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# High court's cert grant in *Sandifer* possibly troubling to employers

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Since John G. Roberts Jr.'s elevation to chief justice in 2005, the Supreme Court has paid repeated attention to labor and employment issues. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

So it comes as no surprise that the court will once again wade into this territory during its fall term.

What is, perhaps, a surprise is the issue that the court chose to address: What constitutes "changing clothes" within the meaning of Section 203(o) of the Fair Labor Standards Act?

That is the issue presented in *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590 (7th Cir. 2012), in which the court accepted certiorari on Feb. 19.

To be sure, the application of Section 203(o) to employees' claims of unpaid work time spent "donning" and "doffing" has been the subject of much focus following *IBP v. Alvarez*, 546 U.S. 21 (2005). The *Alvarez* court held that where the parties did not dispute that the activities of putting on ("donning") and taking off ("doffing") safety gear was a "principal activity," these activities triggered the beginning of the employees' workday, thus requiring IBP to pay for the time an employee spent walking from the locker room in which the protective gear was donned to his or her work station and the time spent walking back from the work station to the locker room where the gear is doffed at the end of the shift.

The *Alvarez* court, however, did not consider the application of Section 203(o) to the employees' claims. Section 203(o) excludes from the FLSA's definition of "hours worked" "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 applicable to the particular employee."

A threshold question for Section 203(o)'s application, then, is what constitutes "changing clothes?" This issue has beguiled the Department of Labor, which has offered conflicting views on the meaning of "clothes" that have expanded and constricted as the department's leadership has alternated between political parties.

In 1997, during the Clinton administration, the department issued an opinion letter interpreting the term — and thus Section 203(o)'s reach — narrowly, providing that the "plain meaning of 'clothes' in Section 3(o) does not encompass protective safety equipment" and reasoning that "clothes" refers only to "apparel."

During the Bush administration, the department reversed course, concluding that "the 'changing clothes' referred to in Section 3(o) applies to the putting on and taking off of the protective safety equipment typically worn in the meat-packaging industry." After Barack Obama's election in 2008, the department changed its position once again, returning to the Clinton administration's narrow interpretation of "clothes."

The question has proven less divisive for the federal circuit courts. Although the 9th U.S. Circuit Court of Appeals in *Alvarez*, 339 F.3d 894 (9th Cir. 2003) interpreted Section 203(o) inapplicable to specialized protective gear, its decision stands alone. Since the 9th Circuit's decision in *Alvarez*, each circuit to have considered Section 203(o) has held that "clothes" includes not only commonly worn street apparel, but also specialized garments. See *Salazar v. Butterball*, LLC, 644 F.3d 1130 (10th Cir. 2011); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.,* 591 F.3d 209, 216, at 211; *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007).

These courts have reasoned that Section 203(o) must cover more than simply "ordinary" clothes, as it was enacted to "encompass[] precisely the sort of clothes that people wear to, at or from work, which are often quite different from the sort that people wear on their own time."

In joining these circuits and rejecting a restricted definition of "clothes," the 7th Circuit in *Sandifer* reasoned similarly: "Given the subject matter of the Fair Labor Standards Act it would be beyond odd to say that the word 'clothes' in Section 203(o) excludes work clothes, especially since the section is about changing into and out of clothes at the beginning and end of the workday." *Sandifer*, 678 F.3d at 593.

Which brings us back to the Supreme Court's surprising grant of certiorari in *Sandifer*. In light of the emerging consensus among the circuit courts as to the meaning of "clothes" under Section 203(o) — with the lone outlier decision having been released 10 years ago — the court's interest in the issue is puzzling.

> ***"Whatever the explanation for the court's interest in* Sandifer*, its grant of certiorari is troubling to employers and may have significant ramifications."***

One potential explanation is the court's frustration with the department's gyrations over different presidential administrations. See *SmithKline Beecham*, 132 S. Ct. at 2156 (rejecting the department's interpretation of its own regulations when it held that pharmaceutical sales representatives qualified as "outside salesmen" under 29 U.S.C. Section 213(a)(1) for purposes of the FLSA's overtime provisions, finding the interpretation "quite unpersuasive").

Moreover, the court's cert grant in *Sandifer* was doubly surprising because the petitioners presented to the court a second question, which the court refused to grant cert, that has resulted in diametrically opposing interpretations from the 6th and 7th circuits — whether a clothes changing activity that is excluded from compensation under Section 203(o) is a "principal activity" that triggers the FLSA's continuous workday rule?

Whatever the explanation for the court's interest in *Sandifer*, its grant of certiorari is troubling to employers and may have significant ramifications. Since 1949, employers and unions have collectively bargained to determine the boundaries of the compensable workday and have frequently resolved, by private agreement, whether compensation is owed for the time spent by employees donning and doffing their work uniforms and other protective gear.

Were the court to adopt the 9th Circuit's restrictive reading of "clothes," Section 203(o) will have essentially no application in the manufacturing and food processing facilities, where the work "clothes" worn by hourly employees may be unique to the workplace.

As a result, *Sandifer* will be closely watched when the court reconvenes in October and hears argument on this pivotal case.