

The Meaning of 'Clothes'

Supreme Court Issues Ruling

By Jessica Schauer Lieberman

A case pending before the Supreme Court is putting a new spin on the question, "What are you wearing?" In *Sandifer v. U.S. Steel Corp.*, No. 12-417, a group of unionized steelworkers at a Gary, IN, factory claim that their employer violated the Fair Labor Standards Act by failing to pay them for time spent changing into flame-retardant suits, steel-toed boots, hardhats, gloves, and other protective items, even though their union has agreed to exclude that time from the compensable workday. The case turns on whether the protective gear the employees wear can be considered "clothes" under § 203(o) of the FLSA.

SECTION 203(o)

Section 203(o) allows unions and employers to agree to exclude from the compensable workday time spent by employees "changing clothes or washing at the beginning or end of each workday." If an employer (or the law) mandates use of protective gear for an employee's job and § 203(o) does not apply, more often than not the employee must be paid for his or her "donning and doffing" time pursuant to a line of case dating back to the Supreme Court's 1956 decision in *Steiner v. Mitchell*. To take advantage of

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The 'Right to Be Forgotten'

Screening Job Applications for Criminal Activities

By Philip Segal

How do the fast-spreading "Right to be Forgotten" and "Ban the Box" initiatives affect employers looking to screen for criminal activity among their job applicants? Not only do they dictate if and when you are allowed to do a criminal background check on a potential worker, but they have also prompted a new federal government push to punish investigators who take shortcuts and come up with the wrong information.

Are you concerned that an applicant was convicted of arson ten years ago? In some places, it may be illegal to deny her a job because of that. Even if you can deny her the job, you could still get into trouble for refusing to interview her on the basis of that conviction.

THE 'RIGHT TO BE FORGOTTEN'

"Right to be Forgotten" is a movement gaining ground in Europe, where many public records are already less accessible than they are in the U.S. But now in the U.S. too, it seems that every week or two a new county, city or state is making it harder to ask about criminal backgrounds of prospective employees (or even current ones) by passing what are known as "Ban the Box" laws.

Some groups such as the National Employment Law Project argue that an old conviction for arson or embezzlement should not keep applicants from being considered for most kinds of jobs. Even where looking at criminal records is allowed, the Federal Trade Commission (FTC) and Equal Employment Opportunity Commission (EEOC) have been increasingly aggressive in going after real or suspected abuses of the law by employers who conduct their own background checks or who contract the searches out.

While prospective employers need to exercise caution about illegally asking for or using information that is freely available, they face a separate hazard

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Criminal Checks

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just as large: the chance of being fed unreliable data by research or investigative companies that fail to check the accuracy of what they report.

ARREST VS. CONVICTION: YOU MEAN THERE'S A DIFFERENCE?

According to the EEOC, "there is no Federal law that clearly prohibits an employer from asking about arrest and conviction records." The key is to know when you can ask, how far back in someone's criminal history you can ask about, and how you use the results of your inquiry.

The part of a criminal check that can cause the most problems is the failure to distinguish between arrests and convictions. The EEOC advises:

Since an arrest alone does not necessarily mean that an applicant has committed a crime the employer should not assume that the applicant committed the offense. Instead, the employer should allow him or her the opportunity to explain the circumstances of the arrest(s) and should make a reasonable effort to determine whether the explanation is reliable.

Even if the arrest resulted in a conviction, that doesn't necessarily mean the applicant ought to be disqualified from the job. The EEOC has said that improper use of criminal history may sometimes violate Title VII of the Civil Rights Act of 1964. This can happen, the EEOC says, when employers treat criminal history differently for different applicants or employees.

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MUG SHOTS ON THE WEB

In talks with clients and while teaching CLE classes we argue as frequently as we can that it is highly irresponsible not to distinguish between an arrest and a conviction. Yet many investigators and websites make this mistake every day. Take websites including Mugshots.com, BustedMugshots.com and JustMugshots, from which mug shots appear in Google web or image searches. As *The New York Times* reported recently, the sites make money by charging between \$30 and \$400 to remove the image of people who may have been arrested and then released immediately or acquitted at trial.

Some states are trying to get rid of the mug shot sites, which are otherwise legal to operate. Oregon and Georgia both have laws requiring sites to take down the images free of charge within 30 days for anyone who can prove they were exonerated or their record was expunged. Utah has a law prohibiting sheriffs from giving mug shots to any website that charges to delete them.

It's not just mug shot sites that give a person's history the once-overlightly treatment: In the first ever Fair Credit Reporting Act case involving mobile apps, the FTC settled in May 2013 with companies that created and sold smartphone applications purporting to allow potential employers to conduct criminal background checks on their employees. Among the accusations in the complaint was that the companies failed to take reasonable steps to verify the accuracy of the information in the reports they provided.

As we have often pointed out, there is no cheap and quick way to conduct a thorough, nationwide criminal background check. Other than law enforcement databases, a complete criminal check would cost over \$1,000 in fees to state records authorities alone. The best you can usually do is to check with the state police or state court system in the states where someone most likely would have committed an offense.

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How the Federal Government Can Learn from the Evolution of CA's Family Leave Act

CA SB 761 and 770

By Evie P. Jeang

The “Quiet Revolution” was coined to identify the gradual change of attitude about women entering the labor force, starting in the 1970s. However, little has been done to assist women who choose to have children while employed. As recently as 2010, women comprised 49% of the total U.S. labor force, including 55% of all workers in high-paying management, professional, and related occupations. After Australia enacted new legislation in 2009, the United States remains as the only industrialized country without national paid maternity-leave laws, leaving itself in the company of countries such as Papua, New Guinea, and Liberia.

More broadly, U.S. employment law had done little to protect workers from job loss when circumstances demand family-necessitated time away from work. Even worse, only a few states, such as California, New Jersey, New York, Hawaii, Rhode Island and Hawaii, have enacted their own programs to try to address this issue. And the length, duration and amount of wage coverage vary widely among these proactive states. For instance, some states will cover up to \$1,000 per week, while others only cover \$170 per week.

PROGRESS IN CALIFORNIA

The advent of CA SB761 and the recent approval of CA SB770 signifies progress in the evolving quest to provide paid family leave for instances such as maternity leave.

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California has led the nation in this endeavor, and despite the challenges along the way, should serve as a model for the federal government as to how to embark on a comprehensive paid family leave program. In addition, pitfalls to avoid can be identified when analyzing the past decade of reform concerning California Paid Family Leave.

Although there is no national legislation directly concerning paid family leave, there has at least been some progress in terms of some type of job-protected leave. The Family and Medical Leave Act (FMLA) was passed in 1993; it provides up to 12 weeks of unpaid job-protected leave for women and men to attend to their own medical conditions or for family care. Unfortunately, FMLA only covers around half of all U.S. workers, and less than a fifth of all new mothers, (since it only applies to companies with more than 50 workers), the key issue is that the leave is unpaid. Thus even workers who are covered often cannot afford to take advantage of it.

The California Paid Family Leave Act (PFLA) was established in 2004, modeled after the California State Disability Insurance Program (SDI). It was the first legislation of any sort (state or federal) providing paid leave for family issues, and has been viewed as the next step in improving upon the FMLA. PFL provides up to six weeks of partial pay (55% of their usual weekly earnings) for employees who take leave from work to care for a child, parent, spouse, or registered domestic partner with a serious health condition or to bond with a minor child within one year of the child's birth or placement in connection with foster care or adoption.

Much like SDI, PFL is funded through a payroll tax paid entirely by employees and is administered by the same state agency — the Employment Development Department (EDD). Therefore, there is should be no actual cost to employers. Like disability benefits, an employee who takes family leave can receive wage replacement of up to 55% of

the individual's average weekly salary. All employees who pay into the State Disability Insurance Fund are covered by PFL. In addition, PFLA is available to biological mothers for six weeks in addition to the SDI benefits they may receive during pregnancy leave.

Besides the fact that FMLA is unpaid and PFL is paid, PFL covers almost all workers and does not exclude any employers on the basis of size. In addition, FMLA requires an employee to have worked for the company for at least 12 non-consecutive months and should have worked a minimum of 1,250 regular hours (not including overtime) for the company in the preceding 12 months, while PFL only requires that the employee must have paid into SDI during the base period (usually six to 18 months prior to the claim). Therefore, it was thought that the passage of PFLA would increase the numbers of workers taking advantage of job-protected partial paid leave.

JOB PROTECTION

However, it appears that this has not entirely been the case. A respected study found that nearly 37% of workers in a recent survey who needed leave and were aware of PFL nonetheless said they did not apply for benefits due to fear of employer retaliation. In addition to fear of termination, employee respondents reported that they chose not to apply for PFL because they feared doing so might anger their employers or limit their future opportunities for advancement. This is a fundamental point that future federal legislation must address at the start, protecting workers from potential job loss.

Most importantly, the program did not create the right to a leave of absence — meaning that employers are not required to reinstate an employee after taking leave. As such, PFLA has not benefited workers to the extent it should have. Two other factors that were identified, which continue to hamper the program's widespread effectiveness, are the confusion caused by overlapping

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laws providing job protection for pregnancy disability and family and medical leave, and the limited definition of family member.

The lack of job protection is the overwhelming reason PFL has not been as successful as it could be. Not only is the employer not obliged to tell the employee her job is not protected when she takes leave, it is not obligated to provide notice of an impending termination due to this leave.

COORDINATING PFL WITH FMLA

Coordinating PFL with FMLA can be complex and confusing to workers, especially how to transition from one kind of leave to another and whether multiple types of benefits can be used at the same time. It is true that combining can have a synergistic effect, such as using PFL with either CFRA (California Family Rights Act — see below) or FMLA, because that enables the leave to be job-protected. That is because the statute requires employees covered by job-protected leave laws to take PFL concurrently with that leave. Also, women who take state SDI for pregnancy-related disability benefit from the transition to PFL for post-birth baby bonding, since women are automatically notified of their ability to take PFL after their pregnancy-related SDI leave runs out.

The definition of a family member is quite narrow. It includes a parent, child, spouse or registered domestic partner. It does *not* include grandparents, in-laws, siblings or extended family. This is a common issue because of the decrease in numbers of the traditional two-parent family structure. The 2010 U.S. census data showed that more than 1 million grandparents in California live with their grandchildren — and that nearly 30% are responsible for the care of those grandchildren. Moreover, non-traditional families are even more common in low-income and minority communities, compounding the

case that low income families are benefited less by PFL.

AMENDING THE BILL: PROS AND CONS

In response to these issues, Bill SB761 was proposed, which would amend PFLA, protecting workers who utilized PFL from potential loss of employment. This amendment makes an employer liable for actual damages and appropriate equitable relief, including employment or reinstatement, if an employer or agent of an employer discharges or discriminates against an individual because he or she has applied for, used, or indicated intent to apply for or use, family temporary disability insurance benefits. It would allow an employee or applicant to bring a civil action seeking these remedies and if successful, the court may award the employee or applicant reasonable attorneys' fees and costs. Consideration of this Bill has been extended for one year, though another Bill (SB 770), which expands the definition of "family" to include grandparents, grandchildren, siblings or parents-in-law, was signed into law on Sept. 24, 2013.

SB 761 has elicited strong opinions both for and against it. The strongest argument for the measure is the fact that PFL is so infrequently used, due to the reasons stated previously. SB 761 should enable more employees to utilize PFL without fear of termination or discrimination. Proponents also argue that the lack of protection for PFL users disproportionately impacts low-wage workers who pay into the system, but who are less likely to qualify for job protection under other state and federal laws due to the lack of job security.

Other arguments for PFL and SB 761 are that this type of legislation is actually good for business. Allowing employees to access benefits without fear of reprisal would benefit workers and their families, which contributes to a happier workplace and better job retention. Employers noted in the aforementioned survey that there was a positive or no noticeable effect on productivity (90%), profitability (91%)

and most importantly, employee morale (99%).

Those opposing the measure feel that this is a way for employees to defraud employers by asking for time off without actually using it for the correct reasons. In addition, by allowing employees to pursue litigation for discrimination immediately, this bypasses the standards set in the California Family Rights Act (CRFA), which requires filing a complaint with the Department of Fair Employment and Housing. In addition, CRFA, which entitles eligible employees to take up to 12 work weeks of unpaid job-protected leave, only covers employees in companies with 50 or more employees who work within a 75-mile radius. CFRA can be viewed as California's version of FMLA. In contrast, SB 761 applies to companies of any size, and opponents warn that employees of an employer with fewer than 50 employees would now be able to request six weeks of leave regardless of hours worked (while larger companies would still be subject to CRFA). Thus, employers would be hurt by the loss of worker hours.

FEDERAL BILLS

Over the past few years, several federal bills, such as the Family Income to Response to Significant Transitions Act (FIRST), have been proposed, though none have made it through Congress, mainly due to the concern of cost of these programs in the midst of an economic crisis. It has become clear that the shortcomings of FMLA could be remedied by a federal PFL program, and these bills did use California's wage replacement provision as a model, but there is reluctance at this point to allocate federal funds for this.

In order to pass federal legislation, some things that would have to be done differently from California would include how to fund a national program and avoid the stigma of being a "welfare-type" program. California's PFL was built upon an existing temporary disability insurance

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program, which will not be possible with a federal program. It would be best to try to find an existing pool of funds to supply the federal program.

Other lessons to learn from family leave programs include studying the cases that were brought to court challenging the validity of those programs. The leading case challenging a FMLA regulation is the Supreme Court decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). The regulation at issue in *Ragsdale* provided that leave taken by an employee does not count against the employee's FMLA entitlement if the employer did not designate the leave as FMLA leave. The decision held the regulation invalid because it found it contrary to the FMLA's intent. The Court reasoned that the regulation fundamentally interfered with the FMLA because it essentially relieved an employee of the burden of proving a real impairment.

Significantly, the Court found that its invalidation of the regulation was consistent with upholding a

key provision of the FMLA: that an employee is entitled only to twelve weeks of leave in a 12-month period, not more. The Court found that that the 12-week provision was a key contested provision during the passage of the FMLA, so it should not be altered by one of the implementing regulations. Several other lower courts also recognized the invalidity of this particular regulation.

A second challenged regulation was 29 C.F.R. § 825.111, which defines the conditions necessary to find an employee eligible for FMLA leave. In *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (2004), the Tenth Circuit looked at 29 C.F.R. § 825.111(a)(3), the provision defining the "worksite" of jointly employed employees. The regulation defined a joint employee's "worksite" as the office of the primary employer "from which the employee is assigned or reports."

The court found that the regulation's definition of "worksite" was "arbitrary, capricious, and manifestly contrary to the statute." The court reasoned that the agency's interpretation of "worksite" was inconsistent with the purpose of the FMLA's 50/75 provision, which was

to ensure an employer has other employees available as temporary replacements during periods of FMLA leave. Just as in the other decisions discussing contested FMLA regulations, this decision shows employers' attempts to limit the coverage of the FMLA by challenging the validity of its implementing regulations.

As for PFL, incorporation of the content of the recent Senate Bills 761 and 770 into any federal PFL would be prudent, providing more protection against job loss, as well as establishing a broad definition of what constitutes "family."

CONCLUSION

Understanding the progression of FMLA and CFRA to a PFL in California will make it easier to pass future federal legislation to assist with workers who desire more work-life balance. The best aspects of California PFL should be scrutinized, including SB761 and SB770, with avoidance of the pitfalls of this type of legislation, in order to bring the United States into line with the rest of the modern world by providing paid family leave.



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FCRA CRACKDOWN

Relying on unverified databases instead of admissible public records can cost you: The FTC sent warning letters this year to 10 background check companies that provide quick, cheap background reports stating that they may be violating the Fair Credit Reporting Act. The FTC said that, among other potential violations, the background check services had not taken reasonable steps to verify the accuracy of the information contained in their reports.

What makes a background checker reasonable in verifying information? At the very least:

- Your investigator needs to find the actual public record on which a database is basing
- its assertion. To report that Robert L. Doe was arrested for arson without being able to say how his case was disposed (Convicted? Acquitted? Pled to a lesser offence?) is simply unacceptable. The FTC thinks so too.
- You need to make sure that the Robert L. Doe in the report is the same Robert L. Doe you are investigating. You take reasonable steps to check by using date of birth, an address, a photograph, a signature, or some other reasonably compelling piece of evidence. Just taking at face value the word of a database or website is not enough.
- If you run out of time, money or both and you are not sure whether the public record of a bad act pertains to the per-

son you are investigating, say so. Tell your client you are not able to confirm whether the Robert Doe who was arrested is the same person being considered for a job.

Investigators should never even start work on a pre-employment check until a prospective employee has signed a Fair Credit Reporting Act release. The FCRA instructs employers to advise a job applicant in writing that a background check will be conducted (whether it's a credit check, a criminal background check, or even a check just for civil litigation). The employer must obtain the applicant's written authorization to obtain the records, and notify the applicant that a poor credit history or conviction will not automatically result in disqualification from employment.

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FINES

The price of violating this law can be steep. Ask HireRight Solutions, which was hit with \$2.6 million in fines last year for violating the FCRA. Background screeners are supposed to provide their reports to job applicants if asked, and must reinvestigate disputed findings and then report on those to the applicant. (15 U.S.C. § 1681(g)(a); 15 U.S.C. § 1681(i)(a)(1)(A) and 15 U.S.C. § 1681(i)(a)(6). HireRight failed to do at least some of these things, according to the complaint.

For jobs that will pay \$75,000 a year or less, arrest records going back more than seven years may not be reported in a pre-employment check, but convictions from any date may be reported. There is a seven-year limit on civil judgments and tax liens that may be reported, and a 10-year limit on bankruptcies. One kink in the law that helps employers is that if background researchers mistakenly report information they are not supposed to (for instance, a 12-year-old DWI conviction), employers may still consider that conviction in deciding whether or not to hire, according to the FTC.

If the background check gets to the point of doing interviews, Under the Fair Credit Reporting Act, a report based on interviews needs to:

- Verify public record information during the 30-day period before the report is issued;
- Confirm the accuracy of information obtained through interviews, unless the person interviewed is the best source; and
- Avoid any inquiry that would violate federal or state equal employment laws.

THE EEOC GETS ACTIVE, THEN SLAPPED BACK

Last year, the EEOC issued guidance to employers when a PepsiCo bottling subsidiary settled with the agency for \$3.1 million after being caught screening applicants who had been arrested, but never con-

victed. The agency went after the company because the policy disproportionately affected some 300 African-American applicants.

Even if an applicant turns out to have been convicted of a crime, the EEOC's guidelines urge employers to consider the crime, its relation to an applicant's potential job, and how much time that has passed since the conviction. The guidelines also recommend that employers review each case individually, and allow applicants to show why they should be hired despite a conviction.

This year, however, the EEOC was slammed in a memorandum opinion in federal court, when a judge firmly rejected the idea that the mere conduct of criminal background checks had an improper disparate impact on job applicants (*EEOC v. Freeman*, 09-cv-02573, United States District Court for the District of Maryland, Memorandum Opinion 8/9/2013).

"Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable," the opinion said. "Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States. ... (E)ven the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90% of its positions."

The court reasoned that by bringing actions that appeared to ban the use of criminal checks at all, the EEOC placed companies in the position of having to choose between possibly hiring convicted felons and exposing them to potential liability, or else run the risk of an EEOC action by using the public information of a criminal or fraudulent act.

'BAN THE BOX' SWEEPING THE COUNTRY

Beyond the FCRA and the EEOC, there are new state laws to worry

about that may add extra restrictions on what investigators and employers can look at. In California, arrest records are completely off limits for pre-employment checks unless a conviction resulted. Even then, some convictions remain off-limits too.

California's "Ban the Box" law is just one example of state, city or county laws in more than 20 states and 51 cities around the country that limit to various degrees the kind of information about a person's criminal past that can be reported to or used by prospective (or current) employers.

A *Wall Street Journal* article this past summer featured the firing of a person in Richmond, CA, when his employer found out he had recently served 16 months in prison for selling heroin. Another person in the article who served six months in prison for arson in 2009 was quoted as supporting Richmond's new ordinance that forbids city government from asking about any job applicant's criminal history.

In all, 10 states restrict criminal background checks for job applicants. Some allow the reporting of convictions but not arrests going back seven years; some such as Massachusetts and Washington make an exception for jobs that will pay \$20,000 or above. In California, no criminal activity older than seven years may be reported on job applicants. The same restriction in California goes for unsatisfied judgments, paid tax liens, and accounts placed for collection.

In some cities such as New York, criminal history may not be the subject of an inquiry to certain city job applicants during the initial application or interview. In Buffalo, most private-sector employers with 15 or more employees may not inquire about criminal history of applicants. Exceptions are for licensed trades or professions; and jobs that include supervising the young, the elderly, or any physically or mentally disabled. This is not unusual: In most such laws around the country,

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§ 203(o), either the terms of a collective bargaining agreement or a custom or practice under a collective bargaining agreement must provide for that time to be excluded. The section, which was passed in 1949 as part of a package of FLSA amendments known as the "Portal-to-Portal Act," was intended to allow unions and employers to use the compensability of certain pre- and post-shift activities as a bargaining chip in their negotiations.

Despite the age of this provision, the scope of § 203(o) has remained an area of uncertainty, due in large part to the U.S. Department of Labor's (DOL) failure to take a consistent position. In the 1990s, the DOL issued a pair of opinion letters narrowly construing the term "clothes" to exclude "protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts."

In 2002, the Bush administration reversed that Clinton-era guidance, opining that even cumbersome protective gear could be considered clothes. The DOL subsequently confirmed its broader reading of the statute in a 2007 opinion letter. However, in an unsolicited 2010 "Administrator's Interpretation," the DOL changed position yet again, declaring that "the § 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job."

THE SANDIFER CASE

The plaintiffs in *Sandifer* filed suit in the Northern District of Indiana arguing both that § 203(o) should exclude from the definition

of "clothes" any items intended to protect the worker from "workplace hazards," and that the time spent walking from their locker rooms to their work stations should also be compensable time because it occurred after the start of the "continuous workday." The district court partially agreed, holding that the plaintiffs' gear was clothing and excludable from compensable time pursuant to an agreement with the plaintiffs' union, but that their walking time might still be compensable, reasoning that changing clothes could still trigger the start of the compensable workday even though that activity itself was excludable under § 203(o).

The Seventh Circuit affirmed in part, finding that most of plaintiffs' gear was clothing and thus covered by § 203(o), and that the few remaining items — such as earplugs and goggles — took so little time to put on that the time could be excluded as *de minimis*. The Appeals Court then went on to determine that only compensable activities can begin the continuous workday, and that plaintiffs therefore were not entitled to compensation until they reached their workstations and began working.

The Supreme Court subsequently granted certiorari. However, despite the fact that Seventh Circuit's "continuous workday" ruling potentially affects a broader range of employers, since it at least arguably applies to time excluded pursuant to the commonly used *de minimis* exception as well as § 203(o), the Supreme Court only agreed to review the part of the Seventh Circuit's decision regarding the definition of "clothing."

After the parties submitted their briefs to the Court, to most observers' surprise, the U.S. Solicitor General's Office filed an amicus brief that once again changed the Government's position on the scope of § 203(o). Although the DOL had filed an amicus brief at the Seventh Circuit on behalf of the plaintiffs, the Solicitor's office came down on the side of U.S. Steel, arguing that the gear at issue in the case — with

a few minor exceptions — should be considered clothing. The amicus brief mentioned the 2010 Administrators Interpretation only in a footnote, urging without explanation that the Court decline to follow it.

ORAL ARGUMENT

At the Nov. 4, 2013 oral arguments in the case, two things seemed apparent: First, the Justices intend to create a broad rule rather than simply decide whether the specific items worn by the steelworkers in this case are "clothes." Second, neither of the parties' proposals has impressed the Court. Even the liberal justices found significant problems with the Plaintiffs' proposal. For example, Justice Sotomayor took issue with the fact that Plaintiffs' approach would exclude "things that look like clothes," and Justice Ginsburg similarly commented that a photograph of the gear in the record "look[ed] like clothes" to her. Justice Kagan asked why there should be a distinction between items required by an employer for sanitary reasons and items required in order to protect the employee.

Counsel for U.S. Steel argued that the Court should consider all items with the purpose of covering the body to be "clothes," but also went further, arguing that in determining what activities fall under § 203(o), the Court should look at the entirety of the block of time in which employees are "changing clothes" rather than focus on the individual items. This approach would sweep in not only actual changing time, but also the time it takes to open one's locker and close it back up again.

Justice Scalia bristled at this suggestion, stating that the approach advocated by the Government in its amicus brief was more "principled" because it adhered to the statutory term, "clothes." Justice Breyer quipped that U.S. Steel's approach would create a category of "constructive clothes" that are not really clothes.

Although Justice Breyer's comment received laughs from the

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certain “sensitive” jobs such as police officers and teachers may still be subject to criminal checks, which are mandatory under federal law or state laws.

Ohio and Texas come at the issue from the other direction. They have laws protecting employers from tort liability when they hire ex-offenders.

But would not asking about criminal history guarantee that the issue would never come up? Certainly not. Suppose a reference mentioned it? We often like to call people who are not listed as references by ap-

plicants, because we think you get a more balanced idea of someone’s character that way. What if one of them mentioned the criminal history of the applicant?

Like all “Right to be Forgotten” rules, the best we can usually do with something already written down is to enforce a Right to Suppress. Short of sealing or expunging a judicial record, it will always be accessible. If it’s been written about in the newspapers or on the Internet, it can probably never be completely eradicated.

But some states are trying. Effective this year, Georgia has had a law that shifts the burden to agencies

responsible for restricting criminal data eligible for expungement and restriction, and also expands the types of criminal history eligible for expungement or restriction from availability to the public. The information now subject to restriction includes certain arrests that are not referred for formal charge and dismissals by prosecutors without seeking formal charges.



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‘Clothes’

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courtroom, it was not in fact very far from the position the U.S. Solicitor General’s Office advocated. The Solicitor’s Office, argued that most, but not all, of the gear worn by the plaintiffs should be considered “clothes.” With respect to non-clothing items like ear plugs, the Government urged the Court to ignore the Seventh Circuit’s holding that the time spent putting on such gear at issue constituted *de minimis* time and to create a new category of items that are “ancillary” to clothes-changing instead. The Assistant Solicitor expressed concern that the Seventh Circuit’s ruling disrupts current law limiting what can be considered *de minimis* time.

For example, some courts have held that the *de minimis* doctrine only applies to activities that are not regularly repeated. This may explain the administration’s decision to abandon the 2010 Administrator’s Interpretation — the administration may have believed that its earlier hard line was likely to be rejected by the Court, and that a wholesale affirmance of the Seventh Circuit’s

decision would abrogate this line of cases. The administration also may have been concerned that rejection of the Administrator’s Interpretation would have created unfavorable precedent with respect to the level of deference to be afforded to DOL interpretations, especially following the Supreme Court’s 2012 decision in *Christopher v. SmithKline Beecham Corp.*, which refused to give deference to a position advanced by the DOL in an amicus brief.

Surprisingly, the DOL’s turnabouts on the scope of § 203(o) received almost no discussion. Only Justice Kagan mentioned this history in passing, asking plaintiffs’ counsel in an almost rhetorical manner why the DOL had never attempted notice-and-comment rulemaking on the issue.

In contrast, another aspect of § 203(o) received unexpected attention. Plaintiffs’ counsel theorized in response to a question from Justice Breyer that the AFL-CIO had joined plaintiffs’ cause, rather than argue for a broader interpretation of § 203(o) as a means to obtain greater freedom in bargaining, because courts had interpreted the “custom and practice” language of the pro-

vision too broadly, tying the hands of unions that failed to object immediately to non-payment. Counsel for U.S. Steel argued that plaintiff’s characterization of the case law regarding this language was incorrect, but Justice Breyer nonetheless returned to that concept several times during the course of the arguments even though the “custom or practice” language was not directly at issue.

WHAT’S NEXT?

It is likely to be several months before the Court issues its decision, but the Court seemed most likely to adopt a middle-of-the-road rule that excludes some “accessory” items like glasses, but includes clothing that protects against workplace hazards. The Court’s decision may also extend beyond the narrow definitional issue at hand and touch upon the “custom or practice” language of § 203(o) or the *de minimis* doctrine. The latter issue in particular would significantly expand the potential application of the decision, as the *de minimis* doctrine is commonly relied upon by employers of all types.



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