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On January 27, 2014, the United States Supreme Court unanimously affirmed a U.S. Court of Appeals decision in *Sandifer v. United States Steel Corp*., No. 12-417, 2014 WL 273241 (Jan. 27, 2014) holding that steelworkers' donning and doffing of certain items of required protective gear constituted "changing clothes" within the meaning of section 203(o) of the Fair Labor Standards Act (FLSA). Since the time spent by the steelworkers donning and doffing their protective gear was specifically excluded from working time under a collective bargaining agreement, the Supreme Court held that the time was not compensable by operation of section 203(o).

By way of background, a provision of the Portal to Portal Act, 29 U.S.C. § 254, states that employees need not be compensated for time spent "*walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform*" or for time spent in "*activities which are preliminary to or postliminary to said principal activity or activities*." Regulations and case law have held that such activities as changing clothes and showering may, under appropriate circumstances, be "an integral and indispensable part" of the employee's principal activity, and thus would be compensable working time. However, another section of the statute says that employees need not be compensated for time spent "*changing clothes or washing at the beginning or end of each workday*" if the time is excluded from working time under a collective bargaining agreement.

The Plaintiffs in *Sandifer* claimed that U.S. Steel violated the FLSA by failing to compensate them for time spent donning and doffing a dozen types of protective clothing. U.S Steel argued the FLSA excludes from the compensable work day time spent "changing clothes" where a collective bargaining agreement excludes by its terms of by a custom or practice time spent changing clothes from compensable work time. The Plaintiff's in *Sandifer* argued that section 203(o) did not apply to them because the protective clothing and equipment they wore were not "clothes" within the meaning of the statute. They contended that these items were "personal protective equipment". The FLSA does not define "clothes" or "changing clothes."

The District Court agreed with U.S. Steel and held that "clothes" as used in the statute, should be given its ordinary, contemporary, common meaning: "covering for the human body or garments in general".

The Seventh Circuit Court of Appeals affirmed the decision of the District Court, holding that the terms of the collective bargaining agreement did not require U.S. Steel to compensate its employees for the time spent changing in and out of the protective clothing. The Seventh Circuit rejected the employees' argument that the protective gear could not be "clothing" because it was personal protective equipment. The appellate court reasoned that protection is a common function of clothing, especially with respect to work clothes worn by factory workers, and that "[i]t would be absurd to exclude all work clothes that have a protective function from section 203(o), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms." With respect to the glasses, ear plugs, and hardhat, however, the appellate court held that while such items may not be clothing in the ordinary sense, the time spent putting these items on is *de minimis* and not compensable.

In reviewing this ruling, the Supreme Court limited its review to the issue of what constitutes "changing clothes" within the meaning of section 203(o). In doing so, the Supreme Court first examined the definitions of the words "clothes" and "changing."

Because the term "clothes" is not defined in the statute, the Court interpreted it by its ordinary, contemporary, common meaning. Using dictionaries from the era that section 203(o) was enacted, the Court used the following definition of "clothes": items that are both designed and used to cover the body and are commonly regarded as articles of dress.

In using this definition, the Court rejected the plaintiffs' definition of "clothes", holding that the plain definition of the word "clothes" does not exclude items with a protective function. The Court pointed out that section 203(o) provides an exception with respect to the changing of clothes only when such "conduct constitutes an integral and indispensable part of the principal activities for which covered workmen are employed." The Court also explained that the statutory context makes clear that the "clothes" referred to in section 203(o) are items that are integral to job performance.

The Supreme Court also considered the definition of "changing," stating that the word usually had two common meanings at the time section 203(o) was enacted – to "substitute" and to "alter." The Court stated that in this instance the word "changing" meant more than mere substitution. The Court held "time spent in changing clothes" included time an employee spent altering his clothes.

Using these definitions the Supreme Court held that the employees' donning and doffing of the protective gear at issue qualified as "changing clothes" within the meaning of section 203(o) such

that U.S. Steel was not required to compensate its employees for this time. The Court specifically held that flame-retardant jacket, pants, hood, hard hat, snood, wristlets, work gloves, leggings, and metatarsal boots were designed and used to cover the body and are commonly regarded as articles of dress and fit within the Court's interpretation of clothes.

The Court also held, however, that safety glasses, earplugs and respirator do not fit the definition of clothes. Despite this, the Court held that the time spent by employees in donning these items was not compensable. In doing so the Supreme Court stated that if the vast majority of time is spent in donning and doffing "clothes", the entire time period qualifies as exempt from compensation under section 203(o). The Court held that in this case, the time spent by each employee donning and doffing safety glasses and earplugs was minimal.

Please note that the Supreme Court did not say that "donning and doffing" time is *never* compensable as working time. Rather, it is now safe to say that changing into or out of protective clothing (as opposed to protective *equipment*) will not necessarily be considered integral to an employee's principal working activities, and therefore may not necessarily be working time. In unionized workplaces, pay for donning and doffing time will continue to be a subject for bargaining. In non-unionized environments, employers should determine whether donning and doffing time is required to be compensated under the particular circumstances of their workplace.