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## Slutwalking in the Shadow of the Law

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## Note

### **That's Not on the Table: Why Employers Should Pay for the Walk from the Locker Room to the Work Station**

*Emily E. Mawer\**

Clifton Sandifer arrived at work each day and proceeded to the locker room to put on required equipment before walking to his assigned work station at the United States Steel Corporation's (USS) Gary Works Plant in Gary, Indiana.<sup>1</sup> The work day equipment included a flame-retardant jacket and pants, safety glasses, a hard hat, protective footwear and headgear, leggings, and wristlets.<sup>2</sup> USS did not pay Sandifer for the time it took to don this protective gear at the beginning of the day or the time spent doffing the clothing prior to going home, pursuant to a custom established under a collective bargaining agreement.<sup>3</sup> In addition, according to a recent Seventh Circuit decision, Sandifer's work day still did not begin when he left the locker room.<sup>4</sup> Instead, USS did not begin paying Sandifer until he reached his work station.<sup>5</sup> However, an employee at USS's Great Lakes Works Plant in Ecorse and River Rouge, Michigan, donning the same protective gear as Sandifer, walking to a location to perform the same job as Sandifer, is paid for the time

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\* J.D. Candidate, 2014, University of Minnesota Law School; J.B.A., 2010, University of Wisconsin-Madison. Thank you to Professor Stephen Befort for his advice and guidance. Thank you also to my colleagues, the board and staff of *Minnesota Law Review*, for the great work they did to publish this Note. Most importantly, thank you to my parents, Mark and Jane, for their endless support, love, and encouragement over the years. Copyright © 2014 by Emily E. Mawer.

1. Sandifer v. U.S. Steel Corp., 2:07-CV-443 RM, 2009 WL 3430222, at \*1-2 (N.D. Ind. Oct. 15, 2009).

2. *Id.* at \*2.

3. Sandifer v. U.S. Steel Corp., 678 F.3d 590, 596 (7th Cir. 2012).

4. *Id.* at 596.

5. *Id.*

he spends walking between the locker room and the work station.<sup>6</sup>

This inconsistency arose from a recent circuit split between the Sixth and Seventh Circuits.<sup>7</sup> The conflicting decisions concern what constitutes work time for which employers must pay their employees.<sup>8</sup> The Fair Labor Standards Act (FLSA) established the forty-hour work week, but did not define the term “work.”<sup>9</sup> The courts have since struggled to define the contours of the work week.<sup>10</sup> In 1944, the Supreme Court defined work as “physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”<sup>11</sup> These “principal activities” provide the start and end point of the compensable work day.<sup>12</sup> Employers are required to pay employees for all activities between the first principal activity and the last principal activity of the day.<sup>13</sup> Even walking time, which is typically exempt from the FLSA,<sup>14</sup> is compensable during this time, as part of the continuous workday.<sup>15</sup> However, the Sixth and Seventh Circuits disagree on whether an activity that is not compensable under a collective bargaining agreement pursuant to § 203(o) of the Fair Labor Standards Act can still be considered a principal ac-

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6. See *Franklin v. Kellogg Co.*, 619 F.3d 604, 620 (6th Cir. 2010). See generally *Facilities*, UNITED STATES STEEL CORPORATION, <http://www.ussteel.com/uss/portal/home/aboutus/facilities> (last visited Mar. 9, 2014) (identifying the Ecorse and River Rouge plants as USS facilities).

7. See generally *Sandifer*, 678 F.3d at 596 (holding that the walking time is not compensable); *Franklin*, 619 F.3d at 620 (holding that the walking time is compensable).

8. See generally *Sandifer*, 678 F.3d at 596 (defining work narrowly); *Franklin*, 619 F.3d at 620 (defining work expansively).

9. See Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 A.B.A. J. LAB. & EMP. L. 363, 364 (2011). See generally Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (2012) (failing to provide a definition for the word “work”).

10. See Alfred & Schauer, *supra* note 9, at 363 (“A patchwork of court cases and regulatory guidance has attempted to fill this void, resulting in a variety of standards and conflicting outcomes.”).

11. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

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

13. *Id.*

14. See Portal-to-Portal Act, 29 U.S.C. § 254(a) (2012) (providing that employers are not liable under the FLSA for failing to pay an employee for time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform”).

15. *IBP, Inc.*, 546 U.S. at 37.

tivity.<sup>16</sup> Thus, in one jurisdiction, the clothing change is a principal activity, and the subsequent walking time is paid; but in the other jurisdiction employees must reach their work station to start their compensable work day.<sup>17</sup> Specifically, under one interpretation, a collective bargaining agreement may remove not only changing time from the paid work day, but also the walk that follows.

Although this litigation focuses on a short period of time, the walk from the locker room to the work station, the outcome has broader implications. An interpretation allowing employers to refuse to pay for the walking time supports an expansive right to contract, favoring employers by allowing a broad range of employee rights to be placed on the bargaining table. In contrast, holding that the walk is compensable promotes a more narrow interpretation, preserving rights guaranteed in the FLSA for all workers. This conflict over § 203(o) presents an opportunity for the Supreme Court of the United States to issue a uniform decision, both clarifying the relationship between statutory rights and collective bargaining agreements and removing some uncertainty from the paid work day.

This Note argues for a narrow interpretation of § 203(o), requiring employers to pay for the walk from the locker room to the work station. Part I introduces the statutory scheme and history of the work week and the relationship between collective bargaining agreements and the FLSA. Part II discusses collective bargaining in America today and examines the previous attempts at determining a collective bargaining agreement's effect on the rights conferred in the FLSA. Part III argues that the U.S. Supreme Court should resolve the circuit split and hold that the unpaid changing time is still a principal activity and thus the subsequent walking time is compensable. Without a clear holding, some jurisdictions give collective bargaining agreements expansive power, beyond the language of the statute. By restricting the negotiable statutory terms in a union contract to a narrow interpretation of the applicable law, the Court would preserve statutory rights for all workers—regardless of union membership.

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16. Compare *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596 (7th Cir. 2012) (holding no), with *Franklin v. Kellogg Co.*, 619 F.3d 604, 620 (6th Cir. 2010) (holding yes).

17. See *Sandifer*, 678 F.3d at 596 (holding that an employee must reach the work station to start the work day); *Franklin*, 619 F.3d at 620 (holding that the employer must pay an employee for walking time).

## I. THE FAIR LABOR STANDARDS ACT: DEFINING “WORK”

The Fair Labor Standards Act (FLSA) provides that an employer cannot “employ any of his employees . . . for a work-week longer than forty hours unless such employee receives compensation for his employment in excess of the hours . . . .”<sup>18</sup> However, the Act does not provide a definition of the word “work,”<sup>19</sup> leaving employers with little guidance on what activities make up their employees’ forty hours per week.<sup>20</sup>

This section will review the evolution of the continuous work day and the role of principal activities. It will then discuss the relationship between collective bargaining and the Fair Labor Standards Act, including previous attempts to interpret § 203(o).

### A. PRINCIPAL ACTIVITIES AND THE CONTINUOUS WORKDAY

In 1944, the Supreme Court first gave context to the term “work” as used in the FLSA.<sup>21</sup> In *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, three iron ore mining companies asked the Court to decide whether the time employees spent traveling in underground mines constituted work.<sup>22</sup> The Court determined that, in the absence of legislative language to the contrary, the term work must be interpreted as it is “commonly used—as meaning 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 and his business.”<sup>23</sup> The Court stressed the danger involved in the miners’ travel, which included exertion as well as “hazards to life and limb,” in concluding that the time did constitute work.<sup>24</sup>

The Court expanded the definition of work two years later in *Anderson v. Mt. Clemens Pottery Co.*, holding that the time employees of a pottery factory spent walking from the entrance of the building to their work stations and the time spent don-

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18. Fair Labor Standards Act of 1938, 29 U.S.C. § 207(a)(1) (2012).

19. *Id.* § 203 (failing to provide a definition for the word “work”).

20. Alfred & Schauer, *supra* note 9, at 363.

21. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597–98 (1944).

22. *Id.* at 591–92.

23. *Id.* at 598.

24. *Id.*

ning non-protective gear was work time.<sup>25</sup> The Court determined that an employee must be paid for any time she is required to be on the employer's premises, even if that time is prior to productive work.<sup>26</sup> The decision caused outrage in the business community over the extension of FLSA coverage for a wide variety of activities that were not typically considered part of the work day.<sup>27</sup> In response, Congress passed the Portal-to-Portal Act, amending employers' liability under the FLSA.<sup>28</sup> Congress acknowledged that the Supreme Court's interpretation of the FLSA "creat[ed] wholly unexpected liabilities . . . upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand . . . the payment of such liabilities would bring about financial ruin of many employers."<sup>29</sup> The Act removed time spent traveling to and from the place of an employee's "principal activities" from compensable time, along with activities before or after those "principal activities."<sup>30</sup> Congress left the Court's interpretation of "work" unchanged; it only created the travel time exception.<sup>31</sup>

The first question the Court addressed under the Portal-to-Portal Act was the definition of a "principal activity."<sup>32</sup> In *Steiner v. Mitchell*, the Secretary of Labor sued a battery factory, claiming that the time employees at the plant spent changing into and out of work clothes and showering at the end of the day to reduce their exposure to the toxic chemicals was compensable.<sup>33</sup> The employer admitted that these activities were "indispensable to the performance of their productive work and

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25. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946).

26. *Id.* at 690.

27. See Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 62–63 (1991) (quoting the Business Advisory Council on Attitude of Industry on Portal-to-Portal telling Congress: "Businessmen do not believe that Congress intended to make any radical change in the practices or customs governing the relationship between employer and employee as to when his compensation started or how much it should be provided that the statutory minimum wage were paid . . .").

28. See Rachael Langston, *IBP v. Alvarez: Reconciling the FLSA with the Portal-to-Portal Act*, 27 BERKELEY J. EMP. & LAB. L. 545, 545–46 (2006).

29. Portal-to-Portal Act, 29 U.S.C. § 251(a) (2012).

30. *Id.* § 254.

31. See *id.* § 251 (lacking a definition for the word "work"); Langston, *supra* note 28, at 546 ("Significantly, the PPA did not include a definition of workday, but left intact the Court's interpretation of workday as applied to the FLSA . . .").

32. Alfred & Schauer, *supra* note 9, at 367.

33. *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956).

integrally related thereto,” but argued that they were not “principal activities.”<sup>34</sup> According to the employer, activities “being performed off the production line and before or after regular shift hours” did not fall under the FLSA.<sup>35</sup> The Court disagreed, holding that activities are compensable under the Portal-to-Portal Act “if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed.”<sup>36</sup> Thus, the time spent changing clothes and showering was compensable, as those activities were an integral part of the employees’ productive work in the battery factory.<sup>37</sup>

The Court more recently clarified the extent of the Portal-to-Portal Act in 2005, in the case *IBP, Inc. v. Alvarez*.<sup>38</sup> The decision clarified the continuous workday rule, holding that any activity after the first principal activity and before the last principal activity of the day was excluded from the Portal-to-Portal Act and was therefore compensable under the FLSA.<sup>39</sup>

Together, Congress and the Court created a system that functions so that an employee who is required to don protective gear before walking to his work station and beginning his productive work, and who is not covered by a collective bargaining agreement, must be compensated for the changing time, the walking time, and the work time.<sup>40</sup> In this situation, the changing time is an indispensable part of the employee’s work or principal activities, so under *Steiner* it is also a principal activity.<sup>41</sup> Thus, the clothing change is the first principal activity of the day.<sup>42</sup> The walk to the work station is subsequent to this principal activity, but prior to the final principal activity, and is therefore part of the continuous workday and compensable under the FLSA.<sup>43</sup> Finally, upon reaching the work station, the employee begins the physical and mental exertion defined as compensable work under the FLSA.<sup>44</sup>

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34. *Id.* at 251–52.

35. *Id.*

36. *Id.* at 256.

37. *Id.*

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

39. *Id.* at 37.

40. *See id.* at 40.

41. *See Steiner*, 350 U.S. at 256.

42. *See id.*

43. *See IBP, Inc.*, 546 U.S. at 37.

44. *See Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

B. COLLECTIVE BARGAINING AND THE FAIR LABOR STANDARDS ACT

Congress passed the FLSA at a time when federal policy strongly favored collective bargaining.<sup>45</sup> Just three years prior to the FLSA, Congress enacted the National Labor Relations Act (NLRA), in an effort to protect employees' right to organize and allow them to bargain for rights and benefits in the workplace.<sup>46</sup> Thus, the FLSA was not meant to disrupt the ability of employers and unions to negotiate.<sup>47</sup> When addressing Congress in debates over the FLSA, President Franklin Delano Roosevelt stated, "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining."<sup>48</sup>

The FLSA is the floor for employee rights, not the ceiling.<sup>49</sup> The Act provides a minimum standard, but allows flexibility for unions and employers to negotiate beyond the rights afforded in the Act.<sup>50</sup> Employers themselves may provide, and unions may bargain for, a higher wage, a higher overtime compensation rate, or a shorter workweek than the FLSA requires.<sup>51</sup> However, a union may not waive any employee rights provided in the FLSA, including minimum wage, overtime requirements, and what activities must be counted as work time.<sup>52</sup> Further,

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45. Anna Wermuth & Jeremy Glenn, *It's No Revolution: Long Standing Legal Principles Mandate the Preemption of State Laws in Conflict with Section 3(o) of the Fair Labor Standards Act*, 40 U. MEM. L. REV. 839, 850 (2010).

46. See Richard Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687, 688 (1997).

47. Wermuth & Glenn, *supra* note 45, at 850.

48. President Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938), in 83 CONG. REC. 8, 9 (1938), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15517>.

49. See Bales, *supra* note 46, at 689.

50. *Id.* at 689–90.

51. *E.g.*, Dep't of Labor, Wage & Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIVISION, [http://www.dol.gov/whd/regs/compliance/fairpay/fs17a\\_overview.pdf](http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf) (July 2008).

52. See, *e.g.*, *Bailey v. Karolyna Co.*, 50 F. Supp. 142, 143 (S.D.N.Y. 1943) ("It has been held that employees cannot bargain away their rights under the Act or release their employers from paying the full amounts due thereunder."); Dep't of Labor, *Collective Bargaining Agreements*, FLSA HOURS WORKED ADVISOR, <http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1c.asp> (last visited Mar. 9, 2014).



an employer is not relieved of the FLSA requirements, even if the requirements are not affirmatively asserted by employees through a collective bargaining agreement.<sup>53</sup> Finally, an employer's reliance on the terms of a collective bargaining agreement does not preclude an employee from bringing an action to collect wages he or she is owed under the FLSA.<sup>54</sup> The employer is responsible for, at a minimum, complying with the terms of the FLSA, regardless of the terms of its contract with its employees.<sup>55</sup>

However, in response to the broad interpretations of the FLSA in subsequent Court cases, Congress amended the FLSA to provide one exception which allows employers to define some time as outside of the work day, even though the FLSA normally requires the employer to pay his or her employees for that time.<sup>56</sup> According to § 203(o), if an employer, explicitly or by custom under a collective bargaining agreement, has established that it considers time spent changing clothes or washing at the beginning and end of the day to be outside of work time, then this time may be exempt from the FLSA's compensability requirement.<sup>57</sup>

The provision has raised the question of whether the unpaid change and wash time can still be considered a principal activity.<sup>58</sup> The discussion led to varying opinions amongst the federal district courts, and ultimately to a circuit split between the U.S. Courts of Appeal for the Sixth and Seventh Circuits.<sup>59</sup>

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53. *Bailey*, 50 F. Supp. at 143 ("And if the employers cannot be relieved of their obligations or duties under the Act by any affirmative action of their employees, they cannot be relieved by any failure on the part of any such employees to insist upon a full compliance with the Act.")

54. See Fair Labor Standards Act of 1938, 29 U.S.C. § 218C(b)(2) (2006) ("The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."); *Bailey*, 50 F. Supp. at 143.

55. See *Bailey*, 50 F. Supp. at 143; Dep't of Labor, Wage & Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIVISION, [http://www.dol.gov/whd/regs/compliance/fairpay/fs17a\\_overview.pdf](http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf) (July 2008) ("The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced."); Dep't of Labor, *Collective Bargaining Agreements*, FLSA HOURS WORKED ADVISOR, <http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1c.asp> (last visited Mar. 9, 2014).

56. See 29 U.S.C. § 203(o); Wermuth and Glenn, *supra* note 45, at 851–52.

57. 29 U.S.C. § 203(o).

58. See *Alfred and Schauer*, *supra* note 9, at 369–75.

59. Compare *Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010) (holding that changing time is a principal activity and therefore subsequent walking time is compensable), and *Andrako v. U.S. Steel Corp.*, 632 F. Supp.

## C. DISPUTES OVER THE INTERPRETATION OF § 203(O)

The Department of Labor has given inconsistent guidance on the interpretation of § 203(o). For example, in 2007, the DOL interpreted § 203(o) as excluding changing time from an employee's principal activities.<sup>60</sup> However in 2010, after a change in presidential administrations, the DOL withdrew the interpretation and issued new guidance allowing § 203(o) changing time to be considered a principal activity, stating "To hold otherwise would expand the § 203(o) exclusion well beyond the language of the statute."<sup>61</sup> Then again, in July 2013, the Agency reversed its opinion and filed an amicus brief with the U.S. Supreme Court arguing that § 203(o) allows employers and employees to bargain over the compensability of changing time, which may affect walking time as well.<sup>62</sup> The opinions fluctuate between claiming § 203(o) is an exception to the protections of the FLSA, and thus must be interpreted narrowly,<sup>63</sup> and asserting that no such interpretation is necessary.<sup>64</sup> Adding to the confusion, the Agency's interpretation of what garments constitute "clothes" under the provision has fluctuated even more than the Agency's opinion on the relationship between

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2d 398, 413 (2009) (holding that while the FLSA exclusion covered time taken to don protective gear, it did not cover time spent walking to and from work after putting on or taking off clothes), *with Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596–97 (7th Cir. 2012) (holding that changing time is not a principal activity if exempt from the FLSA under § 203(o) and therefore subsequent walking time is not compensable), *and Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001, 1011 (2008) (holding that because plaintiff offered no evidence that putting on and taking off clothes were principal activities or integral or indispensable to a principal activity, plaintiff was not entitled to compensation for those activities).

60. Dep't of Labor, Wage & Hour Division, Opinion Letter, FLSA2007-10 (May 14, 2007) [hereinafter 2007 Opinion Letter], *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).

61. Dep't of Labor, Wage & Hour Division, Administrator's Interpretation No. 2010-2, (June 16, 2010) [hereinafter Interpretation No. 2010-2], *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).

62. Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Sandifer v. U.S. Steel Corp.*, No. 12-417 (Jan. 27, 2014) ("Petitioners do not cite any authority for the proposition that when the FLSA leaves the compensability of certain activities to negotiation between employers and unions on behalf of covered employees, the scope of those affected activities must be construed narrowly against negotiation.").

63. Interpretation No. 2010-2, *supra* note 61.

64. Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Sandifer v. U.S. Steel Corp.*, No. 12-417 (Jan. 27, 2014).

compensability and principal activities.<sup>65</sup> As a result of the inconsistent rulings, federal appellate courts, despite disagreeing on which interpretation is correct, have agreed to largely ignore the DOL's position on the issue.<sup>66</sup>

The Sixth Circuit dealt with a § 203(o) case in 2010 in a dispute between Kellogg and an employee at the company's Rossville, Tennessee plant.<sup>67</sup> Kellogg required all hourly employees to wear uniforms consisting of "pants, snap-front shirts bearing the Kellogg logo and employee's name, and slip-resistant shoes . . ."<sup>68</sup> The uniform remained at the plant, so employees changed into their uniform upon arriving at work and out of their uniform before leaving for the day.<sup>69</sup> Kellogg never paid its employees for the time spent changing in the locker room or for the time spent walking between the locker room and the time clock.<sup>70</sup> The collective bargaining agreement governing the facility did not discuss the nonpayment policy, but the policy was in place at the time the union and the employer negotiated the agreement.<sup>71</sup>

An employee at the plant, Alice Franklin, brought suit on behalf of herself and 243 current and former employees from Kellogg facilities across the country to recover wages under the FLSA for the time spent donning and doffing the uniform and for the subsequent walking time.<sup>72</sup> The court held that the custom of nonpayment for changing time was established under

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65. Compare Dep't of Labor, Wage & Hour Division, Opinion Letter, FLSA 2002-2 (June 6, 2002), available at [http://www.dol.gov/whd/opinion/FLSA/2002/2002\\_06\\_06\\_2\\_FLSA.htm#UKG1z8Vqw80](http://www.dol.gov/whd/opinion/FLSA/2002/2002_06_06_2_FLSA.htm#UKG1z8Vqw80) ("[W]e interpret 'clothes' under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks."), with Interpretation No. 2010-2, *supra* note 61 ("[I]t is the Administrator's interpretation that the § 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job.").

66. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) ("Where, as here, an agency repeatedly alters its interpretation of a statute, the persuasive power of those interpretations is diminished."); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n.3 (4th Cir. 2009) ("[O]ur own view rests upon the language of the statute, not upon the gyrating agency letters on the subject.").

67. See *Franklin*, 619 F.3d at 604.

68. *Id.* at 608.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 607–08.

the plant's collective bargaining agreement and therefore § 203(o) exempted the time spent in the locker room from the FLSA.<sup>73</sup> However, the court determined that "compensability under § 203(o) is unrelated to whether an activity is a 'principal activity.'"<sup>74</sup> Since Kellogg required employees to wear the uniform and the uniform primarily benefitted the company, not the employees, the court found changing into and out of the uniform was integral and indispensable to the employee's work.<sup>75</sup> Therefore, although changing time was unpaid, the court held it was still a principal activity, rendering subsequent walking time compensable.<sup>76</sup> The court noted the differing views on the issue amongst the district courts, but was the first federal appellate court to consider the question of whether time spent walking to the time clock after changing clothes was compensable.<sup>77</sup>

In 2012, the Seventh Circuit confronted the same issue, when 800 current and former hourly employees at the USS plant in Gary, Indiana brought suit against the company for failing to pay them for time spent changing clothes in the locker room and the time it took them to walk to the work station from the locker room.<sup>78</sup> As in *Franklin*, the practice of nonpayment for the changing and walking time was established under a collective bargaining agreement.<sup>79</sup> Therefore, § 203(o) excluded the changing time from the compensation requirements of the FLSA.<sup>80</sup> However, the court did not follow the same reasoning as the Sixth Circuit when it determined if the walking time needed to be paid under the FLSA.<sup>81</sup> Instead, the court found that changing clothes was not a principal activity, stating, "Not all requirements imposed on employees constitute employment."<sup>82</sup> Thus, if the union and employer had agreed that changing time was not compensable work time, then according to the Seventh Circuit, it was not part of the employee's principal activities.<sup>83</sup> Under this interpretation, the employees' work

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73. *Id.* at 618.

74. *Id.* at 619.

75. *Id.* at 620.

76. *Id.*

77. *Id.* at 619–20.

78. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 591 (7th Cir. 2012).

79. *Id.* at 591–92.

80. *Id.* at 595.

81. *Id.* at 597–98.

82. *Id.* at 596.

83. *Id.*

day did not begin until they reached the work station, and thus the walk from the locker room did not need to be paid. The court acknowledged the contrary Sixth Circuit decision, but called it “clearly wrong,” and argued that the “*Franklin* opinion offers only a conclusion, not reasons.”<sup>84</sup>

Together, the Sixth and Seventh Circuits created a system where a worker must be compensated for travel time in some states, but not in others, perpetuating the difficulty of defining the workday for employers and employees, in addition to inconsistently enforcing FLSA protections.<sup>85</sup>

D. SUPREME COURT WILL DEFINE “CHANGING CLOTHES” BUT WILL NOT ADDRESS RELATIONSHIP BETWEEN § 203(O) AND COMPENSABILITY OF TRAVEL TIME

On February 19, 2013, the U.S. Supreme Court granted the petition filed by the U.S. Steel employees for a writ of certiorari to review *Sandifer*.<sup>86</sup> However, the Court limited its review to one question<sup>87</sup>: “What constitutes ‘changing clothes’ within the meaning of section 203(o)?”<sup>88</sup> The petitioners presented the relationship between principal activities and § 203(o) as question two of their petition,<sup>89</sup> but the Court denied certiorari on the issue,<sup>90</sup> leaving the inquiry unanswered.<sup>91</sup> Regardless of how the Court chooses to define “changing clothes” under § 203(o), the effect of the provision on the compensability of subsequent walking time under the FLSA will still differ depending on the jurisdiction.<sup>92</sup> Thus, despite the Supreme Court’s review of the *Sandifer* case, further guidance and uniformity on this issue is needed.

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84. *Id.* at 598.

85. See Alfred & Schauer, *supra* note 9, at 363.

86. *Sandifer*, 678 F.3d 590, *cert. granted*, 81 U.S.L.W. 3452 (U.S. Feb. 19, 2013) (No. 12-417).

87. *Id.*

88. Petition for Writ of Certiorari, *Sandifer*, 678 F.3d 590 (No. 12-417).

89. *Id.*

90. See *Sandifer*, 678 F.3d 590, *cert. granted*, 81 U.S.L.W. 3452 (U.S. Feb. 19, 2013) (No. 12-417).

91. See *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) (“This Court has said again and again and again that such a denial [of a petition for certiorari] has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else.”).

92. See *supra* Part I.C.

## II. INCOMPLETE DECISIONS: HOW SECTION 203(O) LITIGATION FAILS TO CONSIDER THE IMPLICATIONS ON COLLECTIVE BARGAINING

Congress passed § 203(o) in response to the Court's expansive interpretation of the FLSA,<sup>93</sup> as an attempt to give power back to negotiations between unions and employers.<sup>94</sup> At the time, Congress believed that collective bargaining was the best mechanism for protecting American employee rights.<sup>95</sup> However, the passage of time has proven that collective bargaining agreements in many ways fail to adequately protect employees.<sup>96</sup> Despite collective bargaining's continually ineffective defense of employee rights, when the federal appellate courts are charged with interpreting § 203(o) of the FLSA—a section explicitly discussing collective bargaining agreements<sup>97</sup>—the courts fail to consider the policy implications of either restricting or expanding the reach of collective bargaining.<sup>98</sup>

This section will analyze the congressional intent behind § 203(o) and both the Sixth and Seventh Circuits' attempts at interpreting the provision.

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93. See Wermuth & Glenn, *supra* note 45, at 841, 844.

94. *Id.* at 853–54.

95. See Bales, *supra* note 46, at 688.

96. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 169 (1991) (“For many workers, the rights that matter most come from public law and not from private collective bargaining agreements.”); see also Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2685–86 (2008) (discussing the National Labor Relations Act's failure to protect workers).

97. The FLSA provides in relevant part:

In determining . . . 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.

Fair Labor Standards Act of 1938, 29 U.S.C. § 203(o) (2012).

98. See *Franklin v. Kellogg Co.*, 619 F.3d 604, 618–19 (6th Cir. 2010) (failing to discuss the effect an interpretation of the relationship between compensability and principal activities has on the reach of collective bargaining agreements); see also *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 595–98 (7th Cir. 2012) (similarly failing to consider the limits of collective bargaining agreements when determining if a non-compensable activity can be principal).

A. CONGRESS PASSED § 203(O) WITH AN UNREALISTIC VISION OF COLLECTIVE BARGAINING AND EMPLOYEE RIGHTS

Amendments to the FLSA, such as § 203(o) and the Portal-to-Portal Act, represent a congressional attempt to give power to collective bargaining agreements in the hope that employees would successfully negotiate for their own rights through unions.<sup>99</sup> Although Congress wanted to provide a bare minimum wage and maximum hours through legislation, the FLSA drafters hoped for unions to negotiate beyond its provisions.<sup>100</sup> In a statement to Congress in 1938, President Roosevelt spoke of the promise the country saw in unions, stating, “I have spoken of labor as another essential in the three great groups of the population in raising the Nation’s income. Definite strides in collective bargaining have been made, and the right of labor to organize has been nationally recognized.”<sup>101</sup> Over the years, however, the era’s vision of labor relations proved inaccurate, leading to the increased importance of legislation protecting individual rights.

In 1954, 34.7 percent of nonagricultural workers in the United States belonged to unions.<sup>102</sup> However, by 2013 only 11.3 percent of wage and salary workers were covered by a collective bargaining agreement.<sup>103</sup> Some of the most important workplace rights, such as the right to fair treatment free from discrimination, the right to health and safety in the workplace, and the right to some economic securities, are protected by

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99. See Portal-to-Portal Act, 29 U.S.C. § 251(b) (2012) (“It is declared to be the policy of the Congress . . . to protect the right of collective bargaining . . . .”); see also Wermuth & Glenn, *supra* note 45, at 854 (quoting Representative Herter’s discussion of § 203(o) as an amendment to avoid broad court interpretations of employee rights that led to the Portal-to-Portal Act and stating that collective bargaining agreements have “been carefully threshed out between the employer and the employees and apparently both are completely satisfied with respect to their bargaining agreements”).

100. President Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938), in 83 CONG. REC. 8, 9 (1938), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15517> (“[M]ore desirable wages are and should continue to be the product of collective bargaining.”).

101. *Id.* at 10.

102. Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 616 (2004).

103. *Union Members—2013*, BUREAU OF LABOR STATISTICS (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>. See generally Steven Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y. TIMES, Jan. 27, 2012, <http://www.nytimes.com/2012/01/28/business/union-membership-rate-fell-again-in-2011.html> (discussing the “decades-long slide” of union membership in the United States).

statutes, not unions.<sup>104</sup> The abundance of employee rights protected through legislation suggests the public has recognized that some rights cannot be protected by collective bargaining, or perhaps are too important to be left up to market forces.<sup>105</sup>

Scholars point to many reasons why collective bargaining failed to become the primary mode of securing employee rights in America.<sup>106</sup> Some suggest that the weaknesses of the NLRA were a cause.<sup>107</sup> The NLRA grants workers the right to organize, but fails to provide remedies to adequately protect the employees who choose to do so.<sup>108</sup> Under the Act, an employee may seek compensatory damages, but not punitive damages, leaving an insufficient deterrent for employers disrupting workers' rights.<sup>109</sup> The Act also fails to cover a growing number of American employees, independent contractors,<sup>110</sup> not only excluding those workers, but also undermining the unity required for covered employees working alongside contractors to unionize.<sup>111</sup>

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104. See Rabin, *supra* note 96, at 170, 175–84. See generally Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631 (2012) (prohibiting employment discrimination against employees over the age of thirty nine); Occupational Safety & Health Act of 1970, 29 U.S.C. § 651 (2012) (creating the Occupational Safety and Health Administration to assure safe and healthful working conditions for employees); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2012) (setting minimum standards for pension plans); Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102 (2012) (requiring employers to provide notification sixty days prior to mass layoffs); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012) (prohibiting employment discrimination against qualified employees with disabilities).

105. See Rabin, *supra* note 96, at 171, 192.

106. See, e.g., *id.* at 193 (arguing the labor movement recognized that it needed the larger resources of the government to effectively create workers' rights); Sachs, *supra* note 96, at 2694–95 (arguing the NLRA fails to adequately protect collective activity).

107. See Sachs, *supra* note 96, at 2694–95.

108. See *id.* See generally Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–1803 (1983) (discussing the failures of the NLRA regime).

109. See National Labor Relations Act, 29 U.S.C. § 160(c) (2012).

110. See 29 U.S.C. § 152(3) (excluding independent contractors from the definition of “employee”); Rick Marin, *Can Manhood Survive the Recession*, NEWSWEEK, Apr. 20, 2011, <http://www.newsweek.com/can-manhood-survive-recession-66607> (“The number of so-called independent contractors is up by more than one million since 2005, according to Jeffrey Eisenach, an economist at George Mason University.”).

111. See Sachs, *supra* note 96, at 2700 (“As the Supreme Court has observed, excluding a subset of a given workforce from the purview of labor law makes it more difficult for all of the employees in that workforce to organize



Other scholars point not to the NLRA, but to the practice of collective bargaining itself.<sup>112</sup> Collective bargaining is based in part on the power of the employee to strike.<sup>113</sup> However, in today's workforce, an employer can easily replace workers or subcontract the work until the strike is over, severely weakening the bargaining power of the union.<sup>114</sup> In addition, worker safety involving issues such as chemical exposure requires technical knowledge that many employees do not have, and therefore is better managed by a government agency like the Occupational Health and Safety Administration.<sup>115</sup> These areas also require uniform enforcement across the industry, and the resources of the government enable OSHA and other regulatory agencies to ensure compliance more effectively than a union.<sup>116</sup> Unions themselves recognized this limitation and strongly supported the creation of OSHA.<sup>117</sup> Finally, some employee benefits, such as healthcare, affect society as a whole.<sup>118</sup> Therefore, government regulation ensuring that all workers have access to such a benefit, rather than just those protected by a specific collective bargaining agreement, is advantageous for the entire country.<sup>119</sup>

Regardless of the reason for the shift from collective bargaining to a system based on public rights, it does not appear that the trend will reverse itself in the near future.<sup>120</sup> Today, non-unionized employees often enjoy more workplace rights

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and act collectively.”); *cf.* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (stating that excluding undocumented employees from the NLRA would “erod[e] the unity of all the employees and imped[e] effective collective bargaining”).

112. *See* Rabin, *supra* note 96, at 193–95.

113. *Id.* at 194.

114. *Id.* at 194–95.

115. *Id.* at 195. *See generally* U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/> (last visited Mar. 9, 2014) (providing information about OSHA).

116. *See* Rabin, *supra* note 96, at 195.

117. *See* James C. Miller III, *Is Organized Labor Rational in Supporting OSHA?*, 50 S. ECON. J. NO. 3 881, 881 (1984); Rabin, *supra* note 96, at 193 (“By helping to enact this legislation, the movement recognizes that it needs the larger resources of government to do its job.”).

118. Rabin, *supra* note 96, at 196.

119. *Id.* at 192–96.

120. Befort, *supra* note 102, at 632 (suggesting that “factors, such as the global economy, the loss of manufacturing jobs, and America’s traditional antipathy for collective action, will continue to militate against any greater rebound in union strength”).

than those protected by collective bargaining agreements.<sup>121</sup> Provisions such as § 203(o), which seek to protect the right to negotiate, often ensure, in practice, that statutory individual rights created for all workers do not apply to unionized employees.<sup>122</sup> Thus, the hope for the future of collective bargaining that inspired the drafters to include § 203(o) in the FLSA is misplaced in the realities of today's workplace, where many rights must be publicly protected, rather than bargained for.

B. SECTION 203(O) LITIGATION'S FAILURE TO CONSIDER THE IMPLICATIONS ON THE RELATIONSHIP BETWEEN THE FLSA AND COLLECTIVE BARGAINING

The Sixth and Seventh Circuits have contrary holdings regarding the effect of § 203(o) on the compensability of subsequent activities.<sup>123</sup> But neither decision established a precedent sufficient to protect employee rights in future cases. Each case focused narrowly on the definition of a principal activity and both failed to consider how a decision either way would affect the power of collective bargaining to put rights protected by the FLSA on the bargaining table.<sup>124</sup>

The Sixth Circuit required employers to pay for the walking time, but provided no rationale, leaving a weak precedent for future challenges to employee rights.<sup>125</sup> The court barely analyzed the language of § 203(o), and instead simply addressed the different positions taken by courts across the country, and

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121. Bales, *supra* note 46, at 690.

122. *Cf.* Fair Labor Standards Act of 1938, 29 U.S.C. § 203(o) (2012); *Livadas v. Aubry*, 943 F.2d 1140, 1150 n.2 (9th Cir. 1991) (Kozinski, J., dissenting) ("It is not inconceivable that an employer could point to this discrepancy [between rights available to non-unionized employees, but not unionized workers] as an argument against an effort to unionize . . ."); Bales, *supra* note 46, at 690, 742–45 (discussing court interpretations of the Labor Management Relations Act and the Federal Arbitration Act that "effectively withdr[ew] from unionized employees many of the individual employment rights that statutes or common law ostensibly confer on all employees").

123. *See Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596–97 (7th Cir. 2012); *Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010).

124. *See Sandifer*, 678 F.3d at 596–97 (holding that § 203(o) "permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time," but failing to discuss the implications of that decision on future collective bargaining agreements); *Franklin*, 619 F.3d at 619 (holding that "compensability under § 203(o) is unrelated to whether an activity is a 'principal activity,'" but failing to provide a rationale for that decision).

125. *See Franklin*, 619 F.3d at 619 (concluding that compensability is unrelated to the principal activity analysis without providing any rationale).

then announced which proposition it agreed with.<sup>126</sup> The only analysis provided by the court is that § 203(o) addresses the compensability of changing time, not its standing as integral and indispensable.<sup>127</sup> The Sixth Circuit is correct, and identified an important feature of § 203(o), but did not go any further to discuss the implications of the language.<sup>128</sup> What the court failed to recognize is that any interpretation allowing collective bargaining agreements to determine if an activity is principal to an employee's work gives the contract authority to affect the compensability of other activities, beyond the changing time explicitly discussed in the provision. Section 203(o) represents a congressional attempt to give some bargaining rights back to unions and employers;<sup>129</sup> however, any interpretation of the provision must consider how many of the rights afforded in the FLSA will be put on the bargaining table and how that will affect employees in future conflicts between collective bargaining and statutes.

The Seventh Circuit likewise failed to consider the implications of its decision on the balance between collective bargaining agreements and statutes that protect American workers' rights. Although the opinion provided more analysis than the Sixth Circuit's, and discussed the reach of collective bargaining in a limited manner, it failed to consider the position of collective bargaining in society today.<sup>130</sup> The court focused on the idea that if an employee is not paid for an activity, it is not an activity for which he is employed.<sup>131</sup> However, like the Sixth Circuit, the Seventh Circuit did not discuss § 203(o) as a provision striking a compromise between the right to collectively bargain and the statutory rights promised by the FLSA.<sup>132</sup> Instead, the court quickly decided that Congress meant to give

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126. *Id.*

127. *Id.*

128. *Id.*

129. Wermuth & Glenn, *supra* note 45, at 854.

130. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596–97 (7th Cir. 2012) (“Section 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time . . .”).

131. *See id.* at 596 (“[C]hanging time is not work time and need not be compensated. If it is not work time—the workers aren’t being paid and their union has agreed to their not being paid—how can it be one of the ‘principal . . . activities which [the] employee is employed to perform’? . . . Not all requirements imposed on employees constitute employment.”) (alterations in original) (quoting the Fair Labor Standards Act of 1938, 29 U.S.C. § 254(a) (2012)).

132. *See id.* at 597–98; *Franklin*, 619 F.3d at 615–16.

full power to union negotiations,<sup>133</sup> an oversimplification of the provision that fails to consider the implications of that broad interpretation in the realities of the modern workplace.

The DOL's fluctuating opinion on the issue is even worse than the weak reasoning of the Sixth Circuit and the oversimplification of the Seventh Circuit. Without ever addressing the implications of its interpretations on the reach of collective bargaining, the DOL gives the impression that the decision is a trivial matter.<sup>134</sup> The DOL's 2007 interpretation letter simply states that § 203(o) removed changing time from hours worked, and therefore from principal activities, and did not inquire further.<sup>135</sup> The 2010 DOL interpretation did recognize what is at stake with this decision, stating that the exclusion from compensability by a collective bargaining agreement does not make the activity any less integral or indispensable.<sup>136</sup> However, in its 2013 amicus brief, the DOL returned to its naïve interpretation, refusing to consider the lack of success of collective bargaining today.<sup>137</sup>

The split over the interpretation of § 203(o) represents a choice with implications for the future of employee rights. When deciding if the unpaid changing time is a principal activity, the courts choose either an expansive right to contract, limiting the scope of the guaranteed employee rights provided in the FLSA, or choose a narrow interpretation limiting the power of collective bargaining and preserving the statutory rights afforded to American workers. Congress passed § 203(o) with a prediction for the future of collective bargaining in American society that did not prove true. The litigation over the compensability of this short period of time, the walk from the locker room to the work station, presents an opportunity to issue a uniform decision with precedential value for future conflicts<sup>138</sup> between statutory rights and collective bargaining agreements.

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133. *Sandifer*, 678 F.3d at 597–98.

134. See generally Interpretation No. 2010-2, *supra* note 61; 2007 Opinion Letter, *supra* note 60.

135. 2007 Opinion Letter, *supra* note 60 (“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.”).

136. Interpretation No. 2010-2, *supra* note 61.

137. Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Sandifer v. U.S. Steel Corp.*, No. 12-417 (Jan. 27, 2014).

138. See, e.g., *infra* note 142.

### III. SECTION 203(O) PRESENTS AN OPPORTUNITY FOR A SUPREME COURT DECISION LIMITING COLLECTIVE BARGAINING'S EFFECT ON STATUTORY RIGHTS

As the circuit split demonstrates, the text of § 203(o) lends itself to arguments both that the Act removes changing time from being defined as a principal activity and that it simply removes changing time from compensability, but not classification as a principal activity.<sup>139</sup> Therefore, the textual argument advanced by each court is insufficient to resolve the issue, and Clifton Sandifer is still getting paid for less time than the employee performing the same duties at the plant in Michigan.<sup>140</sup>

Given the ambiguous text of the provision, and the change in the position of collective bargaining in society from the time Congress passed § 203(o) to today, § 203(o) litigation presents an opportunity to set a precedent for a narrow interpretation of FLSA exemptions based on collective bargaining agreements. Resolving the conflict over the compensability of this fairly insignificant activity, walking from the locker room to the work station, can create a framework for understanding other future conflicts between collective bargaining and statutory individual rights. The Supreme Court of the United States should resolve the circuit split and hold that when unionized employees' statutory rights are in jeopardy, courts must restrict the negotiable statutory terms to a narrow interpretation of the language of the legislature, preserving as many individual statutory guarantees as possible. In this case, the FLSA explicitly allows employees to bargain away their compensation for changing and washing time, but does not discuss pay for walking time.<sup>141</sup> Thus, the only activities explicitly exempt from compensable work time are changing and washing, and the most restrictive interpretation of the provision would not allow any other activity to be unpaid based on that agreement. Resolving the split in this way would not only end the conflicts over walking time, but would also provide an analysis applicable anytime a collective bargaining agreement purports to affect statutory rights.<sup>142</sup>

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139. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 596–97 (7th Cir. 2012) (arguing that the text of § 203(o) allows parties to “reclassify changing time as nonworking time”); *Franklin v. Kellogg Co.*, 619 F.3d 604, 618 (6th Cir. 2010) (finding that the text of “§ 203(o) only addresses the compensability of the time, not whether it is integral and indispensable”); *supra* note 97.

140. See *supra* notes 1–6 and accompanying text.

141. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(o) (2012).

142. For example, the FLSA allows employers and employees to reach a collective bargaining agreement exempting the employer from following over

A. RESTRICTING THE REACH OF COLLECTIVE BARGAINING  
PROTECTS STATUTORY EMPLOYEE RIGHTS

As previously discussed, over time, collective bargaining has proven to be an ineffective way of guaranteeing many important employee rights.<sup>143</sup> When striking a balance between statutory rights and the freedom to collectively bargain, courts must recognize that the unequal bargaining power between the employer and the employees affects the ability of the workers to secure their own rights.<sup>144</sup> Restricting negotiable legal rights to the most limited understanding provided by the statute guarantees a minimum amount of rights for all employees, regardless of union membership.

Proponents of a more expansive interpretation of negotiable rights assert that publicly protected rights impermissibly limit the freedom to contract. Opponents of the Sixth Circuit's opinion suggest that walking time compensation should also be negotiable, as that interpretation would promote the freedom of contract, which has been recognized by the Supreme Court as a fundamental right.<sup>145</sup> However, past attempts at holding the freedom to contract above employee rights have been widely criticized.<sup>146</sup> Thus, although a court is free to recognize freedom

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time requirements. *See id.* § 207(b)(1)–(2), (f). This Note's proposed Supreme Court holding could provide precedent for future interpretations of these sections.

143. *See supra* Part II.A.

144. *See Rabin, supra* note 96, at 194–95 (discussing the workers' ability to effectively collectively bargain). Commentators have criticized court opinions assuming equal bargaining power between employers and employees. *Cf. Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting) (“It may be that the statute [setting maximum hours for employees in bakeries] had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength.”).

145. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . .”); *Lochner*, 198 U.S. at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”).

146. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (stating *Lochner v. New York*, a 1905 Supreme Court decision overturning a worker protection law based on its infringement on the freedom to contract, is perhaps “the most widely reviled decision of the last hundred years”).

to contract as an important constitutional right, it cannot do so at the expense of employee rights.<sup>147</sup> Instead, conflicts between the freedom to contract and statutory rights must be viewed with the understanding that some public interests supersede the right to contract.<sup>148</sup> A Supreme Court decision requiring a narrow interpretation of exemptions to statutory exemptions is a suitable compromise between the importance of the freedom of contract and the necessity of publicly protected employee rights. The decision would allow collective bargaining above the floor provided by the legislature, without putting freedom to contract above all else, a viewpoint which has been utterly rejected over time.<sup>149</sup>

In addition, restricting the effect of collective bargaining agreements on statutory rights does not suggest that collective bargaining has no place in society at all. Proponents of collective bargaining point to limitations of individual statutory employee rights, including the failure of administrative agencies to enforce statutes and the lack of resources for individual employees looking to sue over a violation, to argue that collective bargaining still serves an important function in protecting employee rights.<sup>150</sup> However, the terms of a collective bargaining agreement must be closely monitored to protect employee rights.<sup>151</sup> Although some would argue that placing more statutory rights on the negotiating table, such as compensation for walking time, would allow employees to more effectively negotiate, as previously discussed, relying on the power of the workers to negotiate for their own rights has created a system where union members often have fewer rights than non-union members.<sup>152</sup> Therefore, protecting statutory rights from the bargaining table is appropriate in today's workplace, as it preserves those rights guaranteed to all workers, while still allowing employees and employers to negotiate for other terms. Statutes

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147. *Id.* at 373 (“You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”).

148. *Id.* at 375 (“It is one thing to enforce freedom of contract in a limited and qualified way; it is quite another to make freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes.”).

149. *See id.* *See generally* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (upholding a Washington minimum wage law and marking the Court's departure from *Lochner*).

150. *See* Bales, *supra* note 46, at 749–50.

151. *See supra* Part II.A (discussing collective bargaining's failure to adequately protect workers' rights).

152. Bales, *supra* note 46, at 690.

like the FLSA provide a floor, and unions are welcome to bargain beyond their provisions, as long as they do not jeopardize the statutory guarantees provided by law.

B. THE SUPREME COURT SHOULD ISSUE A DECISION PROVIDING A FRAMEWORK FOR FUTURE CONFLICTS BETWEEN COLLECTIVE BARGAINING AND LABOR STATUTES

Section 203(o) litigation provides an opportunity to remove the provision from the historical view of collective bargaining and place it in the realities of today, setting an example for future conflicts between collective bargaining and statutory guarantees. The statute explicitly allows employees to bargain away their compensation for changing and washing time,<sup>153</sup> but the provision does not explicitly require or allow employees to give up their compensation for walking time.<sup>154</sup> Therefore, the Supreme Court should resolve the circuit split in favor of the Sixth Circuit's decision in *Franklin* and should emphasize the importance of restricting the reach of collective bargaining when the agreement touches statutory rights. By holding that § 203(o) only affects the compensability of changing and washing time, and not its status as a principal activity, the Court will set a precedent for restrictive interpretations of negotiable statutory rights. Any future conflicts regarding what statutory rights are on the bargaining table would then be resolved by using a narrow interpretation, limiting the effect of the provision to the negotiable rights explicitly named by the statute, thus guaranteeing employee rights for all workers, unionized or not.

CONCLUSION

Since Congress passed § 203(o), collective bargaining has proved to be an ineffective protection for many basic employee rights.<sup>155</sup> Today, non-unionized workers have more rights than many unionized workers.<sup>156</sup> The disparity represents the need for judicial decisions narrowly interpreting the statutory employee rights that may be put on the bargaining table in a contract between an employer and a union. The debate over the

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153. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(o) (2012).

154. See *Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010) (“We agree with the courts that have taken the position that compensability under § 203(o) is unrelated to whether an activity is a ‘principal activity.’”).

155. See *supra* Part II.A.

156. Bales, *supra* note 46, at 690.



meaning of § 203(o) presents an opportunity for the U.S. Supreme Court to issue a decision creating a precedent for interpretations that limit the reach of collective bargaining agreements to only the authority explicitly given to them by Congress, thus protecting statutory rights guaranteed to all employees, regardless of union membership. Clifton Sandifer's walk to the locker room may be short in time, but requiring his employer to pay him for those few minutes would bring long lasting effects to statutory employee rights.