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Recent Donning and Doffing Case Sheds Light on This Misunderstood Wage and Hour Issue

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By Judd Lees

Ever since the United States Supreme Court's 2005 decision of Alvarez v. IBP, Inc., employers have been wary of potential employee claims alleging that the time spent putting on and taking off protective clothing, as well as time spent walking to and from this activity, constitutes "work time" compensable under federal or state wage and hour laws. In Andrako v. United States Steel Corporation, a federal district court in Pennsylvania determined that production and maintenance employees of United States Steel Corporation were not entitled to additional compensation for the time they spent donning and doffing protective clothing but were entitled to be paid for "hours worked" walking to and from their work areas once the protective clothing was put on. The decision addressed the interplay between the federal Fair Labor Standards Act and the Portal-to-Portal Act which excludes from compensable hours worked "any time spent in changing clothes or washing at the beginning or end of each work day which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

In this case, the collective bargaining agreement stated that the Company "is not obligated to pay Employees for preparatory or closing activities which occur outside of their scheduled shift or away from their worksite (i.e., so-called 'Portal-to-Portal activities')." The clothing at issue included safety glasses, hard hats, boots, flame-retardant clothing, respirators and other safety equipment. Employees were required to keep their work clothes at the premises and were required to shower at the end of their work shift.

Despite the express exclusion of this time under the collective bargaining agreement, employees filed suit alleging that they were not donning and doffing "clothes" as called for the by the Portal-to-Portal Act. The Court disagreed and granted the employer partial summary judgment, relying on prior holdings that the protective nature of safety equipment and clothing does not "strip it of its essence as clothing." The contractual exclusion of this time as "hours worked" placed the donning and doffing time squarely within the provisions of the Portal-to-Portal Act and therefore outside the definition of "hours worked" under the FLSA.

However, the Court refused to grant summary judgment on the employees' claim for "post-donning and pre-doffing walking time." The Court indicated it was bound by the U.S. Supreme Court's ruling in Alvarez that any walking time occurring after the employee's first principal activity and before the employee's last principal activity is compensable. The Court held that, despite granting summary judgment on the donning and doffing time, it could rule that this time constituted a "principal activity" thereby triggering "hours worked" under the Alvarez decision. The Court did throw the employer a bone by stating that the *de minimus* protection under the Portal-to-Portal Act may ultimately win the day for the employer, depending on the time involved in the act of walking.

As a result, employers need to be cautious when determining whether or not the donning and doffing of protective clothing and subsequent walking time will be treated as "hours

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worked." Ironically, the payment of any amount, even a *de minimus* amount, may result in the loss of protection under the Portal-to-Portal Act. On the other hand, an express exclusion under a collective bargaining agreement or work rules is no guarantee that a court will enforce it. As a general rule, the donning and doffing of rudimentary protective equipment is not considered a "principal activity" which would trigger commencement of "hours worked" including subsequent travel time. However, to the extent the protective clothing involves more than rudimentary safety equipment, it may constitute such a "principal activity" sufficient to trigger liability under federal law. In addition, employers should be aware that state laws often do not have a corollary to the Portal-to-Portal Act so the "principal activity" analysis becomes even more important.