

6-24-2014

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### Recommended Citation

Nicholas Hart, *Preserving the Sanctity of Collective Bargaining: The Compensability of Travel Time Following FLSA Section 203(o) Donning and Doffing Activity*, 63 Cath. U. L. Rev. 497 (2014).

Available at: <https://scholarship.law.edu/lawreview/vol63/iss2/10>

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## Preserving the Sanctity of Collective Bargaining: The Compensability of Travel Time Following FLSA Section 203(o) Donning and Doffing Activity

### Cover Page Footnote

J.D., January 2014, The Catholic University of America, Columbus School of Law; B.M., 2009, University of Cincinnati. The author is grateful to Professor Benjamin Mintz for his valuable comments and insight, and to Jake McDermott for his guidance when writing this Comment. He would also like to thank his father, whose countless hours spent discussing the realities of collective bargaining were invaluable in formulating the author's ideas. Thanks are also due to Professor Roger C. Hartley and the attorneys at Murphy Anderson PLLC for their comments and guidance throughout the author's writing process. Finally, the author gives his utmost gratitude to the staff and editors of The Catholic University Law Review whose hard work was instrumental in the publication of this Comment.

# PRESERVING THE SANCTITY OF COLLECTIVE BARGAINING: THE COMPENSABILITY OF TRAVEL TIME FOLLOWING FLSA SECTION 203(o) DONNING AND DOFFING ACTIVITY

*Nicholas Hart*<sup>+</sup>

*Here was a population, low-class and mostly foreign, hanging always on the verge of starvation, and dependent for its opportunities of life upon the whim of men every bit as brutal and unscrupulous as the old-time slave-drivers; under such circumstances immorality is exactly as inevitable, and as prevalent, as it was under the system of chattel slavery.*<sup>1</sup>

The exploitation of early factory workers, so vividly depicted in Upton Sinclair's *The Jungle*,<sup>2</sup> has been largely eradicated through the growth of the regulatory state. For a select group of workers, however, inequities still remain between the hours they work and the wages they receive. These workers are required to report to work before their shift begins to change into uniforms or protective clothing that usually includes flame retardant or sanitary clothing,<sup>3</sup> steel-toed boots,<sup>4</sup> hard hats,<sup>5</sup> gloves, safety goggles, and earplugs.<sup>6</sup> The employee then makes the trip to the factory floor, which may be a short walk from the changing room or a bus trip across an industrial complex taking several

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1. UPTON SINCLAIR, *THE JUNGLE* 109 (1906).

2. *Id.*

3. *See, e.g., Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 592 (7th Cir. 2012) (considering whether employee compensation is necessary for the time spent putting on flame retardant clothing), *aff'd* 134 S. Ct. 870 (2014); *Arnold v. Schreiber Foods, Inc.*, 690 F. Supp. 2d 672, 674 (M.D. Tenn. 2010) (examining compensation for the time spent putting on sanitary uniforms).

4. *See, e.g., Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 212 (4th Cir. 2009) (requiring workers to change into clean and sanitized steel-toe boots at the work facility).

5. *Sandifer*, 678 F.3d at 592 (listing hard hats as part of the workers' changing regimen); *Schreiber Foods*, 690 F. Supp. 2d at 674 (noting that Schreiber Foods workers wear hard hats while working on the production line).

6. *Schreiber Foods*, 690 F. Supp. 2d at 675 (explaining that employees put on safety goggles, gloves, and a hairnet before leaving the changing area and entering their work stations).

minutes.<sup>7</sup> Once each employee arrives at his or her workstation, the employee clocks in and the compensated workday begins.<sup>8</sup>

Unions, through negotiations with employers, may waive compensation for the time spent donning and doffing via the Fair Labor Standards Act (FLSA) Section 203(o) exclusion.<sup>9</sup> Added to the FLSA in 1949,<sup>10</sup> this provision authorizes the time spent changing into work clothes<sup>11</sup> by union employees to be uncompensated.<sup>12</sup> Should, however, the provision extend to mean that the worker is also not entitled to compensation for post-donning and pre-doffing time spent traveling from the changing room to the factory floor?

The Portal-to-Portal Act,<sup>13</sup> which regulates the compensability of travel time in the workplace, created two exemptions to the FLSA employee compensation requirements.<sup>14</sup> The first exemption excludes all time spent traveling to and from the workplace from compensation.<sup>15</sup> The second exemption covers time spent performing tasks that are “preliminary or postliminary” to the employee’s

7. For example, U.S. Steel asserted in the District Court that it could take as many as eight minutes for a worker to travel from the changing room to their work station. *See Sandifer v. U.S. Steel Corp.*, No. 2:07-CV-443 RM, 2009 WL 3430222 at \*17 (N.D. Ind. Oct. 15, 2009). This means that in U.S. Steel Corp.’s Gary, Indiana complex, some workers have been losing more sixty-nine hours worth of wages for their travel time for every year they work. *See id.* at \*1, \*16–18.

8. The industry refers to this as “line time,” which is a form of wage calculation that measures the workday from the beginning to the end of production on the work line. *See Sepulveda*, 591 F.3d at 212.

9. Section 3(o) of the Fair Labor Standards Act provides:  
In determining for the purposes of . . . this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o) (2006).

10. *See* Act of Oct. 26, 1949, Pub. L. No. 81-393, 63 Stat. 910 (codified at 29 U.S.C. § 203(o) (2006)).

11. 29 U.S.C. § 203(o). The exclusion also covers washing time. *Id.* However, for simplicity, this Comment will focus solely on donning and doffing, otherwise called changing time, and not time spent washing at the beginning or end of a workday.

12. The exclusion may be applied as a result of either the custom or practice of the bargaining unit or the express language of a collective bargaining agreement. 29 U.S.C. § 203(o). The term custom and practice is not meant to implicate “industry” standards. *See* 29 C.F.R. § 790.10(d) (2013). Instead, “‘custom’ and ‘practice,’ . . . may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed.” 29 C.F.R. § 790.10(c).

13. The Portal-to-Portal Act, 29 U.S.C. §§ 251, *et seq.* (2006)

14. The Fair Labor Standards Act (FLSA) requires compensation for all productive work that is performed by an employee on behalf of the employer. 29 U.S.C. § 201, *et seq.* (2006); *see also infra* Part I (discussing the FLSA’s compensation rules).

15. 29 U.S.C. § 254(a)(1) (2006).

job.<sup>16</sup> As a result, compensation is required for all hours an employee works, including time spent traveling between principal activities.<sup>17</sup>

In 2005, the Supreme Court held that the required donning and doffing of work clothes may be a principal activity that triggers compensation for a continuous workday.<sup>18</sup> This ruling, however, left open the question of whether the required donning and doffing of work clothes may still be considered a principal activity triggering compensation for a continuous workday if the union and employer exclude compensation under FLSA Section 203(o).<sup>19</sup>

Congress added Section 203(o) to the FLSA to preserve the “sanctity of collective-bargaining agreements” after the passage of the Portal-to-Portal Act.<sup>20</sup> Congress feared that because courts required compensation for all “principal” activities, the Portal-to-Portal Act would undermine the highly unionized industries that define the workday in collective bargaining agreements, resulting instead in the very windfalls that the Portal-to-Portal Act was passed to prevent.<sup>21</sup> Historically, Portal-to-Portal Act jurisprudence has sought to determine whether the activity is principal in nature and thus compensable.<sup>22</sup>

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16. This exemption only applies if the preliminary or postliminary activities take place before the performance of the first and after the performance of the final principal activity of the employee’s workday. 29 U.S.C. § 254(a)(2). The Code of Federal Regulations defines a preliminary activity as any “activity engaged in by an employee before the commencement of his ‘principal’ activity or activities.” 29 C.F.R. § 790.7(b) (2013). A postliminary activity is defined as one “engaged in by an employee after the completion of his ‘principal’ activity or activities.” *Id.* Although there is no definitive list of these exempted activities, the regulations specifically mention “[w]alking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.” *Id.* However, travel time that is performed during the course of the employee’s principal job duties is not the type of activity exempted by the Portal-to-Portal Act. *Id.* at § 790.7(d).

17. This is known as the continuous workday rule. *See* 29 C.F.R. § 790.6(a). The regulation establishing this rule states, in part:

Under the provisions of section 4, one of the conditions that must be present before “preliminary” or “postliminary” activities are excluded from hours worked is that they “occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases” the principal activity or activities which he is employed to perform.

*Id.*; *see also infra* Part I.B (discussing the continuous workday rule in greater depth).

18. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29–30 (2005).

19. Most recently, the Supreme Court refused to hear the question of whether travel time following and preceding excluded changing and washing activities is compensable. *See Sandifer v. U.S. Steel* Petition for Certiorari, Granted in Part, Denied in Part, 133 S. Ct. 1240, 2013 WL 598470 (2013). Instead, the court only decided the issue of the definition of clothes under Section 203(o). *Sandifer v. U.S. Steel*, 134 S. Ct. 870 (2014) (finding that, for the purposes of the statute, “clothes” will be given its ordinary meaning of articles of clothing that cover the body).

20. *See, e.g.*, 95 CONG. REC. 11210 (1949) (statement of Rep. Christian Herter); *see also infra* Part II.

21. 29 U.S.C. § 251(a)(4).

22. *See, e.g.*, *Steiner v. Mitchell*, 350 U.S. 247, 252–53 (1956) (establishing that the donning and doffing of work clothes may be a principal activity when that activity is “integral and indispensable” to the employee’s job); *Mitchell v. King Packing Co.*, 350 U.S. 260, 261–63 (1956)

Courts, however, have not examined whether compensation is a prerequisite for principal activity status.<sup>23</sup> As a result of these competing principles, there is an emerging split in authority when determining whether the required donning and doffing of work clothes is a principal activity if it is not compensated because of a valid Section 203(o) exclusion.<sup>24</sup>

Part I of this Comment explores the prior law and sets forth the current framework for determining the compensability of work. It then examines the emerging authoritative split in interpreting the principal nature of work performed under a Section 203(o) exclusion. Part II demonstrates that this authoritative split is damaging to the effective implementation of the Section 203(o) exclusion and calls for a resolution to this split. Part III seeks to resolve the current inconsistencies of Section 203(o) jurisprudence by creating a new standard asserting that under the Section 203(o) exclusion, donning and doffing is a *per se* principal activity that triggers compensation for the continuous workday. Because Section 203(o) is at its core a collective bargaining provision, the final part of this Comment analyzes the proposed standard in the context of the current collective bargaining regime.

### I. WHEN IS WORK WORK?

Before determining whether an activity is principal for the purposes of the Portal-to-Portal Act, the activity must first qualify as “work.”<sup>25</sup> Therefore, a brief overview of the FLSA, the Portal-to-Portal Act, the continuous workday rule, and Section 203(o) is required.

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(finding that the sharpening of knives by meat cutters is “an integral part of and indispensable to” the employee’s job and thus compensable under the FLSA).

23. The test for determining principal activity status is whether the activity is “integral and indispensable” to the employee’s principal job duties, not whether the activity is compensated. *See Steiner*, 350 U.S. at 252–53 (1956) (affirming the Court of Appeals’s determination that activities that are “an integral and indispensable part of the principal activities” may not be exempted by the Portal-to-Portal Act).

24. *See Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 595–96 (7th Cir. 2012) (concluding that since the Section 203(o) donning and doffing activity was uncompensated, it could not be a principal activity triggering compensation for the travel time as part of the continuous workday), *aff’d on other grounds* 134 S. Ct. 870 (2014); *Franklin v. Kellogg Co.*, 619 F.3d 604, 619–20 (6th Cir. 2010) (holding that Section 203(o) activity was integral and indispensable and thus a principal activity triggering compensation for the travel time under a continuous workday).

25. The FLSA defines “employ” as “includ[ing] to suffer or permit to work.” 29 U.S.C. § 203(g) (2006). This definition has been interpreted to mean any work that is performed primarily for the benefit of the employer. *See, e.g., Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (holding that the trainees of a railroad were not employed by the railroad while in still in school because “[the Act’s] definitions of ‘employ’ and of ‘employee’ . . . cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction” because the definitions accomplish the purpose of the Act, which was, “as to wages . . . to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage”).

*A. The Fair Labor Standards Act: To Suffer or Permit to Work*

Congress enacted the FLSA in 1938 as a response to substandard wages and as a means to ensure that all employees receive “[a] fair day’s pay for a fair day’s work.”<sup>26</sup> The statute provides:

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages [equal to or greater than the minimum wage].<sup>27</sup>

To “employ” a worker means “to suffer or permit to work,” but the statutory definition leaves significant room for judicial interpretation.<sup>28</sup> “Work” has been defined in multiple ways. The most common definition is “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”<sup>29</sup> In 1944, the Supreme Court expanded this broad definition to include nonexertional acts, asserting that an employee may be hired to wait for productive work to arise, or even be hired to do nothing at all.<sup>30</sup> The Court later affirmed this expansive reading of “work,” holding that the FLSA’s requirements “are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’”<sup>31</sup>

*B. The Portal-to-Portal Act: Exempting Preliminary and Postliminary Activities from Work Time*

In a series of a cases in the 1940s, the Supreme Court added to the definition of “work” by holding that time spent walking from a factory’s entryway to the

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26. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942) (quoting 81 CONG. REC. 4983 (1937) (statement of President Franklin D. Roosevelt)), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. § 251 et seq. (2006).

27. 29 U.S.C. § 206(a) (2006 & 2012). The current federal minimum wage of \$7.25 an hour is a floor; states may enact minimum wages greater than the federal mandate. 29 U.S.C. § 206(a)(1). The Department of Labor’s Wage and Hour Division catalogs current State minimum wage rates. *See Minimum Wage Laws in the States*, DEPT. OF LABOR WAGE AND HOUR DIV. (Jan. 1, 2013), <http://www.dol.gov/whd/minwage/america.htm#.UJrwSKmg1UQ>. In addition to minimum wage regulations, the FLSA also requires overtime wages, equal to 150 percent of the employee’s hourly wage, for all work beyond eight hours in a day or forty hours in a work-week. 29 U.S.C. § 207(a)(1)(2006).

28. *See* 29 U.S.C. § 203(g).

29. *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. § 251 et seq. (2006).

30. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

31. *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

employee's workstation is compensable under the FLSA.<sup>32</sup> This expansion triggered a legislative response that came to be known as the Portal-to-Portal Act.<sup>33</sup> The Portal-to-Portal Act exempts certain activities from compensable time. These exemptions include travel to and from, but not within, the workplace and activities that occur at the workplace but happen before or after an employee is engaged in their principal work activities.<sup>34</sup>

Although both of the statutory exceptions use the phrase "principal activity," neither the statute nor the Department of Labor's regulations clearly define what constitutes a principal activity.<sup>35</sup> The Supreme Court, however, has thoroughly examined the definition of "preliminary and postliminary" activities.<sup>36</sup>

In *Steiner v. Mitchell*, the first Supreme Court case examining the Portal-to-Portal Act, the majority held that "preliminary and postliminary" activities are those activities that are "an integral and indispensable part of the principal activities."<sup>37</sup>

In confusing circularity, this "integral and indispensable" holding establishes an exception to the Portal-to-Portal Act exemptions: if the performance of an otherwise preliminary or postliminary activity is "an integral and indispensable part" of a worker's principal activity, the worker must be paid for it under the FLSA, even if the Portal-to-Portal Act would otherwise exempt the activity from compensation.<sup>38</sup> This universally accepted reading of the Portal-to-Portal Act is critically important because Department of Labor regulations state that donning

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32. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946) (holding that when an employee is required to be physically present at the employer's workplace, "on duty or at a prescribed workplace," the time spent on the premises shall be compensated), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. § 251 et seq.; *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 163 (1945) (holding that workers must be compensated for the time spent traveling between a bituminous mine's portal and the working face), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. § 251 et seq.; *Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 603 (holding that workers must be compensated for the time spent traveling between an iron ore mine's portal and the employee's work site).

33. 29 U.S.C. § 251 et seq. This Act was a congressional effort to limit judiciary overreach. Congress found that courts had been interpreting the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees," which imposed on employers the potential for immensely burdensome liabilities and financial uncertainty so as to freeze development and growth in the industry, create economic imbalances between industries, and difficulty engaging in voluntary collective bargaining. 29 U.S.C. § 251(a) (2006).

34. 29 U.S.C. § 254(a) (2006 & 2012).

35. The statute is silent on the definition of principal activities. *See* 29 U.S.C. § 262 (defining employee, employer, wage, Walsh-Healey Act, Davis-Bacon Act, and state, but not principal activity). The Department of Labor, however, through its rulemaking authority, defines "principal activities" as those "which the employee is 'employed to perform.'" 29 C.F.R. § 790.8(a) (2013). This term includes "all activities which are an integral part of a principal activity." 29 C.F.R. § 790.8(b) (2013).

36. *See Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

37. *Id.*

38. *Id.*

and doffing protective gear may be “integral and indispensable” in certain situations.<sup>39</sup>

*1. The “Continuous Workday” Rule: Compensation is Required for All Time Spent Between Principal Activities*

Compensation for a workday is based on a principle known as the continuous workday rule.<sup>40</sup> A “workday” is “the period between the commencement and completion on the same workday of an employee’s principal activity or activities.”<sup>41</sup> Through this definition of “workday,” the Department of Labor has created an additional exception to the Portal-to-Portal Act exemptions.<sup>42</sup>

This exception requires employers to compensate employees for activities occurring between the performance of the employee’s first and final “principal activity” of the day, even when the Portal-to-Portal Act would expressly provide otherwise.<sup>43</sup> However, the Supreme Court has expansively interpreted the scope of “principal activities” to include “any activity that is ‘integral and indispensable’ to a ‘principal activity.’”<sup>44</sup> Thus, even activities not typically considered “principal activities” can begin the workday if they are “integral and indispensable” to a principal activity.<sup>45</sup> Therefore, employers must compensate workers for all working time accrued subsequent to the initial activity until the employee completes his final principal activity of the workday, even if parts of those hours would not be compensable under the Portal-to-Portal Act exemptions.<sup>46</sup>

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39. Specifically, the regulation states:

If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer’s premises at the beginning and end of the workday would be an integral part of the employee’s principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ‘preliminary’ or ‘postliminary’ activity rather than a principal part of the activity.

29 C.F.R. § 790.8(c).

40. 29 C.F.R. § 790.6; *see also* *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005) (holding activities performed between the first and last principal activities of the workday are compensable as part of the “continuous workday”).

41. 29 C.F.R. § 790.6(b).

42. *Id.* at § 790.6(a). The regulation states:

[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [Section 4 of the Portal-to-Portal Act] have no application.

*Id.*

43. *Id.*

44. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

45. *Id.*; 29 C.F.R. § 790.6.

46. 29 C.F.R. § 790.6.

The courts have consistently held that the donning and doffing of work clothes may be an integral and indispensable part of a worker's principal workday.<sup>47</sup> The inquiry, however, is fact-dependent.<sup>48</sup> Most recently, in *IBP, Inc. v. Alvarez* the Supreme Court, "conclude[d] that the locker rooms where . . . donning and doffing took place are the relevant 'place of performance' of the principal activity," thus triggering compensation for a continuous workday.<sup>49</sup>

*C. The Section 203(o) Exclusion for Donning and Doffing by Union Employees*

With this reasoning in mind, Congress amended the FLSA in 1947 to allow unions and employers to exempt the time spent donning or doffing work clothes from compensable time.<sup>50</sup> When considering the exclusion, Congress determined that deference to the terms of a "bona fide collective-bargaining agreement" is more in the FLSA's spirit of protecting the interests of covered workers than strict, categorical adherence to a poorly-crafted, imprecise mandate.<sup>51</sup>

These exclusions, codified at 29 U.S.C. § 203(o), are valid as long as two conditions are met.<sup>52</sup> First, the donning and doffing must be considered "changing clothes."<sup>53</sup> Second, compensation for this time must be waived

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47. See, e.g., *Alvarez*, 546 U.S. at 37 (holding that the donning and doffing of work clothes may be a principal activity for the purposes of the Portal-to-Portal Act); *Steiner*, 350 U.S. 247, 256 (1956) (concluding that donning and doffing is a principal activity if it is integral and indispensable to the employee's job).

48. See, e.g., *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2001 WL 34897841 at \*11-14 (E.D. Wash. Sep. 14, 2001) (considering the type of clothing and protective equipment, the amount of time it took the employees to don and doff the clothing and protective equipment, and the employer's reasons for requiring employees to wear the clothing and protective equipment as factors in examining the principal nature of the donning and doffing activity), *aff'd in part, rev'd in part*, *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd* *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

49. *Alvarez*, 546 U.S. at 34 (holding that the donning and doffing of work clothes is a principal activity which in turn requires compensation for the time walking between the changing station and work station).

50. Fair Labor Standards Amendments of 1949, Pub. L. No. 49-393, 63 Stat. 910 (codified at 29 U.S.C. § 203(o) (2006)).

51. See 95 CONG. REC. 11210 (1949) (statement of Rep. Christian Herter) (explaining that section 203(o) was enacted to avoid the situation where the Department of Labor deems illegitimate a previously agreed up collective bargaining agreement that specified that no compensation would be paid for donning or doffing of work clothes, thereby forcing employers to retrospectively determine the back pay owed to employees for these activities).

52. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214 (4th Cir. 2009).

53. *Id.* There has long been a controversy over the definition of work clothes. See, e.g., Kimberly D. Krone, *And You Don't Get Paid for That: Section 203(o) of the Fair Labor Standards Act Does Not Apply to Donning and Doffing of Safety Gear*, 9 SETON HALL CIR. REV. 35, 67-72 (2012) (arguing that the donning and doffing of safety gear is a principal activity and that the exclusion should only be applied to changing in and out of "regular work clothing"); James Watts, Comment, *Dressing for Work Is Work: Compensating Employees Under the Fair Labor Standards*

through express contractual language or by the custom or practice<sup>54</sup> of the employer and bargaining unit.<sup>55</sup>

As the Supreme Court has stated, the exclusion's "clear implication is that clothes changing and washing, which are otherwise a part of the principal activity [for the purposes of Portal-to-Portal Act exemptions], may be expressly excluded from coverage by agreement."<sup>56</sup> Thus, even if donning and doffing is "integral and indispensable" and, as a result, compensable under the Portal-to-Portal Act, an employer and union may still "opt out" by excluding the time from compensation under their collective-bargaining agreement or through custom or practice.<sup>57</sup> The inquiry remains as to whether, after an employer and a union apply the exclusion, the donning and doffing, which would otherwise be principal in nature, may retain that status and trigger compensation under a continuous workday.

*D. The Emerging Authoritative Split Regarding the Principal Nature of Changing Time Under Section 203(o) exclusions*

Federal courts and the Department of Labor have split, both internally and with each other, when deciding the nature of travel time following activity excluded under Section 203(o). This split has resulted in two predominant tests for determining the compensability of travel time following excluded donning and doffing. The first standard, adopted by the Sixth Circuit in *Franklin v. Kellogg Co.*, employs a traditional FLSA analysis to determine whether the excluded activity preceding or following the travel time is principal in nature and thus triggers compensation for that travel time.<sup>58</sup> In contrast, the Seventh Circuit applies a conflicting standard that all activities excluded under Section

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*Act for Donning and Doffing Protective Gear*, 87 U. DET. MERCY L. REV. 297, 298 (2010) (highlighting the current authoritative split between the Tenth, Third, Ninth, and Second Circuits over what types of clothing may be excluded under Section 203(o)). This conflict, however, has since been resolved in *Sandifer v. U.S. Steel*, where the court defined work clothes under Section 203(o) as "items that are both designed and used to cover the body and are commonly regarded as articles of dress." 134 S.Ct. 870, 876 (2014).

This comment, however, focuses only on the travel time following those instances in which the donning and doffing is an activity that is properly excluded under Section 203(o).

55. *Sepulveda*, 591 F.3d at 214. For further discussion of when compensation is waived by custom or practice, see *Turner v. City of Phila.*, 262 F.3d 222, 226 (3d Cir. 2001) (holding that custom or practice is a restatement of "the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence").

56. *Steiner v. Mitchell*, 350 U.S. 257, 255 (1956).

57. See *Livadas v. Bradshaw*, 512 U.S. 107, 131 (1994) (describing Section 203(o) as an "opt out" provision).

58. *Franklin v. Kellogg Co.*, 619 F.3d 604, 607–08 (6th Cir. 2010); see also DEPT. OF LABOR, WAGE AND HOUR DIV., Administrator's Interpretation No. 2010-2, at 1 (June 16, 2010), available at [http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010\\_2.pdf](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf) (finding that travel time following excluding donning and doffing activity may be a compensable integral and indispensable activity of the principal workday).

203(o) are not principal in nature, and therefore prohibits compensation for the travel time.<sup>59</sup> This split has resulted in a growing analytical conflict where on the one hand, courts embark on a fact-intensive examination of the excluded activity while on the other hand, courts disregard that excluded activity.

*1. The Kellogg Test: Individual Analysis of the Excluded Activity*

In *Franklin v. Kellogg Co.*, workers at Kellogg's Tennessee plant brought suit seeking back pay for time spent donning and doffing mandatory protective clothing and the time spent traveling between the work line and the changing rooms at the beginning of their shifts, for their work breaks, and at the end of their shifts.<sup>60</sup> The district court granted Kellogg's motion for summary judgment, holding that compensation for time spent donning and doffing was excluded under Section 203(o).<sup>61</sup> The district court also found that workers are not entitled to compensation for the time spent traveling between the work line and the changing rooms following activity excluded by Section 203(o).<sup>62</sup>

On appeal, the Sixth Circuit affirmed the district court's finding that compensation for the time spent donning and doffing was excluded under Section 203(o).<sup>63</sup> However, the court implied that the post-donning and pre-doffing time spent traveling between the changing room and work line was compensable depending on the amount of time spent traveling.<sup>64</sup> In determining whether the donning and doffing was a principal activity despite the Section 203(o) exclusion, the court employed the long-established test for principal activities—whether the excluded activity is “integral and indispensable” to the employee's performance of his job duties.<sup>65</sup> The Sixth Circuit, without providing further analysis, assumed that because the changing time would be considered principal without the exclusion, it must be considered principal when the exclusion is applied.<sup>66</sup>

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59. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 598 (7th Cir. 2012), *aff'd* 134 S. Ct. 870 (2014); see also DEPT. OF LABOR, WAGE AND HOUR DIV., Opinion Letter, FLSA2007-10, at 1 (May 14, 2007), available at [http://www.dol.gov/whd/opinion/FLSA/2007/2007\\_05\\_14\\_10\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf) (finding that activities excluded by Section 203(o) is not principal in nature and therefore cannot trigger compensation for the continuous workday).

60. *Kellogg*, 619 F.3d at 607–08.

61. *Franklin v. Kellogg Co.*, No. 08-2268-JPM-TMP, 2009 WL 6093442, at \*12 (W.D. Tenn. July 20, 2009), *aff'd in part, rev'd in part*, *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010).

62. See *id.* at 9 (granting *Skidmore* deference to the DOL's determination that walking time following Section 203(o) donning and doffing activity is not compensable).

63. *Franklin*, 619 F.3d at 618.

64. *Id.* at 620.

65. *Id.* at 618–20.

66. *Id.*

2. *The Sandifer Test: If the Activity is Uncompensated, it Cannot be Principal in Nature*

The Seventh Circuit has come to the opposite conclusion of the Sixth Circuit.<sup>67</sup> Steelworkers at U.S. Steel's Gary, Indiana campus sued to recover back pay and lost wages for time spent changing and washing and traveling between the changing room and the factory floor at the complex.<sup>68</sup> The district court found that compensation for the changing time was properly excluded under Section 203(o).<sup>69</sup> However, the court certified for interlocutory appeal the issue of whether a Section 203(o) activity that is excluded from compensation, and that would otherwise be principal in nature, could trigger compensation for a continuous workday and result in compensation for the Gary plant's employees.<sup>70</sup>

The Seventh Circuit found that the travel time between the locker room and the employees' workstation was not compensable per the Portal-to-Portal Act exemptions.<sup>71</sup> Writing for the court, Judge Posner found that the time spent donning and doffing could not be a principal activity because it was not compensated.<sup>72</sup> However, this position creates a problem for future application of the holding. Whether compensation is due for a principal activity is a determination made as part of the analysis; it is not a requirement.<sup>73</sup> If an activity must be compensated to be principal in nature, then how could any wrongfully uncompensated activity ever pass the muster of decades of Portal-to-Portal Act jurisprudence?

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67. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 598 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014).

68. *Id.* at 591.

69. *Sandifer v. U.S. Steel Corp.*, No. 2:07-CV-443RM, 2009 WL3430222, at \*10 (N.D. Ind. Oct. 15, 2009).

70. *Sandifer*, 678 F.3d at 592. As certified for appeal, the issue was “[w]hether, where it has been determined that the activities of donning, doffing, and washing are not to be included in compensable hours of work by operation of 29 U.S.C. 203(o), such activities can nonetheless start the continuous workday under 29 U.S.C. 254(a).” Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees/Cross-Appellants, *Sandifer v. U.S. Steel*, 678 F.3d 590 (7th Cir. 2012) (Nos. 10-1821, 10-1866).

71. *Sandifer*, 678 F.3d at 596.

72. *Id.* at 596–97. The Seventh Circuit held:

Section 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time, and they did so, agreeing that the workday would not start when the workers changed their clothes; it would start when they arrived at their work site. If clothes-changing time is lawfully not compensated, we can't see how it could be thought a principal employment activity, and so Section 254(a) exempts the travel time in this case.

*Id.*

73. See *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

### 3. District Court Uncertainty: No Consistent Standard

The district courts have been faced with multiple donning and doffing lawsuits in recent years.<sup>74</sup> But absent a concrete standard from higher courts, they have failed to synthesize a concrete rule for the principal nature of changing activities under a valid compensation exclusion. Some courts have used an analysis similar to the *Kellogg* test,<sup>75</sup> while others followed the Seventh Circuit by applying the *Sandifer* standard.<sup>76</sup> These inconsistent holdings have only contributed to the growing divide in Section 3(o) authority. Nothing, however, has exacerbated the conflict to a greater degree than the Department of Labor's (DOL) inconsistent interpretation of the nature of donning and doffing excluded by Section 203(o).

### 4. Administrative Uncertainty: The DOL's Internal Split

The DOL has created a deeply entrenched, and in some aspects political, split with their internal interpretation of the meaning of Section 3(o) and the nature of activities excluded under the provision.<sup>77</sup> With each change of the controlling party in the Executive Branch, the DOL has changed its interpretation.<sup>78</sup> During

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74. See, e.g., *McDonald v. Kellogg Co.*, 740 F. Supp. (D. Kan. Sept. 16, 2010), *vacated in part on reconsideration*, *McDonald v. Kellogg Co.*, No. 08-2473-JWL, 2010 WL 4386899 (D. Kan. Oct. 29, 2010); *Hudson v. Butterball*, No. 08-5071-CV-SW-RED, 2009 WL 3486780 (W.D. Mo. Oct. 14, 2009);

75. See, e.g., *McDonald*, 740 F. Supp. 2d at 1220 (determining that time spent changing clothes is excluded from the total amount of compensated work hours); *In re Tyson Foods, Inc.*, 694 F. Supp. 2d 1358, 1367 (M.D. Ga. 2010) (holding that donning and doffing protective gear is changing clothes under Section 203(o)); *Arnold v. Schreiber Foods, Inc.*, 690 F. Supp. 2d 672, 682 (M.D. Tenn. 2010) (holding that an employer need not compensate an employee for the time spent donning and doffing required protective clothes); *Andrako v. United States Steel Corp.*, 632 F. Supp. 2d 398, 410 (W.D. Pa. 2009) (holding that the plaintiff was properly denied compensation for donning and doffing of protective gear because the gear constituted clothes within the meaning of a collective bargaining agreement denying compensation for changing clothes); *Gatewood v. Koch Foods of Mississippi, LLC*, 569 F. Supp. 2d 687, 702 (S.D. Miss. 2008) (denying employees compensation for donning and doffing clothing per a relevant collective bargaining agreement under Section 203(o)).

76. See, e.g., *Salazar v. Butterball*, No. 08-cv-02071MSK-CBS, 2009 WL 6048979, at \*15 (D. Colo. Dec. 3, 2009) (explaining that time spent donning and doffing protective clothing is not compensable because it is not "work"); *Hudson v. Butterball*, No. 08-5071-CV-SW-RED, 2009 WL 3486780, \*6 (W.D. Mo. Oct. 14, 2009) (holding that "time spent sanitizing, donning, doffing, and walking is excluded from the definition of hours worked in 29 U.S.C. § 203(o)"); *Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1010 (W.D. Tenn. 2008) (holding that plaintiffs may not be compensated for donning or doffing required protective gear under Section 203(o)); *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 724 (E.D. La. 2008) (explaining that time spent changing into or out of clothes required for work is not compensable under Section 203(o)).

77. See *infra* notes 77–80.

78. See, e.g., DEPT. OF LABOR, WAGE AND HOUR DIV., Opinion Letter, FLSA2007-10, at 1 (May 14, 2007), available at [http://www.dol.gov/whd/opinion/FLSA/2007/2007\\_05\\_14\\_10\\_FLSA.pdf.pdf](http://www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf.pdf) (asserting, under the Bush Administration, that the DOL believed changing time not compensated under Section 3(o) is not a principal activity under the Portal-to-Portal Act); DEPT. OF LABOR, WAGE AND HOUR DIV., Administrator's Interpretation No. 2010-2, at 1 (June

the Bush Administration, the Wage and Hour Division of the DOL determined that work time performed under a valid Section 203(o) exclusion could not be considered a principal activity.<sup>79</sup> The Division stated that under Section 203(o), certain activities excluded from compensation by an applicable collective bargaining agreement, such as the donning and doffing work clothes, are not principal activities, and therefore cannot begin the workday. Furthermore, the Division found that since the excluded activities were not principal in nature, walking time subsequent to excluded donning and doffing could not be a compensable integral and indispensable part of the workday.<sup>80</sup>

In contrast, in 2009, the new Executive Administration changed this position and held that Section 203(o) activities can be principal in nature.<sup>81</sup> In doing so, the Department of Labor stated that “the character of donning and doffing activities is not dependent upon whether such activities are excluded pursuant to a collective-bargaining agreement,” and thus activities occurring after donning clothing were within the workday and may be compensable as such under the Portal-to-Portal Act.<sup>82</sup>

The Department of Labor’s fickle interpretations have led to hesitation by the courts in adopting any standard.<sup>83</sup> As demonstrated, the ever-growing authoritative split has resulted in a clear divide in the courts and the executive

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16, 2010), *available at* [http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010\\_2.pdf](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf) (asserting, under the Obama administration, that changing time not compensated under Section 3(o) can be a principal activity under the Portal-to-Portal Act).

79. DEPT. OF LABOR, WAGE AND HOUR DIV., Opinion Letter FLSA2007-10, at 1 (May 14, 2007), *available at* [http://www.dol.gov/whd/opinion/FLSA/2007/2007\\_05\\_14\\_10\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf).

80. *Id.* at 1. The Division stated:

Section 3(o) of the FLSA excludes “any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.” In promulgating this provision Congress plainly excluded activities covered by Section 3(o) from time that would otherwise be “[h]ours worked.” Accordingly, activities covered by Section 3(o) cannot be considered principal activities and do not start the workday. Walking time after a 3(o) activity is therefore not compensable unless it is preceded by a principal activity. *Id.*

81. DEPT. OF LABOR, WAGE AND HOUR DIV., Administrator’s Interpretation No. 2010-2, at (June 16, 2010), *available at* [http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010\\_2.pdf](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf).

82. *Id.* at 4 (quoting *Figas v. Horsehead Corp.*, 2008 WL 4170043 (W.D. Pa. 2008)).

83. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012), *aff’d*, 134 S. Ct. 870 (2014). Judge Posner rejected the DOL’s interpretation of the principal nature of Section 203(o) activity, commenting that its fickle nature makes the Department of Labor’s position appear as little more than political posturing to change along with each administration. *Id.* (stating that

It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference. . . .

*Id.*

agencies. This split has created uncertainty about the compensability of travel time following donning and doffing activity excluded under Section 203(o). It has also produced two standards of analysis that ignore crucial legislative intent and the negative effects the standards may have on collective bargaining.

## II. NO USABLE STANDARD: THE ENDURING CONFLICT BETWEEN SECTION 203(O) AND THE PORTAL-TO-PORTAL ACT

### A. *The Kellogg Test: Right Result, Wrong Process*

The Sixth Circuit applied a traditional Portal-to-Portal Act analysis for Section 203(o) activity.<sup>84</sup> In its analysis, the court first determined whether a Section 203(o) exclusion is valid, and then examined whether the excluded donning and doffing is “integral and indispensable” to the performance of the employee’s job duties.<sup>85</sup> If the activity is integral and indispensable, then the Section 203(o) activity is a principal activity that triggers compensation for travel time under the continuous workday rule.<sup>86</sup> Unlike the *Sandifer* test, the Sixth Circuit’s analysis fits neatly into past Portal-to-Portal Act jurisprudence.<sup>87</sup>

The legislative history of Section 203(o) partially supports the *Kellogg* approach. In the floor debate accompanying the passage of the exclusion, the sponsor of the amendments noted that some collective bargaining agreements exempted changing clothes from compensation while others did not, and explained that in either case the decision was made carefully and “apparently both [the employers and employees] are completely satisfied with respect to their bargaining agreements.”<sup>88</sup> The legislative history demonstrates that the Section 203(o) exclusion was designed to preserve the “sanctity of collective bargaining agreements” that exclude from compensation payment for the donning and doffing of work clothes.<sup>89</sup> This intent is properly incorporated in *Kellogg*.

There are two major approaches to statutory interpretation and the role of legislative intent in that construction. Both of these models support the resulting *Kellogg* standard. One of these approaches, commonly known as formalism, proposes that a plain reading of the text and structure of a statute present the

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84. See *Franklin v. Kellogg Co.*, 619 F.3d 604, 615–16 (6th Cir. 2010).

85. *Id.* at 619 (predicating compensation under Section 203(o) for donning or doffing on whether the activity “is integral and indispensable” to the employee’s job and not on whether the activity is a principal activity).

86. *Id.* at 618–20 (examining initially whether the activity can be principal in nature, and then whether the activity is “integral and indispensable under the FLSA”).

87. See *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); see also *supra* Part I.B (discussing the Portal-to-Portal Act analysis currently employed by courts).

88. 95 CONG. REC. 11210 (1949) (statement of Rep. Christian Herter).

89. *Id.*

outer limits of a court's interpretation of the scope of that statute.<sup>90</sup> Applying a plain text reading to the exclusion gets a clear result. The text of the exclusion takes away compensation for otherwise compensable changing clothes and washing time.<sup>91</sup> Nowhere in the text is there any mention of altering the nature of the activity. Therefore, a plain text reading of Section 203(o) shows that it should not be interpreted to alter the nature of donning and doffing. Instead, under this formalist approach, courts should limit the reading of Section 203(o) to removing the specified activities from compensation. As a result, a formalist reading of the exclusion supports the *Kellogg* standard.

In contrast to formalism, legal realists seek to interpret a statute by applying the legislators' intent through examining legislative purpose and applying "interpretative principles."<sup>92</sup> Some of these principles include evaluating the intent and the then interpreting the statute through the lens of that intent as well as "constitutional norms" and "institutional concerns" in a way that mends "statutory failure in the regulatory state."<sup>93</sup> Applying these interpretive principles from the realism model, an examination of Section 203(o) should be read to: (1) protect the weaker party, which in this case is the workers;<sup>94</sup> (2) create a uniform application of FLSA principles;<sup>95</sup> and (3) ensure that the application of the exclusion is fair and just.<sup>96</sup>

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90. Formalism is premised on a distrust of the political nature of legislative history and therefore chooses to rely solely on the text of the statute. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring) (explaining that the role of the Court is to "give fair and reasonable meaning to the text of the United States Code," and "not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective"); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Original meaning is derived from words and structure, and perhaps from identifying the sort of problem the legislature was trying to address. . . . Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem."); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 690 (1990) ("The new textualists are right in pointing legal scholars toward the process of evolution, and away from a focus on the original discussions. Hence, as Justice Scalia asserts, the legislative history discussion ought not be central to the interpretive enterprise . . .").

91. 29 U.S.C. § 203(o) (2006 & 2012).

92. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 454–76 (1989); see also Brian Leiter, *In Praise of Realism (And Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865, 893 (2012) ("Praise for Realism is praise for clarity about what really happens, since what really happens is the very stuff on which instrumental reasoning—reasoning about how to achieve what we already want, prefer, or value—operates."); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 850 (2008) (explaining that the need for the legal system to function justly and quickly supersedes the need for a comprehensive understanding of each minute term, and thus "[l]egal academics and the lawyers they train must often make normative evaluations of legal rules and institutions on the basis of only partial information").

93. See Sunstein, *supra* note 92, at 454–76.

94. *Id.* at 477.

95. *Id.* at 479.

96. *Id.* at 482.

Applying these principles lends further support to the *Kellogg* standard and discredits the *Sandifer* standard. The Sixth Circuit's approach in *Kellogg* gives greater protection to the employees by requiring the employer to prove that both the excluded activity and subsequent travel time is not compensable, results in a uniform application by limiting exemptions and expanding minimum standards, and is fair because it limits the scope of the exclusion.<sup>97</sup> The *Sandifer* standard does just the opposite as it takes away the protection of minimum standards to this class of employees, creates inconsistencies by expanding the exclusions from FLSA coverage, and is unfair because it penalizes workers that choose to use the exclusion and bargain away compensation for changing and washing time.<sup>98</sup> Thus, the *Kellogg* standard, which grants both the employer and employee a benefit from the exclusion, was properly generated by a legislative intent analysis through an application of both the formalist and realist approaches to statutory analysis.

However, the *Kellogg* standard assumes the application of the donning and doffing exclusion in Section 203(o) is disconnected from the activity itself and leaves open the examination of the nature of the activity for any subsequent Portal-to-Portal Act claims.<sup>99</sup> Devoid of a clear analysis of the interplay between Section 203(o) and the Portal-to-Portal Act or a definitive rule for the principal nature of excluded changing and washing, the *Kellogg* ruling does little to solve the uncertainty created by the statute's failure to mention the coverage of travel time following excluded changing and washing time.<sup>100</sup> As a result, the ambiguity created by the *Kellogg* court over whether an activity has to be compensated to qualify as a principal activity has come under attack by the Seventh Circuit, which requires compensation for an activity to be principal in nature.<sup>101</sup>

#### *B. The Sandifer Test: Placing Economic Theories Above Established Jurisprudence*

The *Sandifer* test enunciated by Judge Posner conflicts with well-established Portal-to-Portal Act jurisprudence. In his decision, Judge Posner struggled with the notion that an uncompensated activity could ever be principal in nature and trigger the start of the continuous workday.<sup>102</sup> Judge Posner justified this

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97. See *Franklin v. Kellogg*, 619 F.3d 604, 619 (6th Cir. 2010).

98. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 598 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014).

99. See *Kellogg*, 619 F.3d at 619 (concluding that whether an activity is principal does not depend on its compensability, and therefore the court must consider whether the activity is an "integral and indispensable" part of the employee's job).

100. See *Sandifer*, 678 F.3d at 598 (explaining that the *Kellogg* court did not explain its reasoning for deeming a noncompensable activity a principal activity).

101. See *id.*

102. *Id.* at 596. Judge Posner explained that it is illogical to hold that an uncompensated activity can be an "integral and indispensable" activity because employees are required to do many

assertion by engaging in an economic analysis grounded in law and economics theory.<sup>103</sup> In his view, granting compensation for travel time following excluded donning and doffing activity would create a new, economically destructive minimum standard which would either be offset by the employer through lower wages or layoffs.<sup>104</sup>

This view, while considered the majority approach for economic analysis, is not without opposition.<sup>105</sup> Several contemporary economic scholars believe that minimum economic standards are not economically destructive, but instead constitute a policy decision with little to no economic effect.<sup>106</sup> One such view theorizes that although labor markets appear competitive, in a broad sense they

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things for which they are not compensated. *Id.* As part of this explanation, Judge Posner differentiated between tasks an employee is employed to do and tasks that are required as tangentially necessary, such as showing up for work and calling in sick, noting, for example, that employees are not compensated for the time they spend on the phone to call in sick. *Id.*

103. *Id.* at 597.

104. *Id.* Judge Posner explained that compensating employees for travel time would impose higher costs on employers that would ultimately be transferred to employees through lower wages. *Id.* He reasoned that by compensating employees for the time they spent traveling would result in employees doing less productive work during the specified eight-hour shift than was done previously, thereby causing employers to lower wages in compensation or to impose restrictions limiting travel time, which can also translate in to lower wages. *Id.* However, Judge Posner's hypothesis ignores the legal regime of unionized workplaces. And, would his hypothesis occur, it would not necessarily be an evil to be corrected since Congress, in enacting the National Labor Relations Act, put into place a national policy of collective bargaining and economic choice. 29 U.S.C. § 151 (2006 & 2012). As part of this regime, it is unlawful for an employer to make changes to the wages, hours, and working conditions covered by a collective bargaining agreement without first bargaining with the union. 29 U.S.C. § 158(a)(5) and (d). Therefore, if in a union workplace an employer and union bargained to offset a gain from an increase in minimum standards through other economic provisions, then the employer and the union engaged in conduct that is explicitly endorsed under the National Labor Relations Act.

105. See, e.g., David Card & Alan B. Kreuger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397, 1398 (2000) (concluding that the 1992 increase in New Jersey's minimum wage did not decrease the overall number of fast-food workers in the state); Bruce E. Kaufman, *Institutional Economics and the Minimum Wage: Broadening the Theoretical and Policy Debate*, 63 INDUS. & LAB. REL. REV. 427, 427–28 (2010) (arguing that minimum standards are necessary policy choices that may have positive effects on employment); Lawrence F. Katz & Alan B. Kreuger, *The Effect of the New Minimum Wage Law in a Low Wage Labor Market 7–9* (Nat'l Bureau of Econ. Research, Working Paper No. 3655, 1991) (asserting that many low-wage employers ignored the rule allowing them to pay below-minimum wages to youth workers and that many of the employers whose paid wages above the set minimum raised their wages even further to remain competitive in the marketplace); David Neumark & William Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research 5–6* (Nat'l Bureau of Econ. Research, Working Paper No. 12663, 2006) (noting that although their research has shown negative trends in employment for low-wage workers as a result of increased minimum wages, a significant amount of research shows that no effect, a negligible effect, or even a positive effect on employment as a result of minimum wage increases).

106. See Kaufman, *supra* note 105, at 427–28; Neumark & Wascher, *supra* note 105 at 5–6.

heavily favor the employer due to the employer's disguised market power.<sup>107</sup> As a result, absent progressive social norms and labor policies, the supposedly competitive labor market becomes inherently unequal.<sup>108</sup>

Additionally, Alan Krueger and David Card have studied the effects of a minimum wage increase on employment in the New Jersey restaurant industry.<sup>109</sup> The study reached the opposite conclusion of Judge Posner's economic assumptions, finding that instead of a decrease in New Jersey employment post-wage increase, employment increased after the higher wage was implemented.<sup>110</sup> While this study is not without critique,<sup>111</sup> two of the criticizing economists performed their own empirical analysis of Krueger and Card's data and found that although employment did not increase, the negative effects of the minimum wage increase in Krueger and Card's study were negligible.<sup>112</sup>

Nevertheless, Judge Posner promulgated a standard for travel time that follows excluded donning and doffing activity that requires that the donning and doffing activity be compensated in order to be principal in nature.<sup>113</sup> This conclusion, however, complicates the application of Portal-to-Portal Act jurisprudence and conflicts with decades of well-established law.

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107. Kaufman, *supra* note 105, at 434, 437 (explaining that "labor markets *are always and everywhere imperfectly competitive*").

108. *Id.* at 438. The argument is based on the notion that employers and labor markets are, by their nature, parasitic. See Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 125–26 (1988) (arguing that workers will not benefit from increases in minimum wage). This market failure forces societies to consider the problem in terms of "choosing the appropriate social arrangement for dealing with harmful effects" of the market failure. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 18 (1960). Studies of world economics have shown that a more equal income distribution results in greater economic growth. Kaufman, *supra* note 105, at 444. Therefore, pro-minimum standard scholars conclude, higher wages do not negatively effect the distribution of wages within labor markets, but instead are a solution to inequality in the marketplace that will result in greater efficiency and market stabilization. *Id.* In other words, an established minimum term, like compensation for travel time following a Section 203(o) activity that is a principal in nature will offset this inequality by creating efficient terms across the entire labor market, which cannot be rejected by an employer seeking to offset costs. See Willborn, *supra*, at 126.

109. David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 792 (1994) (finding that New Jersey fast-food employers expanded their work forces following the increase in the minimum wage).

110. *Id.*

111. David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Comment*, 90 AM. ECON. REV. 1362, 1362–63 (2000) (criticizing Card and Krueger's study on the grounds that their data methodology was flawed and that estimates based on a different data set comprised of payroll data suggested that fast-food employment fell after the minimum wage increase).

112. *Id.*

113. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 595–96 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014).

The crux of Portal-to-Portal Act judicial interpretations is whether the activity is principal in nature and should be compensated.<sup>114</sup> If the reviewing court finds that the nature of the activity is integral and indispensable to the employee's job duties, then the activity is principal in nature, and all the activities that follow must be compensated.<sup>115</sup> The analysis, however, does not require that an activity be compensated to be principal, because determining whether compensation is due is the purpose of the analysis. In contrast, *Sandifer* makes payment of compensation a requirement for an activity to be a principal activity that can trigger compensation for a continuous workday, in effect making compensation a prerequisite to further compensation.<sup>116</sup> The *Sandifer* test, therefore, frustrates the application of decades of principal activity precedent.<sup>117</sup>

Since 1956, when the Supreme Court decided *Steiner v. Mitchell*, the uniformly applied test for determining when an activity is principal in nature has asked whether the activity is "integral and indispensable" to the performance of the employee's job duties.<sup>118</sup> This test has been applied across the spectrum of Portal-to-Portal Act cases.<sup>119</sup> Recently, the Supreme Court also applied this test

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114. See *Steiner v. Mitchell*, 350 U.S. 247, 255–56 (1956).

115. *Id.*

116. *Sandifer*, 678 F.3d at 596.

117. Posner's analysis in *Sandifer* is in three parts: 1) is the donning and doffing activity principal in nature and therefore capable of being excluded under Section 203(o); 2) did the union and employer waive compensation for the principal donning and doffing activity in question; and 3) does the fact that the employer and union have decided to forego compensation for an otherwise principal activity alter the nature of that donning and doffing. *Id.* Although Section 203(o) excludes by agreement compensation for the time spent changing in and out of work clothes, there is no indication that excluding compensation alters the principal status of that activity.

118. See *Steiner*, 350 U.S. at 255; see also *supra* note 73 (listing cases that have applied the *Steiner* standard).

119. See, e.g., *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005) (holding that, under the Portal-to-Portal Act, "an activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity'"); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 738–39 (1981) (explaining that courts should consider whether an activity is integral and indispensable to the principal activity in analyzing whether compensation is due); *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (finding that knife-sharpening is integral and indispensable to principal butchering activities and therefore must be compensated); *Perez v. Mountaine Farms, Inc.*, 650 F.3d 350, 363 (4th Cir. 2011) (applying the integral and indispensable test); *Bamonte v. City of Mesa*, 598 F.3d 1217, 1221–22 (9th Cir. 2010) (same); *Pirant v. U.S. Postal Serv.*, 542 F.3d 202, 208 (7th Cir. 2008) (holding that because a worker's donning and doffing activities were not integral and indispensable to any principal activity, the actions were not compensable); *De Ascensio v. Tysons Foods, Inc.*, 500 F.3d 361, 371 (3d Cir. 2007) (adopting the integral and indispensable test in deciding whether donning and doffing is compensable); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (applying the integral and indispensable test to determine if compensation was due for required security screening and employer-provided transportation); *Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 140–41 (1st Cir. 2002); *Adams v. Alcoa, Inc.*, 822 F. Supp. 2d 156, 160 (N.D.N.Y. 2011) (holding that the time spent by employees in EMT training was not integral and indispensable to a principal activity and therefore was not compensable); *Wright v. Pulaski Cnty.*, No. 4:09CV00065 SWW, 2010 WL 3328015, at \*4 (E.D. Ark. Aug. 24, 2010) (noting that because workers can don and doff uniforms at home these

in determining that the required donning and doffing of work clothes may be principal in nature.<sup>120</sup> Before the recent Section 203(o) cases, the courts never required that an activity be compensated in order to be principal in nature.<sup>121</sup> Instead, courts have reached the antithetical result; requiring compensation only if an activity is principal in nature.<sup>122</sup>

Aside from the jurisprudential issues of the *Sandifer* standard, the legislative history of Section 203(o) referenced in the *Sandifer* opinion clearly states that Congress designed the exclusion to allow unions and employers to bargain away compensation for donning and doffing time.<sup>123</sup> The legislative history makes no mention of the union and employer being able to bargain over, or change, the nature of the activity.<sup>124</sup> Congress was well aware of the continuous workday rule when it debated and passed the Section 3(o) exclusion.<sup>125</sup> If Congress intended for Section 203(o) to alter the nature of the activity, they would have explicitly stated so.<sup>126</sup> That Congress did not intend or foresee the use of Section 3(o) exclusions waiving the nature of job activities lends further support for denouncing Judge Posner's analysis.<sup>127</sup>

As a result, future courts should reject the *Sandifer* test as incompatible with the current authority on and legislative history of the Portal-to-Portal Act. Since the passage of the Portal-to-Portal Act, courts have looked to the nature of the activity when deciding whether the time spent in the activity should be compensated.<sup>128</sup> Instead of taking a step towards closing the divide in authority, Judge Posner's approach created additional uncertainties that are contrary to well-established law.<sup>129</sup>

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activities are not integral and indispensable and thus not compensable); *Andrako v. U.S. Steel Corp.*, 632 F. Supp. 2d 398, 406 (W.D. Pa. 2009) (applying the integral and indispensable test); *Martin v. City of Richmond*, 504 F. Supp. 2d 766, 776–77 (N.D. Cal. 2007) (same).

120. *Alvarez*, 546 U.S. at 29.

121. For the current Portal-to-Portal Act analysis, which requires an examination of the nature of the activity, see *supra* Part I.

122. See *supra* notes 112–13.

123. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 597–98 (7th Cir. 2012) (citing the preamble to the Portal-to-Portal Act, 29 U.S.C. § 251(a) (2006)), *aff'd*, 134 S. Ct. 870 (2014). Judge Posner's analysis of the legislative history focuses on the Portal-to-Portal Act's purpose of avoiding judicial windfalls for employees gained by large, unexpected costs on employers. See *id.* This analysis, however, ignores several key aspects of the legislative history. Nowhere in the legislative history is there any mention of an employer and union being able to change the nature of the activity being performed, nor does it address the history of Section 203(o), which focused instead on waiving compensation to preserve collective-bargaining agreements.

124. Instead, the focus is on preserving collective bargaining agreements that make certain activities uncompensated. See *supra* Part II.A.

125. The continuous workday rule has long been an established part of employment law jurisprudence. See 95 CONG. REC. 11210 (1949) (statement of Rep. Christian Herter).

126. See *supra* note 88.

127. See *supra* Part I (discussing the FLSA and Portal-to-Portal Act).

128. See, e.g., *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956); see also *supra* note 113.

129. See *infra* Part III.

### III. ADOPTING A NEW STANDARD: THE APPLICATION OF SECTION 203(O) SHOULD PROVIDE CERTAINTY AND FAIRNESS IN THE BARGAINING PROCESS.

Because of the continuing divide in Section 203(o) jurisprudence, the courts should create a definitive rule for the compensability of travel time following excluded donning and doffing. Numerous bargaining units have a hard-negotiated history of agreements that place the beginning of the compensated workday at the time employees commence productive work at their workstations.<sup>130</sup> This bargaining history, however, has ignored the language and intent of Section 203(o) for nearly seven decades and has led to protracted litigation.

The text of the exclusion states that bona fide collective bargaining units may exclude from compensation time spent in donning and doffing activities.<sup>131</sup> This raises the question: Why would the exclusion be applied if the donning and doffing activity was not a principal activity and thus, not compensable? Therefore, the courts should adopt a standard that holds any valid application of the exclusion, either through express contractual language or assertion by the court following a finding of custom and past practices, is a per se principal activity that triggers compensation for a continuous workday.

#### A. *The Principles of Collective Bargaining Support the Proposed Standard*

At its core, Section 203(o) is a collective bargaining statute.<sup>132</sup> Therefore, the recommended standard to resolve the current authoritative conflict regarding

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130. See, e.g., *Agreement By and Between Washington Employers, Inc. and International Brotherhood of Boilermakers Local No. 104*, at 2 (Dec. 13, 2006), available at [http://www.dol.gov/olms/regs/compliance/cba/private/cbrp\\_2280\\_pri.pdf](http://www.dol.gov/olms/regs/compliance/cba/private/cbrp_2280_pri.pdf) (establishing the workday in Article VI); *Collective Bargaining Agreement Between D'Agostino Supermarkets Inc. and Local 1500, U.F.C.W.*, at 3 (Sept. 11, 2005), available at <http://www.dol.gov/olms/regs/compliance/cba/pdf/cbrp0594.pdf> (“Except for part-time employees, forty (40) hours shall constitute the regular work week for all employees covered herein, and it shall consist of five (5) eight (8) hour days.”); *Cf. Collective Bargaining Agreement Between SNE Enterprises, Inc. and Midwestern Council of Industrial Workers of the United Brotherhood of Carpenters and Joiners of America*, at 16 (Mar. 29, 2004), available at <http://www.dol.gov/olms/regs/compliance/cba/pdf/cbrp1897.pdf> (outlining the procedures for the assignment of overtime but not defining a standard workday).

131. 29 U.S.C. § 203(o) (2006).

132. See 95 CONG. REC. 11210 (1949) (statement of Rep. Christian Herter). The legislative history of the FLSA makes it clear that, even though the statute was enacted to alleviate inequality and set minimum standards for all American workers, there was no intention to disrupt private sector collective bargaining. See PRESIDENT FRANKLIN DELANO ROOSEVELT, ADDRESS OF THE PRESIDENT OF THE UNITED STATES DELIVERED BEFORE A JOINT SESSION OF THE TWO HOUSES OF CONGRESS, in H.R. DOC. NO. 75-458, at 4 (Jan. 3, 1938). While debating the FLSA in 1938, President Roosevelt stated that, although the FLSA should address the reality of the unorganized workforce, the statute was not intended to interfere with the national labor policy of collective bargaining. *Id.* In fact, in an address to Congress he specifically recognized the importance of collective bargaining when determining pay for hours worked by employees. *Id.* This was repeated by senior officials within the Roosevelt administration, when then-Attorney General Robert H. Jackson testified to Congress that the “[FLSA] gives effect to collective bargaining.” *Fair Labor*

travel time following Section 203(o) activity should be examined alongside the principles of collective bargaining.

Collective bargaining is “a continuous, dynamic, institutional process for solving problems arising directly out of the employer-employee relationship.”<sup>133</sup> In application, many see collective bargaining as a way by which employees exert unified pressure to obtain higher wages and better benefits from their employers.<sup>134</sup> Thus, an agreement born from the bargaining process acts as a check on the “prerogatives of an unrestrained management.”<sup>135</sup> Simply put, collective bargaining is a set of economic choices made collectively by the employer and the union.

*1. The Nature of Collective Bargaining Requires Certainty of the Legal Effects of Section 203(o)*

Because collective bargaining is a set of economic exchanges, there must be certainty regarding the effects of applying Section 203(o) or else the bargaining parties may be unwilling to apply it.<sup>136</sup> If there is no certainty, union and employer may force themselves into continuous arbitration over the meaning of the exclusion as applied to their bargaining unit.<sup>137</sup> This will result in parties

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*Standards Act of 1937: Joint Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Education and Labor and the H. Comm. on Labor, 75th Cong. 22 (1937)* (statement of Robert H. Jackson, Att’y General of the United States). It is well established that collective bargaining cannot serve to eliminate the minimum standards set by the FLSA. *See, e.g., Brooklyn Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (holding that “[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”); *see also* *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945)) (stating in dicta that because the Supreme Court has repeatedly emphasized that the right to a minimum wage and overtime pay is nonwaivable, “FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”). The FLSA, however, does allow union employees to waive minimum compensation for changing and washing time. 29 U.S.C. § 203(o); *see also* *Steiner v. Mitchell*, 350 U.S. 247, 254–55 (1956) (discussing 29 U.S.C. § 203(o)). But, nowhere in the text or history of the amendment is there any indication that Congress also intended for this waiver to apply to the nature of the activity thus affecting the structure of the workday outside of changing and washing time.

133. HAROLD W. DAVEY ET AL., *CONTEMPORARY COLLECTIVE BARGAINING* 4 (Dale Yoder ed., 2d ed. 1959). The term is believed to be originally conceived by Sidney and Beatrice Webb. *Id.*; *see* SIDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 173 n.1 (1897).

134. David E. Feller, *A Theory of Collective Bargaining Agreements*, 61 CALIF. L. REV. 663, 720 (1973).

135. *Id.* at 721.

136. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (“Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties’ willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.”).

137. Without a doubt, some collective bargaining agreement provisions will have ambiguities that need to be resolved through arbitration or by the courts. These processes, however, should not interpret ambiguities in a way that discourages concerted activity, but instead should foster the public goals of collective bargaining. Thus disputes over the meaning of a contract terms are the

refusing to agree to apply Section 203(o) exclusions to avoid guesswork and high administrative costs.

In contrast, the test recommended herein creates certainty in application of the exclusion. Whether the exclusion results from agreement or custom, the proposed standard creates an irrefutable presumption that the activity is principal in nature, and that any subsequent travel time is compensable.

## 2. Any Viable Standard Must Ensure Fairness Between the Bargaining Parties.

Labor organizations advance the interests of the workers in the bargaining unit by “regulat[ing] terms and conditions of employment and the relations between [labor and management].”<sup>138</sup> For example, the union may bargain away a dollar-per-hour raise to gain improved safety standards or a higher pension contribution. The employer, in turn, may seek to set off any extra costs or benefits achieved by the union through other means. But for a Section 203(o) exclusion to remain effective in the bargaining process, it needs to be applied fairly and must avoid unduly rewarding or penalizing one party.<sup>139</sup>

By altering the nature of the activity, the *Sandifer* standard penalizes the union and gives an extra benefit to the employer by expanding the scope of the waived activity to also include subsequent travel time.<sup>140</sup> In contrast, the proposed standard ensures fairness in the application of the exclusion. If an employer and the union choose to waive compensation for Section 203(o) activity, then the waiver would do just that and nothing more.<sup>141</sup> Applying the exclusion in a

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proper subject matter of arbitration. *See, e.g.*, *U.S. Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (stating that when an agreement is covered by an arbitration clause, courts presume that a dispute over the agreement is covered by the clause and should be settled in arbitration). The overwhelming majority of collective bargaining agreements contain arbitration clauses, which would require any dispute between the union and employer over the terms of a collective bargaining agreement to be settled through an arbitration process. *See Feller, supra* note 129 at 747.

138. Bernard Gernigon, Alberto Odero & Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 INT’L LABOUR L. REV. 33, 51 (2000), available at <http://www.ilo.org/public/english/revue/download/pdf/gernigon.pdf>.

139. Gary Chartier, *Sweatshops, Labor Rights, and Competitive Advantage*, 10 OR. REV. INT’L L. 149, 160 (2008) (“It is thus appropriate for the law to shape bargaining situations and contractual terms to prevent exploitation and coercion.”); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 562 (1989) (asserting that the Taft-Hartley Act, and thus collective bargaining, “strengthened the ethical values of truthfulness and fairness in collective bargaining.”).

140. The standard in *Sandifer* will result in the employer not only achieving a waiver of compensation for the Section 203(o) activity, but also every activity performed by the employee up until the moment the employee begins productive work at their work station. *See Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 592 (7th Cir. 2012), *aff’d* 134 S. Ct. 870 (2014). In contrast, the members of the bargaining unit, who presumably bargained away compensation for the changing time will lose compensation beyond the scope of the waiver. *See id.* This unbalances the bargaining process and thus could undermine the effectiveness of Section 203(o) exclusions.

141. The *Kellogg* framework will ensure that the only compensation bargained away is for the Section 203(o) activity. *See Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010). This maintains

balanced and limited manner combined with the principle that labor unions inherently protect the interests of their workers demonstrates that courts should apply the proposed standard in order to preserve fairness in the bargaining process.

*B. The Economic Choice of Collective Bargaining Supports the Proposed Standard*

In *Sandifer*, the Seventh Circuit panel expressed doubt that interpreting Section 203(o) activity as principal in nature would be seen merely as an illusory gain in wages because doing so would set a new minimum employment standard, which would be offset by the employer.<sup>142</sup> This theory, based on a law and economics analysis,<sup>143</sup> ignores the economic realities of unionized workplaces.<sup>144</sup> Section 203(o) can only be applied to unionized workplaces.<sup>145</sup> Any of the potential employer offsets to maintain economic equilibrium that the Seventh Circuit was concerned about are not certain to occur.<sup>146</sup> Employers that wish to offset the compensation for travel time must bargain with the union

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balance as the benefit achieved by the employer does not result in compensation that is outside the scope of the waiver and that the employee would otherwise be entitled to. *See id.*

142. Recording of Oral Argument, *Sandifer v. U.S. Steel Corp.*, 678 f.3d 590 (2012) (Nos. 10-1821, 10-1866), available at <http://www.ca7.uscourts.gov/tmp/MA0XB9JY.mp3>; see also Willborn, *supra* note 101, at 114 (“Because imposition of minimal terms is the equivalent of a wage increase and because an exogenous wage increase reduces the demand for labor, any benefits to workers from minimum terms in the short run are paid for by other workers in unemployment.”).

143. An economic analysis of the law focuses on the reciprocal nature of economic harm. In other words, assuming that two economic actors are in perfect competition then any harm inflicted by one actor on another will be accompanied by an equal amount of harm on the inflicting actor. *See* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960) (summarizing the nature of reciprocal economic harm).

144. Unlike non-union workplaces, union employers are subject to numerous restrictions on the actions that they can take without the consent of the union. *See infra* note 141 (discussing these employer restrictions).

145. Section 203(o) excludes “any time spent in changing clothes or washing at the beginning or end of each workday . . . by the express terms of or by custom or practice under a bona fide collective bargaining agreement.” 29 U.S.C. § 203(o) (2006). Therefore, only unionized employees can exclude the compensation for changing time from their workday. *See id.*

146. Section 8(d) of the National Labor Relations Act (NLRA) establishes the employer’s obligation to bargain with the recognized union regarding “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). Section 8(a)(5) of the NLRA labels any failure to fulfill the obligation to bargain in good faith as an unfair labor practice. 29 U.S.C. § 158(a)(5). Courts have interpreted this provision to prohibit unilateral modification of contract terms contained in a collective bargaining agreement. *See* Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601, 601 (1984), *aff’d sub nom*, *UAW v. NLRB*, 764 F.2d 175 (D.C. Cir. 1985). Additionally, the courts have interpreted Section 8(a)(5) to prohibit unilateral modification of contract terms made to wages, hours, or other terms and conditions of employment when the terms are not contained in the collective bargaining agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). As a result, there is a strong regulatory regime that stops unionized employers from enacting the very changes that concern the Seventh Circuit without first consulting with the union.

before doing so.<sup>147</sup> Therefore, the employer and the union must agree to any economic offset due to new compensation for travel time.

The United States has a national labor policy of collective bargaining.<sup>148</sup> The government encourages employers and unions to settle the very conflicts that the Seventh Circuit identified.<sup>149</sup> In line with this policy, the courts should not assume a theoretical result of collective bargaining. Instead, courts should recognize the minimum standards required by the FLSA, including required compensation for travel time following a principal activity, and invite collective bargaining over any remaining terms of the collective bargaining agreement.

#### IV. CONCLUSION

The current authoritative split regarding Section 203(o) activity is both damaging to employee compensation and in conflict with decades of Portal-to-Portal Act jurisprudence. This conflict has the potential to frustrate the very purpose of Section 203(o)—preserving collective bargaining agreements. Therefore, the Supreme Court should adopt a new, definitive standard that creates certainty, ensures fairness, and recognizes the economic choice of collective bargaining.

The proposed standard does just that. If a unionized employer wish to employ the Section 203(o) exclusion, they must also recognize that they are endorsing the donning and doffing as a per se principal activity that triggers compensation for the continuous workday. This standard will allow the parties to bargain vigorously over the use of Section 203(o) but not extend the exclusion beyond the original scope enunciated by Congress or the bargaining parties.

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147. *Katz*, 369 U.S. at 743.

148. 29 U.S.C. § 151.

149. *Id.*

