



## The Status of Donning & Doffing Cases For California Peace Officers

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Since the U.S. Supreme Court decision in *IBP, Inc. v. Alvarez* in late 2005, the number of lawsuits based on the federal Fair Labor Standards Act (FLSA) seeking overtime pay for pre and post shift time incurred by employees has grown significantly, including cases involving peace officers. Various groups of peace officers who are required to wear special protective gear have active FLSA lawsuits because the public employers typically do not provide compensation for the time spent putting on ('donning') such gear prior to the start of a shift or taking off ('doffing') the gear at the end of the shift. Together with other pre and post shift tasks associated with the care, maintenance and preparation of special protective gear, the time incurred by peace officers donning & doffing protective gear can be significant.

While the *IBP v. Alvarez* case involved poultry and meat packing employees, it was the 2003 case of *Alvarez v. IBP* (which then became the 2005 U.S. Supreme Court case) in which the Ninth Circuit federal Court of Appeal referred specifically to bullet-proof vests worn by peace officers when distinguishing protective gear from mere clothing, and finding the donning and doffing of such gear compensable under the FLSA. This led to multiple FLSA 'donning & doffing' lawsuits for peace officers, including a number of cases in the federal District Courts within California.

So what is the status of FLSA donning & doffing cases for California peace officers? Where do the lawsuits stand? Where does *the law* on the compensability of pre and post shift time associated with special protective gear for peace officers stand? In the two and a half years since the *IBP, Inc. v. Alvarez* Supreme Court decision significant developments have occurred.

In 2006 some public employers elected to settle claims for compensation for pre & post shift time associated with protective gear as opposed to litigate the disputes. Such settlements included the state of California taking a reasonable posture and providing a 3.5 percent salary stipend for members of the California Association of Highway Patrolmen (CAHP) under an agreement reached between CAHP, represented by Goyette & Associates and Silver, Hadden, Silver, Wexler & Levine, and the California Department of Highway Patrol (CHP). Other disputes went forward in FLSA lawsuits against the public employers, either as suits for individual peace officers, or as FLSA 'collective actions' for classes for peace officers.

In 2007, four different summary judgment rulings were issued by three different federal District Courts within California for peace officer donning & doffing lawsuits. While these rulings help to begin to define the compensability of pre and post shift time associated with protective gear, the decisions conflict significantly.

In the case of *Martin v. City of Richmond* (2007) 504 F.Supp.2d 766, the Northern District Court granted the City's motion for summary judgment regarding the donning & doffing of uniforms, finding that such time was not compensable under the FLSA. The *Martin* Court found, however, that time spent donning & doffing protective gear was 'integral and indispensable' to the work performed, may be compensable under the FLSA, depending on whether such tasks were performed at work or at home, and depending on how much time was incurred.

In the case of *Abbe v. City of San Diego* (2007 WL 4146696), the Southern District Court sided entirely with the employer, ruling that the donning & doffing of both the uniform and protective gear was not compensable because neither the law, the employer's policies, nor the nature of the police work required the donning & doffing to be done at work, and if done at home, it was not compensable under the FLSA. In making this finding, the *Abbe* Court relied in part on a May 31, 2006 advisory memorandum from the U.S. Department of Labor.

In the case of *Vucinich, Maciel v. City of Los Angeles*, the Central District Court agreed with the *Martin* Court and ruled that while donning & doffing of uniforms was not compensable, donning & doffing of protective gear was integral and indispensable to the officers' work and was therefore compensable under the FLSA. Unlike the *Martin* and *Abbe* Courts, the *Vucinich, Maciel* Court did not engage in any analysis of donning & doffing protective gear at home versus at work in finding such time compensable. Following the summary judgment ruling in 2007, this case became *Maciel v. City of Los Angeles* and went to a bench (non-jury) trial, resulting in a verdict which upheld the summary judgment ruling that time spent donning & doffing protective gear was compensable under the FLSA. This ruling is now a citable published decision: *Maciel v. City of Los Angeles* (C.D. Cal., 2008) 542 F.Supp. 2d 1082, 1091-92.

Finally in the case of *Lemmon v. City of San Leandro* (N.D. Cal. 2007) 538 F.Supp.2d 1200, 1204-06, the Northern District Court disagreed with the *Martin*, *Abbe*, and *Vucinich/Maciel* cases, and ruled entirely for the peace officer employees, holding that donning and doffing of *both* the police officer's uniform and special protective gear was compensable under the FLSA. The *Lemmon* Court stated "there is no distinction between the uniform and the equipment because the police uniform with all of its component parts functions as an integrated whole that serves as the officer's survival suit." In addition, in direct opposition to the *Martin* and *Abbe* decisions, the *Lemmon* Court ruled that the compensability of time spent donning and doffing of the uniform and special protective gear did not depend on whether such activity occurred at the employer's premises. The court cited to 9<sup>th</sup> Circuit case law and disagreed with the Department of Labor advisory memo, holding that donning/doffing time may be compensable even when done at home.

The *Abbe* and *Lemmon* summary judgment rulings and the *Maciel* bench trial decision are now reportedly on appeal to the Ninth Circuit Court of Appeal. If and when a Ninth Circuit decision becomes published, the application of the FLSA to pre and post shift donning and doffing time will likely become much clearer for California peace officers. Until then, the mixed District Court decisions weigh in favor of the peace officers - - at

least regarding the donning & doffing of protective gear being compensable under the FLSA.

The ruling that donning & doffing of protective gear is compensable under the FLSA is, however, only the first step towards a successful donning & doffing lawsuit for peace officers. Other significant obstacles regarding establishing *enough* pre & post shift uncompensated time may ultimately determine the outcome of a given donning & doffing case.

First, the *amount of* pre and post shift time spent donning, doffing or otherwise associated with protective gear must be established as more than an insignificant period of time per day in order to avoid having claims defeated by the “de minimus” doctrine. This de minimus rule was set forth in the case of *Lindow v. United States (1984)* 738 F.2nd 1057, under which employers are not required to pay for certain amounts of otherwise compensable time incurred by employees if it is difficult to record such time, if the work activities causing such time do not occur on a regular basis, or if the amount of time for such work activities is small. Until recently, published court decisions never established an exact amount of time above which wage claims cannot be defeated by the “de minimus” doctrine; however, the recently published *Maciel* trial decision found that the 5 to 10 minutes per day of donning & doffing time established in the case, while a small amount of time, is not “de minimus” because it occurred on a regular basis, prior to each work shift.

If enough donning and doffing or associated time is established to overcome the “de minimus” defense, a sufficient amount of time must still be established to overcome “gap time” and allowable FLSA overtime credits. “Gap time” refers to the difference between a peace officer’s regularly scheduled hours and the FLSA trigger for overtime pay for employees subject to the “7k exemption.” For peace officers, employers can adopt the FLSA 7k exemption so that instead of having overtime pay triggered any time actual work hours exceed forty hours per week, overtime pay is instead triggered only when actual time worked exceeds 171 hours in a 28 day period. So for example, if a peace officer has a regular work schedule under which he or she normally works 160 hours in a 28 day period, and no additional work shifts are incurred, then 11 hours of “gap time” (the difference between 160 and the 171 hour 7k exemption overtime trigger) must be overcome by the established donning & doffing time *before* actual overtime pay damages start to accumulate. If a peace officer does work approved additional shifts and is paid overtime for such extra work (pursuant to a collective bargaining agreement or memorandum of understanding), the FLSA also grants a ‘credit’ to employers for such overtime which is paid out prior to the peace officer reaching the 171 hour 7k exemption trigger. This credit must also be overcome by established donning & doffing time before actual overtime pay damages will be due from the employer. Therefore, even with donning, doffing, and other time pre and post shift time associated with protective gear being compensable under the FLSA, a donning & doffing lawsuit will only be successful in recovering overtime pay if the amount of pre and post shift uncompensated time established is sufficient to overcome the “de minimus” defense and both the “gap time” and overtime credit barriers.

Lastly, FLSA lawsuits for donning & doffing which are litigated on behalf of a ‘class’ of peace officers have unique requirements for the ‘class’ which are not present in other federal law or state law based class actions. FLSA class actions are properly termed “collective actions” and, based on prevailing case law, require that each and every class member, including the original named Plaintiffs, file a written, signed consent to join (or “opt-in”) to the lawsuit. If such consent is not filed, a peace officer cannot be considered part of the ‘class’ for the donning & doffing lawsuit. Further, the statute of limitations does not ‘toll’ and the start of the related damage recovery period does not become locked in place for any class member until the opt-in consent is filed with the Court. For large FLSA collective actions, such as the *Nunez et. al. v. City of Los Angeles* lawsuit, which is currently one of the largest pending donning & doffing cases in California (with over two thousand class member who have opted-in to the case), the amount of time and effort simply to set up the ‘class’ in the lawsuit is significant.

In sum, while the District Court decisions in various pending donning & doffing cases within California weigh in favor of peace officers, the ‘law’ will ultimately likely be set by a Ninth Circuit Court of Appeal decision. Even if pre and post shift donning, doffing and other time associated with protective gear remains compensable under the FLSA, evidence of enough of this time must be established in each case to result in successful recovery of overtime pay. But with the right facts and the direction the law appears to be evolving towards, the liability of public employers for pre an post shift donning, doffing and other time associated with protective gear may be very significant.

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