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US Department of Labor Clarifies FMLA Definition of ‘Son and Daughter’

The U.S. Department of Labor recently clarified the definition of "son and daughter" under the Family and Medical Leave Act to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

The FMLA allows workers to take up to 12 weeks of unpaid leave during any 12-month period to care for loved ones or themselves. The 1993 law also allows employees to take time off for the adoption or the birth of a child. The administrator interpretation issued by Nancy J. Leppink, deputy administrator of the department's Wage and Hour Division, clarifies that these rights, which provide work-family balance, extend to the various parenting relationships that exist in today's world. This action is a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones

As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same sex partner will be able to exercise the right to FMLA leave to bond with that child.

The administrator interpretation provides guidance to employers in applying the FMLA's provisions in the workplace and ensures that employees are aware of their rights. Under the act, covered employers must grant eligible employees up to 12 workweeks of unpaid leave during any 12-month period for the birth and care of a newborn child; to adopt or assume care for a foster child; to care for an immediate family member (spouse, child or parent) with a serious health condition; or to take medical leave due to a serious health condition.

DOL offers guidance on whether changing clothes and donning protective clothing is compensable

29 USC 203(o) of the Fair Labor Standards Act (FLSA) provides that the time spent "changing clothes or washing at the beginning or end of each workday" is not counted as time worked if it is "excluded by the express terms of, or by custom or practice under, a bona fide collective-bargaining agreement." The interpretation of this statute has been the subject of many court rulings and Department of Labor rulings, some of which have been contradictory. The DOL has now issued a new Administrator's Interpretation that provides guidance on whether protective clothing should be considered "clothes" under 29 USC

The Focus

203(o). The Administrator's Interpretation also addresses whether activities subsequent to the changing of clothes may still be compensable even if the changing of clothes is considered noncompensable under 29 USC 203(o).

Protective Clothing

Background. The Administrator first considered whether protective equipment could be considered “clothes” under the 29 USC 203(o) exemption in a Dec. 3, 1997 opinion letter. In that opinion letter, the Administrator concluded that the time spent putting on, taking off and cleaning the protective equipment utilized in the meat packing industry was compensable and that the protective equipment did not constitute “clothes” under 29 USC 203(o). Recognizing that 29 USC 203(o) was an exemption that must be read narrowly, the 1997 opinion letter explained that the “plain meaning” of “clothes” as used in 29 USC 203(o) did not encompass protective equipment (e.g., mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards and weight belts). Instead, “common usage dictated that “clothes” refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature.”

In 1998 and 2001, the Wage and Hour Division (WHD) reaffirmed this interpretation in two subsequent opinion letters. In recent years, several courts have adopted a “plain meaning” of the term “clothes” — one that is more faithful to the legislative intent behind the Fair Labor Standards Act and consistent with the 1997, 1998, and 2001 Wage and Hour opinion letters. For example, in 2005, the Supreme Court held that time spent walking between the locker rooms where meat processing workers donned their protective equipment and the production area was compensable (see *IBP, Inc. v. Alvarez*, U.S. Sup. Ct., Dkt. No. 03-1238, 11/8/05). However, in Wage and Hour Opinion Letter FLSA 2002-2, the Administrator opined that “clothes” under 29 USC 203(o) included the protective equipment typically worn by meat packing employees. A 2007 opinion letter (FLSA 2007-10) also differed with the 1997, 1998, and 2001 opinion letters.

New ruling. The Administrator now says that, based on statutory language and legislative history, it does not believe that the 29 USC 203(o) exemption from compensation extends to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job. This interpretation reaffirms the interpretations set out in the 1997, 1998, and 2001 opinion letters and is consistent with the “plain meaning” analysis of the Ninth Circuit Court in *Alvarez*. Employers should no longer rely on the 2002 opinion letter that addressed the phrase “changing clothes” and the 2007 opinion letter in its entirety, since these rulings are inconsistent with the current interpretation.

Clothes Changing

Generally, the time spent putting on and removing protective clothing (i.e., donning and doffing), which may include clothes changing, can be a “principal activity” under 29 USC 254 in the Portal to Portal Act. The Supreme Court in *Alvarez* explicitly held that activities that are integral and indispensable are principal activities, and activities occurring after the first principal activity and before the last principal activity, are compensable. Thus time spent in donning and doffing activities, as well as any walking and waiting time that occurs after the employee engages in his first principal activity and before he finishes his last principal activity, is part of the “continuous workday” and is compensable under the FLSA. In the new Administrator's Interpretation, the DOL says that activities subsequent to the changing of clothes may be compensated for as part of a principal activity that starts the continuous workday, even though the changing of clothes is noncompensable under 29 USC 203(o).

In issuing its ruling, the Administrator cited the U.S. District Court for the Western District of Pennsylvania in *Figas v. Horsehead Corp.*, DC PA, Dkt. No. 06-1344, 9/3/08. The District Court looked to the plain language of 29 USC 203(o). It noted that the section excludes “any time spent in clothes changing or washing at the beginning or end of each workday.” The court explained that under this statutory language “the excluded time is considered to be a part of the workday.” Because activities that are within the workday are compensable under the Portal Act, the language of 29 USC 203(o) supports the compensability of the activities that follow clothes changing. The District Court observed that 29 USC 203(o) “does not make donning and doffing activities any less “integral and indispensable” to the

The Focus

employees” performance of their daily tasks. In other words, the character of donning and doffing activities is not dependent upon whether such activities are excluded pursuant to a collective-bargaining agreement.” To hold otherwise would expand the 29 USC 203(o) exclusion from compensation well beyond the language of the statute.

The Administrator notes that when clothes changing is considered a principal activity, subsequent activities, including walking and waiting, are compensable.