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LEGAL ALERT

Legal Alert: Tenth Circuit Decides that Protective Gear Included in FLSA Exemption for Changing Clothes

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***Executive Summary*:** The Tenth Circuit, which includes Utah, Wyoming, Colorado, New Mexico, Kansas, and Oklahoma, decided this week that an employer did not violate the Fair Labor Standards Act ("FLSA") by failing to pay employees for time spent donning and doffing protective gear. See Salazar v. Butterball LLC (July 5, 2011).

Background

In Salazar, the appeals court upheld the district court's grant of summary judgment in favor of the employer, Butterball. In doing so, the court offered an expansive definition of "clothes" under 29 U.S.C. § 203(o) of the FLSA, disagreeing with the Department of Labor's narrow interpretation of that term.

Section 203(o) excludes "any time spent changing clothes or washing" from compensable time if it is excluded by "the express terms of or by custom or practice under" a collective bargaining agreement. Butterball required its plant workers to don various items of apparel and equipment, including aprons, gloves, boots, hard hats, safety glasses, earplugs, knife holders, and arm guards. The collective bargaining agreement under which the employees worked did not address payment for donning and doffing of this gear, and the workers had never been paid for it. Thus, the court decided that there was a custom or practice in place of excluding such activities from measured working time.

Changing Clothes?

At issue was whether the time spent donning and doffing that protective gear was time spent "changing clothes" under section 203(o). Only if it were, could it be excludable under the FLSA. While acknowledging the Department of Labor's 2010 Administrator's Interpretation that stated that clothes do not include "protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job," the court held that section 203(o) includes personal protective equipment. With the expansive construction, the court declined to defer to the Department of Labor, noting that the agency had repeatedly changed its position in recent years, thus weakening the persuasive power of its latest interpretation. For a discussion of the most recent Administrator's Interpretation, please see our July 8, 2010 Legal Alert, *Protective Equipment Not Included in FLSA Exemption for Changing Clothes*, available at:

http://www.fordharrison.com/shownews.aspx?show=6355.

The Tenth Circuit's decision hardly resolves this issue. While several courts have reached similar conclusions that include personal protective equipment as clothing (for example, the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits), some courts have not (for example, the Ninth Circuit and district courts in Pennsylvania, Wisconsin, and Illinois). In addition, the Department of Labor has issued its analysis in favor of excluding protective equipment from the definition of clothing, and courts will have to decide what level of deference to give the agency. As a result of the ambiguity, it's important to recognize how courts in your jurisdiction have treated the issue.

If you have any questions regarding this decision or other labor or employment related issues, please contact the author of this Alert, Chris McFadden, cmcfadden@fordharrison.com, an attorney in our Phoenix office, or the Ford & Harrison attorney with whom you usually work. Additionally, Mr. McFadden will be discussing donning and doffing issues in more detail in a complimentary e-briefing, "*New Workplace Donning and Doffing Rules: Regulations and Enforcement Under the FLSA,*" on July 27 from 1:00 to 2:00 Eastern time. For registration information, please click here.