White and Williams LLP

# Third Circuit Adopts Majority Approach for Determining Whether Time Spent Donning and Doffing Must Be Compensated Under the FLSA

*Labor and Employment Client Alert*
9.5.23

On August 16, 2023, the Court of Appeals for the Third Circuit clarified the test courts should use when determining whether workplace uniforms or safety gear are integral and indispensable to an employee's principal activities of employment, and therefore, whether time spent donning and doffing should be compensable under the federal Fair Labor Standards Act (FLSA). *Tyger v. Precision Drilling Corp.*, No. 22-1613, __ F.4th __ (3d Cir., August 16, 2023). The court reversed the District Court for the Middle District of Pennsylvania, which had relied on the Second Circuit's "extraordinary risk" test in granting summary judgment to the employer. Under that test, courts determine whether uniforms or gear are integral and indispensable based on whether they guard against extraordinary workplace hazards as opposed to ordinary ones. In *Tyger,* the Third Circuit declared this test too narrow, and adopted the multi-factor test applied by all other circuits to have considered the issue.

By way of background, under the Portal-to-Portal Act—an amendment to the FLSA passed in 1947—employers are not required to pay workers for "activities which are preliminary to or postliminary to" employees' principal activity or activities of employment. However, as the court noted, the U.S. Supreme Court had since clarified that, in certain instances, time spent donning and doffing protective gear or workplace uniforms may constitute compensable activity.

To determine whether workplace gear/uniforms are sufficiently integral and indispensable to entitle employees to compensation for time spent doffing and doffing, the Third Circuit adopted a two-part, multi-factor test in line with most other circuits.

The court held that whether the employee uniforms or protective gear are "integral" requires review of the following factors:

1. **Location:** Whether the changing takes place before or after workers cross the workplace threshold. The court noted that even if the donning and doffing occurs at home and not onsite, location remains relevant; what matters is the location where the majority of workers change their gear or clothing regularly—whether out of practical necessity or in line with industry custom. By way of example, the Court noted that while an employee who works as a sports team mascot could, in theory, change into costume then commute to a sporting arena, most such employees would change on-site. In short, the question is whether the employee has a meaningful opportunity to change into uniform at home.
2. **Regulations:** Where certain specified uniforms or protective gear are required by law or regulation, they are more likely to be considered integral to the employee's principal activities.
3. **Type of Gear:** Courts should consider what kind of gear is required, whether by regulation, the employer, or the nature of the work —the more specialized the gear, the more likely it is integral. Citing regulations promulgated by OSHA, the court found that each employer must assess its own workplace risks and select or require use of specific gear to protect against those hazards. The employer's choices to provide gear, and of what gear to provide, will determine the link between the gear selected and the principal activities being performed.

Noting that not all uniforms will be considered integral, the court expressly declined to draw any bright-line rule to determine integral versus not. Rather, the determination requires a case-by-case, fact-sensitive inquiry based on the above factors.

As to whether employee uniforms/gear are "indispensable," the court held that to satisfy this element, gear or clothing need not be "strictly necessary," but rather only "reasonably so." As an example, the court observed that while workers in a battery plant could, in theory, perform their duties without showering and changing clothes, they would likely suffer illness by doing so. By contrast, conducting security screenings on warehouse workers would not be reasonably necessary to the performance of their job duties. Relying on U.S. Supreme Court precedent, the court found that clothing or gear will be considered indispensable only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively.

In rendering its decision, the court noted that employees spending only *de minimis* time on donning and doffing may not be entitled to compensation. However, employers should carefully evaluate that doctrine with respect to their specific circumstances before attempting to rely on it.

Based on the above multi-factor test, the court remanded the case for trial to determine where the employees change; whether regulations or industry custom require changing into gear at work or at home; how specialized the gear is; whether the gear itself is required by regulation; whether time spent donning and doffing was *de minimis*; and, ultimately, whether the gear was reasonably necessary for doing the work safely and well. The gear at issue consisted of flame-retardant coveralls, steel-toed boots, hard hats, safety glasses, gloves, and earplugs.

Note that *Tyger* applies only to the FLSA. Donning and doffing time that is not compensable under FLSA may still be compensable under state law.

If you have any questions, please contact any member of the Labor and Employment Group.