

And You Don't Get Paid for That: Section 203(o) of the Fair Labor Standards Act Does Not Apply to Donning and Doffing of Safety Gear

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INTRODUCTION

Employees in the meat and poultry processing industry work under some of the most dangerous working conditions in the nation, yet they are undercompensated.¹ The following excerpt demonstrates one task for which employees are commonly uncompensated entirely: the “donning and doffing” of safety equipment.²

I would get my old stuff out, put my rubber boots on, and then you go form a line where they hand out your supplies and there's somebody right there that'll hand you a red smock or white smock depending on the department that you're in, and then you step to the window and she hands you your plastic—the blue gloves, the plastic apron, a pair of ear plugs, and a hair net. Or a cutting glove; you need to show a cuttin' glove to get a cuttin' glove. It took 30 to 45 minutes a day just gettin' ready to, ya know, the process of getting ready and finishin' work. You can't walk outta there with blood up to your elbows, I'm not driving home like that.

And you don't get paid for that?

No.³

For years, courts have grappled with which activities at the beginning and end of the workday should be compensated. Enacted in

¹ See *Alvarez v. IBP, Inc.*, 339 F.3d 894, 898 (9th Cir. 2003); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-96, *WORKPLACE SAFETY AND HEALTH: SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED* 7, 18, 21, 27 (2005) [hereinafter *WORKPLACE SAFETY AND HEALTH*] (citing a 14.9% injury and illness rate in 2002 as compared to 7.2% for all of U.S. manufacturing from the Bureau of Labor Statistics, which is based on employer self-reporting); HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS* (2004), available at http://www.hrw.org/reports/2005/usa0105/2.htm#_ftnref20 [hereinafter *HUMAN RIGHTS WATCH*]; WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 33002, *LABOR PRACTICES IN THE MEAT AND POULTRY INDUSTRY: AN OVERVIEW*, 43–47 (2005).

² Hereinafter, the phrase “donning and doffing” refers to the putting on and taking off of safety equipment. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 369, 371 (11th ed. 2008) (defining “doff” as “**1 a** : to remove (an article of wear) from the body **b** : to take off (the hat) in greeting or as a sign of respect **2** : to rid oneself of : put aside”; defining “don” as “**1** : to put on (an article of clothing) **2** : to wrap oneself in”); The Phrase Finder, <http://www.phrases.org.uk/meanings/doff-your-hat.html> (last visited June 17, 2012) (noting that “don” and “doff” are contractions of “do on” and “do off” that originated in Northern England in the fifteenth century and have come to mean the putting on and taking off of clothing items or even personas or ideas; doffing was also associated with temporarily removing a hat or cap as a sign of respect).

³ DONALD D. STULL & MICHAEL J. BROADWAY, *SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA* 77 (John A. Young ed., Wadsworth 2004).

1938, the Fair Labor Standards Act (“FLSA”) prescribes a minimum wage per hour of work and overtime pay for workweeks in excess of forty hours.⁴ Ten years after the FLSA was enacted, in reaction to judicial interpretations that increased their liability under the statute, employers lobbied Congress to enact the Portal to Portal Act (“PPA”) to amend the FLSA.⁵ The PPA excludes certain types of activities performed at the start and end of the workday from remuneration.⁶ Just two years later, employers successfully lobbied for another amendment to the FLSA, which further limited their liability.⁷ This second amendment, Section 203(o), allowed employers and union representatives to bargain with respect to the time employees spend changing clothes and washing at the beginning and end of the workday.⁸

In light of the considerable amount of time employees spend donning and doffing safety equipment at the beginning and end of each workday, the PPA and Section 203(o) are at the heart of wage and hour litigation in the meat and poultry processing industry. Regardless of whether employees work with large animals, such as cattle, sheep, or hogs, or with smaller animals, such as turkeys or chickens, the slaughtering and packing process entails regular contact with hazardous material such as blood, feces, intestinal juices, and poisonous chemicals necessitating sanitization.⁹ The process also requires the operation of hazardous tools and machinery to kill and dismantle animals, and further unsafe working conditions are created by continuous, repetitive motions of cutting in cramped workspaces at unsafe speeds.¹⁰ Therefore,

⁴ 29 U.S.C. § 202(a) (1974); 29 U.S.C. §§ 206–207 (2007, 2010).

⁵ Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1256 (2009).

⁶ See 29 U.S.C. § 254 (1996); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); Dorris, *supra* note 5, at 1256 (noting that other noteworthy changes to the FLSA were a two year statute of limitations, which became three if the violation was in bad faith, 29 U.S.C. § 255; the elimination of liquidated damages except for violations made in bad faith, 29 U.S.C.A. § 260; and required opt-in for class action suits, 29 USC § 216(b).).

⁷ *Anderson v. Cagle’s Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) (citing 95 CONG. REC. 11,433 (daily ed. Aug. 10, 1949) (comments of Rep. Herter)).

⁸ 29 U.S.C. § 203(o) (2006). Section 203(o) is within the “Definitions” section of the FLSA and provides:

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 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. *Id.*

⁹ WHITTAKER, *supra* note 1, at 44–45; WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 20.

¹⁰ WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 19–24; WHITTAKER, *supra* note 1, at 44 (describing health and safety concerns such as “workers ‘stationed so close

employees must wear protective gear, which varies in weight and complexity, according to the task.¹¹ The more complicated the protective gear, the more time required to prepare for work, breaks, and cleaning.¹²

To maximize profits in a competitive marketplace, employers typically utilize a “gang time” pay model and pay employees only for time spent on the production line actually processing meat or poultry.¹³ Employees may spend as much as an hour each day donning and doffing safety equipment, yet are frequently not paid for this time.¹⁴ Since employers do not include the time spent donning and doffing as part of a forty-hour workweek, courts that have considered the issue, in some instances, have held such time to constitute overtime, requiring overtime pay. But claims made on behalf of hundreds of employees can span several years and total millions of dollars in lost wages for workers and, conversely, liability for employers.¹⁵

The Supreme Court has not yet interpreted Section 203(o). Thus, circuits are split over what is covered by the provision, and only one circuit has ruled on whether it preempts more protective state laws.¹⁶ Further, the United States Department of Labor (“DOL”) has changed its position on the issue multiple times over the past fifteen years.¹⁷ The disagreement among the circuits primarily concerns the meaning of “clothing”—specifically, whether the various pieces of safety gear that employees are required to wear constitute clothing within the meaning of the statute.¹⁸ Employees argue that the term “clothing” does not include safety gear that is required to be worn by law, employers, or the nature of the work, and, therefore, parties are prohibited from bargaining over time

together they lacerated coworkers with their knives, indicating a need for more space, more protective gear, or both.”); HUMAN RIGHTS WATCH, *supra* note 1, at 33; NEBRASKA APPLESEED, *THE SPEED KILLS YOU: THE VOICE OF NEBRASKA’S MEATPACKING WORKERS* 27 (Oct. 2009) [hereinafter NEBRASKA APPLESEED], *available at* http://www.boldnebraska.org/uploaded/pdf/the_speed_kills_you_030910.pdf.

¹¹ WHITTAKER, *supra* note 1, at 44–45; WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 25.

¹² WHITTAKER, *supra* note 1, at 44–45.

¹³ *Alvarez*, 339 F.3d at 899–900; *Perez v. Mountaire Farms Inc.*, 650 F.3d 350, 360 (4th Cir. 2011); CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *WORK WITHOUT JUSTICE: LOW-WAGE IMMIGRANT LABORERS* 22 (2000) [hereinafter *WORK WITHOUT JUSTICE*], *available at* <http://cliniclegal.org/sites/default/files/atrisk3.pdf>.

¹⁴ *STULL & BROADWAY*, *supra* note 3, at 77; *Perez*, 650 F.3d at 372; *De Ascencio v. Tyson Food, Inc.*, 500 F.3d 361 (3d Cir. 2007); *but see Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007) (union employees bargained to be paid for a portion of the time spent donning and doffing).

¹⁵ *See infra* notes 33–41 and accompanying text.

¹⁶ *See infra* notes 146–50, 178–82 and accompanying text.

¹⁷ *See infra* notes 132–145 and accompanying text.

¹⁸ *See infra* notes 146–50 and accompanying text.

spent donning and doffing.¹⁹ In contrast, employers argue that clothing includes all safety gear that employees don and doff at the beginning and end of each workday, permitting parties to bargain over this time.²⁰ Furthermore, employees argue that Section 203(o) and the Labor Relations Management Act (“LMRA”) do not preempt state laws requiring payment for donning and doffing, whereas employers argue that Section 203(o) and the LMRA preempt state law.²¹

This article presents two arguments. First, Section 203(o) should be interpreted narrowly to exclude “required safety gear” in fairness to workers.²² The exploitative work conditions present in the meat and poultry processing industry demand more protective laws.²³ Compensating workers for time spent donning and doffing safety gear required to perform their work is consistent with the purpose of the FLSA, which is to combat exploitative working conditions through a minimum standard of living.²⁴ Section 203(o) will not be rendered meaningless by preventing collective bargaining over the time spent donning and doffing required safety gear because time spent donning and doffing regular clothing can still be part of a collective bargaining agreement (“CBA”).²⁵

Allowing CBAs to exclude time spent donning and doffing *required* safety gear runs counter to the purpose of FLSA. When it excluded particular activities from compensation under the PPA, Congress wanted to ensure that the definition of work was not otherwise altered and, therefore, declared that the PPA should be construed liberally to encompass all work regardless of contract, custom, or practice.²⁶ In interpreting the PPA, the Supreme Court has found that activities such as the donning and doffing of required safety gear are

¹⁹ *Alvarez*, 339 F.3d 894.

²⁰ *Spoerle v. Kraft Foods, Inc.*, 527 F. Supp.2d 860 (W.D. Wis. 2007) (employer did not dispute the time was work but argued it was excluded under Section 203(o) because safety gear constituted clothing).

²¹ See Anna Wermuth & Jeremy Glenn, *It's No Revolution: Long Standing Legal Principles Mandate the Preemption of State Laws in Conflict with Section 3(o) of the Fair Labor Standards Act*, 40 U. MEM. L. REV. 839 (2010).

²² 29 C.F.R. § 790.8(c) & n.65 (1970) (noting that safety gear should be excluded if “required by law, by rules of the employer, or by the nature of the work,” but not gear worn primarily for the employee’s convenience.).

²³ See *infra* Part II.

²⁴ 29 U.S.C. § 202(a) (1974) (describing the congressional finding and declaration of policy of the FLSA).

²⁵ *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (police officer uniforms); *Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008) (postal worker uniform); 29 C.F.R. § 790.8(c) (1970).

²⁶ See *infra* notes 80-81 and accompanying text.

work that must be compensated.²⁷ Furthermore, because Section 203(o) is an FLSA exemption, it commands a narrow interpretation. Safety gear does not plainly and unmistakably fit within the clothing exemption.

Secondly, this article argues that both Section 203(o) and the LMRA should not preempt more protective state laws. Apart from whether required safety gear is found to constitute “clothing” under Section 203(o), states should be permitted to promulgate more protective legislation. The FLSA’s “Savings Clause” expressly permits states to set a higher minimum wage and shorter maximum workweek.²⁸ Compensating employees for time spent donning and doffing safety gear shortens the workweek and falls within the Savings Clause.

The LMRA, which governs preemption, yields to the FLSA’s provisions on the minimum wage and maximum workweek, prohibiting employers and union representatives from bargaining for payment below the minimum wage or for a workweek longer than the maximum set by federal or state law.²⁹ Activities not covered under the PPA, such as time spent donning and doffing required safety gear, contribute to the maximum workweek.³⁰ Since the LMRA yields to laws setting a shorter workweek, the LMRA should not preempt state laws providing for shorter workweeks by requiring payment of time spent donning and doffing.

This article will proceed as follows. Part II summarizes the conditions employees face in the meat and poultry processing industry, all of which evidence the need for more protective labor laws and greater enforcement. Part III establishes a background of the relevant law, providing a review of the FLSA, the PPA, Section 203(o), and corresponding case law. It also evaluates the preemption of state law with respect to Section 203(o) and the LMRA. Part IV then provides an analysis, arguing that the PPA, other laws, and canons of interpretation support the exclusion of time spent donning and doffing required safety gear within Section 203(o) and thus preclude the bargaining of this time. Apart from whether time spent donning and doffing required safety gear is precluded from Section 203(o), Part IV argues that the FLSA’s Savings Clause prevents more protective state laws from being preempted by Section 203(o).³¹ Finally, Part IV argues that since the

²⁷ 29 U.S.C. § 254 (1996); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *Steiner v. Mitchell*, 350 U.S. 247 (1956).

²⁸ 29 U.S.C. § 218 (1967).

²⁹ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981); *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 430 (7th Cir. 2010).

³⁰ 29 U.S.C. § 254 (d) (1996).

³¹ 29 U.S.C. § 218 (1967).

time spent donning and doffing required safety gear counts toward the maximum workweek,³² the LMRA should not preempt state laws requiring a shorter workweek.

WORK CONDITIONS IN THE MEAT AND POULTRY PROCESSING INDUSTRY

Over the past ten years, there have been numerous books, reports, and films documenting a number of serious issues within the United States meat and poultry processing industry, including lethal food contamination, extraordinarily high injury and death rates for workers, meager salaries, inadequate compensation for work injuries, and the negative economic and environmental impact on communities where factories are located.³³ Despite these numerous reports detailing the dangers and abuses within the industry, workers continue to struggle for safe working conditions and decent pay.³⁴ Although several legislative regimes are available to protect employees from violations of safety, labor, and other laws, there is widespread under-enforcement, especially when it comes to the most vulnerable and lowest wage earners.³⁵ Even

³² 29 U.S.C. § 207(a)(1) (2010) (“Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess.”).

³³ See ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 149–223 (Harper Perennial 2005) (2001); *FAST FOOD NATION* (20th Century Fox 2007); *FOOD, INC.* (Magnolia Home Entertainment 2009); HUMAN RIGHTS WATCH, *supra* note 1; WORKPLACE SAFETY AND HEALTH, *supra* note 1; WHITTAKER, *supra* note 1; NEBRASKA APPLESEED, *supra* note 10; STULL & BROADWAY, *supra* note 3; *A RIVER OF WASTE: THE HAZARDOUS TRUTH ABOUT FACTORY FARMS* (Cinema Libre 2009); JONATHAN SAFRAN FOER, *EATING ANIMALS* (Hachette Book Grp., Inc. 2009); WORK WITHOUT JUSTICE, *supra* note 13; Charlotte S. Alexander, *The Law and Economics of Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. (forthcoming 2012).

³⁴ See sources cited *supra* note 33.

³⁵ WHITTAKER, *supra* note 1, at 43–44 (referring to the DOL survey conducted in 1997–1998, “Violations of the FLSA and of the Migrant and Seasonal Agricultural Workers Protection Act were found to be systemic. Some 60% of surveyed plants ‘had violations of wage and hour and safety and health laws.’”); U.S. DEP’T OF LABOR, POULTRY PROCESSING COMPLIANCE SURVEY FACT SHEET (2001), *available at* <http://www.ufcw.org/docUploads/Usdept~1.pdf?CFID=7005606&CFTOKEN=63042914> (finding wage and hour violations in 100% of the 51 companies inspected, 65% were misclassifying workers as exempt from FLSA coverage, 0% were in compliance with three major labor statutes,); Press Release, U.S. Dep’t of Labor, U.S. Labor Department Resolves Back Wage Case Against Pittsburg, Texas-Based Pilgrim’s Pride Corp. (Jan. 29, 2010), *available at* <http://www.dol.gov/opa/media/press/whd/whd20100073.htm>; Brady & Associates, *Tyson Pays \$32 Million to Settle Donning and Doffing Lawsuit*, KANSAS CITY EMPLOYMENT LAWYER BLOG (Sept. 22, 2011), <http://www.kansascityemploymentlawyerblog.com>; J.C. Solomon, *Jury Awards \$2 Million Verdict to Meat Processing Facility Employees*, WAGE & HOUR LAW BLOG (Sept. 27, 2011), <http://wageandhour.yezbaklaw.com>; Cam Caldwell, *Tyson Foods Workers Awarded Jury Verdict in FLSA Lawsuit*, WAGE & HOUR LAW BLOG (Mar. 18, 2011),

when employees manage to complain or unionize, under-protective and unpredictable laws do not provide meaningful solutions to correct the detrimental work conditions the FLSA was meant to address.³⁶

A prevalent problem within the meat and poultry processing industry is the systemic lack of enforcement of wage and hour laws.³⁷ Nationwide, it has been estimated that employers pay more than one billion dollars annually to litigate wage and hour cases.³⁸ Wage and hour class action suits are the most common type of class action, account for almost 20% of all class actions.³⁹ The meat and poultry industry is responsible for a large share of these violations, which have persisted for many years. Out of fifty-one poultry companies surveyed in 2000, the DOL found that 100% had wage and hour violations.⁴⁰ Wage and hour violations continue to plague the industry as evidenced by recent wage and hour lawsuits on behalf of poultry and meat processing workers at Tyson Foods, Inc. and Pilgrim's Pride Corp.⁴¹

At one time, a job in the meatpacking industry was desirable because of gains made by strong union membership.⁴² Union membership in the meat processing industry was roughly 50% between 1970 and 1980; however, by 1987, that percentage had declined to 21%.⁴³ Since then, union membership has remained around 20% for

<http://wageandhour.yezbaklaw.com/2011/09/articles/meat-and-poultry-workers/jury-awards-2-million-verdict-to-meat-processing-facility-employees/>.

³⁶ See sources cited *supra* note 35; Benjamin, I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1162–64 (2011); HUMAN RIGHTS WATCH, *supra* note 1, at 3–5; WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 7; WORK WITHOUT JUSTICE, *supra* note 13, at 26; WHITTAKER, *supra* note 1, at 7; Alexander, *supra* note 33.

³⁷ See sources cited *supra* notes 33 and 35.

³⁸ See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>; Shannon Green, *Wage and Hour Litigation is Big—and Getting Bigger*, N.J. LAW JOURNAL, Mar. 19, 2012, available at <http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202546026856&slreturn=1>; Dorris *supra* note 5, at 1255 (“The Wage and Hour Division of the Department of Labor recovered over \$ 185 million in unpaid wages for more than 228,000 employees in fiscal year 2008. This is just a small percentage of the probable number of FLSA violations. Private actions likely recovered many times more unpaid wages during the same time period. One report suggests private plaintiffs recover over \$ 1 billion annually.”); Michael Orey, *Wage Wars*, BUSINESS WEEK, Oct. 1, 2007, available at http://www.businessweek.com/magazine/content/07_40/b4052001.htm.

³⁹ Dorris *supra* note 5, at 1251.

⁴⁰ See sources cited *supra* note 35; WORK WITHOUT JUSTICE, *supra* note 13, at 12, 22.

⁴¹ See sources cited *supra* note 35.

⁴² WHITTAKER, *supra* note 1, at 7; WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 7; SCHLOSSER, *supra* note 33, at 149; HUMAN RIGHTS WATCH, *supra* note 1, at 11–16.

⁴³ WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 7.

both poultry and meat workers, yet it still exceeds the average rate of union membership nationwide: 12%.⁴⁴ This decline in union membership has coincided with the restructuring and consolidation of the industry (including relocation to union-free environments), a significant decrease in salaries, an increase in immigrant workers, and a large increase in employee turnover rate.⁴⁵ Thus, while union membership in the meat and poultry industry is greater than the national average, members constitute only approximately 20% of the workforce and face multiple challenges in increasing their numbers to improve the abusive work conditions facing both nonunion and union employees.

Although in many circumstances unions provide members with better work conditions than their nonunion counterparts, all employees still require baseline protection. Within the meat and poultry processing industry, two barriers prevent unions from making meaningful improvements. First, the National Labor Relations Act (“NLRA”), which governs unions, is under-protective and does not permit employees to effectively organize to protect their rights and improve working conditions.⁴⁶ Second, fierce competition within the industry encourages employers to preserve abusive work practices in order to

⁴⁴ U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 LIBRARY EDITION, BULLETIN 2800, at 730 (U.S. Gov’t Printing Office 2010–11 ed. 2010) (citing 16% union coverage for food processing employees in 2008); Barry T. Hirsch & David A. Macpherson, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CURRENT POPULATION SURVEY (CPS), <http://unionstats.gsu.edu> (last updated Feb. 4, 2012) (listing 20.3% union coverage for employees in the Animal Slaughtering and Processing Industry category (CIC 1180) and 23.3% union coverage for employees in the Butchers and Meat, Fish, and Poultry Processing Occupation category (COC 7810)); Tony Horwitz, *9 To Nowhere—These Six Growth Jobs Are Dull, Dead-End, Sometimes Dangerous*, WALL ST. J., Dec. 1, 1994, at A6 (“Roughly 80% [of poultry workers] are nonunion”); Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary–2011 (Jan. 27, 2012), available at <http://www.bls.gov/news.release/union2.nr0.htm> (citing 11.8% average for all union members, 37.0% for public sector, and 6.9% for private sector employees).

⁴⁵ WORKPLACE SAFETY AND HEALTH, *supra* note 1, at 7, 18; WHITTAKER, *supra* note 1, at 25; STULL & BROADWAY, *supra* note 3, at 73–75; Alexander *supra* note 33; Bureau of Labor Statistics, U.S. Dep’t of Labor, *May 2011 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 311600 - Animal Slaughtering and Processing*, OCCUPATIONAL EMPLOYMENT STATISTICS, http://www.bls.gov/oes/current/naics4_311600.htm (last modified Mar. 27, 2012) (listing annual mean wages of \$23,610 for meat, poultry, and fish cutters and trimmers; \$24,300 for slaughterers and packers; and \$27,410 for butchers and meat cutters in the animal slaughtering industry); David Moberg, *Poultry Giants Fight Organizers*, IN THESE TIMES, Jan. 30, 2004, available at http://www.inthesetimes.com/article/689/poultry_giants_fight_organizers (noting that poultry workers make an average of \$8 per hour).

⁴⁶ Sachs, *supra* note 36, at 1162–64.

remain profitable.⁴⁷ Therefore, stronger federal legislation and enforcement are required to ensure baseline protections, such as minimum wage and overtime pay, for union employees.⁴⁸

The labor law regime poses a formidable challenge to increasing union membership and strength, thus improving work conditions. For years, U.S. labor law has been criticized as being ineffectual, and collective action has been described as “moribund.”⁴⁹ Indeed, the NLRA has faced criticism over the same central issues, but repeated attempts at reform have failed.⁵⁰ As an initial matter, the NLRA’s protection excludes many categories of employees.⁵¹ Under the NLRA, employers can easily interfere with employee organization, as unions lack the rights necessary to communicate with employees.⁵² Furthermore, the remedial framework of the NLRA is too weak to protect employees against retaliation from employers.⁵³ The election process, for instance, is too slow, allowing employers to defeat unions through attrition and delay.⁵⁴ Finally, the NLRA’s “good faith” bargaining obligation is meaningless because the National Labor Relations Board (“NLRB”) cannot impose contract terms as a remedy.⁵⁵

Although the NLRA granted workers the right to organize and bargain collectively in order to improve their working conditions, the FLSA’s purpose is to provide a “minimum standard of living necessary for health, efficiency, and general well-being” (through a minimum wage and maximum workweek) to address detrimental working conditions of workers.⁵⁶ When legislative hearings on the proposal of the FLSA were held, Sydney Hillman, president of the Amalgamated Clothing Workers Union, urged that the only way to raise standards uniformly was to have it done by the government.⁵⁷ Forcing high standards on only a few employers at a time would drive those employers out of business before the rest of the industry could effectively be organized.⁵⁸

⁴⁷ HUMAN RIGHTS WATCH, *supra* note 1, at 2.

⁴⁸ *Id.*

⁴⁹ Sachs, *supra* note 36, at 1162.

⁵⁰ *Id.* at 1163–64.

⁵¹ 29 U.S.C. § 152 (3) (1978) (defining “employee”).

⁵² Sachs, *supra* note 36, at 1162.

⁵³ *Id.* at 1162.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1162–63.

⁵⁶ 29 U.S.C. § 157 (1947); 29 U.S.C. § 202(a) (1974) (congressional finding and declaration of policy).

⁵⁷ John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 468 (1939).

⁵⁸ *Id.* at 468.

With union membership currently at approximately 20%, dramatic improvements with respect to wages or other work conditions are limited for union members.⁵⁹ Human Rights Watch (“HRW”), which investigates and exposes human rights violations around the world, documented numerous violations by meat and poultry processing employers in a 185-page report entitled, “Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants.”⁶⁰ In its report, HRW calls upon the U.S. government to pass uniform legislation to strengthen minimum labor standards, arguing that if only one company attempted to improve workplace conditions, it likely would go bankrupt, as competitive companies would not follow suit.⁶¹ “Only governmental power can set a uniform floor of strengthened industry-wide rules” and “provide the strong legal enforcement required to deter employers from violating workers’ rights.”⁶²

BACKGROUND OF THE RELEVANT LAW

A. *Fair Labor Standards Act*

President Franklin D. Roosevelt urged Congress to pass the FLSA to give workers “a fair day’s pay for a fair day’s work.”⁶³ The President asserted the necessity for regulation of “maximum hours, minimum wages, the evil of child labor and the exploitation of unorganized labor.”⁶⁴ The FLSA was enacted in 1938 to address the “existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁶⁵ These conditions, among other things, cause commerce “to be used to spread and perpetuate such labor conditions,” constitute “an unfair method of competition,” lead to labor disputes, and interfere “with the orderly and fair marketing of goods.”⁶⁶ Thus, the primary purpose of the FLSA is to address employees’ living and working conditions,⁶⁷

⁵⁹ See Moberg, *supra* note 45.

⁶⁰ HUMAN RIGHTS WATCH, *supra* note 1.

⁶¹ *Id.* at 2.

⁶² *Id.*

⁶³ Dorris, *supra* note 5, at 1253 (from public papers and addresses of Franklin D. Roosevelt: the constitution prevails); see also Gorman v. Consolidated Edison Corp., 488 F.3d 586, 589 (2d Cir. 2007).

⁶⁴ Forsythe, *supra* note 57, at 465–66.

⁶⁵ 29 U.S.C. § 202(a) (1974) (congressional finding and declaration of policy).

⁶⁶ *Id.*

⁶⁷ Dorris, *supra* note 5, at 1253; Forsythe, *supra* note 57, at 465–66.

requiring employers to pay minimum wages and overtime.⁶⁸ Congress declared that the FLSA was to be used “to correct and as rapidly as possible . . . eliminate these conditions without substantially curtailing employment or earning power,” and the Act has since been liberally interpreted.⁶⁹

B. *The Portal to Portal Act*

In 1947, almost ten years after the passage of the FLSA, the PPA was enacted in response to lobbying efforts from employers to limit their FLSA liabilities.⁷⁰ Several United States Supreme Court decisions prompted numerous lawsuits and subsequent lobbying for the passage of the PPA.⁷¹ “The primary concern was the many pending ‘portal-to-portal’ suits—actions brought on the theory that travel time and other preliminary and postliminary work activities should be compensated. Nearly two thousand such suits had been filed in a six-month time span, resulting in well over \$ 6 billion (in 1947 dollars) of estimated liability.”⁷²

An example of one such case is *Anderson v. Mt. Clemens Pottery Co.* There, employees were required to first punch a time clock and then walk to their respective work benches where they performed preliminary duties before beginning productive work.⁷³ Employees were docked fourteen minutes for this activity at both the beginning and end of the workday, and at the start and end of lunchtime, which resulted in a fifty-six-minute deduction from wages each day.⁷⁴ The Supreme Court held that time spent walking from a time clock at the entrance of the factory to a workstation was part of the statutory workweek and must be compensated.⁷⁵ The Court reasoned that an employer must compensate its employees for time it requires them to be on its work premises, on duty, or at a workplace prior and subsequent to the employees’ scheduled

⁶⁸ 29 U.S.C. §§ 206-7 (2007) (“Every employer shall pay to each of his employees . . . wages . . . not less than . . . \$7.25 an hour.”); 29 U.S.C. §§ 207 (2010) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”)

⁶⁹ 29 U.S.C. § 202(b) (1974); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005).

⁷⁰ *Dorris*, *supra* note 5, at 1256.

⁷¹ *See Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

⁷² *Dorris*, *supra* note 5, at 1256.

⁷³ *Anderson*, 328 U.S. at 689–90.

⁷⁴ *Id.* at 682–85.

⁷⁵ *Id.* at 690–91.

working hours.⁷⁶ In reaching this conclusion, the Court followed its recent decisions, including *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, where it held that time spent traveling from iron ore mine portals to underground work areas was compensable.⁷⁷

In enacting the PPA, Congress found that the FLSA had been judicially interpreted “in disregard of long-established customs, practices, and contracts between employers and employees.”⁷⁸ Congress was concerned that this unexpected liability would result in financial ruin for employers.⁷⁹ The PPA, therefore, excluded from FLSA coverage time employees spend “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and activities which are preliminary to or postliminary to said principal activity or activities.”⁸⁰

Congress was careful to ensure, however, that only activities specifically detailed under the PPA were excluded from the FLSA’s protection. In discussing the PPA, Senator Cooper explained which actions were covered: “[T]he liberal construction of the terms ‘principal activity or activities’ urged by Congress, the President, and the Secretary of Labor . . . [provide] broad coverage under the F.L.S.A. and limit[] application of the Portal-to-Portal Act’s exemptions . . . to those employee activities ‘which in no way enter into the production of goods.’”⁸¹ Furthermore, upon approving the PPA, the President stated the following to Congress:

[T]he legislative history of the Act shows that Congress intends that the words “principal activities” are to be *construed liberally* to include any work of consequence performed for the employer, no matter when

⁷⁶ *Id.* at 691.

⁷⁷ *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining work as physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business); *Armour & Co. v. Wantock*, 323 U.S. 126, 131 (1944) (noting that exertion is not necessary for an activity to constitute work under the FLSA and that an employer may hire a man to do nothing or to wait for something to happen).

⁷⁸ 29 U.S.C. § 251(a) (1947). *But see* *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981)

(“The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.”).

⁷⁹ *Id.*; see also Dorris, *supra* note 5, at 1256.

⁸⁰ 29 U.S.C. § 254(a)(1)–(2) (1996).

⁸¹ *Dunlop v. City Electric*, 527 F.2d 394, 399 (5th Cir. 1976) (emphasis added) (quoting comments of Senator Cooper during floor debates on the Portal-to-Portal Act).

the work is performed. We should not lose sight of the important requirement under the Act that all “principal activities” must be paid for, *regardless of contract, custom, or practice*. I am sure the courts will not permit employers to use artificial devices such as the shifting of work to the beginning or the end of the day to avoid liability under the law.⁸²

1. DOL Regulations Interpreting the PPA

Soon after the PPA was enacted, the Secretary of Labor issued an interpretive bulletin discussing the Act.⁸³ Although administrative regulations are not given final authority until courts review them, Congress showed its support for the interpretation put forward by the Secretary of Labor by enacting Section 16(c) shortly thereafter.⁸⁴ Section 16(c) strengthened the force of the Secretary of Labor’s interpretation by providing “any order, regulation, or interpretation . . . shall remain in effect . . . except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of [the FLSA].”⁸⁵

Although not explicitly addressed in the statute, Congress effectively overturned *Anderson* and *Tennessee Coal*. The Secretary of Labor stated that time spent “traveling between the portal of the mine and the working face at the beginning and end of each workday” would not be compensated in the absence of a contract, custom, or practice.⁸⁶ The PPA provides that employers must pay employees where there is “an express provision of a . . . contract” or a “custom or practice” of compensating activities that would otherwise be excluded under the PPA.⁸⁷

The PPA did not otherwise change the purpose of the FLSA or its definition of work.⁸⁸ It did not affect the computation of hours within a

⁸² *Id.* at 398–99 & n.6 (emphasis added); *see also* 29 U.S.C. § 254(b) (1996); 29 C.F.R. § 790.8(b)(2) (1970) (“Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.”).

⁸³ 29 C.F.R. § 790.1 (1970) (Introductory Statement).

⁸⁴ *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956); 29 C.F.R. § 790.1(c) (1970); Brief for Respondents at 21 *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (No. 03-1238).

⁸⁵ *Steiner*, 350 U.S. at 255 & n.8.

⁸⁶ 29 C.F.R. § 790.5(b)(1)–(2) (1970) (explaining effect of Portal-to-Portal Act on determination of hours worked).

⁸⁷ 29 U.S.C. § 254(b) (1996).

⁸⁸ *IBP, Inc.*, 546 U.S. at 28; 29 C.F.R. § 790.2 (1970) (“[T]he act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions ‘detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’ The legislative history indicates that the Portal Act was not intended to change this general policy.”).

workday, that is, the period between the commencement and conclusion of the principal work activities.⁸⁹ The Secretary of Labor explained that “[p]reparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.”⁹⁰

2. The PPA Case Law

i. United States Supreme Court Law on the PPA

Eight years after the PPA was enacted, the United States Supreme Court, in *Steiner v. Mitchell*, concluded that principal activities comprise all activities which are “an integral and indispensable part of the principal activities,” including the donning and doffing of protective gear “before or after the regular work shift, on or off the production line.”⁹¹ *Steiner* involved a battery manufacturing plant where all production workers were exposed to corrosive and toxic chemicals.⁹² Workers were required to shower and change their clothes at the plant in order to protect their health and the health of their families.⁹³ This practice was part of an industrial hygiene program, and Tennessee state law required the employer to provide facilities for showering and changing clothes.⁹⁴ In reaching its decision, the Court referred to a colloquy that took place during Senate hearings on the PPA, in which Senator Cooper had stated, “[I]f the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.”⁹⁵

IBP, Inc. v. Alvarez, another significant Supreme Court decision, was a consolidation of two federal appellate cases involving employers in the meat and poultry processing industry.⁹⁶ *Alvarez v. IBP, Inc.*

⁸⁹ *IBP, Inc.*, 546 U.S. at 28; 29 C.F.R. § 790.6(a)–(b) (1970).

⁹⁰ 29 C.F.R. § 790.8(a) (1970) (noting that an employee operating a lathe “will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool,” and that “a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities,” will “during such 30 minutes distribute[] clothing or parts of clothing at the workbenches of other employees and get[] machines” ready for use by other employees); 29 C.F.R. § 790.7(a) (1970) (noting that “the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not ‘preliminary’ or ‘postliminary’ activities outside the workday.”).

⁹¹ *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

⁹² *Id.* at 249.

⁹³ *Id.* at 251.

⁹⁴ *Id.* at 250.

⁹⁵ *Id.* at 258 (citation omitted).

⁹⁶ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005).

involved a slaughter and processing plant belonging to the largest meat processor in the United States, at which all production workers were required to wear numerous articles of protective gear.⁹⁷ The Ninth Circuit in *Alvarez* held that the donning and doffing of protective gear was integral and indispensable.⁹⁸ It also held that time spent donning and doffing protective gear that was unique to the job at issue was compensable, but that time employees spent donning and doffing non-unique protective gear was “*de minimis* as a matter of law” and not compensable.⁹⁹ *Tum v. Barber* involved production workers in a poultry plant who were required to wear numerous articles of protective gear.¹⁰⁰ The First Circuit found that the employees’ donning and doffing was integral and indispensable, but that all time spent donning and doffing safety gear, and waiting and walking in association with donning and doffing, was *de minimis* and not compensable.¹⁰¹

The principal question raised in both appellate cases was “whether postdonning and predoffing walking time [was] specifically excluded by [the PPA].”¹⁰² The Supreme Court held that

any activity that is “integral and indispensable” to a “principal activity” is itself a “principal activity: under § 4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.”¹⁰³

Thus, the Court ruled that the donning and doffing of safety gear was a principal activity.¹⁰⁴ This principal activity, the court held, signaled the start and end of the workday, and time spent performing activities, including walking or waiting, conducted between the start and

⁹⁷ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 898 n.2 (9th Cir. 2003).

⁹⁸ *Id.* at 903 (recognizing the integral and indispensable standard set forth in *Steiner*).

⁹⁹ *Id.*; see also *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (finding a distinction between unique and nonunique safety gear under *Steiner*’s integral and indispensable standard).

¹⁰⁰ *Tum v. Barber*, 360 F.3d 274, 277 (1st Cir. 2004), *aff’d in part, rev’d in part and remanded sub nom.* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

¹⁰¹ *Id.* at 279–81.

¹⁰² *IBP, Inc. v. Alvarez*, 546 U.S. 21, 30 (2005).

¹⁰³ *Id.* at 37.

¹⁰⁴ *Id.*; *Perez v. Mountaire Farms Inc.*, 650 F.3d 350, 368 (4th Cir. 2011) (“Although the parties in *Alvarez* did not challenge on appeal the conclusion that donning and doffing protective gear was integral and indispensable to the principal activity of poultry processing, it would be illogical to conclude that the Supreme Court would have held the walking time to be compensable if it entertained serious doubts regarding the compensability of the donning and doffing activities themselves.”).

end of the workday must be compensated.¹⁰⁵ Although the circuits below found that, in some instances, time spent donning and doffing safety gear is *de minimis* and not compensable,¹⁰⁶ the Court held that these particular instances of donning and doffing were still within the scope of “principal activity,” as they signaled the start and end of the workday.¹⁰⁷

ii. Circuit Law on the PPA

In applying the “integral and indispensable” standard set forth in *Steiner*, the majority of circuits employ similar tests that reflect Congress’s intent to construe work liberally under the PPA.¹⁰⁸ In fact, only one circuit, the Second Circuit, has construed *Steiner* narrowly.¹⁰⁹ In the Ninth Circuit, an activity is integral and indispensable if it (1) is necessary for the principal work performed, and (2) primarily benefits the employer.¹¹⁰ Activities performed predominantly in the employees’ interest or for the employees’ own convenience are excluded.¹¹¹ An act is necessary to the principal work performed if it is required by law, the employer, or by the nature of the work.¹¹² The Ninth Circuit referred to Section 790.8(c) of the DOL regulations, which interpret the PPA, when explaining the test.¹¹³ Section 790.8(c) states that changing clothes is integral and indispensable when “required by the law, by rules of the

¹⁰⁵ *IBP, Inc.*, 546 U.S. at 36–37, 40.

¹⁰⁶ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903–04 (9th Cir. 2003) (“‘When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours,’ the Supreme Court has observed, ‘such trifles may be disregarded[. for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA].’” (alteration in original) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946))). But cf. 29 C.F.R. § 790.8 n.63 (1970) (noting that “[i]n a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that ‘There was no definite purpose in using the words ‘30 minutes’ instead of 15 or 10 minutes or 5 minutes or any other number of minutes.’ In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee’s principal activity and within the compensable workday.”).

¹⁰⁷ *IBP, Inc.*, 546 U.S. at 37, 40.

¹⁰⁸ See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Perez*, 650 F.3d 350; *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004); *Alvarez*, 339 F.3d 894; *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Dunlop v. City Electric*, 527 F.2d 394 (5th Cir. 1976) (applying similar integral and indispensable test to different set of facts); see also 29 C.F.R. § 790.1 (1970).

¹⁰⁹ *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007).

¹¹⁰ See *Perez*, 650 F.3d 350; *Ballaris*, 370 F.3d 901; *Alvarez*, 339 F.3d 894.

¹¹¹ *Perez*, 650 F.3d at 366; *Dunlop*, 527 F.2d at 398–99.

¹¹² *Perez*, 650 F.3d at 366 (citation omitted).

¹¹³ *Alvarez*, 339 F.3d at 903.

employer, or by the nature of the work.”¹¹⁴ The circuits that have applied *Steiner* in the meat and poultry processing context have employed the same or a similar test as the Ninth Circuit and have found that time spent donning and doffing safety gear is integral and indispensable to the principal work activity at issue and must be compensated if not *de minimis*.¹¹⁵

As noted above, however, one circuit has applied *Steiner* narrowly.¹¹⁶ The Second Circuit, in *Gorman v. Consolidated Edison Corp.*, concluded that *Steiner* applies only to measures necessary to enter and work within a lethal working environment.¹¹⁷ *Gorman* involved workers in a nuclear plant who claimed they should have been paid for time spent complying with security procedures and donning and doffing safety gear.¹¹⁸ The court examined dictionary definitions to determine the meaning of “integral and indispensable,” finding indispensable to mean “necessary” and integral to mean “essential to completeness.”¹¹⁹ The court provided an example of integral: “[A] diver’s donning of wetsuit, oxygen tank and mouthpiece may be integral to the work even though it is not the (underwater) task that the employer wishes done.”¹²⁰ While the court found that the donning and doffing of safety gear may have been indispensable, it concluded it was not integral to the principal work activities, despite the fact that safety gear was required by the law and the employer, because the employees did not work in a lethal atmosphere.¹²¹

C. Section 203(o) of the FLSA

Section 203(o) is included within the definitions section of the FLSA. It was added to the FLSA in 1949, two years after the PPA, to

¹¹⁴ 29 C.F.R. § 790.8(c) & n.65 (1970).

¹¹⁵ *Perez*, 650 F.3d 350; *Franklin*, 619 F.3d 604; *Bonilla*, 487 F.3d 1340; *see also* *Tum v. Barber*, 360 F.3d 274 (1st Cir. 2004) (finding donning and doffing of safety gear integral and indispensable, but because the time was *de minimis*, the court did not order compensation), *aff’d in part, rev’d in part and remanded sub nom.* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *Alvarez*, 339 F.3d 894; *Reich*, 38 F.3d 1123.

¹¹⁶ *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007). *But cf.* *Pirant v. U.S. Postal Serv.*, 542 F.3d 202, 209 (7th Cir. 2008) (citing *Gorman* in concluding that donning and doffing the type of work clothing at issue—a postal worker’s uniform, gloves, and work shoes—was not integral and indispensable to the employee’s principal activities because it was not extensive and unique, but declining to discuss the work environment).

¹¹⁷ *Gorman*, 488 F.3d at 593.

¹¹⁸ *Id.* at 589.

¹¹⁹ *Id.* at 592.

¹²⁰ *Id.* at 593.

¹²¹ *Id.* at 593–94 (finding that *Steiner* applied to workers at a nuclear plant, but only those who worked in the nuclear containment area).

strengthen the PPA and avoid another set of lawsuits like those that had led to the Act's enactment.¹²² Section 203(o) defines hours worked, permitting employers and union representatives to decide whether to compensate time spent changing clothes and washing at the start and end of the workday.¹²³

Hours Worked.—In determining for the purposes of sections 206 and 207 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.¹²⁴

The original House Bill proposed that *any* activity could be bargained away so long as it was part of a CBA.¹²⁵ Senator Herter, who introduced the amendment, used CBAs in the bakery industry to exemplify what he hoped the amendment would allow.¹²⁶ In the bakery industry, there existed CBAs that provided that time spent changing clothes at the end of the day would count as part of the workday; in other CBAs, it was not considered part of the workday.¹²⁷ Senator Herter argued that, in both cases, the CBAs were “carefully threshed out between the employer and the employee,” and “both [parties] [were] completely satisfied.”¹²⁸ The Conference Committee narrowed the scope of Section 203(o) by limiting the exclusion to time employees spend changing clothes and washing at the beginning and end of the workday, and the final bill incorporated this limitation.¹²⁹

Although the legislative history, the PPA, and the DOL regulations provide some guidance as to how Section 203(o) should be interpreted,

¹²² *Anderson v. Cagle's Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) (citing 95 CONG. REC. 11,433 (daily ed. Aug. 10, 1949) (comments of Rep. Herter)).

¹²³ 29 U.S.C. § 203(o) (2006).

¹²⁴ *Id.*

¹²⁵ U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#.UKBVeIV-x7I (citing S. REP. NO. 81-640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2255).

¹²⁶ *Id.* (citing 95 CONG. REC. H11210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter)).

¹²⁷ *Id.* (citing same).

¹²⁸ *Id.* (citing same).

¹²⁹ See 29 U.S.C. § 203(o) (2006); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#.UKBVeIV-x7I (citation omitted).

no United States Supreme Court decision has directly interpreted Section 203(o).¹³⁰ As a result, there has been considerable disagreement among the federal courts with respect to the interpretation of Section 203(o) and similar inconsistencies within the DOL Opinion Letters.¹³¹ The main issue to be addressed is whether “clothing” includes safety gear. A second, but related, issue is whether Section 203(o) is an exemption requiring narrow interpretation. Lastly, there is disagreement over what constitutes a “custom or practice” under Section 203(o).

1. DOL Advisories Addressing Section 203(o)

The DOL, the administrative agency responsible for enacting regulations and enforcing the FLSA, has issued several advisories on the meaning of “clothes” within Section 203(o) and whether this includes safety equipment.¹³² Since its first opinion letter in 1997, the DOL’s position has changed multiple times, typically in conjunction with political party changes in the executive branch.¹³³ Due to the DOL’s repeated position change, the federal circuits have not given deference to the DOL’s interpretation nor are they required to.¹³⁴

In 1997, the DOL considered whether donning and doffing safety gear was covered by Section 203(o) and determined that, because Section 203(o) “provides an exemption from the broad, remedial provisions of the FLSA, it must be interpreted narrowly” and does not apply to the donning and doffing of safety gear.¹³⁵ It further explained that the common usage of “clothing” refers to apparel and not safety gear, “which is generally worn over such apparel and may be

¹³⁰ See generally *Livadas v. Bradshaw*, 512 U.S. 107, 131–32 (1994) (explaining that Section 203(o) provides employees with minimum labor standards absent an agreement to the contrary); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.19 (1981) (“Section [203](o) of the [PPA] . . . excludes from the definition of ‘hours worked’ under §§ 6 and 7 of the FLSA, ‘any time spent in changing clothes or washing at the beginning or end of each workday’ if that time was noncompensable ‘under a bona fide collective-bargaining agreement.’”); *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956). (“[I]ts clear implication is that clothes changing and washing, which are otherwise part of the principal activity, may be expressly excluded from coverage by the agreement.”).

¹³¹ See *infra* notes 132–45, 146–50 and accompanying text.

¹³² *Franklin v. Kellogg Co.*, 619 F.3d 604, 612–13 (6th Cir. 2010) (discussing DOL Opinion Letters); see also U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK CH. 31 (Dec. 15, 2000); U.S. Dep’t of Labor, Wage & Hour Div., Advisory Memorandum No. 2006-2 (May 31, 2006), available at http://www.dol.gov/whd/FieldBulletins/AdvisoryMemo2006_2.htm#.UKBXJoV-x7I.

¹³³ *Franklin*, 619 F.3d at 612–14.

¹³⁴ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011); *Franklin*, 619 F.3d at 612–14.

¹³⁵ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter, 1997 WL 998048, at *1 (Dec. 3, 1997).

cumbersome in nature.”¹³⁶ In 2001, the DOL restated this position in another letter.¹³⁷

In 2002, the DOL published another letter with a different opinion.¹³⁸ The letter declared that “changing clothes” within Section 203(o) applies to the donning and doffing of safety gear typically worn in the meat packing industry.¹³⁹ The letter explained that “clothing” includes “items worn on the body for covering, protection, or sanitation, but [does] not . . . include tools or other implements such as knives, scabbards, or meat hooks.”¹⁴⁰ The DOL restated this position in a 2007 opinion letter and further clarified that “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.”¹⁴¹

In 2010, the DOL reverted back to the position it had taken in 1997 and 2001.¹⁴² It stated that dictionary definitions are not helpful because they are a collection of a word’s various meanings and depend on context.¹⁴³ The DOL looked to the legislative history and found that the “clothes” Congress had in mind when it narrowed Section 203(o) were those that workers wore in the bakery industry and hardly resembled the safety gear used in today’s meat and poultry industry.¹⁴⁴ The DOL concluded that Section 203(o) does not cover safety gear that is required by law, the employer, or by the nature of the job.¹⁴⁵

2. Circuit Law Addressing Clothing within Section 203(o)

In light of the DOL’s lack of consistency, it should come as no surprise that there is a circuit split over the meaning and interpretation of “clothing” under Section 203(o).¹⁴⁶ The Fourth, Fifth, Sixth, Seventh,

¹³⁶ *Id.*

¹³⁷ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter, 2001 WL 58864, at *1 (Jan. 15, 2001).

¹³⁸ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2002-2 (June 6, 2002), *available at* www.dol.gov/whd/opinion/FLSA/2002/2002_06_06_2_FLSA.pdf.

¹³⁹ *Id.* at *1.

¹⁴⁰ *Id.* at *3.

¹⁴¹ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2007-10 (May 14, 2007), *available at* www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf.

¹⁴² U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#UKBVeIV-x7I.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1137 (10th Cir. 2011) (discussing circuit split).

Tenth, and Eleventh Circuits have found that safety equipment constitutes clothing” under the section.¹⁴⁷ Yet, none of those circuits was willing to declare a per se rule.¹⁴⁸ Only the Ninth Circuit has found that the donning and doffing of safety equipment does not “fit within [20]3(o)’s ‘clothing’ term.”¹⁴⁹ Similarly, the circuits are split over whether Section 203(o) should be treated as an exemption and require a narrow construction.¹⁵⁰

The Ninth Circuit’s decision in *IBP, Inc. v. Alvarez* involved employees working at a beef processing plant, who were required to wear extensive safety gear.¹⁵¹ The Ninth Circuit held that Section 203(o) did not cover safety equipment.¹⁵² The court looked to the “ordinary, contemporary, common meaning” of the relevant language because it found inadequate guidance in case law and legislative history.¹⁵³ The Ninth Circuit first rejected the broad definition of “clothing” proposed by IBP, Inc., explaining that FLSA exemptions “are to be construed narrowly against the employer.”¹⁵⁴ The court refused to apply exemptions unless they “plainly and unmistakably” fit, and protective gear did not “plainly and unmistakably” fit within Section 203(o)’s “clothing” term, according to the court.¹⁵⁵

¹⁴⁷ *Salazar*, 644 F.3d 1130; *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009); *Anderson v. Cagle’s Inc.*, 488 F.3d 945 (11th Cir. 2007); *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (addressing a dispute over law enforcement uniforms, not safety gear); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (determining that safety equipment worn while manufacturing surgical needles and sutures constituted clothing).

¹⁴⁸ See *supra* note 146.

¹⁴⁹ *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); see also *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368, 379–80, 382–83 (M.D. Pa. 2008) (describing district court decisions coming down on both sides).

¹⁵⁰ *Salazar*, 644 F.3d at 1138 (discussing circuit split).

¹⁵¹ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005) (addressing whether post-donning and pre-doffing walking time is excluded by the PPA; Section 203(o) was not at issue); *Alvarez*, 339 F.3d at 898.

¹⁵² *Alvarez*, 339 F.3d at 905.

¹⁵³ *Id.* at 904.

¹⁵⁴ *Id.* at 905 (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.19 (1981) (referring to Section 203(o) and other FLSA provisions as exceptions to the FLSA); *Marshall v. Brunner*, 668 F.2d 748, 751 (3d Cir. 1982) (interpreting Section 203(i) narrowly); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 384; *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1072–76 (D. Minn. 2007); U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter, 1997 WL 998048, at *1 (Dec. 3, 1997) (classifying Section 203(o) as an exemption).

¹⁵⁵ *Alvarez*, 339 F.3d at 905.

Second, the Ninth Circuit explained that specialized protective equipment is different than typical clothing.¹⁵⁶ When feeling cold, one does not consider putting on “a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards.”¹⁵⁷ The court pointed to an Occupational Safety and Health Administration regulation, which distinguished personal protective equipment from general work clothes, and stated that general work clothes are not intended to function as protection against workplace hazards.¹⁵⁸ Government-mandated personal protective equipment is not an appropriate subject for collective bargaining because it would not be in the interest of public policy to provide disincentives for use.¹⁵⁹

Unlike the Ninth Circuit, the Fourth Circuit, in *Sepulveda v. Allen Family Foods, Inc.*, held that the meaning of “clothes” within Section 203(o) embraces safety equipment.¹⁶⁰ *Sepulveda* involved employees at a poultry processing plant, wearing what the court described as “standard safety equipment.”¹⁶¹ Because the statute did not define “clothing,” the Fourth Circuit looked to the dictionary to ascertain the plain meaning of the word, which was defined as “covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.”¹⁶² Since the statute referred to “clothes,” the court determined that the most straightforward interpretation of the term embraced all clothing, because even street clothes are worn for some degree of protection.¹⁶³ The court noted that Congress intended the statute to encompass work clothes, and administrative regulations had also referred to safety gear as clothing.¹⁶⁴ The Fourth Circuit concluded that all of the safety gear at issue fit within the definition.¹⁶⁵ Other circuits that have found safety equipment to fall within the definition of “clothing” have either followed *Sepulveda* or adopted comparable reasoning.¹⁶⁶

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing 29 C.F.R. § 1910.130(b) (1999)).

¹⁵⁹ *Id.* at 905 n.8.

¹⁶⁰ *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 211 (4th Cir. 2009).

¹⁶¹ *Id.*

¹⁶² *Id.* at 214–16.

¹⁶³ *Id.* at 215.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 216.

¹⁶⁶ *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138–41 (10th Cir. 2011); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614–15 (6th Cir. 2010); *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010); *Anderson v. Cagle’s Inc.*, 488 F.3d 945, 956 (11th Cir. 2007); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001).

With the exception of the Ninth Circuit, federal appellate courts that have addressed whether Section 203(o) should be treated as an exemption—and, therefore, narrowly construed—have answered that question in the negative.¹⁶⁷ The Tenth Circuit, in *Salazar v. Butterball, LLC*, involved workers at a turkey processing plant who were required to wear various pieces of safety equipment.¹⁶⁸ The Tenth Circuit explained that the term “clothing” is ambiguous, pointing to the many, differing interpretations of the circuit courts and the DOL.¹⁶⁹ The court ultimately found that Section 203(o) is not an exemption because (1) it was not specifically designated as such by Congress; (2) it removes “discrete activities” from the definition of hours worked, whereas other FLSA exemptions remove entire classes of employees; and (3) it gives parties the option of removing discrete activities through the process of collective bargaining.¹⁷⁰

The Fifth, Sixth, Seventh, and Eleventh Circuits have also held that Section 203(o) is not an exemption, adopting reasoning similar to the Tenth Circuit.¹⁷¹

3. Case Law Addressing Custom and Practice under Section 203(o)

Section 203(o) permits the exclusion of time based upon “the express terms of or . . . custom or practice under a bona fide collective-bargaining agreement.”¹⁷² The majority of cases that reach the circuit courts involve situations where the nonpayment of donning and doffing is held to be a custom or practice under a CBA. The Third, Fifth, Sixth, Tenth, and Eleventh Circuits do not require parties to negotiate or discuss the compensation of time spent donning and doffing safety gear in order to establish a custom or practice.¹⁷³ A custom or practice can be

¹⁶⁷ *Salazar*, 644 F.3d at 1138; *Franklin*, 619 F.3d at 611–12; *Allen v. McWane, Inc.*, 593 F.3d 449, 458 (5th Cir. 2010); *Anderson*, 488 F.3d at 957. *But cf.* *Adams v. United States*, 471 F.3d 1321, 1325–26 (Fed. Cir. 2006) (finding that exclusions under the PPA that are similar to Section 203 are not exemptions); *Turner v. City of Philadelphia*, 262 F.3d 222, 226–27 (3d Cir. 2001) (describing Section 203(o) as an exclusion).

¹⁶⁸ *Salazar*, 644 F.3d at 1134.

¹⁶⁹ *Id.* at 1138.

¹⁷⁰ *Id.*

¹⁷¹ *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 595–96 (7th Cir. 2012) (concluding that Section 203(o) is an exclusion but not an exemption and describing the PPA as an exemption); *Franklin*, 619 F.3d at 611–12; *Allen*, 593 F.3d at 458; *Anderson*, 488 F.3d at 957–58.

¹⁷² 29 U.S.C. § 203(o) (2006).

¹⁷³ *Salazar*, 644 F.3d 1130; *Franklin*, 619 F.3d at 617 (citing *Allen*, 593 F.3d at 457); *Anderson*, 488 F.3d at 958–59; *Turner v. City of Philadelphia*, 262 F.3d 222, 226–27 (3d Cir. 2001).

established as long as there has been a prolonged period of acquiescence and a CBA.¹⁷⁴

Some district courts have interpreted custom or practice differently than the circuit courts.¹⁷⁵ These district courts require a prolonged period of nonpayment during which employees knowingly acquiesce.¹⁷⁶ The reason these courts require more than a history of nonpayment is because, otherwise, “[Section] 203(o) would essentially be an unlimited FLSA exemption applicable to every unionized employer that did not pay for clothes-changing time.” These courts do not believe that Section 203(o) is so sweeping.¹⁷⁷

D. The FLSA, the NLRA, and Preemption

Adding to the confusion among the circuits is the additional question of whether Section 203(o) and the NLRA preempt more protective state laws.¹⁷⁸ The FLSA explicitly grants states the authority to create such laws,¹⁷⁹ and all federal court decisions that have addressed the issue have concluded that such laws are not preempted by Section 203(o).¹⁸⁰ Nevertheless, some employers have asserted that Section 203(o) preempts state law.¹⁸¹ The more complex question, however, is whether the NLRA preempts state laws that provide more protection than Section 203(o). The issue of whether the NLRA can preempt a state law that requires a shorter workweek in the context of Section 203(o) has been addressed by several district courts and one circuit court.¹⁸²

¹⁷⁴ *Franklin*, 619 F.3d at 617.

¹⁷⁵ See *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043 (W.D. Pa. Sept. 3, 2008); *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063 (D. Minn. 2007); *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL 32987224, at *8 (N.D. Ala. Feb. 4, 2002), *overruled by* Nos. 4:9-CV-1612-VEH, 4:06-CV-4676-VEH, 4:06-CV-4677-VEH, 2007 WL 6477624 (N.D. Ala. Aug. 31, 2007).

¹⁷⁶ *Franklin*, 619 F.3d at 617 n.5.

¹⁷⁷ *Kassa*, 487 F. Supp. 2d at 1071.

¹⁷⁸ *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840 (E.D. Wash. May 16, 2005).

¹⁷⁹ 29 U.S.C. § 218 (1967).

¹⁸⁰ See sources cited *supra* note 178.

¹⁸¹ *Wermuth & Glenn*, *supra* note 21.

¹⁸² *Spoerle*, 614 F.3d 427; *Martinez v. Cargill Meat Solutions Corp.*, Nos. 8:09CV247, 4:09CV3079, 2011 U.S. Dist. LEXIS 58457 (D. Neb. Apr. 12, 2011); *O’Keefe v. Hess Corp.*, No. 10-2598 (WJM), 2010 WL 3522088 (D.N.J. Sept. 1, 2010); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368; *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007).

1. The FLSA and Preemption

i. The FLSA Savings Clause, Section 218

The FLSA contains a savings clause, 20 U.S.C. § 218, which expressly permits states to promulgate more protective laws and establish higher minimum wages and shorter maximum workweeks.¹⁸³ Courts have recognized that “[t]he intent of § 218(a) was to leave undisturbed ‘the traditional exercise of the states’ police powers with respect to wages and hours more generous than the federal standards.’”¹⁸⁴ The purpose behind the FLSA, therefore, “is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.”¹⁸⁵ The overall effect is to afford states “a continuing role in regulating wages and hours (subject to federal minimums).”¹⁸⁶

ii. Circuit Law Addressing Section 203(o) and Preemption

In *Spoerle v. Kraft*, the first federal appellate decision addressing the issue of preemption, the Seventh Circuit held that Section 203(o) did not preempt a more protective Wisconsin state law.¹⁸⁷ The employees in *Spoerle* worked at a meat processing plant and were required to wear several items of safety gear.¹⁸⁸ The required donning and doffing of safety gear took five to twelve minutes each day, and the CBA did not

¹⁸³ 29 U.S.C. § 218(a) (1967). Section 218(a) provides:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter . . . [N]o provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter. *Id.*

¹⁸⁴ *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 393.

¹⁸⁵ *Id.* (quoting *Pacific Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990)).

¹⁸⁶ Dorris, *supra* note 5, at 1256.

¹⁸⁷ *Spoerle*, 614 F.3d at 430; *see also* *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1143 (10th Cir. 2011) (finding Colorado law, which had no statutory equivalent to Section 203(o), did not apply to the defendant and, therefore, declining to reach the issue of preemption); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 393 (noting, in dicta, that Section 203(o) would not preempt state law); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *36 (E.D. Wash. May 16, 2005) (finding that Section 203(o) does not preempt state law).

¹⁸⁸ *Spoerle*, 614 F.3d at 428.

guarantee payment for this time.¹⁸⁹ The employees wanted compensation for these minutes at the higher rate of pay that was agreed upon during bargaining.¹⁹⁰ They argued that the safety gear at issue was not “clothing” under Section 203(o) and that Wisconsin law did not have a provision equivalent to Section 203(o) requiring payment for time spent donning and doffing safety gear.¹⁹¹ Relying on the Fourth Circuit’s reasoning in *Sepulveda*, the court held that the safety gear constituted “clothing” under Section 203(o) and subsequently sought to determine whether Wisconsin law was preempted by Section 203(o).¹⁹²

In concluding that Wisconsin law was not preempted, the Seventh Circuit first pointed to the introduction of Section 203(o) and stated that there was nothing in the section that limited the application of the FLSA Savings Clause.¹⁹³ “States are free to set higher hourly wages or shorter periods before overtime pay comes due.”¹⁹⁴ As an example, the court cited a CBA providing payment of \$8 per hour when the state minimum wage was \$8.25 per hour and the federal minimum wage was \$7.25 per hour.¹⁹⁵ The court asserted that the more protective state law would trump the CBA and require payment of \$8.25 per hour.¹⁹⁶ Indeed, the state law would trump both a CBA setting an hourly wage below the minimum wage and one requiring a greater number of hours to be worked in order to earn overtime pay.¹⁹⁷

Despite the lack of case law supporting their position, practitioners who represent management in labor and employment litigation have asserted arguments in support of Section 203(o) preemption.¹⁹⁸ These practitioners rely on *Sepulveda*, a Fourth Circuit decision, which did not address preemption but characterized Section 203(o) as a preference for private resolution of specified workplace concerns.¹⁹⁹ State law that refuses to acknowledge Section 203(o) presents an obstacle to accomplishing Congress’ purpose by preventing bargaining.²⁰⁰ Deferring

¹⁸⁹ *Id.*; *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913 (W.D. Wis. 2009); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860 (W.D. Wis. 2007).

¹⁹⁰ *Spoerle*, 614 F.3d at 428.

¹⁹¹ *Id.*

¹⁹² *Id.* (citing *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214–16 (4th Cir. 2009)).

¹⁹³ *Id.* at 429.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 430.

¹⁹⁶ *Spoerle*, 614 F.3d at 430.

¹⁹⁷ *Id.* at 429.

¹⁹⁸ *Wermuth & Glenn*, *supra* note 21.

¹⁹⁹ *Id.* at 873 & n.151 (citing *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 219 (4th Cir. 2009)).

²⁰⁰ *Id.* at 873.

to the CBA, as opposed to strictly adhering to statutory mandate, is more aligned with the spirit of the FLSA when it comes to protecting workers.²⁰¹ Section 203(o) is a unique provision allowing parties to waive their rights under the FLSA through collective bargaining, and it should not be taken away by state legislation.²⁰²

2. The NLRA and Preemption

i. The NLRA & the LMRA

In 1935, Congress enacted the NLRA to give employees the right to organize and bargain collectively.²⁰³ Congress found that the denial of these rights results in economic recession due to depressed wages, decreased purchasing power, and the lack of adequate working conditions.²⁰⁴ It also found that protecting employees' rights to organize and bargain collectively safeguards commerce by preventing industrial unrest and obstructions in the free flow of commerce.²⁰⁵ Furthermore, permitting the formation of unions allows workers to compete fairly with corporations, which are also collective entities.²⁰⁶

The NLRA was amended in 1947 by the LMRA.²⁰⁷ Section 301 of the LMRA has been interpreted to require a common federal law for all CBAs in order to maintain uniformity and consistency in their interpretation and application.²⁰⁸ Thus, Section 301 preempts state law claims requiring the interpretation or application of a CBA.²⁰⁹

In enacting the NLRA, however, Congress envisioned the coexistence of federal labor laws and minimum state labor protections for employees who bargain collectively.²¹⁰ Determining whether the NLRA preempts state labor laws involves a delicate balance between maintaining uniform federal laws on collective bargaining and permitting states to provide stronger labor protections for their citizens.²¹¹ There are times when preemption may interfere with state laws that offer stronger

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 29 U.S.C. § 157 (1947).

²⁰⁴ *Id.* § 151.

²⁰⁵ *Id.*

²⁰⁶ *Vegeahn v. Guntner*, 167 Mass. 92 (1896) (Holmes, J., dissenting).

²⁰⁷ *Id.* § 141.

²⁰⁸ *Id.* § 185(a); Kirsten M. Nelson, *Section 301 of the LMRA Does Not Require Preemption of a Minimum State Labor Standard if the Legal Character of the Claim Is Independent of the Rights in a Collective Bargaining Agreement*: *Livadas v. Bradshaw*, 36 B.C. L. REV. 330, 331–32 (1995).

²⁰⁹ Nelson, *supra* note 208, at 332.

²¹⁰ *Id.* at 331.

²¹¹ 29 U.S.C. § 151 (1947).

labor protections.²¹² The Supreme Court has developed rules to deal with this type of conflict.²¹³

ii. The Supreme Court Addresses the LMRA

In *Livadas v. Bradshaw*, a California state law required the provision of unpaid wages immediately upon an employee's termination, but the CBA at issue dictated otherwise.²¹⁴ Thus, the employee in *Livadas* was forced to choose between enforcing her state labor rights and entering a CBA.²¹⁵ The Supreme Court noted that "forcing employees . . . to bargain for what they [are] otherwise . . . entitled to" under state law is not part of federal labor law policy.²¹⁶ It stated, "[Section] 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law."²¹⁷ To survive preemption, the Court explained, "[t]he legal character of the state . . . claim must be 'independent' of the rights under the collective bargaining agreement [I]f the rights and duties asserted in the state claim arise out of the contractual obligation of the collective bargaining agreement, section 301 preempts the state claim."²¹⁸ When the meaning of the contract is not the subject of dispute, states can consult CBAs to resolve disputes without triggering preemption because the CBA may have information helpful in determining damages in a state suit.²¹⁹

iii. Circuit Law Addressing the LMRA

While a few district courts have addressed the issue, only one federal circuit court has ruled on whether state law should be preempted by the LMRA when Section 203(o) is involved.²²⁰ Relying on the Supreme Court's decision in *Lingle v. Norge Division of Magic Chef*,

²¹² Nelson, *supra* note 208, at 332.

²¹³ *Id.* at 332–34.

²¹⁴ *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

²¹⁵ *Id.* at 117.

²¹⁶ *Id.* at 130.

²¹⁷ *Id.* at 123 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)).

²¹⁸ Nelson, *supra* note 208, at 339; *see also Livadas*, 512 U.S. at 123–24.

²¹⁹ *Livadas*, 512 U.S. at 124; Nelson, *supra* note 208, at 339.

²²⁰ *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010); *see also Martinez v. Cargill Meat Solutions Corp.*, Nos. 8:09CV247, 4:09CV3079, 2011 U.S. Dist. LEXIS 58457 (D. Neb. Apr. 12, 2011) (preemption); *O'Keefe v. Hess Corp.*, No. 10-2598 (WJM), 2010 WL 3522088 (D.N.J. Sept. 1, 2010) (no preemption); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368, 392, 397 (M.D. Pa. 2008) (noting, in dicta, that the LMRA would preempt state law); *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007) (finding state law claims requiring compensation for donning and doffing were preempted by the LMRA).

Inc., the Seventh Circuit in *Spoerle* found that Wisconsin law was not preempted because the law was not “interpreting or enforcing the collective bargaining agreement.”²²¹ The Seventh Circuit found that nothing requires Wisconsin law to interpret or enforce the CBA.²²² What is required is that the CBA “be ignored, to the extent that it sets lower wages or hours than state law specifies.”²²³ The court ignored a provision in the CBA that did not require employees to be compensated for donning and doffing safety gear.²²⁴ The court compared the situation to a state law requiring a higher minimum wage than federal law requires, and noted that a CBA paying the federal minimum wage would have to give way to a state law requiring a higher minimum wage.²²⁵ The court recognized that every state law could affect collective bargaining, because knowing that state law requires higher overtime may lead labor and management to agree to a lower base pay.²²⁶

iv. District Court Law on the LMRA

Although there are only a few district court decisions addressing the issue, they are split over whether the LMRA should preempt more protective state laws concerning donning and doffing. *O’Keefe v. Hess Corp.* followed the Seventh Circuit’s reasoning in *Spoerle* and did not find preemption, while the other district courts have concluded that the LMRA preempts state law.²²⁷

In *In re Cargill Meat Solutions Wage & Hour Litigation*, employees of a meat processing plant filed several wage and hour claims, including a claim for unpaid wages for time spent donning and doffing safety gear.²²⁸ Although the court found that the donning and doffing of safety gear was compensable, as it did not find safety gear to constitute “clothing,”²²⁹ it still analyzed whether Section 203(o) and the LMRA

²²¹ *Spoerle*, 614 F.3d at 430; see also *infra* Part IV(B)(2) (describing *Lingle* in further detail).

²²² *Spoerle*, 614 F.3d at 429–30.

²²³ *Id.* at 430.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *O’Keefe v. Hess Corp.*, No. 10-2598 (WJM), 2010 WL 3522088 (D.N.J. Sept. 1, 2010); see also *Spoerle*, 614 F.3d 427; *Martinez v. Cargill Meat Solutions Corp.*, Nos. 8:09CV247, 4:09CV3079, 2011 U.S. Dist. LEXIS 58457, at *51–53 (D. Neb. Apr. 12, 2011) (finding preemption and citing Seventh Circuit district court cases prior to *Spoerle* that found LMRA preemption); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007).

²²⁸ *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 371.

²²⁹ *Id.* at 378.

would preempt Pennsylvania law.²³⁰ Thus, in dicta, the court found that Section 203(o) would not preempt the Pennsylvania law because the FLSA explicitly permits states to enact laws mandating higher minimum wages and/or shorter maximum workweeks.²³¹ With respect to LMRA, the court stated that state law would be preempted by the Act because it would require interpretation of the CBA.²³² Although there were no express terms addressing the donning and doffing of safety equipment, the court found that resolving state law claims would require an interpretation of the implied terms of the CBA,²³³ which the court determined were five minutes of compensation per day for mesh-wearing employees and no compensation for non-mesh-wearing employees.²³⁴

In reaching its conclusion, the court cited a decision from the same circuit, *Townsend v. BC Natural Chicken LLC*.²³⁵ In *Townsend*, employees brought several wage and hour claims, including claims involving the time spent donning and doffing protective gear.²³⁶ The employees argued that their case was analogous to *Livadas*,²³⁷ and that the court needed to look only to the CBA to offset the time the employees were already compensated.²³⁸ The court found that determining whether the time spent donning and doffing was compensable required interpretation of the CBA, which expressly provided “twelve (12) minutes of pay per week to provide for wash up time,” and therefore, the state law claims were preempted.²³⁹

ANALYSIS

This article argues two points. The first is that Section 203(o) should be construed narrowly to exclude safety gear and, therefore, require compensation for donning and doffing. The second is that, even if Section 203(o) is found to include safety gear, more protective state laws, requiring compensation for donning and doffing, should not be preempted by either Section 203(o) or the NLRA.

²³⁰ *Id.* at 392.

²³¹ *Id.* at 393.

²³² *Id.* at 392, 397.

²³³ *Id.* at 397.

²³⁴ *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 397.

²³⁵ *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007).

²³⁶ *Id.* at *12.

²³⁷ See *supra* notes 213–18 and accompanying text.

²³⁸ *Townsend*, 2007 U.S. Dist. LEXIS 8282, at *15.

²³⁹ *Id.* at *15–16.

A. Section 203(o) Should Exclude “Required Safety Gear”²⁴⁰

1. “Required Safety Gear” is Defined in the DOL’s Regulations and Used for Determining What Constitutes a Principal Activity by the Federal Circuit Courts.

The DOL’s regulations should be followed in interpreting Section 203(o) for several reasons. First, the regulations not only are consistent with the legislative intent of Congress, they also were approved by Congress. Second, the majority of circuits already rely upon the regulations to help define principal activities (i.e., work) under the PPA. Lastly, employers will not face extraordinary liability because activities that are *de minimis* do not require compensation.

Congress, the President, and the Secretary of Labor intended for the phrase “principal activities” under the PPA to be construed broadly. On the other hand, “preliminary” and “postliminary” activities under the PPA were intended to be construed narrowly and not to be used as a tool to avoid compensating employees. In accordance with these intentions, the DOL’s regulations broadly define principal activities and specifically mention Congress’s intent within their text.²⁴¹ Further, by enacting Section 16(c), Congress approved of the regulations shortly after they were issued by the Secretary of Labor, which suggests that the interpretation was consistent with its intent.²⁴²

DOL regulations are enacted specifically to explain the PPA. The regulations define principal activities as “activities which the employee is ‘employed to perform’” and “all activities which are an integral part of a principal activity.”²⁴³ There is no categorical list of “preliminary” and “postliminary” activities except those mentioned in the PPA, and, depending on the circumstances, an activity can be either principal or preliminary.²⁴⁴ “[C]hecking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to

²⁴⁰ 29 C.F.R. § 790.8(c) & n.65 (1970) (referring to “required safety gear” and including items “required by law, by rules of the employer, or by the nature of the work,” but not those worn primarily for the employee’s convenience); *see also supra* notes 108–15 and accompanying text (describing test for “principal activity”).

²⁴¹ 29 C.F.R. § 790.8(a)–(c) (1970); *see also supra* notes 108–15 and accompanying text.

²⁴² *See supra* notes 81–82 and accompanying text.

²⁴³ 29 C.F.R. § 790.8(a)–(b) (1970); *see also* 29 C.F.R. § 790.8(c) (1970) (“Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.”).

²⁴⁴ 29 C.F.R. § 790.7(b) (1970).

receive pay checks” *may* be preliminary or postliminary activities.²⁴⁵ Importantly, if the changing of clothes or washing is “required by law, by rules of the employer, or by the nature of the work,” it is an integral and indispensable part of the job.²⁴⁶ This language is consistent with the legislative intent of Congress.

The majority of circuit courts look to the DOL regulations for guidance in applying the PPA. In determining whether the time spent donning and doffing safety gear requires compensation, almost all circuits look to whether the activity is (1) necessary for the work and (2) primarily benefits the employer. In applying the first part of this test, circuits look to whether the activity is “required by the law, by rules of the employer, or by the nature of the work.”²⁴⁷ The circuits cite to Section 790.8(c) of the regulations for this language. Additionally, the Secretary of Labor has relied on this language in its Advisory Opinions, explaining that Section 203(o) does not include safety gear.

To produce a safe product for consumption, employees in the meat and poultry processing industry are required—by the law, the nature of the work, and their employers—to don and doff safety gear. The high death and injury rates of workers on the job, as well as the illness and death of workers and consumers from food contamination, clearly demonstrate that the nature of the work requires multiple protective measures.²⁴⁸ Employees are exposed to lethal chemicals that are required for sanitation, lethal biological toxins from animals, hazardous tools and machinery used to kill and dismantle large animals (or poultry), and other hazardous working conditions created by continuous, repetitive cutting motions in cramped workspaces at unsafe speeds.²⁴⁹ The Occupational Safety and Health Standards, the Federal Meat Inspection

²⁴⁵ 29 C.F.R. § 790.7(g) (1970); *see also* 29 C.F.R. § 790.7(h) (1970) (noting that when employees are required by their employer to report to their workstations at a certain hour and there is no work to perform for a period of time, waiting for work would be compensable; however, if employees voluntarily arrive earlier than required, this is not compensable); 29 C.F.R. § 790.8(c) (1970) (“If an employee in a chemical plant . . . cannot perform his principal activities without putting on certain clothes, changing clothes on the employer’s premises at the beginning and end of the workday would be an integral part of the employee’s principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ‘preliminary’ or ‘postliminary’ activity rather than a principal part of the activity.”); 29 C.F.R. § 790.7(g) n.49 (1970) (“Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee’s ‘principal activity’.”).

²⁴⁶ 29 C.F.R. § 790.8(c) & n.65 (1970); 29 C.F.R. § 790.7(g) n.49 (1970).

²⁴⁷ *See supra* notes 108–15 and accompanying text.

²⁴⁸ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 898 (9th Cir. 2003); *see supra* notes 1, 33.

²⁴⁹ *See supra* note 10.

Act, and the Poultry Products Inspection Act govern and require the use of safety equipment and sanitary procedures within the meat and poultry processing industry.²⁵⁰ When determining whether an activity is integral and indispensable and thus work, the majority of circuits cite to these federal regulatory schemes.²⁵¹ Furthermore, state law regimes, industrial groups, insurers, and individual employers have their own requirements and policies, which courts also examine to determine whether an activity is integral and indispensable and thus work.²⁵²

Courts assessing whether an article of clothing or safety gear fits within the Section 203(o) exception are already familiar with the DOL's "required safety gear" standard, as it is already in common use. While interpretation of "required safety gear" is not as clear as, for instance, a bright-line rule stating that all safety gear constitutes "clothing" and should be covered by Section 203(o), it better conforms with Congress's intent behind and interpretation of the PPA and provides adequate and uniform guidance on which activities should be compensated.

Furthermore, even if the donning and doffing of safety gear is found to be excluded from Section 203(o) because it is required by law, courts should apply the *de minimis* test used in determining a "principal activity" under the PPA.²⁵³ If time spent donning and doffing is *de minimis*, the employer should not be required to compensate for it. Although this interpretation would result in less coverage under Section 203(o) for employees who wear required safety gear, it would not necessarily result in more liability for the employer.

²⁵⁰ 29 U.S.C. § 654 (1970); 29 C.F.R. § 1910.132 (2011); 9 C.F.R. §§ 416.1–6 (1996).

²⁵¹ See *Perez v. Mountaire Farms Inc.*, 650 F.3d 350, 366 (4th Cir. 2011) (citing 9 C.F.R. § 416.5 (1999); 29 C.F.R. § 1910.132(a) (1994)); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010), 619 F.3d 604 (adopting language of sanitary conditions, but not citing the USDA or OSHA statutes); *Alvarez*, 339 F.3d at 903 (citing 29 C.F.R. § 1910.132(a) (1999); 9 C.F.R. § 308.3 (1999)). Cf. *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) (noting that regulatory requirements support integrality and indispensability, but finding that donning and doffing required safety gear does not meet the definition of "work" within the FLSA). But see *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007) (noting that an activity does not become "integral" simply because it is required by the employer or a government regulation, but does become "integral" when required for work in a lethal atmosphere).

²⁵² *Steiner v. Mitchell*, 350 U.S. 247 (1956); *De Ascencio v. Tyson Food, Inc.*, 500 F.3d 361 (3d Cir. 2007); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *36 (E.D. Wash. May 16, 2005).

²⁵³ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005).

2. Section 203(o) Applies to Regular Work Clothing

There are significant practical and legal distinctions between normal clothing and safety gear that prevent Section 203(o) from being rendered meaningless when it is construed narrowly to exclude required safety gear. Employees wearing normal clothing can still bargain over whether time spent changing clothes and washing should be compensated. But, because a meatpacker or poultry worker cannot conduct his or her job without wearing safety gear, the donning and doffing of safety gear is considered a principal activity and not merely clothes-changing. Parties should be precluded from bargaining over whether this time is compensated.

In *Fox v. Tyson Food, Inc.*, the court discerned the practical difference between clothing and safety gear. There, the district court held that safety gear worn at a chicken plant could not be regarded as a mere analog to clothing because the everyday, plain meaning of the term “clothing” describes “what most people do every day—taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening.”²⁵⁴ The court further explained that a police officer’s uniform is different because it replaces the clothing the officer wore before work, and a police officer can drive to work in her uniform, whereas plant workers cannot be expected to drive to work “wearing boots, arm guards, plastic aprons, and several layers of gloves over their ordinary clothing.”²⁵⁵ The liberal and remedial purposes of the FLSA suggest that Section 203(o) should be construed to exclude activities that “clearly go beyond mere ‘clothes changing’ and involve such unusual, extraordinary things as steel-mesh gloves, plastic aprons, and soft and hard plastic sleeve guards.”²⁵⁶ These items are not merely for the convenience of employees, but protect them and consumers from death or serious harm.

As the Secretary of Labor noted in a 2010 Opinion Letter, the type of clothing contemplated when Section 203(o) was enacted does not resemble the kind or quantity of equipment used in today’s workforce.²⁵⁷ The example presented by Senator Herter, who introduced Section 203(o), involved clothing worn by bakers, not the complex, heavy, and

²⁵⁴ *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL 32987224, at *6 (N.D. Ala. Feb. 4, 2002).

²⁵⁵ *Id.* at *7.

²⁵⁶ *Id.* at *6.

²⁵⁷ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010), [available at](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#UKBVelV-x7I) http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#UKBVelV-x7I.

cumbersome pieces of safety gear worn today.²⁵⁸ A plant manager at Tyson Food, Inc. reported that each employee wears \$400 worth of safety equipment, and a plant guide at IBP, Inc. stated that a worker may wear as much as \$600 worth of safety equipment, including face masks, hardhats, earplugs, cloth and steel mesh gloves, mail aprons and leggings, weight-lifting belts, and shin guards.²⁵⁹ Thus, the Ninth Circuit interpreted “clothing” under Section 203(o) correctly by distinguishing regular clothing from safety gear, which encompasses items worn to protect against workplace hazards.²⁶⁰

Supreme Court jurisprudence, the PPA, and DOL regulations make several legal distinctions between safety gear and clothing. The Supreme Court, in *Steiner*, recognized the distinction between normal clothes-changing and items used for protection against workplace hazards.²⁶¹ The Court recognized that it was not dealing with clothes changing and washing under normal conditions, especially because the Government had conceded that normal conditions would constitute either a “preliminary” or “postliminary” activity.²⁶² Within the federal circuits, time spent donning and doffing regular clothing and standard uniforms, such as police or postal worker uniforms, has not been considered a principal activity under the PPA.²⁶³ Furthermore, the DOL regulations acknowledge the distinction between these two types of activities.²⁶⁴ “[I]f changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered . . . a ‘preliminary’ or ‘postliminary’ activity rather than a principal part of the activity.”²⁶⁵ Thus, the donning and doffing of safety gear is considered a principal activity under the FLSA, and normal clothes-changing, which is not integral and indispensable, can be subject to bargaining under Section 203(o).

²⁵⁸ *Id.* (citing 95 CONG. REC. H11210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter)).

²⁵⁹ WHITTAKER, *supra* note 1, at 45; *Meatpacking Injuries Spawn Union Drive: Immigrant Workers at Tyson Plant Fight for “Justice, Dignity and Respect,”* ASSOCIATED PRESS, Feb. 18, 2007, available at <http://www.msnbc.msn.com/id/17158226/ns/business-retail/t/meatpacking-injuries-spawn-union-drive/#.UKKxuhY0ozI>.

²⁶⁰ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003).

²⁶¹ *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956).

²⁶² *Id.*

²⁶³ *See Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008) (postal worker uniform); *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (police officer uniforms).

²⁶⁴ *See* 29 C.F.R. § 790.8(c) & n.65 (1970).

²⁶⁵ *Id.* § 790.8(c) (internal citations omitted).

3. CBAs Not Requiring Compensation for Donning and Doffing of Required Safety Gear are in Conflict with the FLSA and the PPA.

i. The PPA Requires Compensation, Regardless of Contract, Custom, or Practice.

Section 203(o) allows time spent changing clothes and washing at the beginning and end of each workday to be excluded from hours worked through the process of collective bargaining.²⁶⁶ This provision has created confusion among the courts because the donning and doffing of clothing can be a principal, preliminary, or postliminary activity under the FLSA, and because the meaning of “clothing” within the statute has been interpreted differently.²⁶⁷ Yet, since the passage of the PPA, the majority of circuit courts have construed “principal activity” broadly, as intended by Congress, and found that the donning and doffing of safety gear is work.²⁶⁸ The Supreme Court’s decisions in *Steiner* and *IBP, Inc. v. Alvarez* provide strong support for the proposition that donning and doffing required safety gear is a principal activity.²⁶⁹ Thus, it is largely unanimous that the time spent donning and doffing required safety gear is a principal activity, and, therefore, such time is compensable.²⁷⁰

Principal activities contribute to hours worked each day.²⁷¹ If principal activities could be bargained away, such bargaining would directly conflict with the FLSA, which prohibits employers from lengthening the workweek.²⁷² The FLSA Savings Clause permits both federal and state law to set higher minimum wages and shorter periods of time before overtime begins, but it does not allow employers to set lower minimum wages or longer workweeks without overtime pay.²⁷³ The FLSA Savings Clause provides that “[n]o provision of this chapter shall . . . justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this

²⁶⁶ See 29 U.S.C. § 203(o) (2006).

²⁶⁷ See 29 C.F.R. § 790.8(c) (1970).

²⁶⁸ See sources cited *supra* note 108.

²⁶⁹ See *supra* notes 91–107 and accompanying text.

²⁷⁰ *But cf.* *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594–95 (2d Cir. 2007) (holding that time spent donning and doffing protective gear is only a principle activity when the gear is being used in a lethal atmosphere).

²⁷¹ 29 U.S.C. § 254(d) (1996); *see also* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (recognizing that some activities may start the workday, but time spent performing them is not compensable because it is *de minimis*).

²⁷² 29 U.S.C. § 218(a) (1967).

²⁷³ *Id.*

chapter.”²⁷⁴ Therefore, CBAs that extend the maximum workweek, like those excluding compensation for principal activities, directly conflict with the FLSA and must yield to it.

Congress made clear that the PPA would compensate work regardless of contract, custom, or practice and that principal activities were meant to be broadly interpreted under the Act.²⁷⁵ Additionally, Congress approved of the DOL's regulations explaining the PPA and articulating Congress's intent.²⁷⁶ It is, therefore, unlikely that just two years later, Congress would allow parties to bargain away principal activities under Section 203(o), which amended the PPA. Congress, after all, rejected the original House bill, which provided that *any* activity could be bargained away.²⁷⁷ By limiting the scope of Section 203(o) to clothes-changing at the beginning and end of each day, Congress demonstrated that it was unwilling to allow parties to bargain over activities that may be considered work. Senator Herter's example of bakers' clothes-changing is more akin to regular work clothing, which is not considered a principal activity by the courts today.²⁷⁸ Thus, permitting collective bargaining over time spent performing activities that are “preliminary” or “postliminary” under the PPA best comports with the purposes and determinations of work under the FLSA.²⁷⁹

ii. Section 203(o) Is an Exemption that Should Be Construed Narrowly

The Supreme Court is clear: exemptions under the FLSA “are to be narrowly construed against the employers seeking to assert them”²⁸⁰ Exemptions are limited to those “plainly and unmistakably within their

²⁷⁴ *Id.*

²⁷⁵ See *supra* notes 81–82 and accompanying text.

²⁷⁶ See *supra* notes 83–85 and accompanying text.

²⁷⁷ U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010) (citing 95 CONG. REC. H11210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter)), available at http://www.dol.gov/WHDOpinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#UKBVeIV-x7I.

²⁷⁸ See *Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008) (postal worker uniform); *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001) (police officer uniforms).

²⁷⁹ See 29 U.S.C. § 254(b) (1996).

²⁸⁰ *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see also *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 402 (1996); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.”).

terms and spirit.”²⁸¹ The Supreme Court has interpreted Section 203(f) as an exemption and has referred to Section 203(o) as an exception.²⁸² The Third Circuit has interpreted Section 203(i) as an exception, and the Ninth Circuit has held that Section 203(o) is an exemption.²⁸³

Finding, however, that “clothing” encompasses safety equipment, many circuits assert that Section 203(o) should be interpreted expansively.²⁸⁴ These circuits reason that Congress did not expressly designate Section 203(o) as an exemption, and the plain language of the statute provides no indication of narrow interpretation.²⁸⁵ These circuits, however, fail to consider how the PPA and its reinforcement, Section 203(o), fit within the FLSA. Both the PPA and Section 203(o) were added to the FLSA with the express purpose of excluding certain activities from the FLSA’s coverage.²⁸⁶ They are not included within Section 213 of the FLSA because they do not fall within the same category of exemptions.²⁸⁷ Section 213 exemptions exclude whole categories of employees, whereas Section 203(o) and other FLSA provisions exclude certain types of activities.²⁸⁸ The circuits’ arguments also run counter to the legislative history of the PPA, which intended for “principal activities” to be broadly interpreted and for “preliminary” and “postliminary” activities to have limited application.²⁸⁹ Thus, Section 203(o) should be construed narrowly, which would limit its coverage to

²⁸¹ *Arnold*, 361 U.S. at 392.

²⁸² *Holly Farms Corp.*, 517 U.S. at 402 n.8 (describing Section 203(f) as an exemption); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.19 (1981) (“Section [20]3(o) of the [PPA] . . . excludes from the definition of ‘hours worked’ under §§ 6 and 7 of the FLSA, ‘any time spent in changing clothes or washing at the beginning or end of each workday’ if that time was noncompensable ‘under a bona fide collective-bargaining agreement.’” (internal citations omitted)); *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956) (“[I]ts clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement.”).

²⁸³ *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003); *Marshall v. Brunner*, 668 F.2d 748, 751 (3d Cir. 1982) (describing Section 203(i) as the “ultimate consumer” exception).

²⁸⁴ *See supra* notes 108–15 and accompanying text.

²⁸⁵ *See supra* notes 167–71 and accompanying text.

²⁸⁶ *See* 29 C.F.R. § 790.2(a) (1970) (“The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interrelated parts of the entire statutory scheme for the establishment of basic fair labor standards. The [PPA] contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the [FLSA].”).

²⁸⁷ *See* 29 U.S.C. § 213 (2004).

²⁸⁸ *See id.*

²⁸⁹ *See supra* notes 81–82 and accompanying text.

activities which “clearly and unmistakably” fit within its purview.²⁹⁰ Under this narrow construction, “clothing” would not include safety gear.

4. Requiring Compensation for Time Spent Donning and Doffing Required Safety Gear Will Improve Working Conditions

The FLSA’s purpose is to address detrimental working conditions by ensuring a fair day’s pay for a fair day’s work.²⁹¹ As evidenced by the numerous reports and lawsuits, current working conditions are approaching the detrimental conditions that existed when the FLSA was promulgated seventy-four years ago.²⁹² With low levels of union membership and an under-protective labor law regime, unions struggle to effectively organize and make significant improvements to abusive conditions in the industry. Even if a union was capable of forcing a few employers to improve working conditions, these employers would not be able to compete and would be driven out of business before the remaining employers were unionized.²⁹³ Therefore, solutions that improve baseline working conditions on a national- or industry-wide scale are essential. Requiring employers to pay union employees for time spent donning and doffing required safety gear is one step toward improving the abusive work conditions in the meat and poultry processing industry.

5. “Custom or Practice” Under Section 203(o) Codifies Industry Custom

Meat and poultry processing employees have historically been paid using a “gang time” model, meaning employees only get paid for time actually spent processing poultry or meat on the production line.²⁹⁴ Thus, a history of nonpayment for donning and doffing is prevalent in the industry. In enacting the FLSA and the PPA, Congress did not intend

²⁹⁰ *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003); 29 C.F.R. § 790.2(a) (1970) (“It would therefore appear that the Congress did not intend by the [PPA] to change the general rule that the remedial provisions of the [FLSA] are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come ‘plainly and unmistakably within (the) terms and spirit’ of such an exemption.”).

²⁹¹ *See* 29 U.S.C. § 202(a).

²⁹² WHITTAKER, *supra* note 1, at 43.

²⁹³ *See supra* notes 57–58, 61 and accompanying text.

²⁹⁴ *See Perez v. Mountaire Farms Inc.*, 650 F.3d 350, 360 (4th Cir. 2011); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214 (4th Cir. 2009); WHITTAKER, *supra* note 1, at 45.

to perpetuate industry custom.²⁹⁵ Rather, Congress intended for employees to be paid for all work performed, including the time spent donning and doffing safety gear.

While introducing Section 203(o), Senator Herter pointed to his bakery example and noted that the issue under the CBA—payment versus nonpayment of time spent changing clothes—was “carefully threshed out between the employer and the employee”²⁹⁶ However, where there have been no negotiations over payment of donning and doffing time, there cannot be a careful threshing out of CBA terms. Thus, a history of nonpayment alone cannot represent a careful threshing out of the terms.

Nevertheless, the majority of circuits have found that a custom or practice exists under Section 203(o) when there is a period of prolonged acquiescence.²⁹⁷ The circuits’ interpretation of “custom or practice” under Section 203(o) —one based purely on a history of nonpayment—puts employers at an advantage and codifies industry custom. It does not represent a careful threshing out of terms as Senator Herter recommended when he introduced the section.

In determining the presence of custom or practice, a more just result would occur if parties were required to show there had been negotiation over the matter in dispute. Such negotiation would demonstrate that actual bargaining had occurred and would not result in codification of industry practice. The test used by some district courts is more in line with congressional intent. These district courts require a prolonged period of nonpayment and knowing acquiescence.²⁹⁸

²⁹⁵ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981); *see supra* notes 81–82 and accompanying text.

²⁹⁶ U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2010-2 (June 16, 2010) (citing 95 CONG. REC. H11210 (daily ed. Aug. 10, 1949) (statement of Rep. Herter)), *available at* http://www.dol.gov/WHDOpinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm#UKBVelV-x7I.

²⁹⁷ *See supra* notes 172–74 and accompanying text.

²⁹⁸ *See Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043 (W.D. Pa. Sept. 3, 2008); *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063 (D. Minn. 2007); *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL 32987224, at *8 (N.D. Ala. Feb. 4, 2002), *overruled by* Nos. 4:9-CV-1612-VEH, 4:06-CV-4676-VEH, 4:06-CV-4677-VEH, 2007 WL 6477624 (N.D. Ala. Aug. 31, 2007).

B. Section 203(o) and the LMRA Do Not Preempt State Laws Requiring Compensation for Time Spent Donning and Doffing

1. Section 203(o) Does Not Preempt More Protective State Laws

The Savings Clause of the FLSA permits federal law, state law, and municipal ordinances to establish a higher minimum wage or shorter workweek than the FLSA requires.²⁹⁹ The Savings Clause also states that no employer can interfere with any federal law, state law, or municipal ordinance that, pursuant to the Savings Clause, has established a higher minimum wage or shorter workweek.³⁰⁰ Since Section 203(o) is part of the FLSA and is not limited by the Savings Clause, states may define “hours worked” more broadly by requiring time spent donning and doffing safety gear to be compensated, and employers cannot compensate employees, union or non-union, below this level.

All federal court decisions discussing the issue, including a federal appellate court decision, have concluded that Section 203(o) does not preempt more protective state laws.³⁰¹ The Seventh Circuit in *Spoerle* found that Section 203(o) did not preempt a more protective Wisconsin state law.³⁰² The court observed that since a more protective state law would trump the CBA with respect to minimum wage, a CBA calling for a longer workweek than state law required would also be trumped.³⁰³

Practitioners arguing in favor of preemption often fail to discuss the implication of the FLSA Savings Clause, which provides that the FLSA creates a national floor for labor standards, not uniformity. This is a significant flaw in practitioners’ analysis because the argument would not necessarily end there. Even if Section 203(o) does not preempt state law, state law may still be preempted by the LMRA.³⁰⁴ Further, as the Seventh Circuit in *Spoerle* explained, the FLSA Savings Clause explicitly allows states to promulgate laws shortening the workweek and does not permit employers to oppose this.

²⁹⁹ 29 U.S.C. § 218(a) (1967).

³⁰⁰ *Id.*

³⁰¹ See *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840 (E.D. Wash. May 16, 2005).

³⁰² *Spoerle*, 614 F.3d at 430; see also *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1143 (10th Cir. 2011) (finding Colorado law, which had no statutory equivalent to Section 203(o), did not apply to the defendant and, therefore, declining to reach the issue of preemption); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d at 393 (noting, in dicta, that Section 203(o) would not preempt state law); *Chavez*, 2005 WL 6304840, at *36 (finding that Section 203(o) does not preempt state law).

³⁰³ *Spoerle*, 614 F.3d at 429.

³⁰⁴ See *supra* notes 207–13 and accompanying text.

Practitioners also argue that deference to a CBA better conforms with the FLSA's purpose, which is to protect workers. But employees' interests are not necessarily best protected by a CBA. Although union workers may obtain more benefits than nonunion workers, unionization is not necessarily the best means of providing baseline protection for workers or improving work conditions, especially considering the current number of challenges facing unions.³⁰⁵ Furthermore, bargaining over compensation for time spent donning and doffing frequently does not occur, and the circuits' interpretation of Section 203(o) favors employers under these circumstances.³⁰⁶ Broader measures, like the FLSA, which provides a minimum level of protection, and more protective state laws, which may provide a living wage,³⁰⁷ are more effective in protecting workers, especially when enforcement of such laws is adequate.

2. The LMRA Does Not Preempt More Protective State Laws

State courts are not permitted to use state law to interpret CBAs; however, states can set the level at which bargaining begins by establishing a higher minimum wage or a shorter workweek.³⁰⁸ The FLSA creates minimum labor standards for CBAs, and the Supreme Court has found that a minimum wage and maximum workweek are rights that cannot be waived by contract because doing so "would 'nullify the purposes' of the [FLSA] and thwart the legislative policies it was designed to effectuate."³⁰⁹ The Supreme Court has also found that certain benefits required by state law, such as minimum mental health benefits for employees with health insurance and severance pay, cannot be bargained away.³¹⁰ In *Spoerle*, the Seventh Circuit held that a Wisconsin law requiring compensation for time spent donning and doffing safety gear was not preempted by the LMRA.³¹¹ Judge Easterbrook premised his decision on *Lingle v. Norge Division of Magic Chef, Inc.*, which had found that state laws disregarding, rather than interpreting, CBAs were not preempted by federal labor policy.³¹²

In *Lingle*, a unanimous Supreme Court held that "an application of state law is preempted by [the LMRA] only if such application requires

³⁰⁵ See *supra* Part II.

³⁰⁶ See *supra* notes 294–98 and accompanying text.

³⁰⁷ See *STULL & BROADWAY*, *supra* note 3, at 74 (noting that a living wage is one sufficient to feed, clothe, and shelter workers and their families).

³⁰⁸ See *supra* note 216–19, 183–86 and accompanying text.

³⁰⁹ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

³¹⁰ See *Nelson*, *supra* note 208, at 332–38.

³¹¹ *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 429–30 (7th Cir. 2010).

³¹² *Id.* at 430 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)).

the interpretation of a collective-bargaining agreement.”³¹³ In *Lingle*, an employee was injured at work and filed an Illinois worker’s compensation claim to cover her medical expenses; her employer subsequently fired her for allegedly filing a false claim.³¹⁴ Although the CBA in question provided the employee with a broad contractual remedy for wrongful discharge, the employee was permitted to bring a lawsuit under a state law prohibiting retaliatory discharge.³¹⁵ This was because “the employee’s claim [was] based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.”³¹⁶ Not every dispute involving a CBA provision will be preempted.³¹⁷ State law claims may require courts to look to a CBA to determine appropriate damages, such as rate of pay and other benefits, but this does not render the claim preempted.³¹⁸

Only the Seventh Circuit has ruled on this issue with respect to Section 203(o). Whereas all of the district courts that have ruled on the issue agree with *Spoerle* that state laws are not preempted by Section 203(o), some district courts have found that the LMRA preempts state laws requiring compensation for time spent donning and doffing safety gear.³¹⁹ Practitioners representing employers support these district court decisions and have argued in favor of preemption.³²⁰ Accordingly, these arguments will be addressed below.

i. District Court Decisions Finding Preemption Under the LMRA

Townsend’s reasoning for concluding that the LMRA preempts state law is representative of other district courts that have likewise ruled in favor of preemption.³²¹ In making its decision, the *Townsend* court first recognized that state law rights that do not exist independently of a CBA, and can be waived or altered by agreement, are preempted.³²² The

³¹³ *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).

³¹⁴ *Id.* at 401.

³¹⁵ *Id.* at 412–13.

³¹⁶ *Id.* at 412.

³¹⁷ *Id.* at 413.

³¹⁸ *Id.*

³¹⁹ See *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 U.S. Dist. LEXIS 8282 (E.D. Pa. Feb. 2, 2007).

³²⁰ See Wermuth & Glenn, *supra* note 21.

³²¹ See *Martinez v. Cargill Meat Solutions Corp.*, Nos. 8:09CV247, 4:09CV3079, 2011 U.S. Dist. LEXIS 58457 (D. Neb. Apr. 12, 2011); *In re Cargill Meat Solutions Wage & Hour Litig.*, 632 F. Supp. 2d 368.

³²² *Townsend*, 2007 U.S. Dist. LEXIS 8282, at *13. But see *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (rejecting the view that a right established in a state pension statute was pre-empted by the NLRA simply because the NLRA empowered the parties to a CBA to come to a private agreement about the subject of the state law).

court subsequently posited that interpretation is required to determine whether a contract grants implied or express rights.³²³ The court stated that “when resolution of a state-law claim is substantially dependent upon analysis of the terms” of a CBA, that claim must be preempted.³²⁴ The court recognized that *Lingle* had held that a state law claim addressing the same set of facts as a claim under the CBA was not preempted because it did not require interpretation of the CBA.³²⁵ The court also observed that, in *Livadas*, the Supreme Court had examined a CBA in order to ascertain a wage rate necessary to resolve the plaintiff’s state law claim.³²⁶ The court in *Townsend*, however, did not find the facts of its case analogous to those in *Livadas* and, instead, cited two Third Circuit decisions decided prior to *Livadas*, which had found that employees were not entitled to back wages or overtime pay because the CBA’s terms required interpretation.³²⁷

As discussed above, a state can provide minimum labor rights for individual employees, whether or not those employees are covered by a CBA.³²⁸ The FLSA specifically allows states to shorten the workweek and increase the minimum wage. The Supreme Court has ruled that courts can look to a CBA to resolve state law claims that are independent of a CBA as well as matters covered by both state law and the CBA. The meaning of the CBA, however, cannot be the subject of the dispute.³²⁹ Further, the Supreme Court has found that an employee should not be forced to choose between a right guaranteed by state law and collective bargaining.³³⁰

Townsend did not correctly apply Supreme Court precedent set forth in *Livadas* or *Lingle*. There was no issue with respect to whether the right in *Townsend* was independent from the CBA. Compensation for time spent donning and doffing safety gear was required by Pennsylvania state law and shortened the workweek, which is explicitly permitted by the FLSA Savings Clause. This right was created by the state and independent from any applicable CBA.

It appears that *Townsend* confused the calculation of damages with interpretation of a CBA when it claimed that resolving the issue would require CBA interpretation. Indeed, there was no dispute over the meaning of the contract, which afforded employees twelve minutes per

³²³ *Townsend*, 2007 U.S. Dist. LEXIS 8282, at *13.

³²⁴ *Id.*

³²⁵ *Id.* at *14.

³²⁶ *Id.* at *14–15.

³²⁷ *Id.* at *10, *15–16.

³²⁸ See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

³²⁹ *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

³³⁰ *Id.*; see also *Metropolitan Life Ins. Co. v. Massachusetts* 471 U.S. 724 (1985).

week for donning and doffing.³³¹ The court needed only to look at the CBA's explicit terms in order to calculate the amount owed to employees for time spent donning and doffing safety gear. No interpretation was required, as the circumstances were no different than those in *Livadas* or *Lingle*, where the Supreme Court had looked to the CBAs at issue to calculate damages for violations of state law claims. The facts in *Townsend* are also analogous to the scenario described in *Spoerle*, where the Seventh Circuit looked to a CBA to calculate damages because, under the contract, the employee was paid less than the state minimum wage. Thus, the state law claim in *Townsend* should not have been preempted, and the CBA should have been disregarded to the extent it did not comply with state law.³³²

iv. Practitioners Representing Employers

Practitioners representing employers have asserted that courts should follow the reasoning set forth in *In re Cargill Meat Solutions Wage & Hour Litigation* and *Townsend*.³³³ They argue that LMRA “preemption occurs *whenever* the resolution of a claim requires a court to interpret the provisions of a collective bargaining agreement between an employer and union-represented employees.”³³⁴ In addition, they assert that “preemption is triggered when a claim is ‘founded directly on rights created by collective-bargaining agreements.’”³³⁵ While recognizing that the NLRA is not permitted “to preempt nonnegotiable rights conferred on individual employees as a matter of state law,” employers argue that the donning and doffing of safety gear is a negotiable right because Congress left this type of compensation to be determined by collective bargaining.³³⁶ Employers contend that their right to exclude compensation for time spent donning and doffing is founded on a congressional mandate, which is later manifested in the CBA.³³⁷ Section 203(o)'s language, according to employers, requires a court to look at the CBA to understand its terms.³³⁸ Accordingly, the LMRA preempts state law claims for donning and doffing under Section 203(o) because it depends upon the interpretation of a CBA.³³⁹

³³¹ *Townsend*, 2007 U.S. Dist. LEXIS 8282, at *12.

³³² *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 430 (7th Cir. 2010) (citing *Lingle*, 486 U.S. 399).

³³³ *Wermuth & Glenn*, *supra* note 21, at 868–69.

³³⁴ *Id.* at 868 (emphasis added).

³³⁵ *Id.* at 869.

³³⁶ *Id.* at 870.

³³⁷ *Id.* at 869.

³³⁸ *Id.* at 869–70.

³³⁹ *Wermuth & Glenn*, *supra* note 21, at 870.

In response to practitioner contentions, states have been permitted to provide minimal labor rights for individual employees, even those employees covered by a CBA. Thus, CBAs must yield to both federal and state laws that establish minimum standards such as minimum wage, overtime, and other benefits that are independent from a CBA. States that require compensation for time spent donning and doffing protective equipment are exercising their right to establish a shorter maximum workweek for employees—a right expressly granted by the FLSA Savings Clause. As established in *Livadas* and *Lingle*, under these circumstances, courts addressing overtime pay under state law are permitted to look to the CBA in order to calculate damages without being preempted.

CONCLUSION

In an extremely profitable industry, rife with abuse of workers and debilitating working conditions,³⁴⁰ the costs of doing business should not fall on the workers or communities where factories are located.³⁴¹ When workers are not compensated or not compensated fairly, society is left to absorb the costs.³⁴² Measures should be taken to ensure that the corporations that create these abusive working conditions are held responsible. Enforcement of all labor laws will undoubtedly improve protection for workers, but, because of the egregious state of conditions, more is required. Increasing employee protection under the FLSA, which seeks to provide a minimum standard of living for workers, will help provide employees with a living wage.³⁴³

A narrow construction of Section 203(o), requiring compensation for the donning and doffing of safety gear, would result in improved working conditions for all employees, achieving the FLSA's purpose of addressing detrimental working conditions through a minimum standard of living.³⁴⁴ Such interpretation would not render Section 203(o) meaningless because normal clothing would remain a subject of

³⁴⁰ See sources cited *supra* note 33.

³⁴¹ See generally *WORK WITHOUT JUSTICE*, *supra* note 13, at 23; *NEBRASKA APPLESEED*, *supra* note 10, at 9 (discussing state tax incentives under the Quality Jobs Act); *SCHLOSSER*, *supra* note 33; *STULL & BROADWAY*, *supra* note 3, at 42 (tax incentives), 63–64 (increase in poverty level), 75, 99, 122; Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL'Y REV. 17 (2011).

³⁴² See sources cited *supra* note 341.

³⁴³ See *STULL & BROADWAY*, *supra* note 3, at 74 (noting that a living wage is one sufficient to feed, clothe, and shelter workers and their families).

³⁴⁴ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 (1978) (noting “the widely recognized impact that a rise in minimum wage may have on the level of negotiated wages generally”).

bargaining. Requiring employers to compensate employees for time spent donning and doffing safety gear would also be more consistent with Congress's original objective, which was to have "work" construed liberally under the PPA and for exemptions under the FLSA to be construed narrowly. Furthermore, a clear and uniform interpretation of Section 203(o) would result in less litigation for all parties involved.

Even if Section 203(o) is interpreted to include safety gear, the FLSA Savings Clause permits states to enact more protective state laws with regard to minimum wages, overtime pay, and other types of employee benefits. State laws requiring compensation for donning and doffing safety gear shorten the workweek and fall under the FLSA Savings Clause. In addition, Supreme Court jurisprudence allows CBAs to be ignored to the extent they do not conform with state laws that create rights independent of a CBA. Looking to a CBA to determine damages does not conflict with the LMRA. Therefore, state laws requiring compensation for the donning and doffing of safety gear are independent of CBAs and should not be preempted by the LMRA.

