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In Light of Supreme Court's Sandifer Decision, Employers Should Revisit "Donning and Doffing" Compensation Policies

Authors: Whitney M. Dowdy
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On January 27, 2014, the United States Supreme Court held that time spent donning and doffing required protective gear was not compensable under the Fair Labor Standards Act (FLSA) and the terms of a collective bargaining agreement. In *Sandifer v. United States Steel Corp.*, the Court ruled that the donning and doffing of protective gear qualified as "changing clothes" under § 203(o) of the FLSA. Pursuant to § 203(o), a labor union and an employer can determine whether time spent in changing clothes at the beginning or end of each workday will be compensable.

In the *Sandifer* case, current and former U.S. Steel unionized employees claimed they were not properly compensated for donning and doffing the required protective gear prior to and after their shifts. U.S. Steel alleged, however, that the donning and doffing in question, which would otherwise be compensable under the FLSA, was not compensable pursuant to the collective bargaining agreement. The protective gear in the *Sandifer* case included flame-retardant jackets and pants, hoods, hard hats, neck protectors, wristlets (protective detached shirt-sleeves), work gloves, leggings, steel-toed boots, safety glasses, ear plugs and respirators. The Supreme Court held that "clothes" under § 203(o) means "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court further held that changing clothes includes putting on substitute clothing and "altering dress," but failed to go as far as embracing the holdings of some courts of appeal that clothes means anything worn on the body. Specifically, the Supreme Court concluded in this case that safety glasses, ear plugs and respirators were not "clothes" under § 203(o). The implication from the Court's Opinion, however, is that in situations where the vast majority of donning and doffing includes items that are considered "clothes," employers may preserve their agreements and practices with the union in a collective bargaining agreement and will, therefore, not be subject to liability. Employers, therefore, must be cognizant of what items employees spend the majority of their time donning and doffing, and the fact-intensive analysis that will likely be performed by the courts.

While the Supreme Court's decision in *Sandifer* speaks to employers with unionized workforces and their collective bargaining agreements, non-unionized employers should recognize that the Supreme Court's Opinion implies that the donning and doffing in question in the *Sandifer* case would have been compensable under the FLSA without application of the § 203(o) exception. For that reason employers should review any donning and doffing requirements, the time spent on those activities, and whether those activities are being properly compensated.