

Insight

IN-DEPTH DISCUSSION

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Wisconsin Supreme Court Weighs in on the Compensability of Pre- and Post-Shift Work

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The Wisconsin Supreme Court recently helped clarify the circumstances under which pre- and post-shift donning and doffing constitutes compensable work under Wisconsin's minimum wage and overtime laws.¹ The decision, which involved production workers at a plant owned by Hormel Foods Corporation ("Hormel" or "the company"), also appears to narrow the applicability of the federal *de minimis* rule under state law.

Background

Hormel operates a canning facility in Beloit, Wisconsin, where it produces and cans a variety of food products. The facility operates much like an assembly line. Meats are ground, cooked, and then canned as finished products. The facility is governed by numerous federal health and safety regulations, including regulations promulgated by the USDA, FDA, and OSHA.

The company's production line employees were required to wear hard hats, hearing protection, and eye protection. Employees were also required to wear hair nets and sanitary clothing provided by Hormel. The company did not compensate employees for the time spent donning and doffing these required items. Employees were required to change into their required items upon arrival, swipe in, and then report to their workstations. At the conclusion of their shifts, the employees swiped out and then changed out of their required clothing. The employees were compensated only for the time between their assigned start times and the time they swiped out.

The plaintiff sued the company on behalf of a class of 300 employees, alleging Hormel had violated Wisconsin law by failing to compensate the

¹ *United Food and Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, No. 2014-AP-1880, 2016 WI 13 (Wis. Mar. 1, 2016).

employees for the time spent donning and doffing. Following a bench trial, a Wisconsin circuit court held in favor of plaintiffs, awarding them more than \$180,000.00 in wages, which represented an average of 5.7 minutes per day per class member for unpaid donning and doffing.² The decision was subsequently upheld by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

“Integral and Indispensable” Job Duties

In upholding the trial court’s verdict, the Wisconsin Supreme Court first considered whether the employees’ donning and doffing were “integral and indispensable” to their primary job duties of processing and canning food. Under both state and federal law, an employer generally must compensate its employees for pre- and post-shift activities that meet the “integral and indispensable” standard.³ In *Hormel Foods*, the employees argued that donning and doffing were integral and indispensable to their primary job duties, an argument that the court accepted.

To achieve its result, the court was forced to reconcile its holding with the U.S. Supreme Court’s holding in *Integrity Staffing Solutions, Inc. v. Busk*. In *Integrity Staffing*, employees who worked in a warehouse retrieving and packaging products alleged that their employer violated federal law by failing to pay them for the time spent undergoing mandatory security screenings before and after the scheduled start of their shifts. The U.S. Supreme Court held that the employer was not required to compensate the employees because the screenings were not integral and indispensable to their primary job duties. In other words, even if the security screenings were eliminated, the employees could still retrieve and package products.

In *Hormel Foods*, the Wisconsin Supreme Court distinguished the donning and doffing at issue at the Hormel plant with the security screenings in *Integrity Staffing* by reference to federal health and safety regulations. By the Wisconsin Court’s reasoning, while the employees in *Integrity Staffing* could have performed their principal job activities in the absence of the security screenings – which were aimed at preventing employee theft – the Hormel Foods employees could not have performed their principal job duties because if the employees did not wear the required clothing, Hormel could not comply with federal health and safety regulations. In essence, absent the required clothing, the employees’ performance of their primary job duties would have been illegal.

Application of the *De Minimis* Defense

The second takeaway from the *Hormel Foods* decision concerns the *de minimis* defense. Under the *de minimis* rule, a court may find that pre- and post-shift tasks that take only a few minutes to perform are not compensable. The *Hormel Foods* court observed, however, that the *de minimis* rule has not been explicitly incorporated into Wisconsin’s wage and hour statutes and went on to “assum[e], without deciding” that the *de minimis* doctrine does apply to Wisconsin wage and hour claims. The court then held that even if the doctrine applied, the donning and doffing was not *de minimis* because when considered in the aggregate, the donning and doffing amounted to approximately 24 hours per year, equating to more than \$500 in unpaid wages.

2 By stipulation, the circuit court also awarded \$15,000.00 in damages to plaintiffs for unpaid meal periods. A majority of the court agreed that whether the company’s policies with respect to lunch periods violated the law was not at issue before the court.

3 As explained below, *de minimis* pre- and post-shift tasks may not be compensable.

Takeaways for Employers

Hormel Foods now represents the controlling authority with regard to the compensability of pre- and post-shift work activities under Wisconsin law. It serves as an important reminder for Wisconsin employers to carefully consider whether such activities are integral and indispensable to their employees' principal job activities. Further, *Hormel Foods* shows that the Wisconsin Supreme Court views the FLSA's *de minimis* rule with skepticism, and to the extent that the court accepts the rule, it will apply it narrowly.