

FLSA-264

July 12, 1973

This is in reply to your letter of November 29, 1972, addressed to our *** Regional Offices. You request an opinion on whether time spent in clothes changing on the employer's premises each day before and after the employees work shifts would be regarded as compensable working time under the Fair Labor Standards Act. You indicate that the employees do not come into contact with toxic or deleterious materials which would necessitate the wearing of uniforms for protective purposes and suggest that the time spent in clothes changing is for the convenience of the employees.

The subject of preparatory and concluding activities as compensable hours of work under the Act is discussed in sections 785.24 through 785.26. Clothes changing time must be counted as hours worked if the changing of clothes is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. There is an exception to this general rule which is provided by section 3(o) of the Act for employees under collective bargaining agreements. The exception provided by section 3(o) does not apply, however, as the information in your letter indicates that none of the employees in the plant are covered by collective bargaining agreements.

The work rules prescribed on pages 9 and 10 of the Employee Handbook, *** require the wearing of uniforms by all employees. It states: " The products made in this mill must be made under sanitary conditions. Therefore, all employees must maintain a high level of personal cleanliness and present themselves in a neat manner to other employees and to those visiting the mill. The following rules apply: 1. Wear the standardized work clothes as issued. *** 2. Furnished clothing is not to be worn outside the mill."

The employer has imposed the requirement that all employees must wear uniforms and because they cannot be worn off the premises, there is also the requirement that the employees must change clothes on the premises. In our opinion the requirements prescribed by the employer establish the compensability of the clothes changing time under the principle given in section 785.26. When uniforms are required to be worn, it is not material that the employees do not come into contact with dangerous substances or that the employees might, perhaps, derive some benefit from the uniforms.

You also ask whether the time spent in clothes changing could be regarded as so minimal that compensation for it is not required. The employees punch in their time cards after changing into work uniforms and punch out before changing into street clothing so that the clothes changing time has not been recorded as working time. While insubstantial or insignificant periods of a few seconds or minutes may be disregarded as "de minimis", where justified by industrial realities, an employer may not arbitrarily fail to count and pay for any part of an employee's fixed or regular working time or any other practically ascertainable time actually spent on duties which the employee is regularly required to perform. (See section 785.47).

The clothes changing activity, which is performed pursuant to the work-rules promulgated by the employer, is done during practically ascertainable periods of time, and constitutes a duty which the employee is regularly required to perform. Accordingly, under the above rule, the time spent in clothes changing cannot be regarded as de minimis. The amount of time spent in clothes changing, therefore, should have been recorded as working time in accordance with the record-keeping requirements of the Act. Since this time has not been recorded by the employer, the amount remains a question of fact which will need to be resolved. We will consider all pertinent information in concluding our examination of this matter, including the statement in your letter concerning the estimate of clothes changing time given by company officials.

In concluding your letter, you indicate that the clothes changing should not be regarded as an integral part of the employees' principal activity. As indicated above, however, this factor is not necessarily determinative of the hours worked question. Time spent on duties entirely unrelated to an employee's primary duty may be working time, as where a production employee performs overtime work as a maintenance man. As indicated in the previously cited work rules, the employees in the plant are engaged in the manufacture of products which "must be made under sanitary conditions". The uniforms are required to aid in maintaining such conditions. Under such circumstances, together with all the other factors previously discussed, the clothes changing is considered indispensable to the performance of the employees' principal activities and must be regarded as an integral part of such activities.

In your letter you classify the 500 employees in the plant into two groups. One group appears to include approximately 67 employees who work a standard 8-hour day and who receive an unpaid lunch period. The remainder of the employees work an eight hour shift which includes a paid 30-minute lunch period. The following information will be helpful in further explaining the application of the principles discussed in the above paragraphs to this larger group of employees. Where an employer pays for lunch periods and counts such time as hours worked, it is the Department's position that the agreement of the parties to provide compensation for such hours implies an agreement of the parties to regard them as working time although they are not otherwise required to be so regarded under the Act. (See sections 778.223 and 778.320 of Interpretative Bulletin, Part 778.) In such case, the agreement of the parties is respected. The payments for lunch periods which were treated as working time cannot, however, offset the wages due for uncompensated clothes changing time. When the employees work more than 40 hours a week, including compensated meal periods and uncompensated clothes changing time, they are due additional pay for the uncompensated time at their regular rate as well as the statutory overtime premium pay. On the other hand, in workweeks of 40 hours or less, an hourly rated employee is considered as being paid in compliance where his total earnings divided by his hours worked (including clothes changing time for which no payment was made) are not less than the \$1.60 per hour minimum wage.

Where an employer pays for the lunch periods but does not count the time as hours worked in computing overtime pay, the time is not considered as hours worked, but such compensation is part of the employee's remuneration for employment which must be

included with other straight-time earnings in arriving at the employee's regular rate of pay (§778.223 and §778.320). There would be compliance with the minimum wage provisions in workweeks of less than 40 hours (including the clothes changing time which was not compensated) so long as the total remuneration for the workweek divided by the hours worked equals or exceeds the statutory minimum wage. However, in workweeks of more than 40 hours, the employees would be due additional pay for the uncompensated clothes changing time at their regular rates as well as the statutory overtime pay.

Sincerely,

Ben P. Robertson
Acting Administration
Wage and Hour Division

Enclosures