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Briefly

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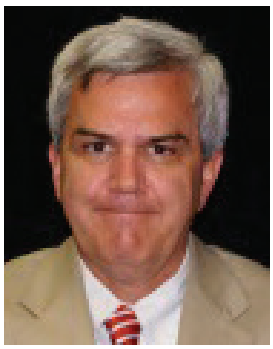

Howard B. Jackson

"[T]he mere existence of the 'quickie election' rules will likely encourage unions to significantly increase their organizing efforts."

NLRB RE-ISSUES ITS "QUICKIE ELECTION" UNION VOTING RULES

On February 5, 2014, the NLRB re-issued its proposed amendments to the rules and procedures governing union elections, sometimes known as the "quickie election" or "ambush election" rules. In general, these rules are designed to reduce the time period for holding a union election from approximately six weeks to approximately three weeks from the date of the filing of the union petition (request) for an election with the NLRB. The main vehicle to accomplish these shorter elections is to delay resolution of disputes over voting eligibility in many cases until after the election occurs. Unions have long argued that employers try to stall elections, making it harder for unions to win. Employers counter that quickie election rules are actually designed to limit the opportunity to exercise free speech to engage the voters on the union campaign issues.

The proposed rules are identical to previous proposed rules regarding representation elections published on June 22, 2011. The earlier proposal resulted in more than 65,000 public comments, as well as two days of comments at a public hearing. Major portions of the proposed rules were actually implemented in April, 2012, in a final rule in which the NLRB deferred portions of the proposed rules for further consideration. But the rule only remained in effect for about a month, as it was quickly struck down by a federal district court on the basis that the NLRB lacked a quorum when it issued the final rule.

Notably, the final rule that was published in December 2011 did not include provisions regarding the electronic filing of petitions, the requirement that hearings on voter eligibility be set for seven (7) days after service of the notice of hearing, the requirement of formal statements and positions to be filed before or at the hearing, inclusion of e-mail addresses and telephone numbers of employees on the voting list, and the changing of the period for filing the voting list from seven (7) to two (2) work days after the direction of election. All of these items are now included in the new proposed rule published on February 5. Thus, the proposed rules go beyond the new rules briefly implemented during 2012.

In issuing the new proposed rule, the Board states that it is reviewing the rules with an open mind, and that no final decisions have been made. The Board states that it will again review all of the comments filed in response to the original proposals, as well as any new responses filed in response to the current proposal, with the deadline for comment being April 7, 2014. In addition, the Board will hold a public hearing during the week of April 7, 2014, at which time members of the public may address the proposed amendments and make other suggestions for improving the Board's representation procedures.

Editor's Note: There are many reasons for employers to be concerned about the proposed rules. History shows that unions request an election at the height of their strength, and sometimes employers are not even aware of the union organizing until the petition is filed. It takes an employer some period of time to determine election issues, formulate its message, and effectively communicate with its employees. It can be expected that union winning percentages in NLRB elections will increase should the new procedures go into effect.

While some suggest that unions are at a disadvantage under the current election procedures, unions are currently winning well over 60% of all secret ballot elections. Further, the mere existence of the "quickie election" rules will likely encourage unions to significantly increase their organizing efforts. During the short period of time, less than one month, in which the quickie election rules were in effect during 2012, the number of union election petitions filed more than doubled.

Wimberly Lawson filed numerous comments to the prior proposed rules, and one of them was a simple suggestion that the NLRB chose not to mention in its comments. If the Board wants to hold a union election within three (3) weeks after the filing of a union request for an election, but also claims that these procedures are not designed to discourage full campaigning on the union election issues, why not require unions to give an employer notice of their organizing activities prior to soliciting signature cards requesting an election? This procedure would still allow elections to be held quickly after the filing of a petition with the NLRB while allowing employees to be fully aware of all the pros and cons as communicated by all parties to the election proceedings.

It will be interesting to observe whether public comment results in any change to the NLRB's planned implementation. We will keep you updated as this issue develops.

SUPREME COURT GIVES DONNING AND DOFFING GUIDANCE

Jerome D. Pinn

"The case and more significantly its ramifications are highly important to both union and non-union employers."

On January 27, 2014, the U.S. Supreme Court rendered an important donning and doffing ruling in *Sandifer v. United States Steel Corp.* (No. 12-417). The case concerned issues of whether donning and doffing certain protective gear was compensable. The Court ruled that the time spent donning and doffing protective gear was not compensable because of Section 203(o), a special provision of the wage-hour law applicable only to operations covered by a labor agreement. The case and more significantly its ramifications are highly important to both union and non-union employers.

The facts involved a steel-making facility in which employees were required to don and doff the following types of required protective gear: a flame-retardant jacket, pair of pants, and hood; a hard hat; a "snood"; "wristlets"; work gloves; leggings; "metatarsal" boots; safety glasses; ear plugs; and a respirator. The plaintiffs sued contending that they wanted to be paid for the time they spent putting on and taking off these objects.

For purposes of this decision, the Court stated the case turned on the application of Section 203(o), which in pertinent part states: "... there shall be excluded any time spent in changing clothes or washing at the beginning or end of each work day 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."

The Court described this portion of the statute as providing that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining. Later, the Court reiterated that the object of Section 203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiations.

The plaintiff argued that the word "clothes" was indeterminate and should not include items designed and used to protect against workplace hazards. Plaintiff further argued that even if "clothes" included the protective gear at issue, the exception did not apply unless there was a "changing" of clothes, which meant to substitute one item of changing for another, rather than simply adding protective gear.

As to the first contention, the Court rejected the proposition that "clothes" somehow excluded protective clothing. The distinction offered by Plaintiffs would reduce 3(o) to "near nothingness." It is only when employees change into protective clothing that the issue arises as to whether the activity becomes "an integral and indispensable part of the principal activities for which covered workmen are employed." Thus, section 3(o) is meant to exclude that time.

The Court did find some limitation to the word "clothes" as the term is not so broad to mean essentially anything worn on the body – including accessories, tools, and so forth. The Court indicated its definition leaves room for distinguishing between clothes and wearing items that are not clothes, such as some equipment and devices. The Court refused to find that "clothes" excluded all objects that could conceivably be characterized as equipment.

Addressing the second argument of plaintiffs dealing with "changing clothes," the Court ruled that the term "changing" included not only to "substitute" but also to "alter." The Court thus found that "time spent in changing clothes" included time spent in altering dress.

Applying the principles to the facts of the case, the Court found that the first nine particular items donned and doffed clearly fit within the interpretation of clothes, as they were both designed and used to cover the body and are commonly regarded as articles of dress. However, three items did not meet the definition, glasses, earplugs, and respirators. The question then was whether the time devoted to the putting on and taking off these three items must be deducted from the non-compensable time.

In one of the two most controversial portions of the ruling, the Court stated that: "We doubt that the *de minimis* doctrine can properly apply to the present case." The Court stated that "... we nonetheless agree with the basic perception of the Courts of Appeals that it is most unlikely Congress meant Section 203(o) to convert federal judges into time-study professionals." The Court analogized that just as one can speak of "spending a day skiing" even when less-than-negligible portions of the day are spent having lunch or drinking hot toddies, so one can speak of "time spent changing clothes and washing" when the vast preponderance in question is devoted to those activities. The question for the Court is whether the period at issue can, on the whole, be fairly characterized as "time spent in changing clothes or washing." "... [I]f the vast majority of the time is spent in donning and doffing 'clothes' as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted."

Thus, under the facts of the case, all the time spent donning and doffing the twelve items of protective clothing were deemed non-compensable because of the Section 203(o) exemption for collective bargaining relationships.

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KNOW YOUR ATTORNEY - CONGRATULATIONS JOE!

JOE LYNCH

T. JOSEPH LYNCH is now a "Member" in the Knoxville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which he joined in 2004. His law practice includes an emphasis in labor and employment law, fair housing and public housing defense and the defense of workers' compensation claims for employers. Joe received his Bachelor of Arts in English, cum laude, from Carson-Newman College and his law degree from the University of Tennessee School of Law. He is a deacon and member of Covenant Presbyterian Church. Joe is a member of the Knoxville Bar Association and Tennessee Bar Association and is a 2010 graduate of the Tennessee Bar Association Leadership Law Program. Joe is a member of the Society of Human Resource Management, the Loudon Monroe Human Resource Association, and serves as a Board Member for the Tennessee Valley Human Resource Association.

UPDATE ON TENNESSEE "GUNS IN TRUNKS" LAW

Jerome D. Pinn

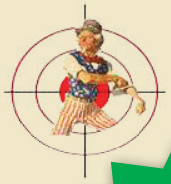
"On February 5, 2014, the Tennessee Senate rejected an amendment to the 'guns in trunks' law that would have explicitly prohibited employers from discharging employees with a handgun permit who have a gun in their locked vehicles at work."

On January 13, 2014, Tennessee Lieutenant Governor Ron Ramsey received a legal opinion from the Tennessee General Assembly's Office of Legal Services regarding the "guns in trunks" law passed by the Tennessee legislature in 2013. The legal opinion found that it was not necessary for the Tennessee legislature to clarify with new legislation that an employee could not be discharged for having a gun in a locked vehicle if the employee had a concealed handgun carry permit, because the law already provided this legal protection to employees.

This legal opinion conflicts with the opinion provided by the Tennessee Attorney General on May 28, 2013. In that opinion, the Attorney General concluded that, even after the "guns in trunks" law was enacted, a Tennessee employer could still prohibit employees from having guns in their locked vehicles on the employer's premises and the employer could terminate the employment of employees violating the employer's no weapons policy. Neither of these opinions are binding upon employers or the courts.

On February 5, 2014, the Tennessee Senate rejected an amendment to the "guns in trunks" law that would have explicitly prohibited employers from discharging employees with a handgun permit who have a gun in their locked vehicles at work. Unless and until the Tennessee legislature further addresses the issue through new legislation, it will likely be up to the Tennessee courts to decide this question of whether an employer can lawfully discharge an employee with a carry permit for having gun in a vehicle at work.

Some Tennessee employers continue to maintain and enforce their no weapons policies, in reliance on the Attorney General's opinion. Other employers have added an exception to their policy for handgun permit holders in recognition of the "guns in trunks law". Yet other employers have dropped their no weapons policies entirely. Until the courts rule on the issue, employers cannot know for sure what they are legally entitled to do with regard to guns on their premises. Hopefully, this uncertainly will be removed by the courts or the legislature in the not too distant future.



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"DONNING AND DOFFING"

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Editor's Note: The following comments are going to be controversial, as different attorneys may draw different interpretations from the Sandifer ruling. Therefore, please remember that the following comments are not "black letter law," but instead one law firm's interpretation of the ruling and its ramifications on union and non-union employers.

The first controversial point has already been mentioned, basically whether the *Sandifer* case abolishes the *de minimis* rule under the wage-hour laws. The *de minimis* doctrine, as noted in the *Sandifer* case, is a long-standing doctrine that has been previously acknowledged as good law by the U.S. Supreme Court, and it currently exists as a standard under federal wage-hour regulations in 29 C.F.R. Section 785.47. Our firm places great significance on the fact that the context of the Court's ruling was limited to the application of Section 203(o), and not to the entire wage-hour law. We believe that the Court is saying that the *de minimis* doctrine does not apply to Section 203(o); it is not saying that the *de minimis* rule does not apply anywhere under the wage-hour laws.

The Court nowhere indicated that the *de minimis* doctrine as outlined in an earlier Supreme Court ruling in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946), was no longer applicable under the wage-hour laws, or that the federal wage-hour regulations applying the *de minimis* concept were no longer valid. Thus, we believe there is room for the continuing application of the *de minimis* doctrine under wage-hour law, although courts may feel more inclined in light of *Sandifer* to make more limited applications of the doctrine. Further, plaintiffs are sure to argue that the doctrine no longer exists under the wage-hour laws.

Another point worth mentioning here is that the Court actually applied a more favorable (to employers) doctrine than the *de minimis* rule in the context of Section 203(o). That is, the Court talked about not making federal judges into "time-study experts" and determining whether the vast majority of the time was spent in changing clothes, or changing certain types of equipment not considered clothes. The Court, in essence, is applying something akin to the "vast majority" of time spent in non-compensable activities, versus compensable activities, and indicating the entire time is to be counted as non-compensable under those circumstances. This conceptually is a more valuable doctrine than *de minimis*, although again the Court is only talking about Section 203(o).

In light of the Court's explanation of the concept to Section 203(o), one wonders whether the same concept would be applied by the Court to lunch periods. Some courts have indicated that if lunch periods of 30 minutes or longer are primarily for the benefit of the employee to have lunch, the fact that some compensable donning and doffing is performed during that lunch period does not destroy the non-compensability of the entire lunch period. The Court's rationale in *Sandifer* seems to support this concept concerning lunch periods, although it would be reasoning by analogy. This conclusion is further supported by the favorable citation to *Sepulveda v. Allen Family Foods, Inc.,* 591 F.3d.209, 218 which applied this reasoning to meal breaks.

Perhaps the most controversial part of the *Sandifer* ruling is, however, how it affects the non-union sector. There is a simple sentence in the ruling referring to donning and doffing the twelve items of required protective gear that "this donning-and-doffing time would otherwise be compensable under the Act." Some commentators and all plaintiffs' lawyers will take the position that this means the donning and doffing of protective gear should never be excluded from compensable time as preliminary or postliminary to the principal activity or activities that an employee is employed to perform under the Portal-to-Portal Act. That Act excludes from compensable time such activities. If this interpretation of *Sandifer* is correct, then a powerful defense would be unavailable to employers, that the donning and doffing of protective equipment in some circumstances at least should be excluded from compensation as preliminary or postliminary time. When combined with the plaintiff's argument that the *de minimis* rule no longer applies, non-union employers would have few defenses left to defend donning and doffing lawsuits.

We believe that the Supreme Court did not go that far. Indeed, the Court cited *Steiner v. Mitchell* for the proposition that "changing clothes and showering" can, under some circumstances, be considered an "integral and indispensable part of the principal activities for which covered workmen are employed ... ." The Court also discussed its *IBT* ruling as applying *Steiner* to treat as compensable the donning and doffing of protective gear somewhat similar to that at issue here, meaning the twelve items of protective clothing involved in the *Sandifer* fact pattern. In its decision, the Court indicates that it is talking about "items that can be regarded as integral to job performance." Later, the Court expressly limits its holding to the "donning and doffing of the protective gear at issue," referring to the twelve particular items which included a flame-retardant jacket, pair of pants, hood, hard hat, snood, wristlets, work gloves, leggings, metatarsal boots, safety glasses, ear plugs and a respirator.

The significance of this point is that many cases draw a distinction between "unique" and "non-unique" protective gear, indicating that "heavy" or "unique" protective gear is not subject to the preliminary and postliminary exception of compensable work time under the Portal-to-Portal Act. Thus, a close reading of the *Sandifer* case indicates there is still room to argue this distinction, in addition to the *de minimis* doctrine. Indeed, we believe the case could open up a new argument for employers that the Court looks to see which activity constitutes the vast majority of time – donning and doffing gear that is an integral and indispensable part of the principal activity or donning and doffing gear that is not integral and indispensable.

Nevertheless, there is no question that as a result of the *Sandifer* decision, more donning and doffing lawsuits will be brought in the non-union sector. In contrast, in the union sector, there will likely be fewer such suits. Non-union employers should look at their work practices and determine whether they should be modified because of the additional legal exposure.