uniform or required gear – is poised to enter the common parlance. This hot legal issue stems from the requirement in the Fair Labor Standards Act (FLSA) that employers must pay employees for all “hours worked.” Although the Supreme Court and Congress have weighed in on various aspects of the question “what activities constitute work,” many issues remained unsettled. Until recently, one of these issues was whether employees are entitled to compensation for the donning and doffing of work uniforms and related gear where they have the option to dress at home, but choose to dress at the workplace. A number of district courts have addressed this issue, with varying results. The 9th Circuit’s decision in *Bamonte v City of Mesa*, 2010 DJDAR 4505 (9th Cir. 2010), issued last Thursday, conclusively resolves this issue, at least for employers in this Circuit.

In *Bamonte*, a divided panel of the 9th Circuit addressed the compensability of time spent donning and doffing uniforms

and related equipment. Police officers employed by the city of Mesa contended that the city violated the FLSA by failing to compensate them for the time they spent donning and doffing their police uniforms and accompanying gear.

The police officers argued that the time they spend donning and doffing uniforms and gear should be compensated under the FLSA because the uniforms and gear are necessary to their law enforcement work. In particular, the officers argued that the uniforms and gear contributed to the officers’ “command presence,” promoting public respect and deference to the officers’ authority.

The police officers also argued that they were effectively required to dress at work, further justifying compensation for this activity. To support this contention, the officers presented evidence that while the city did not require the officers to dress at work, in practice the vast majority of the officers donned and doffed their uniforms and associated gear at the station, rather than at home. Among other things, the officers cited discomfort associated with wearing their uniforms and gear during their

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commutes, the increased risk of being identified as a police officer while off duty, and concerns regarding access by family members to uniforms and gear if stored at home.

To determine whether the police officers' donning and doffing time was compensable under the FLSA, the 9th Circuit did not directly address whether donning and doffing of uniforms and gear was "work" under the FLSA. Instead, the court assumed, without deciding, that the activities were work, and proceeded to consider whether these activities were compensable as "integral and indispensable;" in other words "necessary to the principal work performed and done for the benefit of the employer." Applying this test, the court concluded that the officers' donning and doffing time was not compensable. In reaching this conclusion, the court explained that whether the time was compensable requires consideration of two questions: Whether any law, rule, regulation, or policy of the employer requires the employees to dress on the premises of the employer, and if not, whether the employees dress on the employer's premises for the benefit of the employer.

The 9th Circuit determined that the police officers' donning and doffing time was not compensable because donning and doffing at the workplace was entirely optional, and because on-premises donning and doffing was done not for the employer's benefit, but rather, exclusively for the police officers' benefit. The court observed that while the police officers' reasons for donning and doffing at work, rather than at home, were logical, those reasons reflect the officers' preferences — not mandates.

The panel's opinion in *Bamonte* cements the 9th Circuit's position on compensability of donning and doffing at the workplace. Given the proliferation of donning and doffing lawsuits, and the myriad legal questions these lawsuits have presented in recent years, however, the Supreme Court may

find cause to address this issue in the relatively near future.

In the meantime, employers within the 9th Circuit should take steps to ensure their workplace uniform dressing policies are consistent with the court's guidance in *Bamonte*. First, employers that presently permit employees to don uniforms or equipment at home or otherwise away from the work premises should carefully review their policies on dressing, paying specific attention to whether there are any drawbacks to the employer, as opposed to the employee, of dressing away from the work premises. Second, employers with a significant number of employees who dress at work for practical reasons should consider whether the reasons for an employee to dress at work benefit the *employer* in any way. If so, compensation may be required, even though employees have the option to dress away from the workplace. Finally, employers are strongly encouraged to discuss the specifics of their policies with legal counsel. Application of the legal framework discussed in this article is highly fact-specific, and numerous other factors not mentioned here, as well as state wage and hour laws, may be relevant to determining whether a specific policy will pass legal muster.

Latham & Watkins represents the city of San Diego in police officer donning and doffing litigation.

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