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How Sandifer May Affect Nonunionized Employers

Law360, New York (February 04, 2014, 4:17 PM ET) -- The U.S. Supreme Court recently addressed whether, under the Fair Labor Standards Act, nonexempt employees in a union setting must be paid for time they spend putting on protective gear before they start work ("donning" such gear) and taking it off at the end of the workday ("doffing").

Under the FLSA, employers are not required to pay employees for time spent changing clothes at the beginning or end of the workday unless changing clothes is an integral and indispensable part of the principal activity of their employment. Courts have held that clothes changing is integral and indispensable and therefore compensable when employees must change on site at the employer or changing is required by statute or environmental regulations to protect employees from chemicals or other workplace hazards. When clothes changing is compensable only unionized employers may bargain compensability away through the process of collective bargaining.

But while commentators have noted that Sandifer only applies to unionized employers there are nuances in the Sandifer decision that may be applicable to all employers, whether union or nonunion. In particular, the Sandifer court focused heavily on the idea that the purpose of Section 203(o), and the preceding portal-to-portal law, was to lessen litigation over portal activities by conferring bargaining rights upon employers, unions and employees allowing agreements to be reached on the scope and extent to which portal activities and time spent in those activities would be compensated.

While the Sandifer decision focused its attention on the donning and doffing of clothing it is important to note that prior to the passage of Section 203(o), the Portal-to-Portal Act, §254, also contemplated agreements between employers and employees — whether union or nonunion — on whether "portal" activities would be compensated.

Portal activities could include not just clothes changing but also travel time and other preliminary and postliminary activities. Section 254(b) states that preliminary and postliminary activities described in Section 254(a) that would otherwise be noncompensable can be deemed compensable through an agreement between an employer and a union or with employees directly via "an express provision of … contract … or custom or practice …" 29 USC §254(b). These activities have traditionally included walking time or other travel time but can also include clothes changing when it is not required as an integral or indispensable part of the job.

Congress expanded on the idea of employers and employees reaching an agreement over these activities by passing Sections 254(c) and (d), which allow companies and employees to reach compromise positions on compensating for these activities only during certain times rather than compensating for all of the time spent on them. Section 254(c) states:

“Restriction on Activities Compensable Under Contract or Custom

For the purposes of subsection (b) of this section an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.” (Emphasis added.)

(d) states:

“Determination of Time Employed with Respect to Activities
In the application of the minimum wage and overtime compensation provisions of the FLSA … in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which an employee engages in any such activity which is compensable within the meaning of subsection (b) and (c) of this section.” (Emphasis added.)

For nonunion employers, if clothes changing and washing up are not integral and indispensable parts of the job you can nonetheless reach an agreement or understanding with your employee on the degree to which you will compensate for any preliminary or postliminary work activities.

Under these provisions an employer can have a policy or agreement with employees that says employees will be paid for these activities if they occur in the first “X” minutes of the shift or the last “X” minutes of the shift.

That Congress intended for agreements between employers and employees, whether union or nonunion, to be quite broad over portal activities cannot be disputed. In the congressional record for the passing of Section 254 this intent to expand employers’ rights to determine what of these portal activities would be considered work, and therefore compensable, is made clear by Sen. Albert Hawkes and Sen. Forrest Donnell.

Hawkes: To give an illustration, am I not correct in understanding that the [s]enator is saying that the parties can agree to anything which they wish to agree to as being “work?”

Donnell: Certainly.

Hawkes: In other words, they can agree either verbally or in writing that everything an employee does from the time he gets out of bed in the morning and performs his ablutions until he gets home at night will be regarded as work, so long as they expressly provide so in the contract and know it must be paid for as work.

Donnell: The [s]enator is precisely correct.

Hawkes: And in that way, by knowing what it is to be paid for, it will be possible for a business to be conducted satisfactorily because it knows in advance what must be paid for. On the other hand, the manager of a business does not know what is understood in that connection by either party, it will be impossible for him or anyone else to continue to operate the business under such conditions.

Donnell: The [s]enator from New Jersey has stated the matter so clearly that there could be no misunderstanding.

93 Cong. Rec. 2179 (1947)

One difficulty arose following the passage of the Portal-to-Portal Act in that employees at factories that for safety or environmental reasons required the changing of clothes into special protective clothing were deemed to be engaged in a principal work activity by doing that changing and therefore commencing the continuous workday. As such, two years after the passage of the Portal-to-Portal Act, Congress then passed Section 203 to close this gap and further expand bargaining rights to include — in unionized settings only — the donning and doffing of clothing and washing. even in industries requiring such protective gear.

The decision by the Sandifer court acknowledged this as the purpose of Section 203 and that its overriding concern was to provide bargaining rights in the resolution of these issues at the bargaining table, rather than in the court. In fact, the purpose of Section 203(o) was stated by Congressman Christian Herter who said, its purpose was to "avoid another series of incidents which led to the portal-to-portal legislation' ..." Congressman Herter went on to say:

"In some … collective bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements. The difficulty, however, is that suddenly some representative in the Department of Labor may step into one of those industries and say, 'You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day.' That situation may arise at any moment. This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement. It sounds wordy, but in effect it is a very simple amendment."

95 Cong. Rec. 11210 (1949)

In Sandifer the court has recognized that the overriding concern of Congress with Section 203(o) was to confer those bargaining rights. The fact that there might be some activities that do not involve the changing of clothes, but rather other nonclothing items such as earplugs, safety glasses and respirators, does not transmute Section 203(o)'s main purpose of rendering those time periods bargainable.

The court in Sandifer stated that judges should not be converted to time-study engineers. But the Supreme Court also stated that even though earplugs, respirators and safety glasses were not donning and doffing clothing, those activities, as long as they did not constitute the "vast majority" of the time being spent at issue, could nonetheless be part of the collective-bargaining process.

One hopes that post-Sandifer litigants and courts do not start demanding a breakdown of the amount of time spent on putting in earplugs, safety glasses and respirators vis-à-vis the donning and doffing of clothes and washing up. Imagine the dilemmas created if time studies get performed in the locker room and showers. Any guesses as to how employees would react to being videotaped while showering or stripping off their clothes to measure that time versus the amount of time spent putting in earplugs or donning a respirator?

A better application and analysis of the Sandifer decision is for courts and parties to focus on the bargaining rights Congress intended to convey, namely fairly broad bargaining rights over the portal type of activities at the beginning and end of a work shift.

By allowing companies and unions — and in some cases companies and employees — to reach agreement on the compensation for preliminary and postliminary activities, such as travel time, changing and washing up, the courts would be furthering the purpose of Congress when it passed the Portal-to-Portal Act and Section 203(o) legislation to promote harmonious labor relations and allow the parties to reach a mutually amenable agreement without second guessing from the DOL or courts.

Reaching an agreement both in union and nonunion settings can help insulate employers from collective actions alleging additional compensation for such activities. Employers who have employees donning clothing or walking off the clock at the beginning and end of the day may wish to use the Sandifer decision and the provisions of Section 254(b), (c) and (d) to inoculate themselves from claims for uncertain levels of compensation for these activities.

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