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Workplace Safety and Health Update

Week of ***March 10, 2014***

High Court Holds Time Changing Clothes Is Not Compensable

A U.S. Supreme Court decision may well have put to rest the highly litigious issue of whether or not workers are entitled to payment for time spent putting on and taking off personal protective equipment (PPE).

Under the Fair Labor Standards Act (FLSA), time spent changing clothes or washing at the beginning or end of each workday is excluded from compensable time if it is treated as non-work time under a collective bargaining agreement. The High Court, *Sandifer v. U.S. Steel Corp.*, unanimously interpreted that language, drawn from Section 203(o) of the FLSA, as indicating compensation is not warranted for most PPE.

To arrive at that conclusion required the Court to interpret what Congress meant by the phrase "changing clothes." Workers from a Gary, Indiana, steel plant, seeking back pay from their employer, claimed "changing" could mean only substituting one item for another. Since "changing" is not involved because PPE is put on over street clothes, the time to do so is compensable, they contended. "Clothes," they argued, should exclude any items designed and used to protect against workplace hazards. The employer claimed the time was not compensable under its collective bargaining agreement with the workers' union.

Examining Congress' intent, the High Court disagreed with the workers, saying that in 1949, when the language was adopted, "changing" could mean either substituting or altering. As a result, whether a worker puts clothes on over other items that are already worn or substitutes one item for another should not affect whether the time spent can be the subject of collective bargaining, and thus the possible exclusion from compensable time, the Court said. As for "clothes," dictionaries from that time indicate the term was to be applied to items designed and used to cover the body and commonly were regarded as items of dress. Thus, time donning or doffing the protective equipment referenced by the workers fell squarely within the Section 203(o) provision and, pursuant to the parties' collectively bargained exclusion, thus was not compensable, the Court concluded.

The workers had cited 12 items they were required to put on for work. The Court said nine clearly fit the definition of "clothes": a flame retardant jacket, pants, hood, hardhat, snood (type of hood), wristlets, work gloves, leggings and steel-toed boots. However, the last three—safety glasses, earplugs and respirator—did not. For these three, the Court said, the question was whether the minimal time devoted to putting them on and taking them off should be deducted from the non-compensable time. Some courts, applying a *de minimis* principle, have said this time is not compensable because the time involved is so trivial. But the Supreme Court said that was not the proper test. Instead, courts should look at the total amount of time involved and what was done during the bulk of it. If most of the time was spent donning and doffing clothes, then Section 203(o) applies. However, if the vast majority of the time was spent with equipment and non-clothes items, such as a diver's suit and tank, then the entire period would not qualify under the provision, even if some of the time involved workers' clothing.

This decision likely will affect the poultry processing, meat packing and basic metals industries, as well as others, which have faced lawsuits over the issue in recent years.

Barges at Coal Load-out Facility Fall under MSHA, Judge Rules

MSHA's jurisdiction extends to the barge staging area of a terminal that employs workers who prepare and load the barges with shipments of coal. An administrative law judge made this ruling in a case arising after a 52-year-old deckhand fell off a barge into the Tennessee River in February 2012 and drowned.

To rule otherwise, ALJ David P. Simonton said, would lead to the absurd result that load-out employees could be covered by MSHA on and off throughout their workday depending on whether their duties took them to the land-based portion of the facility or onto the barges. ALJ Simonton also held that not extending coverage over the entire load-out operation would conflict with congressional intent that MSHA be given the benefit of any doubt in jurisdictional disputes.

At the time of the accident, the employee had been measuring the storage capacity of a barge to determine how much coal it could carry. The case was brought by his employer, SCH Terminal Co., Inc., which operates the Calvert City Terminal in Kentucky, challenging MSHA citations The facility stores coal, blends it to customer specifications and ships it by rail, truck and barge. The terminal facility consists of a land processing portion, a fixed loading dock and a barge staging area. Since the victim was on a moveable barge at the time of the accident, SCH asserted he was outside MSHA's jurisdiction. SCH neither owns the barges nor the tugboats that move them. However, its employees are fully engaged in the loading process from the time the barges arrive in the staging area until the barges are released downriver fully loaded. The work requires employees move back and forth among the three facility subunits and maintain communication with the load-out operator.

In deciding against SCH, ALJ Simonton also noted the Federal Mine Safety and Health Review Commission has ruled that operations taking place at a single site must be viewed as a collective whole; otherwise, separate business identities could be set up along functional lines with each doing some part of a job that in reality is a single operation.

For SCH, the decision means it could be liable for the $163,000 in fines MSHA assessed in connection with the accident. However, ALJ Simonton's decision also has ramifications for other load-out facilities set up in a similar way.

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Ask a Jackson Lewis Attorney

Q:

One of our employees just gave us notice that he is resigning, effective in two weeks. Can we tell him today is his last day? If we do so, must we pay him for the two weeks?

Answer provided by Teresa Burke Wright, a shareholder in the Washington, D.C. Region office:

When an employee gives notice of resignation with an effective date in the future, employers often terminate the employee's employment that day. This may be done for security reasons or simply as a matter of practice. There is nothing in federal law, nor the law of most states, that requires the employer to keep that worker employed. As long as the employee works in an at-will state, he or she can be discharged for any reason, and at any time, and that includes terminating the employee that day, rather than allowing the employee to continue working during his or her notice period. Some states may require notice pay, however, so always check your state's requirement.

Also, check your company handbook to ensure the company is following its own policies. This employee's situation should be handled consistently with past cases. Treating one employee differently from others in a similar situation, without a legitimate business explanation, can lead to discrimination claims.

Do you have an employment law question that may be of interest to other employers? If so, please send it to Regan Harrison at regan.harrison@jacksonlewis.com for consideration in upcoming issues of this newsletter.

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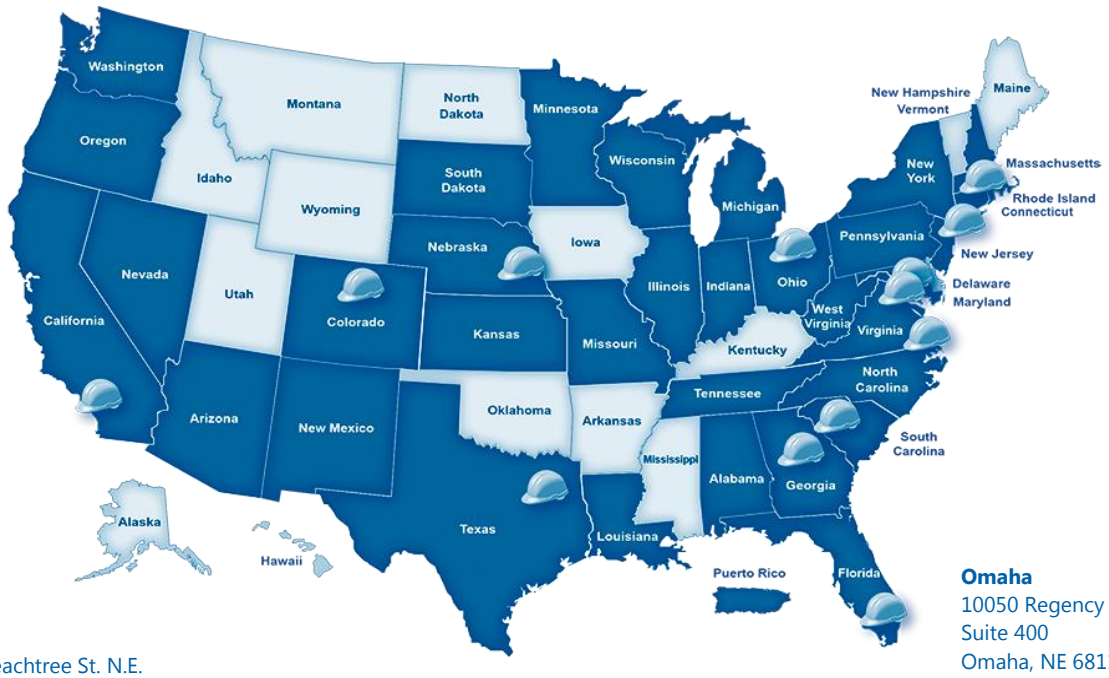

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