U.S. Supreme Court Further Clarifies the “Changing Clothes” Standards in the Fair Labor Standards Act

In *Sandifer v. United States Steel Corp.*, several employees of the United States Steel Corporation (U.S. Steel) brought an action seeking back pay from their employer for time they spent donning and doffing certain items of protective gear. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 874 (2014). The employees alleged the protective gear, including protective gloves, boots, leggings and a respirator, was required by U.S. Steel due to hazards associated with working at the steel plant. *Id.* at 874. The United States District Court for the Northern District of Indiana held that donning and doffing these items constituted “changing clothes” and was therefore non-compensable under the Fair Labor Standards Act of 1938 (FLSA or the Act). *Sandifer v. U.S. Steel Corp.*, 2009 U.S. Dist. LEXIS 96715, *35. The Seventh Circuit Court of Appeals affirmed that ruling. *Sandifer v. United States Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012). Upon review, the United States Supreme Court held unanimously that the phrase “changing clothes,” as used in the FLSA, means the act of putting on “items that are both designed and used to cover the body, and are commonly regarded as articles of dress.” *Id.* at 876-877. Thus, the U.S. Supreme Court found that time spent donning and doffing the gear at issue in *Sandifer* was non-compensable under the FLSA. This column examines the basis for the Supreme Court’s decision and questions what effect this decision will have on the development of wage and hour law.

The Fair Labor Standards Act of 1938 and the Portal-to-Portal Act

Enacted in 1938, the FLSA governs minimum wages and maximum hours for certain employees “engaged in commerce or in the production of goods for commerce, or are employed in an enterprise engaged in commerce or in the production of goods for commerce” in any workweek. *Sandifer*, 134 S. Ct. at 875 (quoting 29 U.S.C. § § 206(a), 207(a) and 213). While the Act defines “employee” (“any individual employed by an employer”) and “employ” (“to suffer or permit work”), the Act does not define “work” or “workweek.” *Id.* The absence of these definitions ultimately led to a series of opinions where the Supreme Court gave these terms broad effect, culminating in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

In *Anderson*, the Supreme Court held “the statutory workweek includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at the prescribed workplace.” *Anderson*, 328 U.S. at 690-691. That period includes time spent pursuing “certain preliminary activities after arriving … such as putting on aprons and overalls [and] removing shirts.” *Id.*, at 692-693. Following the *Anderson* opinion, organized labor seized on the Court’s expansive construction of compensability by filing what became known as “portal” actions, which is a reference to the “portals” or entrances to mines, where workers put on their gear. Congress responded by passing the Portal-to-Portal Act of 1947, stating that the FLSA had been
“interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees.” Sandifer, 134 S. Ct. at 875.

One of the effects of The Portal-to-Portal Act (PTPA) was to exclude from mandatorily compensable time any “activities which are preliminary to or postliminary to [the] 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.” Id. (citing 29 U.S.C. § 254(a)(2)). Subsequently, a Labor Department interpretive bulletin advised that, although changing clothes would be considered preliminary or postliminary activities when performed outside the workday, that those same activities may “in certain circumstances be so directly related to the specific work [of] the employee [that they] would be regarded as an integral part of the employee’s ‘principal activity.’” Sandifer, 134 S. Ct. at 875 (citing 29 C.F.R. § 790.7(g), n. 49).

In response to the tension between the PTPA and the Labor Department bulletin, Congress amended the FLSA in 1949. The amendment added the provision at issue in Sandifer, which provides:

Hours Worked. In determining for the purpose of [the minimum-wage and maximum-hours sections] 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 to the particular employee.


Thus, under section 203(o), compensation for the time spent washing or changing clothes is a subject appropriately determined through collective bargaining. Sandifer, 29 S. Ct. at 876. But, if preliminary or postliminary tasks such as putting on safety gear is not “changing clothes” for purposes of § 203(o), then it is mandatorily compensable under the FLSA.

The Facts of Sandifer

As noted, the plaintiff-employees sought back pay for time spent putting on and taking off various pieces of protective gear. The plaintiffs alleged that U.S. Steel required the employees to wear all of the items due to hazards regularly encountered in steel plants. Sandifer, 134 S. Ct. at 874. The plaintiffs noted 12 items in the lawsuit as the most common kinds of required protective gear: “a flame-retardant jacket, pair of pants, and hood; a hardhat; a ‘snood’”; (a hood that also covers the neck and upper shoulder area), “‘wristlets’” (essentially detached shirtsleeves); “work gloves; leggings; ‘metatarsal’ boots; safety glasses; earplugs; and a respirator.” Id. at 874.

The question of compensability in the Sandifer case turned upon a provision in the relevant collective-bargaining agreement. The agreement with the plaintiffs’ union provided that time for donning and doffing protective gear was not compensable. The validity of that provision turned upon the applicability of § 203(o), which allows parties to decide, as part of a collective-bargaining agreement, that time spent changing clothes...at the beginning or end of each workday” is noncompensable. Id. at 874.

U.S. Steel did not dispute the Seventh Circuit’s conclusion that “[h]ad the clothes-changing time in this case not been rendered noncompensable pursuant to § 203(o), it would have been a principal activity,” and thus mandatorily compensable. Id. at 876. The plaintiffs argued that the putting on and removing of the protective gear did not constitute “changing clothes,” and, therefore, should be mandatorily compensable under the Act.
The U.S. Supreme Court began its analysis by noting the fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Id.* at 876 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Court noted that dictionaries contemporaneous to § 203(o)’s enactment defined “clothes” as “items that are both designed and used to cover the body, and are commonly regarded as articles of dress.” As a result, the Court assigned that meaning to the word as used in § 203(o). *Sandifer*, 134 S. Ct. at 877.

In reaching this conclusion, the Court rejected several arguments raised by the employees. First, the plaintiffs argued that the word “clothes” is too indeterminate and should be read to exclude items that are designed to protect against workplace hazards. *Sandifer*, 134 S. Ct at 877. The Court noted that under one definition, “clothes” is “a general term for whatever covering is worn, or is made to be worn, for decency or comfort.” *Id.* Under the Court’s analysis, “comfort” does include safety. For example, because a parasol or work gloves can protect against the sun’s rays, or scrapes and cuts, both can enhance the wearer’s “comfort.” *Id.*

The Court also noted that the employees’ interpretation of the statute would effectively render § 203(o) a nullity. Section 203(o) provides an exception to a statutory compensation requirement when that conduct constitutes “an integral and indispensable part of the principal activities for which covered workmen are employed.” *Id.* at 877 (citing *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)). Because protective gear is the only clothing that is integral and indispensable to the work of many positions, the Court concluded that the employees’ definition of the term would limit § 203(o) to “what might be called workers’ costumes, worn by such employees as waiters, doormen and train conductors.” *Id.* at 877.

The Court discussed the historical context surrounding § 203(o)’s passage, and specifically highlighted an illustration included in the Labor Department’s 1947 regulations, demonstrating how “changing clothes” could be intimately related to a principal activity. That illustration indicated an employee in a chemical plant cannot perform his duties without putting on certain “clothes” as is required by law. *Id.*

Second, the employees argued that the Court’s definition of “clothes” for purposes of the statute was so broad that absurd items would be embraced by it, including “bandoliers to barrettes to bandages.” *Id.* The Court rejected this argument, noting that the statutory section in question dealt with clothes integral to job performance, and that the donning and doffing of other items would create no claim to compensation under the Act. *Id.*, at 878.

Importantly, the Court also recognized the boundaries of its own definition, in that “our definition does not embrace the view, adopted by some Courts of Appeals, that ‘clothes’ means essentially anything worn on the body—including accessories, tools, and so forth.” *Id.* at 878 (citing *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139-1140 (10th Cir. 2011) (“clothes” are items or garments worn by a person, including knife holders). The Court observed that:

> The construction we adopt today is considerably more contained. 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.’ Our definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices.

*Sandifer*, 134 S. Ct. at 878.

The Court also clarified the meaning of the word “changing.” The employees had argued that “changing” connotes substitution, and that—for example—an individual is not described as “changing clothes” when he puts on an overcoat. *Id.* The Court accepted that the normal meaning of “changing clothes” connotes substitution, but again turned to the relevant dictionary for a definition that included an alternative definition of “altering.” *Id.*
The Court concluded that while the usual meaning of “changing clothes” may connote substitution of clothing, the “broader statutory context makes it plain that ‘time spent changing clothes’ includes time spent in altering dress.” Id. Also, from a policy perspective, “the object of § 203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually-beneficial negotiation.” Id. If the definition of “changing” turned on whether or not clothing was substituted, there would be no predictability, because whether one actually exchanges street clothes for work clothes or simply layers them over the top is a personal choice, influenced by a variety of factors. Id. at 740-741.

The Court ultimately held that the employees’ donning and doffing of the protective gear at issue qualified as “changing clothes” within the meaning of § 203(o). Sandifer, 134 S. Ct. at 741. As to the 12 items at issue in the litigation, the Court determined that the first nine fit within the interpretation of “clothes” as “items that are both designed and used to cover the body, and are commonly regarded as articles of dress.” These include jacket, pants, hood, gloves, hard-hat, snood, wristlets, leggings, and boots. Id. at 741.

Three items, however, did not satisfy the standard. The Court noted that while glasses and earplugs have a covering function, they are not commonly regarded as articles of dress. As to the respirator, the Court noted that it fell short on both grounds. Id. The Court then addressed whether the time spent donning and doffing these non-clothing items would be deducted from the non-compensable time. The Court declined to apply a de minimis rule. Id. at 741-742. Nonetheless, the Court did not deduct the time spent with the non-clothes items from the non-compensable time:

If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver’s suit and tank) 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.

Id. at 743.

**Sandifer’s Place in Contemporary Wage and Hour Law**

The United States Supreme Court has now handed down two recent opinions providing guidance as to whether employees must be compensated while changing into and out of clothing and safety equipment in the work setting. In 2005, the Court examined the effect of the Portal-to-Portal Act on the compensability of walking and waiting time between the production and the changing areas. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005). There, the Court held that the time spent walking from the changing area after donning protective gear, and the time spent walking to the changing area in order to doff the protective gear, were compensable under the FLSA. IBP, Inc. 546 U.S. at 39. The Court also held that the time spent waiting to doff the safety equipment was also mandatorily compensable under the FLSA. Id. However, the Court held that the time spent waiting to don the first piece of safety gear that begins the continuous workday is excluded from the FLSA. Id. at 528; (see also, Kimberly Ross, U.S. Supreme Court Finds Time Spent in Safety Gear is Compensable; Time Spent Waiting to Don Gear is Not, Illinois Association of Defense Trial Counsel, IDC Quarterly, Vol. 16, No. 1 (16.1.15).

The safety equipment involved in IBP, Inc. included outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. IBP, Inc. 126 S. Ct. at 521-522. Other employees were also required to wear a variety of protective equipment for their hands, arms, torsos, and legs. This gear included chain link metal aprons, vests, plexiglass armguards, and special gloves. Id. IBP had previously concluded that the workday began with the first piece of meat cut, and ended with the last piece of meat cut. IBP would pay for four minutes of
clothes-changing time, but did not contend that this fully compensated the employees for the preproduction and postproduction time spent donning and doffing the safety equipment. *Id.* at 522. The *IBP, Inc.* Court held that the donning and doffing of such equipment was “integral and indispensable” to a “principal activity” of the employment under the FLSA, and, therefore, compensable. *Id.* at 528.

However, the employer in *IBP, Inc.* did not raise a challenge under § 203(o). According to *Sandifer*, most of the items involved in *IBP, Inc.* would arguably constitute “clothing.” Thus, under the *Sandifer* rule, employees’ time spent changing before and after production at the IBP facility would not be mandatorily compensable under the FLSA, but rather would be appropriate subject matter for collective bargaining.

An interesting question for practitioners and employers is what role the *Sandifer* opinion will play in the tapestry of wage and hour law. The *IBP, Inc.* opinion focused upon timing, or what tasks constitute the beginning and end of a work day. *Sandifer*, in contrast, focused upon the type of clothing and/or equipment worn. Future opinions are likely to focus upon some interaction between those two concepts, and in fact, some reported opinions already appear to show this interplay. For example, in *Mitchell v. JCG Industries, Inc.*, the Seventh Circuit examined “whether the time spent in changing during the lunch break is worktime that must be compensated.” 745 F.3d 837, 839 (7th Cir. 2014). (holding the time spent donning and doffing sanitary gear over the top of their street clothes during lunch breaks is *de minimis*, and therefore not mandatorily compensable). In *Jones v. C&D Technologies, Inc.*, a federal district court examined whether travel time should be included with donning and doffing time. 2014 U.S. Dist. LEXIS 39009 (S.D. Ind. 2014) (declining to “expand the Supreme Court’s holding in *Sandifer* to lump non-‘hanging’ activities such as travel time in with donning and doffing, such that time spent on those activities will also be included in the 5- and 10-minute allowances.”).

**Conclusion**

In *Sandifer* the Supreme Court ruled that under the plain meaning of the Portal-to-Portal Act the compensability of time spent donning and doffing most protective equipment is governed by the terms of any applicable collective bargaining agreement. The Supreme Court in *Sandifer* Court did recognize, however, that certain types of protective equipment such as respirators were not sufficiently similar to traditional forms of attire to fall within the Portal-to-Portal Act’s definition of “clothing,” and suggested that time spent donning and doffing such items might therefore be compensable under the *Anderson* rule—at least insofar as the time spent donning or doffing them was not insignificant when compared to other preparatory or wind-down activities.

Employers would be well advised, therefore, to ensure that any language in their collective bargaining agreements relating to time spent donning or doffing is sufficiently broad to encompass whatever protective equipment the job requires. Where there are particular items worn by employees with regularity, employers should explicitly identify those items in their collective-bargaining agreements as items whose donning and doffing is not compensable.

**About the Author**

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