Legal Update Article

Third Circuit Offers Guidance on When Donning and Doffing Safety Gear Is Compensable

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A federal district court applied the wrong legal test when it held on summary judgment that oil rig workers were not entitled to compensation under the Fair Labor Standards Act (FLSA) for the time they spent changing into and out of protective gear, holds the U.S. Court of Appeals for the Third Circuit. *Tyger v. Precision Drilling Corp.*, No. 22-1613, 2023 U.S. App. LEXIS 21374 (Aug. 16, 2023).

The court held the compensability of time spent changing into clothes depends on a multifactor test and rejected a standard (adopted by the district court from the Second Circuit, which has jurisdiction over Connecticut, New York, and Vermont) that pegs compensability on whether the clothing guards against dangers that "transcend ordinary risks." Under the Third Circuit test, changing into some clothing that is generic and guards against ordinary risks might be compensatory, broadening the scope of compensable activity than permitted by the Second Circuit.

The Third Circuit has jurisdiction over federal courts in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

Background

Employers must sometimes pay workers for time spent changing into and out of protective gear. But when? Even though changing into gear might be considered "work," the Portal-to-Portal Act, 29 U.S.C. 254(a), provides that certain activities "which are preliminary to or postliminary to" an employee's "principal activity" are nonetheless non-compensable under the FLSA. Based on U.S. Supreme Court precedent, activities that are "integral and indispensable" to an employee's principal activity are compensable. The question: What is "integral" and what is "indispensable"?

At issue in this case was whether time spent by oil rig workers donning and doffing flame-retardant coveralls, steel-toed boots, hard hats, and other required safety gear was integral and indispensable to their principal activity of drilling for oil and gas.

The Third Circuit had not previously adopted a standard for defining whether an activity is integral to productive work. Absent circuit guidance, the U.S. District for the Middle District of Pennsylvania borrowed the Second Circuit's test, which asks whether the protective gear is meant to protect against dangers that "transcend ordinary risks." Under this test, the district court found the risks in this case were "ordinary, hypothetical, or isolated" and, as a result, held changing into protective gear was not integral or indispensable to oil drilling.

On review, the Third Circuit vacated the decision. It rejected the Second Circuit's narrow approach used by the district court in favor of a multifactor test — one that "mirrors those of most of our sister circuits" — for the district court to apply on remand.

A Multifactor Approach

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Turning to the first requirement — that the activity is "integral" to the principal activity — the Third Circuit described the "integral" element as requiring that the work be "intrinsic" to the productive work (citing Supreme Court precedent), but it conceded those terms are "abstract." Therefore, the Third Circuit provided three key factors for courts to consider when deciding whether changing gear is intrinsic, or "integral," to workers' principal activity:

1. *Location.* Does the worker change before or after crossing "the workplace threshold"? If the changing typically takes place at the worksite and there is no "meaningful option" for workers to change at home, then "changing is more likely to be integral to the work."
2. *Regulations.* Donning and doffing protective gear is more likely integral to workers' principal activity when specific regulations mandate its use.
3. *Type of gear.* The more specialized the gear, the more likely changing in and out of it is integral. However, even "generic gear" can be intrinsic to workers' principal activity and should not be categorically ruled out.

As for the second element — whether changing gear is "indispensable" — the appeals court, also applying Supreme Court precedent, explained an activity is "indispensable" if the employee cannot safely and effectively perform the work without changing into the gear. While the activity may not be technically necessary to do the job, if it is "reasonably" necessary to perform the job safely and effectively, then it is indispensable.

Responding to concerns that the test adopted is too broad and might result in payment for time spent changing into *any* safety gear, the court explained the *de minimis* doctrine "stems the tide" to such concerns. Under that doctrine, workers do not need to be paid when the donning and doffing activity takes mere minutes.

With these newly articulated factors in mind, the appeals court found genuine issues of fact remained. It laid out the pertinent questions to be resolved on remand below (*including* whether the time the oil rig workers spent changing was *de minimis).*

In addition, the appeals court found the U.S. Department of Labor (DOL) rule persuasive as to the relevance of location as a factor in determining whether changing gear is integral to workers' principal activity. The court made clear, however, that it did *not* grant deference to the agency's rule. (The DOL had submitted a friend-of-the-court brief in this appeal.)

Takeaway

The appeals court placed the Third Circuit in the majority on the applicable test to apply when determining which gear counts as "integral and indispensable" to workers' principal activity. The Third Circuit emphasized, however, it is a fact-intensive inquiry, not well-suited to bright-line rules.

If you have any questions about the *Tyger* decision, the compensability of donning and doffing work gear, or any other wage and hour question, please consult a Jackson Lewis attorney.

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