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A New Interpretation of Time Spent "Donning and Doffing" Under the Fair Labor Standards Act

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In *Franklin v. Kellogg Co.*, the Sixth Circuit recently held that time spent donning and doffing and walking to and from the changing area and time-clock is compensable under the Fair Labor Standards Act (FLSA). In *Franklin*, Alice Franklin and other employees of Kellogg Company were required to wear uniforms consisting of pants, shirts and shoes. In addition, Kellogg Company mandated its employees to wear hair nets, beard nets, safety glasses, ear plugs and bump caps. The employees were obligated to change into their uniforms and safety equipment upon arriving at work and to change out of their uniforms and safety equipment before leaving work so that the uniforms could be washed at the factory.

In its 19 years of instituting this policy, Kellogg Company never paid its employees for the time spent donning and doffing the uniforms and safety equipment or the time spent walking from the locker room

About the photo: Associate Patrick A. Sadowski at our new Findlay office.

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to the time clock. Despite this longstanding practice known by both the employer and employees, no written provisions in the collective bargaining agreement addressed the policy.

Under the FLSA, employers are required to pay employees an overtime wage of at least one and one-half times the regular wage employees earn for working in excess of 40 hours a week. But section 203(o) of the FLSA exempts "changing clothes" worn during the workday from the measured work-time if excluded by custom or practice under a bona fide collective bargaining agreement. In *Franklin*, the Court first reviewed the plain meaning of the word "clothing" as defined in a dictionary: "covering for the human body or garments in general: all the garments and accessories worn by a person at one time."

The Court reasoned that the plain meaning of the word clothing is quite expansive and certainly includes uniforms consisting of pants and shirts. Hair nets, beard nets, safety glasses, ear plugs, and bump caps also were deemed to be clothing because they provide cover for the body. The Court concluded that both protective and non-protective clothing are included within section 203(o). Thus, time spent changing into and changing out of uniforms and safety equipment is compensable under the FLSA.

However, even when negotiations never included the issue of non-compensation for changing time, a policy of non-compensation for changing time that has been in effect for a prolonged period of time satisfies the section 203(o) exemption for measuring work-time. The fact that the employees did not know they were entitled to compensation is irrelevant. The employees and employer both were well aware that the time spent donning and doffing was never compensated during the previous 19 years at Kellogg Company. Therefore, despite the lack of a written provision in the collective bargaining agreement, Kellogg Company's 19 year practice of not compensating its employees for time spent donning and doffing established a custom. Accordingly, the time spent putting on and taking off uniforms and safety equipment was deemed not to be compensable in this specific case.

Under the "continuous workday rule," the workday includes the period between the start and completion of an employee's principal activities on the same workday. Principle activities are those that are "integral and indispensible" to the activities for which the employee is employed. The Court considered three factors in determining whether the activities at issue were integral and indispensible: (1) whether the activity is required by the employer; (2) whether the activity is necessary for the employee to perform his or her duties; and (3) whether the activity primarily benefits the employer. In the present case, the activity was required by the employer. The employer benefitted from maintaining sanitary working conditions and manufacturing safe products. The employees also were protected from injury. However, wearing uniforms and safety equipment is not absolutely necessary to perform the employees' duties. Nevertheless, the Court concluded that donning and doffing a uniform and safety equipment is integral and indispensible and therefore, a principle activity.

Moreover, any activity that is integral and indispensible to a principle activity is itself a principle activity. Thus, the employees may be entitled to compensation for walking to and from the changing area and time-clock. But because there were questions of fact regarding the length of time spent walking to and from the time-clock and changing area and whether the time was de minimis, the Sixth Circuit remanded the case to the district court for further clarification.

Due to the court's expansive interpretation of clothing and integral and indispensible, many activities routinely excluded from compensation could potentially be compensable under the FLSA. Employers that traditionally have required their employees to wear uniforms or safety equipment such as the manufacturing and machinery industries may need to update their compensation policies. *Franklin v. Kellogg Co*. could be just the tip of the iceberg. If you have any questions regarding your company's compensation policies, be sure to consult your employment counsel.

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