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COZEN O'CONNOR

Third Circuit Court Opines on Donning and Doffing Under FLSA

In *Tyger v. Precision Drilling Corp.*, the Third Circuit Court of Appeals clarified the circumstances under which donning and doffing activities by employees may be compensable under the Fair Labor Standards Act (FLSA).

Precision Drilling is an oil company that requires its employees to wear protective gear like steel-toed boots, hard hats, and flame-retardant coveralls. Precision does not pay its employees for time spent changing into and out of protective gear, claiming that such activities are preliminary and postliminary to principal activities and, therefore, not compensable pursuant to the Portal-to-Portal Act. Precision employee, Rodney Tyger, brought suit on behalf of himself and others similarly situated, arguing that such activities *are* compensable as integral and indispensable to the principal activity of oil drilling.

The District Court for the Middle District of Pennsylvania adopted the Second Circuit's extraordinary risk test for determining whether changing into and out of gear is compensable — specifically, whether the gear "guards against workplace dangers that accompany the employee's principal activities and transcend ordinary risks." The District Court granted summary judgment for Precision, finding that relevant workplace dangers did not transcend ordinary risks, and thus changing gear was neither integral nor indispensable to the principal activity of oil drilling.

The Third Circuit vacated the District Court's decision on appeal, finding that the District Court's reliance on the extraordinary risk test was improper where the test failed to adequately consider multiple factors relevant to whether an activity is integral and indispensable ("The integral-and-indispensable inquiry is fact-intensive and not amenable to bright-line rules."). Such factors include:

1. the location where donning and doffing occurs;
2. pertinent regulations; and
3. the type of gear at issue.

The ultimate question regarding location is whether employees have a meaningful option to change at home. On this point, industry custom is highly relevant, as is employees' regular practice. Regarding regulations, donning and doffing is more likely to be integral if a specific law requires employees to perform such activities at the workplace. The type of gear is also relevant, with the Court explaining that changing into and out of generic gear may still be compensable despite such activities being more integral for specialized gear. Lastly, changing gear is likely indispensable so long as it is reasonably necessary to perform the principal activity safely and effectively. In *Tyger*, the Court held that these factors created genuine factual disputes best left for the province of a jury.

While the Third Circuit rejected the extraordinary risk test as too narrow, the Court noted the *de minimis* doctrine should alleviate employers' concerns over a multifactor approach. The *de minimis* doctrine provides that an activity is not compensable where it concerns only a few seconds or minutes beyond scheduled working hours. The Court, therefore, reasoned that employers need not worry that a broader approach will inherently require paying employees for changing into *any* gear. However, employers should proceed with some caution before relying on such assurances when dealing with pendent state law claims arising in jurisdictions such as Pennsylvania, where there is no *de minimis* doctrine.[1]

Tyger establishes that assessing a job's risks is, in and of itself, insufficient for determining whether changing into and out of gear is compensable. Rather, employers must consider a

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multifactor test including where employees normally change and regulations addressing the same, the type of gear in question, and the degree to which changing into and out of gear is reasonably necessary for employees to perform the principal activity safely and effectively. Employers who fail to engage in this more fact-specific inquiry may erroneously conclude that changing gear is not compensable and expose themselves to civil liability.

[1] *See In re Amazon.com, Inc.*, 255 A.3d 191,193 (Pa. 2021).