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LEGAL ALERT

# Legal Alert: Protective Equipment not Included in FLSA Exemption for Changing Clothes

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Recently, the U.S. Department of Labor (DOL) issued an Administrator's Interpretation (AI) reversing DOL positions published during the Bush Administration and stating that employees must be compensated for time spent donning and doffing certain kinds of "protective equipment" even if under the terms of the relevant collective bargaining agreement (CBA), or the CBA's custom and practice, such time is to be unpaid. *See* Administrator's Interpretation No. 2010-2, available on the DOL web site at: http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm. The AI also reverses other DOL interpretations and states that while time spent changing "clothes" (as opposed to "protective equipment") can still be treated as unpaid time pursuant to the terms of a CBA or custom and practice, "subsequent activities, including walking and waiting, are compensable." ***FLSA § 203(o)*** Under the Fair Labor Standards Act (FLSA,) time spent "changing **clothes** or washing at the beginning or end of each workday" can be treated as unpaid if the time is excluded from compensable time pursuant to "the express terms or by custom or practice" of a CBA. 29 U.S.C. § 203(o) (*emphasis added*). ***DOL Determines "Clothes" Does Not Include Protective Equipment*** In a 1997 Opinion Letter, the DOL concluded that time spent putting on, taking off and cleaning the protective equipment utilized in the meat packing industry was compensable and that the protective equipment did not constitute "clothes" under § 203(o). Subsequently, the DOL changed positions and issued opinion letters in 2002 and 2007 including such protective equipment in the definition of "clothes." Federal courts never fully accepted the Bush Administration's position, with the Ninth Circuit Court of Appeals and district courts in the Seventh and Fourth Circuits handing down decisions since 2002 applying a definition of "clothes" at odds with the Bush Administration's position. The DOL's recent AI reverses the Bush Administration's position and states that the term "clothes" as used in § 203(o) does not include "protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job." Examples of such "protective equipment" that is no longer considered clothing include "mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards and weight belts." ***Changing Clothes is a Principal Activity that Begins the Continuous Workday*** The recent AI also determined that "changing clothes" is a "principal activity" that begins the continuous workday even if the time is non-compensable under the terms of a CBA. As a result, while donning and doffing "clothes" (as opposed to "protective equipment") can still be treated as unpaid time pursuant to a CBA's terms or custom and practice, subsequent activities,

including walking and waiting, are compensable. The DOL's current position on this issue also reverses its prior position that if such donning and doffing is excludable time under a CBA, it cannot be a principal activity that begins the continuous workday. As with the Bush Administration's "protective equipment" position discussed above, federal courts never fully adopted its "principal activity" position, with district courts in the Third, Fifth, Sixth, Seventh and Eleventh Circuits rejecting the Bush Administration's interpretation. **Bottom Line for Employers:** It is the DOL's current position that unionized employees cannot bargain away their right to be paid for time spent putting on and taking off certain "protective equipment." Thus, if a CBA provides that time spent donning and doffing such equipment is not compensable, that provision is now invalid in the eyes of the DOL. Also, it is now the DOL's position that while donning and doffing "clothes" (as opposed to "protective equipment") can still be treated as unpaid time pursuant to a CBA, these activities now begin the continuous workday. As a result, the DOL takes the position that a unionized workforce must be paid for time spent doing subsequent activities, like walking to the factory floor or waiting in line at the time clock, as long as such periods of time are not so insubstantial and insignificant as to be considered *de minimis*. If you have any questions regarding this issue or any other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.