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Wage And Hour Issues Make Headlines Early In 2014

Authors: Jennifer G. Hall
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Based upon a unanimous ruling from the United States Supreme Court and comments from President Barack Obama during his State of the Union address, wage and hour issues are front and center for 2014. Under the wage and hour laws, specifically the Fair Labor Standards Act ("FLSA"), most employees must be paid at least minimum wage for every hour worked and 1.5 times their regular rate for all hours worked in excess of 40 hours per week.

While this seems like a simple concept, the U.S. Supreme Court's recent decision in *Sandifer v. U.S. Steel Corp*. demonstrates how complicated this can be. In that case, approximately 800 current and former employees sued U.S. Steel alleging that they should have been paid for the time to put on and take off ("donning and doffing") certain required protective gear, including flame-retardant jackets, pants, and hoods; hardhats; "snoods"; "wristlets" work gloves; leggings; "metatarsal" boots; safety glasses; earplugs; and respirators. U.S. Steel disagreed that the donning and doffing of these items were compensable. Instead, U.S. Steel argued that donning and doffing of these items were no different than "changing clothes" which is excluded by the FLSA. Specifically, 29 U.S.C. § 203(o) provides:

Hours Worked. In determining for the purposes of [the minimum wage and overtime/maximum hours provisions] of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday 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.

This provision means that union employees are not paid to change clothes unless the collective bargaining agreement ("CBA") provides otherwise. The CBA between U.S. Steel and the employees' union did not provide compensation/counting hours worked for changing clothes. In an unanimous decision, the Supreme Court determined that the donning and doffing of the protective gear was the same as changing clothes and, therefore, not compensable under § 203(o) of the FLSA.

What does this mean for employers? For unionized workplaces, employers should expect their respective unions to push for compensation of changing clothes, including the donning and doffing of protective gear, in the next round of union negotiations if the current CBA does not provide so already. For non-unionized workplaces, employers should not assume that the donning and doffing of protective gear is no longer compensable. *U.S. Steel* was unique in that the case involved unionized employees and there is a specific exception in the FLSA for unionized employees. The test for whether the donning and doffing of protective gear in non-unionized workplaces remains whether such items are "preliminary to or postliminary to the employee's principal activity or activities." Therefore, the *Sandifer* case did little to resolve donning and doffing issues that non-union employers face.

Additionally, in his State of the Union address, President Obama stated his intention to raise the minimum wage from $7.25 to $10.10. To accomplish this goal, he will issue an executive order requiring that all federal contractors immediately raise minimum wage for employees on federal projects. President Obama will turn to

Congress to pass a bill to raise the minimum wage for private sector employees to $10.10. Look for blog updates on this issue.