



MANUFACTURING UPDATE: NOVEMBER 2005

This bulletin provides an update on employment issues for Manufacturing subscribers. Please contact us if you have any questions about these decisions or about their effects on your business.

Donning, Doffing, Walking & Working

On Wednesday, November 8, 2005, The United States Supreme Court unanimously addressed what is considered “working time” for donning and doffing safety equipment and walking between the safety station or locker room and work site. The cases, IBP, Inc. v. Alvarez and Abdela Tum, et al. v Barber Foods, establish the following parameters for “working time” under the Fair Labor Standards Act:

1. Time spent donning and doffing safety gear which is “integral and indispensable” to the employee’s work is considered compensable. This involves unique safety gear. The time spent donning and doffing a hard hat, smock, safety glasses and ear protection is considered *de minimis* and not compensable. However, unique safety gear, such as fire-retardant clothing or plastic and wire mesh forearm protection (in the IBP beef processing facility), is considered unique and indispensable and, therefore, the time spent donning it is compensable.

2. The employee’s work day begins once the employee begins to don the “integral and indispensable” clothing and safety protection. After the employee dons the gear at a safety station or locker room, the time walking from that area to the work station is working time, as is the time at the end of the work day walking from the work station to the area to doff the clothing. The employee’s compensable work day ends when the employee completes doffing the clothing. The time after doffing to walk from the safety or locker area to the employee’s vehicle or time clock is not working time.

3. If the employee waits to don the clothing at the beginning of the work day, the waiting time is not compensable, just as the time spent waiting in line to clock in at the beginning of the day is not compensable.

Employers may be concerned about the amount of time the employee takes to don and doff the clothing and walk to the employee's work station. We suggest that employers determine how much time those functions should take and follow the disciplinary principles regarding those employees who take more time than necessary.

AFL-CIO Declares December 10, 2005 National Organizing Mobilization Day

Historically, the manufacturing sector has been at the foundation of organized labor, including the Steelworkers, Machinists, Auto Workers and Teamsters. December 10, 2005 is International Human Rights Day. In support of that event and employee rights to unionize, AFL-CIO President John Sweeney called for the national mobilization of unions and employees on December 10, 2005 to support organizing and passage of the Employee Free Choice Act (H.R. 1696, S.842). This legislation would require the NLRB to certify a union as the bargaining representative based upon a card check, without a secret ballot election, and provide for mandatory arbitration in the event contract negotiations did not result in an agreement within 90 days of certification. The AFL-CIO and Change to Win Coalition unions will focus their organizing efforts for 2006 first and foremost on those employers for whom they have some unionized sites, but not all.

Illegal Worker Entitled To Worker's Compensation

The California Court of Appeals on October 17, 2005 in the case of Farmers Bros. Coffee v. Workers' Compensation Appeals Board, Inc., concluded that although an employee was an alien without authorization to work in the United States, workers' compensation law permitted that individual to receive all rights and benefits under workers' compensation statutes. The court concluded that federal immigration law did not supercede state workers' compensation statutes as an employee's immigration status under federal law is "irrelevant" to liability under state law for paying an injured employee. Presumably, this means that California and states whose courts reach the same conclusion will extend the prohibition of a retaliatory discharge under state workers' compensation law to an illegal alien. The company argued that obtaining

employment and workers' compensation benefits by fraudulent means should bar an employee from receiving workers' compensation benefits. According to the court, the employee "was not required to be a lawfully documented alien to be an employee entitled to workers' compensation benefits. It was the employment, not the compensable injury, that [the employee] obtained as a result of the use of fraudulent documents." If as a result of a job related injury an employer discovers that the employee is working illegally under immigration laws, the employer should determine whether state workers' compensation statutes and its retaliatory discharge provisions apply before terminating the employee.

This Manufacturing update was prepared by Richard I. Lehr, an attorney with the law firm of Lehr, Middlebrooks, Price & Vreeland. Please contact Richard Lehr (205 323-9260) or David Middlebrooks (205-323-9262) if you have questions or comments.

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