Donning and Doffing Compensable – What Does Your CBA Say?

Labor & Employment Law Update

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On March 24, 2016, we reported on a U.S. Supreme Court's decision involving litigation by workers at meat-processing facilities who alleged they were entitled to overtime pay and damages because they were not paid for time spent "donning and doffing" protective gear. A critical issue in that case was the plaintiff's use of statistical data to prove their claim, which the Supreme Court found appropriate, and which ultimately resulted in a $5.8 million judgment.

Shortly after that Supreme Court's decision, the Tenth Circuit issued a ruling on yet another "donning and doffing" case. In *Castaneda v. JBS USA, LLC*, the Tenth Circuit affirmed the trial court's judgment in favor of the employer, concluding that employees failed to show that an agreed upon pre-calculated time in their compensation scheme (in a collective bargaining agreement (CBA)) did not adequately compensate them for their time changing in and out of safety clothing and equipment and walking to their job posts.

In *Castaneda*, the employees at a beef-processing plant were part of a CBA that incorporated set measured times to don and doff safety clothing and equipment. The so called "plug time" was the result of industrial engineering studies that calculated the time needed by employees (which were position-specific) to put on and take off safety clothing. A subsequent agreement resulted in additional "plug time" for pre- and post- shift walking time between the locker room and the production floor. Following adoption of the CBA, the plaintiffs sought to recover retroactive unpaid wages for uncompensated work, including pre- and post-shift time spent donning and doffing clothing and protective gear, washing equipment and themselves, and walking to and from their job posts. Plaintiffs also pursued compensation for their entire meal break, or at a minimum for their time donning, doffing, washing and walking at the beginning and the end of the meal break.

In rejecting the plaintiffs' claims, the Tenth Circuit first noted that pre- and post-time devoted to changing clothes was *not* compensable under §203(o) of the Fair Labor Standards Act (FLSA) if it was so determined under the CBA. [Section 203(o) allows employers and unions to pay its unionized employees for the time they spend before and after their shifts putting on and taking off safety clothing and related items.] Secondly, the court stated that the time to remove non-clothing

items was not generally compensable if the time to do so was *de minimis*. Finally, the court added that if time spent performing an activity was not compensable, it would not become a "principal activity," and therefore compensable, simply because the employer agreed to incorporate it as part of the so-called "plug time" in the CBA.

Because JBS and the Union agreed to incorporate "plug time" compensation in the CBA, the Tenth Circuit deferred to the CBA and held that the parties should be able to govern not only whether "changing time" and "walking time" were compensable activities, but also how such activities should be compensated.

Unionized employers should examine their collective bargaining agreements to determine if they have a provision regarding donning or doffing, and if not, whether they want to add express language to minimize the possibility of future disputes. Experienced labor and employment counsel can help negotiate effective provisions into a collective bargaining agreement.