

PUBLICATION

Getting Paid for Dressing and Undressing On the Clock: Baker Donelson Secures Employer-Friendly Decisions

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Employees in several industries continue to pursue claims under the Fair Labor Standards Act (FLSA) alleging that various pre-shift and post-shift activities such as putting on, taking off or washing sanitary or protective gear before and after work is compensable and/or not being compensated adequately. This "donning and doffing" litigation is especially active in the food processing industry, and the law governing the claims continues to evolve in response to the thousands of claims being pursued.

Baker Donelson recently obtained a pair of significant victories in donning and doffing lawsuits pending in Mississippi and Tennessee. On October 21, 2009, a federal court in Mississippi decertified a large collective action pending against Koch Foods of Mississippi, LLC. There, five named plaintiffs sought to recover on behalf of over 1,300 current and former Koch Foods employees in an FLSA action seeking damages for donning and doffing activities. Through focused discovery documenting evidence concerning the differences among the plaintiffs, Baker Donelson convinced the court to decertify the action, dismiss all opt-in plaintiffs from the case, and sever the remaining five named plaintiffs' claims for individual trials. The court held that "the named plaintiffs are not even similarly situated to each other, much less to the over 1300 opt-in plaintiffs" and recognized the prejudice Koch Foods would experience if compelled to defend the claims of all plaintiffs in one large collective action trial. (*Gatewood, et al. v. Koch Foods of Mississippi, LLC*, Civil Action No. 3:07CV82DPJ-JCS, in the United States District Court for the Southern District of Mississippi). Trials of the remaining named plaintiffs will likely be completed during the first half of 2010.

In a separate case, on November 13, 2009, Baker Donelson achieved another victory on the issue of whether a custom and practice under a collective bargaining agreement may bar employees from recovering for donning and doffing activities taking place before and after work. A federal court in Tennessee held that the donning and doffing of the sanitary and protective gear worn by poultry employees at two Koch Foods plants in Tennessee constituted "changing clothes" under § 203(o) of the FLSA, and, therefore, that the time spent on these activities at the beginning and end of the work day was not compensable when the applicable collective bargaining agreement was in effect. The court also held washing hands was excluded from compensability because of the custom and practice of excluding this activity from compensation under the collective bargaining agreement. (*Linda Johnson, et al. v. Koch Foods, Inc.*, Civil Action No. 2:07-CV-51, in the United States District Court for the Eastern District of Tennessee, Greenville Division). That case is currently set to be tried on the remaining issues in January.

Perhaps the most significant development in this area is the outcome of the Secretary of Labor's lawsuit against Tyson Foods, Inc. in Alabama. There, the DOL brought the suit on behalf of approximately 3,000 current and former employees of a Tyson poultry plant six years ago. Earlier this year, the case was tried for several weeks, which resulted in a mistrial after the jury failed to reach a unanimous verdict. A second trial began in August and continued through October. After several days of deliberation, the jury found in favor of the workers and awarded them \$250,000 in back pay damages. The DOL was seeking to recover approximately \$8 million. The jury, however, rejected the DOL's FLSA record-keeping violation claims. After the verdict, the Court ordered the parties to mediate and set a nationwide bench trial on the issue of injunctive relief to begin in February 2010.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

Baker Donelson gives you what boutique labor and employment firms can't: a set of attorneys who are not only dedicated to the practice of labor and employment issues, but who can reach into an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs. We set ourselves apart by valuing your entire company. And when it comes to your company's most valuable asset - your employees - we're committed to counseling with and advocating for you every step of the way.