Employer's Guide to the Fair Labor Standards Act

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Back to Basics

Using Common Sense with the FLSA: Dictionaries and the *Sandifer* Decision

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Complying with the Fair Labor Standards Act can be a challenge, particularly because even the vocabulary can be confusing. The law throws out terms such as "exempt," "nonexempt," "regular rate," "working time" — and the list goes on. "Working time," for example, is time that the employee is "suffered or permitted" to work (29 C.F.R. §785.11). When you look at the legal definitions of these terms it seems as if you need a dictionary (maybe one from the Middle Ages) or concordance to decipher what they really mean — and that still might not help.

What may help is a little more common sense, and the U.S. Supreme Court seemingly wants to use such an approach, based upon two decisions issued in the last year-and-a-half.

Defining 'Clothes' and 'Changing Clothes'?

Many employers don't realize that employees and unions cannot waive or bargain away most FLSA rights. An employee cannot, for example, "volunteer" to work overtime without proper compensation. One of the few exceptions is found in Section 3(o) of the FLSA (29 U.S.C. §203(o)), which states:

> In determining for the purposes of sections 206 [minimum wage] and 207 [overtime] of this title the hours for which an employee is employed, there shall be excluded 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.

Thus, a union and an employer are permitted to agree that certain clothes-changing time will not be compensable as hours worked.

Sounds simple, at least until you see what kind of gear is required in some workplaces. What exactly are "clothes"? Is an employee wearing "clothes" when he suits up like Darth Vader to enter a contaminated nuclear facility? What about the somewhat more mundane protective gear worn in food processing plants or steel mills; are those "clothes"? Different courts have answered these questions differently.

Into this fray the Supreme Court has jumped, armed with … a dictionary and some common sense (*Sandifer v. United States Steel Corp.*, No. 12-417 (Jan. 27, 2014). Actually, the decision cites two dictionaries — the 1950 edition of *Websters* and 1933 edition of the *Oxford English Dictionary* — because, explains the Supreme Court, the words in the FLSA must be given the "common meaning" they had when the law was written. (The FLSA was enacted in 1938, and Section 3(o) was added in 1949.)

"Clothes," it turns out according to those dictionaries, are: "coverings for the human body," "coverings for the person," "wearing apparel," "dress" or "vestments." In essence, says the Court, the word "clothes" denotes "items that are both designed and used to cover the body and are commonly regarded as articles of dress."

What about "*changing* clothes"? The employees in *Sandifer* argued that changing clothes means taking off one article of clothing and *substituting* a different one, while putting something on top of an employee's street clothes does not involve "changing." The Court, however, rejected that definition as impractical, because one employee might put a given garment over his own shirt, while another might remove his shirt to put on the same garment.

Applying these definitions, the Supreme Court concludes that "clothes" includes the steelworkers': flame retardant jacket, pants and hood; hardhat; snood (a type of hood, similar to a skier's balaclava); wristlets; work gloves; leggings; and steel-toed boots. On the other

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hand, safety glasses, earplugs, and a respirator are not clothes, according to the Court.

Even so, the time spent donning the glasses, earplugs and respirator was found by the Supreme Court to be noncompensable because those items were put on at the same time the employee was "changing clothes." Section 3(o), the Court noted, says that: "In determining … the hours for which an employee is employed, there shall be excluded *any time spent in changing clothes*" (emphasis added). A very practical, common sense ruling.

Is This Part of a Trend?

The Supreme Court's approach in *Sandifer* is, in some ways, reminiscent of the Court's June 2012 decision in *Christopher v. SmithKline Beecham, Inc.*, where it was called upon to define "sales" for purposes of qualifying for the FLSA's "outside sales" exemption. There, too, the Court resorted to dictionaries. And, said the Court, interpreting the FLSA requires "a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works," rather than giving a word (in that case, "sales") too literal a meaning. The Court in *Christopher* also applied common sense in determining that it would be completely impractical to treat the employees in that case as nonexempt.

Christopher was a 5-4 decision by the Supreme Court. In contrast, the decision in *Sandifer* was unanimous (except that Justice Sotomayor took exception to one footnote). Are we seeing a trend toward a simpler, more common sense way of interpreting and applying the FLSA — a trend that started, perhaps, 10 years ago, when the U.S. Department of Labor looked to the dictionary for a new definition of "primary duty" to replace the old percentage-of-time test (*see* 69 Fed. Reg. 22,185, April 23, 2004; 29 C.F.R. §541.700)?

Only time will tell.

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