



**FLSA2007-10**

May 14, 2007

Dear **Name\***:

This is in response to your request on behalf of your client, **Name\***, for an opinion regarding the application of section 3(o) of the Fair Labor Standards Act (FLSA) to employees in the meat packing industry. Specifically, you request an opinion on the following questions:

- (1) Whether, notwithstanding the opinion of the Court of Appeals for the Ninth Circuit in *Alvarez v. IBP, Inc.* 339 F. 3d 894 (9th Cir. 2003), the Department of Labor continues to maintain the interpretation of section 3(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o), set forth in the opinion letter issued by Administrator Tammy McCutchen on June 6, 2002 [FLSA2002-2](#)?
- (2) Whether, outside states within the jurisdiction of the Ninth Circuit, **Name\*** may continue to rely on the June 6, 2002 opinion letter as the basis for a “good faith” defense under 29 U.S.C. § 259 against donning and doffing claims at locations where it has negotiated collective bargaining agreements that exclude equipment donning and doffing time from compensable work time by the express terms or by custom and practice under the collective bargaining agreements?

Section 3(o) of the FLSA excludes “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.” 29 U.S.C. § 203(o). In promulgating this provision Congress plainly excluded activities covered by section 3(o) from time that would otherwise be “[h]ours worked.” 29 U.S.C. § 203(o). Accordingly, activities covered by section 3(o) cannot be considered principal activities and do not start the workday. Walking time after a 3(o) activity is therefore not compensable unless it is preceded by a principal activity.

After carefully reviewing the interpretation of section 3(o) set forth in Wage and Hour Opinion Letter FLSA 2002-2 (June 6, 2002), it remains our view, based upon the statute and its legislative history, that the “changing clothes” referred to in section 3(o) applies to putting on and taking off the protective safety equipment typically worn by employees in the meat packing industry. As in our previous letter, we take no position on what constitutes a custom or practice for purposes of excluding time under section 3(o), or on whether there is such a custom or practice by any employers in your industry. As specified in the 2002 letter, this clothing includes, among other items, heavy protective safety equipment worn in the meat packing industry such as mesh aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards.

The Ninth Circuit rejected the June 6, 2002 opinion letter in its decision in *Alvarez v. IBP, Inc.*, 339 F. 3d 894 (2003), but the issue was not addressed by the Supreme Court in *IBP v. Alvarez*, 126 S.Ct. 514 (2005). The Division has not changed its interpretation as a result of the circuit court's opinion and continues to believe that the opinion letter is correct for the reasons stated therein. Therefore, you may continue to rely on the letter for practices outside states within the jurisdiction of the Ninth Circuit. Of course, we will monitor any case law that addresses this issue in other courts, and may reconsider our interpretation if case law so requires.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust the above information is responsive to your inquiry.

Sincerely,

Paul DeCamp  
Administrator

**Note: \*The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).**