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Forum

Cities Must Pay Officers for Donning Gear

By Alison Berry Wilkinson

The question in the dispute over whether the donning and doffing of safety gear is compensable time under the Fair Labor Standards Act is whether the equipment is integral and indispensable to the job. If you say that it isn't, I ask you to pause and consider whether you would confront, chase and arrest bad guys without at least a pair of handcuffs, a gun, a baton, pepper spray, a radio and a ballistic vest.

In the mid-1970s, the California Legislature found that "it is essential to good law enforcement that law officers have the equipment necessary for the apprehension of offenders and ... protection of the officers," and passed a law identifying the equipment that officers must be issued at employer expense. Government Code Section 50081. That statute came on the heels of a lawsuit filed by the Oakland Police Officers Association seeking reimbursement for required safety gear. In that case, the court defined safety gear to include "any practicable method of mitigating or preventing a specific danger." The court further stated that "it is unthinkable that a local governmental agency would require or permit its officers to go onto the streets without guns." *Oakland Police Officers Assn. v. City of Oakland*, (1973) 30 Cal.App.3d 96.

Thirty years later, it is still unthinkable to send an officer out into the streets to arrest bad guys without a gun, let alone the full complement of available safety gear. Officers are able to go home to their families after each shift because they wear this gear while performing their sworn duty.

The debate over whether such time is compensable was re-ignited by the U.S. Supreme Court decision in *IBP v. Alvarez*, which reaffirmed and expanded the court's 1956 decision in *Steiner v. Mitchell*, 350 U.S. 247. Under *Steiner*, activities such as the donning and doffing of protective gear that is are "performed either before or after the regular work shift, on or off the production line" were deemed

compensable under the Fair Labor Standards Act "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed."

IBP took it one step further and held that the continuous workday doctrine meant that the time spent after performing the first integral and indispensable duty (i.e., putting on the protective equipment) and then walking to the place where the principle duties are performed (i.e., on the floor of the poultry processing plant), is compensable. IBP says that when the protective gear is integral and indispensable to the performance of the job, the workday starts when that gear is put on in the locker room, not when the employee arrives at their designated work station. For police officers, that means their shift no longer starts when they appear fully suited for briefing.

Those who object to applying IBP to law enforcement assert that it takes only a couple minutes to put on all the safety gear necessary to protect and serve the community. Those folks have never actually done it. Try it some time. Taken together, the required uniform and safety gear weighs about 20-30 pounds. The body armor alone weighs about 10 pounds. All equipment needs to be functional and securely fastened to the uniform belt. The sheer bulk of the required uniform and safety gear is both cumbersome and awkward to put on and remove. On average, it takes 10 to 15 minutes both before and after the shift to don and doff the required safety gear. Thus, the total amount of daily time spent performing this function is between 20 and 30 minutes, which is substantial.

Under the FLSA, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded as "de minimis." But, the regulations interpreting that rule provide that an employer cannot arbitrarily fail to count as hours worked "any part, however small, of an

employee's fixed or regular working time, or practically ascertainable period of time he is regularly required to spend on duties assigned to him." See 29 C.F.R. Section 785.47. Thus, the de minimis exception cannot apply to the ongoing, daily obligation of a police officer to put on, take off, and maintain his or her uniform and required safety gear, even if it only takes "a couple minutes" to do the required task.

Some agencies permit officers to gear up at home, rather than requiring them to change at the police department. This flexibility has been capitalized on as yet another possible escape route from the liability imposed by the IBP and *Steiner* decisions.

While that option may impact the application of the continuous work day rule, it does not make the time spent performing the integral and indispensable job duty any less compensable. It is well established under the FLSA that an employee must be paid for work performed as long as the work was suffered or permitted within the constructive or actual knowledge of the employer. The rule applies even to work performed away from the premises or job site. 29 C.F.R. Section 785.12.

The public agencies have actual knowledge that their police officers are donning and doffing safety equipment that is indispensable to performing their job functions, officers must be compensated for the time spent even if the gear was put on at home.

The Fair Labor Standards Act was enacted to provide a fair day's pay for a fair day's work. It takes time, energy and effort to put on and take off law enforcement safety gear. That equipment is undeniably essential to the ability of a police officer to perform the job. Other than a stubborn adherence to outdated shift-scheduling practices, there is no good reason why police officers should not be given time at the start and end of each shift to perform these required tasks.

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