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FLSA

The recent unanimous U.S. Supreme Court ruling in *Sandifer v. U.S. Steel Corp.* turned on the Fair Labor Standards Act's definition of ''changing clothes.'' In this BNA Insights article, August W. Heckman III and Richard G. Rosenblatt of Morgan Lewis discuss the case, which held that company employees couldn't avoid the terms of a collective bargaining agreement that provided they would not be compensated for time spent donning and doffing required protective gear.

While *Sandifer* ostensibly addressed a seemingly mundane question regarding whether personal protective equipment constitutes ''clothes'' within the meaning of the FLSA, the authors say the real import of the case may prove to be its reaffirmation that preliminary and postliminary activities that are only tangentially related to—but not integral to—the performance of one's job are not compensable principal activities.

Sandifer v. U.S. Steel: Implications Beyond Collective Bargaining and the Definition of 'Changing Clothes'

By Richard G. Rosenblatt and August W. Heckman III

On Jan. 27, the U.S. Supreme Court issued its opinion in *Sandifer v. U.S. Steel Corp.*,[1] unanimously holding that U.S. Steel employees could not avoid the terms of their collective bargaining agreement, which provides that they are compensated only for time at their work stations and not for time spent donning and doffing required protective gear. The case turned on the definition of ''changing clothes'' found in Section 203(o) of the Fair Labor Standards Act.[2]

The court noted that, normally, the time spent donning and doffing such protective gear would be compensable under the FLSA as a ''principal activity.'' Section 203(o), however, permits the exclusion from ''hours worked'' of the ''time spent in changing clothes . . . at the beginning or end of each workday'' in accordance with ''the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.''

Changing Clothes

The principal focus of the *Sandifer* decision turned on the definition of ''changing clothes.'' The workers argued that a provision in their collective bargaining agreement that excluded the changing of clothes from compensable time was not subject to the FLSA Section

[1] No. 12-417, 21 WH Cases2d 1477 (U.S.)(17 DLR AA-1, 1/27/14).

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[2] 29 U.S.C. § 203(o).

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203(o) exclusion because putting on and taking off the protective gear was not the same as ''changing clothes'' and, therefore, Section 203(o) was inapplicable.

Specifically, the workers argued that the term ''clothes'' does not include ''items designed and used to protect against workplace hazards.'' Instead, ''clothes,'' according to the workers, are meant for ''decency and comfort.''

U.S. Steel argued that '' 'clothes' encompasses the entire outfit that one puts on to be ready for work.'' The court rejected both interpretations, looking to the '' 'ordinary, contemporary, common meaning' '' of the term ''clothes.''[3]

The court noted that ''[d]ictionaries from the era of § 203(o)'s enactment [i.e., 1949] indicate that 'clothes' denotes *items that are both designed and used to cover the body and are commonly regarded as articles of dress*.''[4] Ultimately, the court's unanimous decision hinged on a textual statutory analysis. The court focused on the fact that an operative word in Section 203(o) was ''clothes'' and the statute contained no exclusion for protective clothing. Absent an express exclusion, ''clothes'' meant clothes—nothing more, nothing less.

''Many accessories—necklaces and knapsacks, for instance—are not 'both designed and used to cover the body.' Nor are tools 'commonly regarded as articles of dress,' '' the Supreme Court said, citing Webster's.

The court further explained that ''[t]he statutory context makes clear that the 'clothes' referred to are items that are integral to job performance; the donning and doffing of other items would create no claim to compensation under the [FLSA], and hence no need for the § 203(o) exception.''[5]

The court also explained what would not count as clothes, stating: ''Many accessories—necklaces and knapsacks, for instance—are not 'both designed and used to cover the body.' Nor are tools 'commonly regarded as articles of dress.' ''[6] The court addressed several specific items, including flame-retardant jackets, pants, hoods, hard hats, safety glasses and something called a snood, which Justice Scalia explained, ''on the ski slopes, one might call it a 'balaclava.' ''

Having determined the definition of ''clothes,'' the court then turned to the meaning of ''changing.'' The workers argued that ''changing'' means ''substitution''—i.e., taking off an article of clothing and replacing it with another. Thus, protective gear that is placed over street clothes is not covered by Section 203(o). The court rejected this interpretation, holding instead that '' 'time spent in changing clothes' includes time spent in altering dress.''[7]

Applying the above principles to the facts at hand, the court rejected the use of a de minimis doctrine because it ''does not fit comfortably within [Section 203(o)], which, it can fairly be said, is *all about* trifles—the relatively insignificant periods of time in which employees wash up and put on various items of clothing.''[8] Rather, the ''question for courts is whether the period at issue can, *on the whole*, be fairly characterized as 'time spent in changing clothes or washing.' ''[9]

In that regard, ''[i]f an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items . . . the entire period would not qualify as 'time spent in changing clothes' under § 203(o), even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing 'clothes' as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.''[10]

More Than Snoods

Although the focus in *Sandifer* was the meaning of ''changing clothes,'' much more can be discerned from the court's rationale. In language that will take center stage in a variety of wage and hour off-the-clock timekeeping cases under the FLSA, the court summarized the history of the Portal-to-Portal Act as abrogating earlier case law allowing employees to argue that they were entitled to compensation for any time ''necessarily required to be on the employer's premises'' for the employer's benefit.

Rather, ''preliminary'' and ''postliminary'' activities are compensable under the FLSA only if they are an ''integral and indispensable part of the principal activities *for which covered workmen are employed*.''[11]

Employers undoubtedly will cite this discussion in *Sandifer* as further support that noncore activities such as passing through security screening; booting up and shutting down computers; downloading assignments from home before traveling in a company vehicle to a first assignment; quickly checking one's smartphone or other device; remotely uploading data upon returning home at night; and other activities that are only tangentially related, but not integral to the performance of one's job, are *not* compensable principal activities that will start or extend an employee's workday.

Background

The Supreme Court—almost 70 years ago—observed that for a task or activity to be considered ''work'' under the FLSA, one must look to how the word ''work'' is ''commonly used''; the task or activity must involve ''physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the em-

[3] *Id.* (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).
[4] *Id.* (citing Webster's New International Dictionary of the English Language 507 (2d ed. 1950)).
[5] *Id.* at 9.
[6] *Id.*
[7] *Id.* at 11.
[8] *Id.* at 13.
[9] *Id.* at 14.
[10] *Id.* at 14-15.
[11] *Steiner v. Mitchell*, 350 U.S. 247, 256, 12 WH Cases 750 (1956) (emphasis added).

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ployer and his business.''[12] As the *Tennessee Coal* decision made clear, an employee is working if ''engaged in work *necessary to production*.''[13] *Tennessee Coal* remains good law; thus ''not all work-related activities constitute 'work or employment' that must be compensated.''[14]

Central to a court's analysis is the Portal-to-Portal Act,[15] by which Congress narrowed the FLSA's scope and overturned prior expansive judicial interpretations of the FLSA under which employees could recover for activities that had little to do with their actual job duties. In relevant part, the Portal-to-Portal Act provides that:

> ''no employer shall be subject to any liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee . . . wages . . . on account of any of the following activities of such employee . . .
>
> (1) 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, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities . . . .''[16]

When first called upon to consider the meaning of ''preliminary'' and ''postliminary'' activities, the Supreme Court held that such activities are compensable ''work'' only if they constitute an ''integral and indispensable part of the principal activities for which covered workmen are employed.''[17] Harking back to *Tennessee Coal*, the court reaffirmed that an employee's ''principal activities'' include only ''work of consequence performed for an employer'' and activities that are ''indispensable to the performance of productive work.''[18]

Thus, preliminary and postliminary activities are compensable as ''work'' under the FLSA only if they are integral and indispensable to the productive work the employee was hired to perform. In other words, postliminary tasks are not ''work'' unless they are integrally connected to—i.e., part of the very fabric of—the work the employee is hired to perform.[19]

In *Sandifer*, the Supreme Court confirmed that the Portal-to-Portal Act abrogated *Anderson v. Mt. Clemens Pottery Co.*,[20] insofar as that case held that ''the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.''[21] The court further reaffirmed that whether something rises to the level of a ''principal activity'' within the meaning of the Portal-to-Portal Act derives from whether that activity is ''so directly related to the specific work the employee is employed to perform'' as to be ''integral to job performance.''

Stated differently, the *Sandifer* court's decision reaffirmed that while many things may be a consequence of one's work, those activities only rise to the level of compensable principle activities if they are ''work of consequence.''

The potential implications of *Sandifer* are far reaching. For example, retailers and warehouse operators have faced litigation across the country involving security screening and bag checks and whether such screening is a preliminary or postliminary activity.[22] In fact, this issue is at the heart of a recent grant of certiorari before the Supreme Court in *Busk v. Integrity Staffing Solutions, Inc.*, 20 WH Cases2d 937 (9th Cir. 2013) (71 DLR AA-1, 4/12/13), *cert. granted* (U.S. Mar. 3, 2014) (No. 13-433) (41 DLR AA-1, 3/3/14). There, the petitioners already have cited *Sandifer* as further grounds why a decision of the Ninth Circuit holding that security screening may be compensable time was in error and at odds with decisions of the Second[23] and Eleventh circuits[24] on the issue. It now appears that the Supreme Court is poised to provide much-needed guidance on this critically important decision when it decides the Integrity Staffing decision next term.

FLSA claims remain on the rise, with off-the-clock cases mushrooming because there is some uncertainty as to what types of activities are compensable. While *Sandifer* ostensibly addressed a seemingly mundane question regarding whether personal protective equipment constitutes ''clothes'' within the meaning of FLSA Section 203(o), the real import of *Sandifer* for a much broader audience of employers and employees may prove to be its reaffirmation that preliminary and postliminary activities that are only tangentially related to, but not integral to, the performance of one's job are *not* compensable principal activities.

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[12] *Tenn. Coal, Iron and R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 4 WH Cases 293 (1944).

[13] *Id*. at 599 (emphasis added).

[14] *Gorman v. Consol. Edison Corp*., 488 F.3d 586, 589 (112 DLR A-1, 6/12/07; 111 DLR C-2, 6/10/08) (2d Cir. 2007).

[15] 29 U.S.C. §§ 251-62.

[16] *Id.* § 254(a).

[17] *Steiner* 350 U.S. 247, 256 (1956).

[18] 29 C.F.R. § 790.8(a).

[19] Once an employee performs his first principal activity of the day, he is subject to the Department of Labor's ''continuous workday'' rule, which states that all time spent between the first principal activity of the day and the last principal activity of the day is compensable. The ''continuous workday'' rule does not, however, answer the question of whether activities outside of the ''continuous workday''—so-called preliminary and postliminary activities—are ''work.'' Rather, ''[t]o decide whether [a postliminary or preliminary] activity is an 'integral and indispensable part' of a 'principal activity,' the court must determine whether the activity is 'performed as part of the *regular work* of the employees in the ordinary course of business.' '' *Duchon v. Cajon Co.*, 840 F.2d 16, 27 WH Cases 1077, 40 FEP Cases 1432 (6th Cir. Feb. 22, 1988) (citing *Dunlop v. City Electric, Inc.*, 527 F.3d 394, 401, 22 WH Cases 728 (5th Cir. 1976)).

[20] 328 U.S. 680, 6 WH Cases 83 (1946).

[21] 571 U.S. __ (quoting *Anderson*, 328 U.S. at 690-91).

[22] *See, e.g.*, *Gorman v. Consol. Edison Corp*., 488 F.3d 586, 13 WH Cases2d 1344 (2d Cir. 2007) (112 DLR A-1, 6/12/07), *cert. denied*, 553 U.S. 1093 (2008) (power plant) (111 DLR C-2, 6/10/08); *Bonilla v. Baker Concrete Constr., Inc*., 487 F.3d 1340, 1344-45, 13 WH Cases2d 160 (11th Cir.), *cert. denied*, 552 U.S. 1077 (2007) (airport) (237 DLR AA-3, 12/11/07); *Anderson v. Purdue Farms, Inc*., 604 F. Supp. 2d 1339, 1359, 14 WH Cases2d 1515 (M.D. Ala. 2009) (food-processing plant); *Ceja-Corona v. CVS Pharm., Inc*., No. 1:12-cv-01868 (E.D. Cal. Mar. 4, 2013) (distribution center); *Sleiman v. DHL Express*, No. 5:09-cv-00414 (E.D. Pa. Apr. 27, 2009) (mail-sorting center); *Whalen v. United States*, 93 Fed. Cl. 579, 601,16 WH Cases2d 648 (2010) (air traffic control center); Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa., 65 FLRA 996, 999-1000 (2011) (prison).

[23] *Gorman*, 488 F.3d 586.

[24] *Bonilla*, 487 F.3d 1340.