
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JEFF SPOERLE, NICK LEE, KATHI SMITH,
JASON KNUDTSON, on behalf of themselves
and others who consent to become plaintiffs and
similarly situated employees,

Plaintiffs-Appellees,

v.

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Defendant-Appellant.

Appeal From The United States District Court
For The Western District of Wisconsin,
Case No. 07-cv-300-bbc
The Honorable Barbara B. Crabb, Chief District Judge

BRIEF OF PLAINTIFFS-APPELLEES

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DISCLOSURE STATEMENT

Appellate Court No.: 09-2691

Short Caption: Jeff Spoerle, et al. v. Kraft Foods Global, Inc., Oscar Mayer Foods Division

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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ADDAMS, DEBRA	ARAGON, CHRISTOPHER	BARTEL, TROY	VERCHER, RUBY
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AHMED, AZIMUDDIN	AREND, RICHARD	BATES, JENNY	BORSUK, LARRY
AHMED, YOUSUF	AREVALO, CARLOS	BATZ, PHILLIP	BOURNES, COREY
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AIDE, RANDY	ARNOLD, CAROL	BECKER, STEVEN	BOYD, DALE
AINI, MEHRAB	ARY, RANDY	BECKWITH, DONALD	BOYD, MARTIN
ALBERS, RUSSELL	ARY, RONALD	BENADDOUR, ABDEL	BRAITHWAITE, STEVEN
ALBINO, SONIA	ASTIN, CATHERINE	BENTZ, DANIEL	BRAITHWAITE, STEVEN
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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Not applicable.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

Dated this 30th day of September, 2009.

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JURISDICTIONAL STATEMENT

The jurisdictional summary in defendant-appellant Kraft's brief is complete and correct.

STATEMENT OF THE ISSUES

The only issue properly before this Court is the sole issue decided by the district court: whether 29 U.S.C. § 203(o) preempts plaintiffs' right under Wisconsin law to compensation for the time they spend putting on and taking off captive footwear (shoe rubbers, over-the-calf rubber boots, work boots), hairnets, beard nets, hardhats, bump caps, frocks and/or career clothing that Kraft, their employer, requires them to wear.

STATEMENT OF THE CASE

A. Nature Of The Case

Plaintiffs brought this class action under the Fair Labor Standards Act ("FLSA") and Wisconsin wage laws against their employer, Kraft Foods Global, Inc., Oscar Mayer Foods Division ("Kraft"). Plaintiffs seek to recover compensation for the time Kraft requires them to spend donning and doffing captive footwear, hard hats and other personal protective equipment ("PPE") and then walking between the locker area and their production sites at the start and end of their shifts at Kraft's meat processing plant in Madison. Kraft requires that plaintiffs wear the PPE for safety and sanitary reasons. Plaintiffs are not allowed to remove any of the PPE from the plant.

B. Course of Proceedings

Shortly prior to the scheduled trial date, after the district court denied Kraft's motion for summary judgment in 2007 and certified the case as a class action in 2008, the parties agreed to a class action settlement under which they stipulated to the formula for plaintiffs' damages, and Kraft withdrew all but two of eight defenses it had previously asserted. (R.242.) The two defenses preserved for litigation were: (1) whether § 203(o) applies in this case to bar plaintiffs'

FLSA claims and (2) whether plaintiffs' Wisconsin law claims are preempted. It was agreed that:

(1) If it is determined *either* that the state law claims are not preempted *or* that § 203(o) does not apply to the plaintiffs' FLSA claims, then plaintiffs will be entitled to 100% of the negotiated backpay. (R.242 ¶¶ 6(i), 7.)

(2) If it is determined that the state law claims *are* preempted, and that § 203(o) applies to some but not all items, plaintiffs would still be entitled to judgment, but with a recalculation of the settled damages "based upon the time associated with the remaining Articles *and* the time spent walking to and from the locker room." (R.242 ¶6(ii) (emphasis added); *see also id.* ¶¶ 6(iii), 6(iv) for specific scenarios.)

(3) The only way for Kraft to avoid judgment against it is to prevail on both preserved defenses: that the state law claims are preempted by federal law *and* that § 203(o) applies to *all* of the PPE items at issue. (R.242 at 8, ¶¶ 6(v), 7.)

Thus, under the settlement, plaintiffs are entitled to judgment (in whole or in part) unless Kraft establishes that that the state law claims are preempted *and all* of the PPE are covered by § 203(o). (R.242 ¶¶ 6-7.)

As the settlement agreement required, the parties filed cross-motions seeking a final judgment on the two reserved defenses. Kraft advanced a preemption argument only under § 203(o).

C. Disposition Below

On June 16, 2009, the district court granted plaintiffs' motion and denied Kraft's motion for final judgment. *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp.2d 913 (W.D. Wis. 2009). The court rejected Kraft's preemption defense, holding that "§ 203(o) does not preempt more

generous state laws even if the articles at issue in this case are ‘clothes’ within the meaning of § 203(o).” (A-App.3.) As a result of this ruling, the court declined to rule on the § 203(o) claim.

It held:

Because the parties agree that state law *does* require defendant to pay plaintiffs for donning and doffing these articles and that plaintiffs are entitled to full relief under the settlement if they are successful on their federal law claims *or* their state law claims, it is unnecessary to determine whether plaintiffs are entitled to prevail under the FLSA.

(A-App.3 (emphasis in original).)

The court rejected Kraft’s § 203(o) preemption argument for several reasons. First, the court recognized the presumption “that Congress does not wish to interfere with the state’s power to provide for the welfare of its people” and held that the FLSA’s purpose to protect the well-being of workers was not frustrated “by a statute that seeks to insure full compensation to employees for all the work that they do.” (A-App.13, 14).

Second, the district court observed that the FLSA has an express savings clause, 29 U.S.C. § 218(a), that precludes a reading that § 203(o) excuses noncompliance with a state law establishing a higher minimum wage or lower maximum work week, such as the Wisconsin laws here. (A-App.14-15.)

In addition, the court observed that Kraft had failed to develop any arguments it may have had under three other preemption doctrines, § 301 of the Labor Management Relations Act (“LMRA”), and the theories set forth in *San Diego Building Trades Council v. Garmon*, 259 U.S. 236 (1959), and *Lodge 76, International Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132 (1976). By failing to do so, Kraft waived those arguments. (A-App.12-13.)

Final judgment was entered in favor of plaintiffs and against Kraft in the amount of \$2,210,343 for the period through April 30, 2008. (A-App.20.)

STATEMENT OF FACTS

Plaintiffs are a class consisting of current or former employees at Kraft's Oscar Mayer Facility in Madison, Wisconsin. (A-App.58 ¶¶ 1-2.) At that facility, Kraft processes meat products for human consumption. (A-App.58 ¶ 1.) In the process, it is required to comply with United States Department of Agriculture regulations and with safety and health regulations promulgated under the Occupational Safety & Health Act. (A-App.61 ¶ 12, 13.) Kraft has also implemented its own safety and sanitation practices and procedures to preserve plant safety and "prevent direct contamination and/or adulteration of [its] food products." (A-App.61 ¶ 12-14, A-App.87; *see also* A-App.76-108 (Sanitation Standard Operating Procedure); A-App.109-10 (Madison Plant Safety Rules); A-App.111-12 (Madison Plant Sanitation & Hygiene Requirements); A-App.113-18 (Personal Protective Equipment requirements); A-App.121-22 (Madison Plant Head Protection Policy).)

Under these safety and sanitation policies, Kraft requires plaintiffs to wear various items it refers to as personal protective equipment or "PPE," (A-App.110, 113-18), including the following items it requires plaintiffs to don and doff on unpaid time: captive footwear (shoe rubbers, over-the-calf rubber boots, or work boots), hairnets, beard nets, hardhats or bump caps, and frocks (white polyester lab coats) or career clothing (shirt, pant and jacket). (A-App.62-63, ¶ 17, 18.)

Plaintiffs *must* wear these items. (A-App.62 ¶ 17.)¹ They are subject to disciplinary action, up to and including discharge, for "failure to wear mandatory safety equipment." (A-App.119.) And they must don and doff the items at the work place, as Kraft does not permit them to remove the PPE from the Madison plant. (A-App.62 ¶ 17.) Specifically, plaintiffs are

¹ The career clothing is required of Electrical Technicians; others may wear the frocks instead. (A-App.63 ¶ 20.)

required to store the headwear in their lockers and the footwear in shoe racks immediately below their lockers in locker areas located up to more than a three minute walk from their assigned work stations. (A-App.64 ¶ 21, A-App.135-41.) The frocks (laundered professionally each night at Kraft's expense) are stored in the frock room just outside the locker area, picked up there and carried to the work site. (A-App.63 ¶ 18.) Consequently, plaintiffs are required to report to the locker area for these items before their shifts and then walk from the locker area to their work stations by the time their shifts begin. (A-App.63 ¶ 18, A-App.64 ¶ 21.) Plaintiffs must return to the locker area to drop the items off (in the frock bins and locker room) at the end of the shift. (*Id.*) They are not paid for this donning and doffing of the items or the walking time. (A-App.64 ¶ 22.)

It is undisputed that Kraft requires the PPE for safety and sanitation reasons. (A-App.61-65.) The headwear is required by Kraft's Head Protection Policy as protection from bumps to the head and lacerations due to low or protruding objects and equipment in the work area. (A-App.121-22.) The "captive" footwear is reinforced in the toe to protect from compression injuries, and its treaded, rubber-type, chemical resistant soles are designed to prevent slipping, not hold meat particles, and withstand the chemicals and water from anti-bacterial footbaths required at the entry to all production areas to prevent the introduction of bacteria into the food production. (A-App.62 ¶ 17 n.2; A-App.65 ¶¶ 25, 26, 27; A-App.87.) The white polyester frock coats are worn over plaintiffs' own clothing and ensure that plaintiffs have clean outerwear in the food production areas in order to meet the sanitation requirements in those areas. (A-App.63 ¶ 19; A-App.87, 111-12.) In order to reduce the likelihood of cross-contamination, Kraft requires the frocks to be picked up from a separate frock room located near the locker rooms, then carried to the production areas, donned there before the shift begins, doffed outside the production area

at the end the shift, and carried back to the dirty laundry bins outside the locker rooms. (A-App.63 ¶ 18.) Alternative “career clothing” required for Electrical Technicians provides “arc protection.” (A-App.63 ¶ 20.) Company-issued hairnets covering the ears, and beard nets for all employees who are not clean-shaven, are required by Kraft’s Sanitation Standard Operating Procedures and its Madison Plant Sanitation & Hygiene Requirements to prevent product contamination. (A-App.87, 111.) In fact, these items are color-coded to allow management to identify the areas in which employees work and to minimize cross-contamination issues. (A-App.62 n.4.)

The uncompensated time plaintiffs spend each day in the locker area and walking to and from their work areas ranges from 5.607 minutes to 11.946 minutes, depending on the employee’s job. (A-App.66, ¶ 28; A-App.135-41.) The parties stipulated that the unpaid time yielded \$2,210,343 in unpaid wages, just through April 30, 2008. (R.263 at 3.)

SUMMARY OF ARGUMENT

Kraft chose to locate a meat processing plant in Wisconsin. Despite this, Kraft contends it is excused from following Wisconsin laws that apply to all employers because its collective bargaining agreement does not comply with Wisconsin law. Kraft bases its argument on 29 U.S.C. § 203(o), which allows parties to a collective bargaining agreement to exclude time spent “changing clothes or washing” from the hours worked for which the FLSA otherwise requires compensation. Specifically, Kraft contends that § 203(o) preempts the Wisconsin laws that require that plaintiffs be compensated for time they spend donning and doffing PPE Kraft requires them to wear.

Kraft’s preemption defense fails for several reasons. First, the FLSA has an express savings clause, 29 U.S.C. § 218(a), that applies to the Wisconsin laws at issue here because those laws provide a lower maximum workweek than the FLSA. Second, § 203(o) itself limits its

reach to the calculation of wages owed under the FLSA, not state laws. Any general policy of deference to collective bargaining agreements fails in the face of this express anti-preemption language found in the FLSA.

Kraft's preemption defense based on § 203(o) is the only issue properly before this court. Kraft waived all other preemption defenses by failing to develop them in its motion for final judgment or in its response to plaintiffs' motion for final judgment. Therefore, this Court should not consider Kraft's alternative argument that § 301 of the LMRA preempts plaintiffs' state law claims. Regardless, because plaintiffs' Wisconsin claims are independent of the collective bargaining agreement and do not require an interpretation of that agreement, § 301 preemption does not apply.

Finally, the district court properly declined to rule on Kraft's § 203(o) defense to plaintiffs' FLSA claims because such ruling would not affect the outcome of the case. Because plaintiffs' state law claims are not preempted, plaintiffs are entitled to the entire judgment agreed to in the settlement. Thus, Kraft's § 203(o) defense should not be considered by this Court. In any event, Kraft's § 203(o) defense fails because the PPE plaintiffs don and doff are not "clothes" within the plain meaning of the term and do not fall within the "changing clothes" exception found in the statute. According to Kraft, any items it requires employees to don and doff should be deemed mere "clothing" under § 203(o) if the collective bargaining parties agree that the donning and doffing time need not be paid. This construction reads the "changing clothes" limitation out of § 203(o) and has no support in the case law, legislative history or the policies underlying the FLSA.

The district court has now rejected Kraft's arguments on multiple occasions. This Court should affirm the district's court's entry of final judgment in favor of plaintiffs.

ARGUMENT

I. PLAINTIFFS' STATE LAW CLAIMS ARE NOT PREEMPTED.

“[I]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”

Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (citations omitted). “Federal preemption is an affirmative defense upon which the defendants bear the burden of proof.” *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005).

As the district court noted, “[d]efendant’s burden becomes even heavier when one considers that the general purpose of the FLSA is to prevent ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’” (A-App.13-14 (quoting 29 U.S.C. § 202(a).) The district court correctly found that Kraft failed to meet its burden in this case. Wisconsin law sets a lower maximum workweek than set by the FLSA. (A-App.15.) It therefore falls squarely within the FLSA’s express savings clause, § 218(a), and is not preempted.

A. Section 203(o) of the FLSA Does Not Preempt State Law Donning and Doffing Claims.

1. Section 203(o) does not grant the right to bargain over clothes changing time.

Contrary to Kraft’s central argument, § 203(o) does not provide a “mandate establishing the right to bargain” over compensation for certain time. (Br. of Appellant (“Kraft Br.”) at 40.) The right to bargain over changing clothes time was established by the National Labor Relations Act (“NLRA”) at the same time that the NLRA established the right to bargain over wages, hours and other terms and conditions of work. 29 U.S.C. § 157 (first enacted in 1935). The

establishment of this right does *not* preempt state laws governing minimum wage rates and compensable hours. *See* 29 U.S.C. § 218 (a).

In the context of the established doctrine of NLRA preemption, the Supreme Court has observed that “there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.” *Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co.*, 471 U.S. 724, 756 (1985). This legislative intent is even clearer with respect to the FLSA; the FLSA explicitly does not preempt state minimum wage laws:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter....

29 U.S.C. § 218(a). “No provision” means “*no* provision” and specifically means that § 203(o) does not excuse noncompliance with state minimum wage and overtime laws.

Kraft concedes that Congress authorized “[s]tate laws setting higher minimum wages, higher ages for employment, and fewer hours per week.” (Kraft Br. at 35.) Given that plaintiffs are seeking to enforce state minimum wage and overtime laws that provide higher standards than federal law, Kraft’s opposition to plaintiffs’ state law claims in the face of this concession is puzzling – and unfounded.

2. The statutory language signifies an intent not to preempt.

Section 203(o) provides:

Hours Worked.-- *In determining for the purposes of sections 206 and 207 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) (emphasis added). In addition, FLSA Section 203 begins with the qualifier, “[a]s used in this chapter –.” Therefore, the statutory language itself demonstrates that Congress did not intend § 203(o) to prevent compensation owed under any law other than 29 U.S.C. §§ 206 or 207, the minimum wage and maximum hour provisions of the FLSA. Kraft’s contention that § 203(o) “expresses a firm congressional mandate,” (Kraft Br. at 35), ignores the firm congressional direction that § 203(o) applies *only* to the determination of hours worked under these two specific sections of the FLSA.

As discussed above, Kraft’s argument that “[t]he sanctity of collective bargaining agreements that § 203(o) sought to preserve would be fleeting indeed if states could then interfere with the bargaining process in ways that wholly negate that effect,” (Kraft Br. at 34) flies in the face of the explicit language of § 203(o) that its exclusion applies only “[i]n determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed.” 29 U.S.C. § 203(o). The district court properly rejected this argument. As the court recognized, “the [legislative] history [behind § 203(o)] showed that Congress was interested in limiting the requirements of federal law; there was no evidence to suggest that it was seeking to override § 218(a).” (A-App.17 (citing *In re Cargill Meat Solutions Wage and Hour Litig.*, No. 3:CV-06-513, 2008 U.S. Dist. LEXIS 31824, at *72-74 (M.D. Pa. Apr. 10, 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 U.S. Dist. LEXIS 29714, at *118-20

(E.D. Wash. May 16, 2005)).) Because § 203(o)'s reach is explicitly limited to the determination of hours worked for purposes of sections 206 and 207 of the *federal FLSA*, stronger *state* standards in no way hinder congressional intent. “All the difference between federal and state law shows is that Wisconsin law gives workers more rights than they would be entitled to under federal law, something that is permissible as a general matter.” (A-App.16 (citing *English v. General Electric Co.*, 496 U.S. 72, 89 (1990)).)

Without citing to a single case that reached that conclusion, Kraft contends that § 203(o) itself preempts plaintiffs' state law claims because allowing those claims would “result[] in direct and unlawful state interference with Congress's express purpose in passing § 203(o).” (Kraft Br. at 33.) Kraft suggests that “the absence of any case law rejecting an argument for preemption of state law *after* finding that § 203(o) applied” is a result of the unique nature of § 203(o) within the FLSA. (Kraft Br. at 34 (emphasis in original).) First, § 203(o) is not “unique.”² Second, given the large amount of donning and doffing litigation, any absence of caselaw holding that § 203(o) preempts state laws indicates that there is no such preemption. Furthermore, all three courts that have addressed the issue have rejected Kraft's position. *Spoerle*, 626 F. Supp.2d at 918-21 (A-App.12-18); *In re Cargill*, 2008 U.S. Dist. LEXIS 31824, at *70-75; *Chavez*, 2005 U.S. Dist. LEXIS 29714, at *112-22.

² § 203(o) is not significantly different from many other subsections in § 203 that define terms solely by what they include or exclude without providing complete definitions. *See, e.g.*, § 203(d) (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization...”); § 203(f) (“‘Agriculture’ includes farming in all its branches...”); § 203(g) (“‘Employ’ includes to suffer or permit to work”); § 203(m) (defining “Wage” and providing in part “[t]hat the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee”); § 203(n) (“‘Resale’ shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance...”). In addition, because “wage” is used in § 218(a), it is clear that the collective bargaining exclusion in the definition found in § 203(m) was not intended by Congress to preempt state wage laws. The same language in § 203(o) similarly has no preemptive effect.

In *Chavez*, the court rejected arguments that the Washington state Minimum Wage Act (“MWA”) conflicted with both § 203(o) and the Portal-to-Portal Act § 4:

A more generous definition of hours worked embodied in the MWA does not frustrate the purpose of FLSA § 3(o) and Portal Act § 4. The enactment of both of these sections did not indicate an intent for there to be one and only one federal *and state* definition of determining compensation for hours worked or liability for failure to pay. Section 3(o) defines “hours worked” for the purpose of the FLSA as excluding pre- and post-shift changing clothes and washing based on agreement, custom or practice. . . . Both of these sections indicate Congress’s intent to better define the liability of employers under the FLSA. They do not, however, supplant the traditional power of the state to more generously regulate wage and hour via their own state regulations.

Section 3(o), as correctly indicated by defendants, evidences Congressional intent to respect the negotiation process between employers and employees when determining compensation under the FLSA. As a baseline, it establishes that changing clothes and washing may be excluded. It does not, however, preclude a state law like the MWA that defines “hours worked” more broadly. Nor does it evidence a clear Congressional policy to commandeer the state into enacting wage and hour laws that perfectly conform to the provision.

Chavez, 2005 U.S. Dist. LEXIS 29714, at *119-21 (emphasis in original).

As the court in *Cargill* recognized, “the purpose of § 203(o) was ‘avoiding another series of incidents which led to the portal-to-portal legislation.’ The series of incidents which led to the Portal-to-Portal Act was litigation under the FLSA not state law legislation.” *In re Cargill*, 2008 U.S. Dist. LEXIS 31824, at *73-74 (quoting 95 Cong. Rec. 11,210 (Aug. 10, 1949) (comments of Rep. Herter)). That court’s analysis of whether § 203 preempts the Pennsylvania minimum wage and wage payment laws applies equally to the Wisconsin laws on which plaintiffs base their state claims:

Pennsylvania has not adopted a similar exception to § 203, and, as a result Pennsylvania law protects employees by not permitting unions and employers to negotiate away payment for donning and doffing of clothes as Congress has under the FLSA. As noted above, *Cargill* argues that it cannot comply with both the FLSA and Pennsylvania law regarding this matter. However, *Cargill*, in Pennsylvania, could comply with both laws by following the Pennsylvania law, which is more protective of individual employee rights, by paying its employees for donning and doffing of gear. Based on the entire scheme of the FLSA to

protect workers and create minimum standards over which a state may more generously regulate, a successful § 203(o) defense would not preempt Plaintiffs' PMWA and PWPCL claims.

Id. at *74-75.

In addition, the District Court for the Eastern District of Wisconsin recently rejected an argument that donning and doffing claims under Wisconsin law are preempted by the FLSA:

It is clear that in enacting the FLSA, Congress did not explicitly preempt state wage and hour laws. Indeed, the FLSA contains a 'savings clause' that expressly allows states to provide workers with more beneficial minimum wages and maximum workweeks than those mandated by the FLSA itself. *See* 29 U.S.C. § 218(a) ([quoting statute]). Given this express statement of Congress' intent not to displace state laws granting workers higher minimum wages or a shorter maximum workweek, it is clear that the FLSA would preempt only state laws that mandated lower minimum wages or longer maximum workweeks. Since the parties agree that the Wisconsin wage and hour laws, Wis. Stat. chs. 103 and 104 and §§ 109.01-109.11, are not less generous than those of the FLSA, it seems clear that the FLSA does not displace the state law. Rather, it would seem that state law may offer an alternative legal basis for equal or more generous relief for the same alleged wrongs.

DeKeyser v. Thyssenkrupp Waupaca, Inc., 589 F. Supp.2d 1026, 1030-31 (E.D. Wis. 2008). As the court held, "[t]here is no need to consider implied preemption, since Congress expressly stated its intent not to preempt the field and to allow continued enforcement of state laws mandating more generous wage and hour regulations." *Id.* at 1031.

3. Kraft's general arguments about the sanctity of collective bargaining agreements do not support preemption.

Despite Kraft's best efforts, there simply is no theory of preemption that allows preemption simply because a state law provides employees greater benefits than were negotiated in collective bargaining agreement. In a different context, the Supreme Court recently rejected an argument that a federal statute without an express preemption provision nonetheless preempts state law about which Congress was presumably aware. *Wyeth*, 129 S. Ct. at 1200. The Court held "it is not impossible for Wyeth to comply with its state and federal law obligations and that

Levine’s common-law claims do not stand as an obstacle to the accomplishment of Congress’ purposes in the [Food, Drug, and Cosmetic Act].” *Id.* at 1204. The Court reasoned:

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA’s 70-year history. . . . Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness....The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.

Id. at 1200 (quotation omitted). In the present case, Congress enacted an express *anti*-preemption provision in 29 U.S.C. § 218(a), indicating Congress’ awareness of state wage laws and its intent to *not* preempt those laws. Therefore, Kraft’s FLSA preemption argument must fail.

B. Plaintiffs’ State Law Claims Are Not Preempted Under Any Other Doctrine.

1. Kraft has waived its ability to argue preemption under LMRA § 301.

Pursuant to the settlement in this case, Kraft agreed “to limit its defense to the remaining Wisconsin Claims to its arguments that such claims are pre-empted by the NLRA, Section 301 of the LMRA, and/or the FLSA pursuant to the Supremacy Clause of the U.S. Constitution, *which it will submit to the Court for adjudication as provided below in paragraph 3.*” (R. 242 at 5, ¶ 2; *see also* A-App.59-60 at ¶ 9 (emphasis added).) Paragraph 3 states, “The Parties agree to submit to the Court argument on the applicability of Section 203(o) of the FLSA and pre-emption of the Wisconsin Claims for summary disposition without trial, based on the agreed set of stipulated facts...Defendant shall file a Motion for Summary Judgment based on the Stipulation of Facts not later than 45 days after the date on which final approval of this Class Action Settlement is granted...” (R.242 at 6, ¶ 3.) That is, Kraft agreed that it would submit arguments on its

remaining defenses to the plaintiffs' Wisconsin claims by submitting such argument to the district court *after* approval of the settlement.

In its motion for final judgment, the only preemption theory Kraft argued was that the state law was preempted because it was *in conflict* with § 203(o). Kraft's failure to develop in its post-settlement motion any other preemption defense waived all other arguments, including those defenses it had otherwise preserved in the settlement agreement. *See Boyers v. Texaco Ref. and Mktg., Inc.*, 848 F.2d 809, 811 (7th Cir. 1988) ("It is axiomatic that issues and arguments which were not raised before the district court cannot be raised for the first time on appeal.") The district court properly held that Kraft failed to preserve its § 301, *Garmon* or *Machinists* preemption arguments by failing to develop them in its motion for final judgment. (A-App.12-13.) This Court should not consider those arguments on appeal. *Cf. Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 279 (7th Cir. 1994) ("Because this circuit will not permit the appeal of an issue that was not properly raised before the district court at trial in a motion for judgment as a matter of law, it would be odd indeed for us to consider whether summary judgment was properly denied in a case where the identical issue was presented at trial and the requisite motions for judgment as a matter of law were not made.") (citations omitted).

Despite its admitted failure to make a § 301 preemption argument in its motion for final judgment as provided for by the settlement agreement, Kraft contends that its § 301 argument made in its first summary judgment motion, which was denied by the district court and mooted by settlement, is nonetheless properly before this court on appeal. (Kraft Br. at 36 n.16.) Kraft ignores the explicit terms of the settlement agreement, in which it agreed to submit to the Court argument pursuant to which the district court would enter a final judgment that could be appealed. In its motion for final judgment, Kraft repeated the other arguments made in its first

motion for summary judgment; if it wanted to preserve its right to argue its § 301 preemption argument, it should have included it in its motion for final judgment. The settlement wiped clean the proceedings that had occurred before its entry. Therefore, this is not a situation in which, for example, “the denial of a motion for a new trial or a similar final order ‘implicates all prior orders.’” (Kraft Br. at 36 n.16 (citing *Janky v. Lake County Convention & Visitors Bureau*, 576 F.3d 356, 359 (7th Cir. 2009).) The settlement changed the procedural posture of this case from the norm.

Furthermore, even if arguments made in Kraft’s first motion for summary judgment were properly before this court, Kraft waived much of the section 301 preemption argument that it now wishes to make by failing to make it in its initial summary judgment brief. *See, e.g.*, A-App.44 (“Defendant did not even attempt to explain how plaintiffs’ claims required an interpretation of the collective bargaining agreement until its reply brief.”)

Finally, Kraft’s own “Statement of the Issues” in its appeal brief fails to suggest any issue involving § 301 preemption. The only preemption issue Kraft asserts is whether “§ 203(o) ... preempt[s] a state law that would otherwise require compensation.” (Kraft Br. at 2.) As discussed below, § 301 preemption has nothing to do with § 203(o).

2. Even if it had not been waived, Kraft’s § 301 preemption argument fails on its merits because the application of Wisconsin laws to plaintiffs’ claims does not require interpretation of the collective bargaining agreement.

As the district court held when Kraft raised the issue in its first motion for summary judgment, § 301 of the LMRA “has no application in this case because plaintiffs’ claims have nothing to do with enforcing or interpreting a collective bargaining agreement.” (A-App.44). “[A]n application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective bargaining agreement.”

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988). “If a state-law claim requires reference to, but not interpretation of, a collective bargaining agreement, the claim is not preempted.” *Baker v. Kingsley*, 387 F.3d 649, 657 (7th Cir. 2004).

Determining whether § 301 preempts a state law claim “requires case-by-case factual analysis to determine the extent to which a state law claim will require interpretation of a CBA.” *In re Bentz Metal Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001). Although Kraft contends that “determining the number of ‘hours worked’ under Wisconsin law ... requires an interpretation of the CBA,” it fails to explain why this is so. (Kraft Br. at 38.) Instead, Kraft repeats its general refrain that “the sanctity of the collective bargaining agreement” requires preemption. The Supreme Court has emphatically rejected this argument. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) (“§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.”).

§ 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 pre-emption purposes.

Lingle, 486 U.S. at 409-410. Thus, contrary to Kraft’s assertion, § 301 of the LMRA does not allow collective bargaining agreements to trump all contrary state laws. *See Livadas v. Bradshaw*, 512 U.S. 107, 130 (1994) (“we have never suggested that labor law’s bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course.”).

In its appeal brief, Kraft contends for the first time that:

Section 203(o) by its terms requires an interpretation of the parties' collective bargaining agreement: determining whether compensation for clothes changing activities is governed by the 'express terms of or by custom or practice under a bona fide collective-bargaining agreement' is a precondition to the application of that statute. 29 U.S.C. § 203(o). A court cannot decide the applicability of § 203(o) without first interpreting the reach of the parties' collective bargaining agreement.

(Kraft Br. at 37-38 (emphasis omitted).) This argument is newly contrived for this appeal and is therefore waived. *Boyers*, 848 F.2d at 811)). It is also irrelevant. Whether § 203(o), part of a federal statute, may require an interpretation of the collective bargaining agreement has nothing to do with plaintiffs' independent claims under *state* law. Plaintiffs' state law claims are entirely independent of its claims under the FLSA.

Moreover, there is no conceivable need to interpret a collective bargaining agreement in the present case because the parties have stipulated to the interpretation of the collective bargaining agreement as is relevant to this action. (A-App.66-67.) Therefore, there is no dispute as to the interpretation of the collective bargaining agreement and § 301 preemption does not apply. *See Livadas*, 512 U.S. at 124 (“[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.”). What is disputed is whether the donning and doffing of PPE constitutes “changing clothes” as used in § 203(o). That is a question of law involving interpretation of a federal statute that does not involve any dispute over the reach or interpretation of the parties' collective bargaining agreement. That dispute is also irrelevant to plaintiffs' Wisconsin claims. Kraft's newly-contrived argument above ignores its stipulation in an effort to create a factual dispute where there is none.

It is undisputed that Wisconsin law requires that Kraft compensate its employees for the time they spend putting on and taking off the PPE at issue here. By agreeing “to limit its

arguments regarding plaintiffs’ state-law claims to whether federal law preempted them,” (Kraft Br. at 7), Kraft stipulated that in the absence of preemption doctrine, Kraft’s failure to pay plaintiffs for donning and doffing time violates state law. However, whether the collective bargaining agreement must be consulted – or even interpreted – to determine plaintiffs’ damages does not change the preemption analysis:

A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.

Lingle, 486 U.S. at 413 n.12 (citation omitted).

Kraft’s effort to support preemption by analyzing plaintiff’s state law claims in the abstract is equally futile. First, because there is absolutely no dispute as to the terms or interpretation of the collective bargaining agreement, no interpretation is required in the present case and it is irrelevant whether a hypothetical state law claim might sometime be preempted.³ *See, e.g., Livadas*, 512 U.S. at 119 (“Pre-emption analysis...turns on the *actual* content of respondent’s policy and its *real* effect on federal rights.”) (emphasis added). Second, the law is clear that the fact that mere reference to the CBA may be required to pursue a state claim is not sufficient to preempt that claim. *Id.* at 124.

³ Kraft has a confusing sentence in its brief that suggests incorrectly both that the current CBA between Kraft and plaintiffs compensates plaintiffs for “time spent changing clothes” and that “time spent changing clothes” “would not necessarily constitute ‘hours worked’ under Wisconsin law.” (Kraft Br. at 38.) Despite the fact that Kraft’s preemption argument is so convoluted that it has apparently confused itself, it is undisputed both that under the current CBA Kraft does not compensate plaintiffs for donning and doffing the articles at issue in this case and that Wisconsin law requires such compensation.

Third, Kraft's unsupported assertion that determining the meaning of "hours worked" as used in Wis. Admin. Code § DWD 274.03 "requires an interpretation of the CBA" is untenable. The district court correctly rejected it when Kraft raised it in a reply brief prior to entering into the settlement and Kraft has failed to expand on its unsupported assertion. A-App.44 ("Defendant fails to explain why construction of those terms is necessary. Neither side suggests that there is any dispute over the 'regular rate of pay.' Although the 'hours worked' are in dispute, this is a dispute over the meaning of state and federal law, not the collective bargaining agreement. Defendant may have to *calculate* the hours and rate of pay to determine damages, but that is not enough to trigger preemption.") (citing *Livadas*, 512 U.S. at 124-25; *In re Bentz*, 253 F.3d at 285) (emphasis in original). Furthermore, Kraft concedes that "Wisconsin administrative regulations define 'hours worked.'" (Kraft Br. at 38 (citing Wis. Admin. Code § DWD 272.12).) The relevant regulations do not refer to the collective bargaining agreement – let alone interpret it – to determine whether the donning and doffing at issue here constitute "hours worked." Wis. Admin. Code § DWD 272.12(2)(e)c. Even if they did, such reference would not create a dispute here where the requirements of Wisconsin law as applied to the facts are undisputed.

Plaintiffs have not asserted that Kraft did not pay them amounts owed under the CBA. Instead, plaintiffs bring an independent claim under Wisconsin law. To determine plaintiffs' "hours worked" for purposes of their Wisconsin claim requires solely applying the facts of each plaintiffs' situation to the definition set out in Wisconsin law. *See, e.g., Espinoza v. National Beef California, L.P.*, No. 08-CV-01902-H, 2008 WL 6630100, at *3 (S.D. Cal. Dec. 11, 2008) ("Plaintiffs' claims for failure to pay for all hours worked is not preempted by § 301 on the ground that it asserts a state cause of action dependent on rights created by the CBAs. Plaintiffs

and the Class would have the right to compensation for all ‘hours worked’ under California law regardless of whether a CBA existed.”). Whether the current CBA compensates plaintiffs for time that might not be required under state law is irrelevant to plaintiffs’ state law claims. *See, e.g., United Food & Commercial Workers Union, Local 1473 v. Nestle USA, Inc.*, No. 06-C-595-S, 2006 WL 3474198, at *2 (W.D. Wis. Nov. 29, 2006).

The cases Kraft cites in support of its contention that a determination of “hours worked” “therefore requires an interpretation of the CBA’s provisions,” (Kraft Br. at 38), are inapposite. For example, in *Mowry v. United Parcel Serv.*, 415 F.3d 1149, 1157 (10th Cir. 2005), the plaintiff claimed that UPS failed to pay the wages owed him *under the collective bargaining agreement*, and did not assert a claim for wages required under a state law independent of the collective bargaining agreement. In *Townsend v. BC Natural Chicken LLC*, No. 06-4317, 2007 WL 442386, at *5 (E.D. Penn. Feb. 2, 2007), the court provided no analysis other than to state that “determining whether Plaintiffs’ claim that time spent ‘donning and doffing’ represents hours worked is a matter of interpretation of the CBA.” The plaintiffs’ second statutory claim in that case alleged breach of an employment contract, which was a collective bargaining agreement. *Id.* Here, plaintiffs do not allege breach of the collective bargaining agreement.

Kraft’s citation to *In re Bentz Metal Prods. Co.*, is even more surprising. In *In re Bentz*, the court rejected a § 301 preemption challenge to the plaintiffs’ state claims, holding “that a state law claim is not preempted if it does not require interpretation of the CBA even if it may require reference to the CBA.” *Id.* at 285. In the excerpt quoted by Kraft at page 39 of its brief, the court was not considering the situation here, where entitlement to wages is based on a state law providing for compensation for all employees, union and non-union, for time spent donning and doffing.

If the entitlement to wages (or other employee pay) or the amount due were at issue, the CBA would control; almost certainly, interpretation of the agreement would be necessary and would be subject to the arbitration procedures in the contract. So as to that determination, preemption would apply. The mechanic's lien, however, is *a benefit provided to workers based on a state policy protecting workers; it is a separate claim, not dependent on interpretation of the agreement for its existence even though the amount of the pay is dependent on the CBA*. In this situation, the claim is not preempted.

Id. at 289 (emphasis added). So, too, here. Plaintiffs' Wisconsin claims are separate from the CBA and are not dependent on an interpretation of the CBA. Further, the amount of damages has been agreed to in the settlement agreement and even the determination of damages does not require reference to the CBA.

The cases Kraft cites in a footnote on page 39 of its brief are similarly distinguishable. *See, e.g., Radtke v. AFSCME Council 48*, 376 F. Supp.2d 893, 908 (E.D. Wis. 2005) ("As to the unused benefit time, *Radtke does not claim that Wisconsin law requires employers to provide paid benefit time*. Instead, Radtke argues that he is entitled to payment based on the CBA.") (emphasis added); *Firestone v. Southern California Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000) ("The parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law.") Indeed, this Court's recent precedent under the Railway Labor Act dictates a finding of no preemption in the present case because there is no dispute over the collective bargaining agreement's terms. *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 760 (7th Cir. 2008) ("preemption under the RLA will *only* occur if the parties dispute the CBAs' terms") (emphasis added).

District courts that have addressed the preemption of state laws in donning and doffing cases support plaintiffs' position. *See Espinoza*, 2008 WL 6630100, at *3 ("The parties do not dispute any term of the CBAs, but whether Plaintiffs and the class have received proper compensation under state law. 'The need for a 'purely factual inquiry ... [that] does not turn on

the meaning of any provision of a collective-bargaining agreement,’ however, is not cause for preemption under section 301’”) (citations omitted).

In *UFCW Local 1473*, Judge Shabaz concluded the CBA is irrelevant to a resolution of the plaintiffs’ claims based on the same Wisconsin laws Kraft claims are preempted:

Proof of these elements [required for plaintiffs’ Wisconsin claims] appears to be entirely unrelated to any provision of the CBA. Whether employees spend time preparing for work and whether they were paid for that time is a question of fact unrelated to any provision of the CBA.

For example, DWD 272.12(2)(e) defines in detail standards for when preparatory activities such as dressing constitute hours worked for purposes of the statutory wage requirements. Whether the activities of the plaintiff employees in this case meet the standards is entirely a question of proof of the facts and circumstances involved in the preparatory activities, and application of those facts to the regulation. That determination might require interpretation of the state regulations, but does not require interpretation of the CBA.

UFCW Local 1473, 2006 WL 3474198, at *2.

Kraft cites no express provisions of the CBA that will require construction. Simply put, it is not necessary to interpret the CBA for plaintiffs to prove their Wisconsin claims. The same proof would be required if plaintiffs were not covered by a collective bargaining agreement.

Therefore, § 301 does not preempt plaintiffs’ state law claims.

C. No Other Preemption Doctrine Applies Here.

Lacking persuasive legal support for its § 203(o) and § 301 preemption arguments, Kraft invokes “the courts’ long history of preempting state laws that purport to regulate the areas of federal labor and employment law.” (Kraft Br. at 40.) Because the Wisconsin laws at issue do not purport to regulate *federal* labor and employment law, and because the FLSA explicitly allows states to enact more employee-friendly provisions than found in the federal law, this argument does not help Kraft. Further, it would “turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by

preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.” *Metropolitan Life*, 471 U.S. at 756.

As it did before the district court, Kraft references the *Garmon* and *Machinists* doctrines without applying those cases to the facts of this case. Even if Kraft had not waived defense based on those doctrines, the doctrines do not apply here. For the reasons already discussed, and as the district court recognized, plaintiffs’ state law claims do not contradict federal law, undermine congressional intent or invade bargaining rights. *See, e.g.*, A-App.17 (“The federal bias toward collective bargaining may lead to the preemption of some state laws or causes of action, but generally this has been when state laws create a risk of *taking away* employee rights provided by collective bargaining or becoming entangled in the collective bargaining process, not when state laws *add* a right that is independent from the agreement.”) (emphasis in original); A-App.43 (“defendant’s view is that federal law preempts any state law claim involving a matter that is subject to collective bargaining. This argument simply has no support in the law, under any theory of preemption.”).

Finally, contrary to Kraft’s assertion, the Supreme Court’s decision in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), does not stand for “the principle that the terms of collective bargaining agreements should be honored unless they violate a federal statute.” (Kraft Br. at 42). As Kraft concedes, *Penn Plaza* was not a preemption case. It stands solely for the proposition that a collective bargaining agreement may control the forum for deciding discrimination claims. *See id.* at 1469. *Penn Plaza* is irrelevant to plaintiffs’ substantive rights under Wisconsin law.

III. PLAINTIFFS’ FLSA CLAIMS ARE NOT PROPERLY BEFORE THIS COURT.

In addition to its § 203(o) preemption defense to plaintiffs’ state law claims, Kraft asserts there is a second issue for review and asks for an advisory opinion as to whether, in addition to violating Wisconsin law, Kraft violated the FLSA. As part of the settlement of this class action,

Kraft stipulated that if the court determines that plaintiffs' Wisconsin claims are not preempted, damages will be awarded to plaintiffs in the full amount sought, "regardless of the Court's disposition with respect to the FLSA Claims." (R.242 ¶ 7.) Furthermore, the parties stipulated "that if Plaintiffs recover on both their FLSA Claims and their Wisconsin Claims, there shall be no duplication of damages." (R.242 ¶ 8.) Because plaintiffs' FLSA claim would have no effect on the outcome of the case based on the district court's finding of no preemption, the district court properly declined to rule on Kraft's § 203(o) defense after it "conclud[ed] that § 203(o) does not preempt more generous state laws":

Because the parties agree that state law *does* require defendant to pay plaintiffs for donning and doffing these articles and that plaintiffs are entitled to full relief under the settlement if they are successful on their federal law claims *or* their state law claims, it is unnecessary to determine whether plaintiffs are entitled to prevail under the FLSA.

(A-App.3) (italicized emphasis in original; underlined emphasis added).

Assuming this Court affirms the district court's ruling that plaintiffs' Wisconsin claims are not preempted, a ruling on plaintiffs' FLSA claims will not affect the relationship between the parties and the Court should not issue an advisory opinion on the applicability of the § 203(o) defense. *Cf. Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986) ("in keeping with the notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground.").

Furthermore, because the district court properly did not rule on plaintiffs' FLSA claim or on Kraft's defense to that claim under 29 U.S.C. § 203(o), that claim and defense are not properly before this Court and should not be addressed on appeal in the first instance. *See Nemmers v. United States of America*, 795 F.2d 628, 632 (7th Cir. 1986) ("it is not an appellate court's function to decide in the first instance how the case comes out under the correct legal standard."). Should this Court reverse the district court's ruling that § 203(o) does not preempt

plaintiffs' state law claims, it should remand this case to the district court for a ruling on Kraft's § 203(o) defense.

IV. SHOULD THIS COURT CONSIDER THE MERITS OF THE CLAIM, SECTION 203(o) DOES NOT BAR PLAINTIFFS' FLSA CLAIMS.

Pursuant to the settlement agreement, Kraft's only defense to plaintiffs' FLSA claims is based on § 203(o), an exception to the FLSA's mandate that employers must pay employees for all time spent in work. As an exception to the FLSA's broad remedial purpose to provide workers with minimum standards, § 203(o) is to be "narrowly construed against the employers seeking to assert [it]." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (citations and internal quotations omitted). It will not apply "except in contexts *plainly and unmistakably* within the given exemption's terms and spirit." *Id.* (quotations omitted) (emphasis in original). Finally, § 203(o) is an affirmative defense, with Kraft bearing the burden to establish that the defense applies. *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *12 (W.D. Pa. Sep. 3, 2008).

As the district court and other courts to address the issue have recognized:

Under § 203(o), donning and doffing particular articles may be excluded from an employee's "hours worked" if two conditions are met: (1) the activity is excluded from compensation "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement"; and (2) the activity constitutes "changing clothes."

(A-App.7 (emphasis in original).) In the present case, it is undisputed that the first condition is met. Kraft expands the undisputed first condition into four conditions and ignores the all-important second condition, "whether donning and doffing protective equipment constitute 'changing clothes' *under the statute.*" (A-App.33 (emphasis added).) The bargaining history is irrelevant to this second question. Because the required safety and sanitation equipment at issue here are not "clothes" as used in § 203(o), Kraft's defense fails.

A. The PPE At Issue Here Are Not “Clothes” Within The Common Understanding Of The Word.

First, as already discussed, in ruling on the parties’ cross-motions for summary judgment, the district court explicitly did not rule on Kraft’s § 203(o) defense. When the district court did rule on Kraft’s § 203(o) defense, it was to reject Kraft’s pre-settlement motion for summary judgment based on that defense, after properly focusing on the meaning of “changing clothes” under the statute. (A-App.32-36.)

After considering the existing caselaw on the issue, the district court held that:

“[C]hanging clothes” is “an everyday, plain-language term that describes what most people do every day – taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening.” This view makes the relevant questions straight forward: Is the article something the employee would normally wear anyway (or does it replace such clothing)? Or is it something the employee wears in addition to those clothes and is required to do so for a job-related reason?

(A-App.35 (quoting *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612-M, 2002 WL 32987224 (N. D. Ala. Feb. 4, 2002) at *6-7).) Distinguishing plaintiffs’ donning and doffing at the work site from an individual’s dressing at home before leaving for work, the court observed that “donning and doffing safety and sanitation equipment on the work site . . . are activities performed for the employer, for a uniquely job-related purpose and are under the employer’s control.” (A-App.36.) Further, the court noted the important safety-related purpose of the PPE in this case, and concluded that “[w]ithout an explicit mandate, one would not expect that Congress intended to allow employee safety and sanitation to become a bargaining chip in contract negotiations.” (A-App.36.)

Nothing in the facts stipulated by the parties pursuant to their settlement supports any change in this result. The stipulated facts demonstrate that the PPE at issue here are required by Kraft for “uniquely job-related purposes”: to protect against workplace hazards related to both

employee safety and the sanitation required to prevent contamination of Kraft's meat products. These PPE are not analogous to the mere "uniforms" discussed by the district court. (A-App.35). Nor are they worn for modesty, warmth, fashion, or to provide protection from the elements. Finally, Kraft requires that the donning and doffing of these PPE proceed *at the work place* (not at home). This Court should adopt the plain-language approach set forth by the district court and reject Kraft's § 203(o) defense.

1. The PPE here do not fall within the plain meaning of "clothes."

"Clothes" is such a common word that it is unlikely that members of Congress consulted a dictionary when drafting § 203(o). Kraft's reliance on the broadest of dictionary definitions ignores the everyday, plain-language meaning of the term "clothes." Even without considering the items' purpose, there is a difference in common parlance between clothes and shoes, and clothes and hats. *See, e.g., Books v. Chater*, 91 F.3d 972, 975 (7th Cir. 1996) ("he had difficulty putting on his clothes and shoes in the morning"); *Williams v. Harrison*, 110 F.2d 989, 994 (7th Cir. 1940) ("It is a matter of common knowledge that clothes, hats, shoes and many other articles are sold under the trade-name of the wholesale or retail dealer ..."); *U.S. for Use and Ben. Of Magnolia Petroleum Co. v. Core & Planche*, 58 F. Supp. 607, 610 (D. La. 1945) ("is no different in essence than if he had bought clothes or shoes for himself, wife, and children"). The conclusion that the ordinary meaning of "clothes" does *not* include shoes or hats is even stronger with respect to captive footwear, hard hats and hairnets. Thus, even if hard hats and hair or beard nets were more akin to "hats, hoods, caps, and masks" than to "arc-welding shields or sealed helmets," (and they are not), the former items are not clothes any more so than the latter. A better analogy is that a hard hat or bump cap is similar to a batting helmet in both appearance and function. Plainly, however, a batting helmet is protective sporting *equipment*, not clothes.

In any event, looking to dictionary definitions does not provide a definitive answer. *See, e.g., Alvarez*, 339 F.3d at 904-05 (noting parties cited same 1939 dictionary source to argue for two different definitions); 2A Norman J. Singer, *Statutes and Statutory Construction* (7th ed. 2007) § 46:2 at 164 (“dictionary definitions do not necessarily reflect the legislature’s intention in enacting statutes.”). Kraft concedes that the broad definition of “clothes” it prefers is *overbroad*, as it would encompass a spacesuit or armor, leading to results “no reasonable union would have intended.”⁴ (Kraft Br. at 17.) Even if a dictionary definition were appropriately applied in this case, plaintiffs posit that a much more common use of “clothes” is to refer to cloth articles of personal use that can be washed. *See, e.g.,* <http://www.merriam-webster.com/dictionary/clothes>. Neither a spacesuit nor PPE are “clothes” under this definition.

Kraft’s statement that “[s]hoes, shirts, pants, frocks and hats are all everyday articles” adds nothing to its argument because the PPE at issue here are not “everyday articles.” (Kraft Br. at 20.) Most people in Madison, Wisconsin do not wear reinforced-toed, special-treaded, rubber-soled boots built to withstand Kraft’s chemical footbaths. A plow-truck driver who chooses to wear a warm winter hat is in an entirely different situation than plaintiffs, who are *required* by Kraft to don hairnets and hard hats or bump caps, and are required to don them at their worksite for purely safety and sanitary reasons. Clearly, plaintiffs do not choose to wear hairnets or hard hats as a “convenience.” Finally, the white frocks replace nothing. They are essentially lab coats, worn *over* the employees’ regular clothes. Career clothing is worn to protect against damage, soiling and ripping, and (for electricians) against arcing.

⁴ As the district court noted, “[o]nce defendant qualifies its position in this way, [excluding situations where the CBA definition is “patently unreasonable’ or otherwise unfair”], any practical benefits it might have disappear.” (A-App.8.)

In the case from which Kraft correctly quotes the statement, “[r]egardless of whether it is labeled ‘personal protective equipment or something else, a hair net is still a hair net,’” (Kraft Br. at 27 (quoting *Kassa v. Kerry, Inc.*, 487 F. Supp.2d 1063, 1066 (D. Minn. 2007))), the court explicitly declined to find that hairnets and beard nets were “clothes” under § 203(o). *Kassa*, 487 F. Supp.2d at 1067 n.1 (noting that hair nets and beard nets “are purely functional and are not generally considered ‘clothes’ as that term is ordinarily used.”); *cf.* Kraft Br. at 31 (misrepresenting ruling in *Kassa* as defining hairnets and beard nets as “clothes”). Instead, the court rejected compensation for those items as de minimis, a defense the district court previously rejected in the present case and that Kraft has since withdrawn.

The PPE items at issue are thus *unlike* clothes ordinarily worn outside of work. And unlike clothes ordinarily worn outside of work, Kraft *requires* these particular PPE for safety and sanitation reasons, and requires them stored, donned and doffed *at the work place* (not at home where employees generally don regular clothes or even uniforms). Kraft is free to impose this requirement, but the time it takes to don, doff and store the PPE at work, including walking time, is compensable under the FLSA.

2. Other courts have adopted this approach.

The Court of Appeals for the Ninth Circuit has held that “the ‘changing clothes’ exception in § 3(o) ... [does] not include[] the time spent putting on personal protective equipment,” which in that case included a sanitary outer garment provided and washed each night by the employer, a plastic hardhat, hair net and safety boots/shoes. *Alvarez*, 339 F.3d at 898 n.2, 905. In the short time since the district court issued its decision denying Kraft’s pre-settlement motion for summary judgment, at least three other district judges have cited it and rejected summary judgment motions based on a § 203(o) defense. In *Perez v. Mountaire Farms*,

Inc., Civil No. AMD 06-121, 2008 WL 2389798 (D. Md. Jun. 10, 2008), the court held that “a lab coat, ear plugs, a bump cap (or helmet), an apron, a hair net, safety glasses, boots with steel toes and one or more pairs of four types of gloves” are not “clothes” for purposes of Section 203(o) because they “are not items employees would ‘normally wear.’” 2008 WL 2389798, at *1, *5 (quoting *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp.2d 860, 867 (W.D. Wis. 2007)). In *Hoyt v. Ellsworth Cooperative Creamery*, 579 F. Supp.2d 1132 (W.D. Wis. 2008) (Shabaz, J.), the court applied the same rationale:

[A]lthough part of plaintiffs’ sanitary/safety uniforms consist of merely a shirt and pants, they are not similar to everyday clothing worn for plaintiffs’ convenience. Instead plaintiffs’ uniforms are required to satisfy defendant’s very specific needs for sanitation and safety. Furthermore, the uniforms have to be donned and doffed at the Creamery, they are cleaned by defendant, they are required by defendant and they must be worn to help ensure that defendant’s products are sanitary in satisfaction of defendant’s customers’ demands and state law. Based on the reasoning in *Spoerle* and the undisputed facts in the record the sanitary/safety uniforms plaintiffs don and doff cannot as a matter of law be “clothes” under 29 U.S.C. § 203(o).

579 F. Supp.2d at 1140.

Another district court recently held that articles including “a smock, hard hat, hair net, ear plugs, steel-toed boots, safety glasses, plastic gloves, rubber gloves, plastic sleeves, and cut resistant gloves” “may be more appropriately defined as safety equipment or gear worn by an employee for protection” than as “clothes” as used in § 203(o). *In re Cargill*, 2008 U.S. Dist. LEXIS 31824, at *47. The court held that Cargill had not satisfied its burden to prove that the described equipment was “clothing” under § 203(o) because “[t]his protective gear is obviously different from typical work-related clothing” and “has, as a basis, functional aspects such as safety.” *Id.*

Kraft admits that its reasons for requiring the PPE are to preserve safety and for sanitation purposes. (Kraft Br. at 11; A-App.61.) For its own uniquely production related

reasons, Kraft does not allow employees to wear their own clothes at work, but rather requires them to don and doff the PPE and requires them to do so *at the work place*. Plainly, all of the PPE at issue here are “necessary not for the convenience or modesty of the employee, but required for the very specific needs of the employer for sanitation and safety.” A-App.35 (quoting *Fox*, 2002 WL 32987224, at *6-7). Any convenience that happens to result to the employee as a result of Kraft’s requirements is incidental and immaterial.

3. This Court should adopt the district court’s definition.

This Court has not previously addressed the meaning of “changing clothes” as used in § 203(o). However, Kraft points to the court’s decision in *Pirant v. United States Postal Service*, 542 F.3d 202, 208 (7th Cir. 2008), to argue that “the distinction between compensable and non-compensable donning and doffing activities rests in whether the articles or gear are ‘extensive and unique.’” (Kraft Br. at 19.) The issue in *Pirant* was whether the plaintiff’s time spent donning and doffing a uniform shirt, gloves, and work shoes counted toward the hours required for eligibility under the Family and Medical Leave Act (“FMLA”). *Pirant*, 542 F.3d at 204, 208. Since that statute adopts the legal standards of the FLSA for purposes of determining whether the FMLA hours-of-service requirement is met, the court considered whether the time the plaintiff had spent donning and doffing the shirt, gloves and shoes was preliminary and postliminary under the Portal-to-Portal Act. *Id.* at 208-09. The court said nothing about the meaning of “changing clothes” in § 203(o).

Contrary to Kraft’s suggestion, in *Pirant*, the court did *not* hold that *only* donning and doffing of “extensive and unique protective equipment” was compensable. *Id.* at 208-09. The portion of the decision on which Kraft relies states:

Here, *Pirant* was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes. The donning and doffing

of this type of work clothing is not “integral and indispensable” to an employee’s principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes “under normal conditions” that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity.

Id. The court simply recognized that donning and doffing extensive and unique protective equipment would be integral and indispensable to a principal activity and noted that the articles at issue in that case were not such equipment. Because the articles at issue were not required for protective purposes at all (but consisted of “only a uniform shirt, gloves, and work shoes”), the court had no reason to – and did not – address whether the donning and doffing of non-extensive and non-unique protective equipment would be compensable.

The court’s dismissal of the plaintiff’s contention without discussing many facts regarding the shirt, gloves and work shoes involved, and the extent to which they were required by the employer (much less whether they were required to be donned and doffed *at work*) suggests that the issue in that case was not close. The district court’s decision in the same case similarly describes Pirant’s “work clothes” solely as including “a work shirt, apron, gloves, and shoes.” *Pirant v. United States Postal Serv.*, No. 03 C 9383, 2006 WL 3590072, at *7 (N.D. Ill. 2006). That court noted, however, that:

There is no evidence that [Pirant’s principal work activity of handling mail] touches upon the type of vital considerations of health, safety, or hygiene that would take Pirant’s clothes changing activities out of the range of ordinary clothes changing and showering that need not be compensated under the FLSA...Indeed, there is no evidence that handling mail involved contact with hazardous substances, nor that it required utilization of any type of unique protective or safety gear. Instead, at most Pirant was required to use ordinary gloves and an apron.

Id. at *7 (distinguishing *Steiner v. Mitchell*, 350 U.S. 247 (1956)). Therefore, in addition to addressing a different legal issue, the facts in *Pirant* were completely unlike those in the present case. In the present case, plaintiffs contend that the PPE are both extensive and unique to the

workplace. Even if they were not, however, it is undisputed that the PPE are required by Kraft for protective and sanitary purposes and are thus not addressed by *Pirant*.

As the district court in the present case recognized, “the distinction defendant would make between ‘burdensome’ or ‘unique’ articles and any other safety or sanitation equipment has no basis in the statute or in the ordinary meaning of clothes.” (A-App.9.) In *Pirant*, this Court described the Supreme Court’s decision in *Steiner* (a case that did not involve a § 203(o) defense), as holding “that a battery manufacturer must compensate its employees for the 30 minutes they spent putting on unique protective clothing and bathing at the factory because those activities were indispensable to the health and safety of the employees.” *Pirant*, 542 F.3d at 208. However, the word “unique” does not appear in the *Steiner* decision and in *Steiner*, the Supreme Court describes the clothing solely as “old but clean work clothes.” *Steiner*, 350 U.S. at 251 (noting “[t]he cost of providing their own work clothing would be prohibitive for the employees, since the acid causes such rapid deterioration that the clothes sometimes last only a few days”). The language of the decision also suggested that all employees at the battery plant were furnished the “old but clean work clothes,” not just certain employees in certain jobs. *Id.* at 250-51.

In *Alvarez*, the Court of Appeals for the Ninth Circuit suggested that the uniqueness of gear was determined by the pervasiveness of its use in industrial work or “ubiquity of use.” *Alvarez*, 339 F.3d at 903 (holding that both non-unique and unique gear “are ‘integral and indispensable’ under *Steiner*’s exception to the Portal-to-Portal Act’s bar to compensation of preliminary or postliminary activity.”). The court rejected the plaintiffs’ claim for compensation for time spent donning and doffing “non-unique protective gear such as hardhats and safety goggles” on the ground that the time spent was de minimis (a defense that Kraft has withdrawn),

not because it was “non-unique.” *Id.* at 904; *see also Kassa*, 487 F. Supp.2d at 1066 (recognizing that “*Alvarez* did not address whether items of non-unique protective gear were ‘clothes’ under § 203(o)”). Finally, the court’s use of the terms “unique” and “non-unique” occurred in its discussion of whether donning and doffing protective gear was “work” under the Portal-to-Portal Act, not when it rejected the employer’s § 203(o) defense. *Alvarez*, 339 F.3d at 905.

In addition, the *Alvarez* court did not distinguish between “specialized protective gear” and “non-unique protective gear.” Instead, the court distinguished between “specialized protective gear” and “typical clothing,” with no suggestion that it considered the non-unique gear such as hardhats and safety goggles to fall into the category of “typical clothing.” On the contrary, hardhats and safety goggles fall squarely within that court’s description of personal protective equipment as “materials worn by an individual to provide a barrier against exposure to workplace hazards.” *Id.*

Moreover, the unique/non-unique distinction says nothing about the important questions of whether the employer requires the article to be worn, whether the employer requires the article to be donned and doffed at the work site or whether the article has a work-related safety or sanitary purpose. Just as clothing is clothing, regardless whether one employee or all employees at a plant wear the particular item, so too with PPE or other non-clothing gear required by an employer. A hardhat or bump cap is no less important as protection from workplace hazards simply because all plaintiffs must wear one. The fact that an article of PPE may be required to be worn by all employees does not change anything about whether that PPE is “clothing” for purposes of § 203(o).

Applying the proper standard, as previously recognized by the district court and set forth above, to the stipulated facts of this case demonstrates that the PPE here are not “clothes” within the meaning of § 203(o).

B. The Collective Bargaining Agreement Does Not Control The Meaning Of “Clothes” As Used In The Statute.

Kraft advocates giving “sanctity” to decisions made by collective bargaining parties by deeming any donning and doffing that those parties agree is unpaid to be automatically covered by the exception in § 203(o), without regard to whether the activity constitutes the mere changing of clothes. This reading of § 203(o) is inconsistent with its legislative history and is bad policy. As the district court recognized,

Congress gave no hint in the statute that the task of interpreting § 203(o) should be relegated to employers or unions....Defendant fails to point to even one other example in which private parties have binding authority to construe a statute, or, as defendant suggests even more boldly, in which the meaning of a word in a statute can *vary* from case to case, depending on the individualized interpretation in a collective bargaining agreement. By their nature, statutes are meant to create rules of conduct that govern everyone the same. I would not depart from this basic principle of law without strong evidence of congressional intent, evidence that defendant has failed to provide.

(A-App.7-8 (emphasis in original).)

1. The legislative history does not support Kraft’s automatic deference standard.

The FLSA stands for the simple proposition that “employers must pay their employees a wage for all of the ‘work’ that they do.” (A-App.24.) Nothing in the legislative history suggests that § 203(o) was intended to allow the parties to a collective bargaining agreement to exclude compensation for anything other than “changing clothes or washing.” Representative Herter’s comments add nothing to the discussion of what Congress meant by “clothes”: the comments accompanied an amendment introduced by Representative Herter that was *not* limited to “changing clothes or washing,” and instead would have excluded “*any* time” that was excluded

by a collective bargaining agreement. 95 Cong. Rec. 11210 (1949) (included at A-App.277) (amendment read by Clerk) (emphasis added).

This proposed language was not passed, however, and authority to bargain away FLSA rights to compensation for donning and doffing PPE was thus not conferred. Instead, Congress modified the Herter amendment to produce the substantially narrower language now appearing in § 203(o).

Under the section as passed by the House, for the purposes of the minimum wage and maximum hours provisions of the act, there would be excluded from “hours worked” *any time* spent by the employee which was excluded from measured working time under a bona fide collective-bargaining agreement applicable to him or custom or practice thereunder. The conference agreement *limits this exclusion* to time spent by the employee in *changing clothes* and cleaning his person at the beginning or at the end of each workday.

S. Rep. No. 640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2255 (emphasis added). This legislative history supports the district court’s understanding of “changing clothes” as “an everyday, plain-language term that describes what most people do every day.” (A-App.5.)

The legislative history also rebuts Kraft’s contention that plaintiffs’ reading is wrong because it “would render the entirety of § 203(o) meaningless, in that it would have no effect other than to mirror the preliminary/postliminary standards of the Portal to Portal Act’s pre-203(o) amendment to the FLSA.” (Kraft Br. at 20.) During debate over the amendment, Representative Lucas made that point:

Mr. LUCAS. I do not oppose the gentleman’s amendment, although I must say about it ... that I do not think it is necessary. The Portal-to-Portal Act was intended to cover just such situations as the gentleman describes. However, if the gentleman insists upon re-enacting certain provisions of the Portal-to-Portal Act or the meaning of the provisions of the Portal-to-Portal Act in this bill, I can offer no objection.

Mr. HERTER. The gentleman’s interpretation of the Portal-to-Portal Act, I am afraid, may not be shared by others who fear that there may be a loophole here. That is all I am trying to cover, to avoid the kind of misunderstanding that arose before.

95 Cong. Rec. 11210 (1949) (reprinted at A-App.277). It is noteworthy that Representative Herter did *not* insist that his proposal would change the Portal-to-Portal Act, but instead explained that the amendment was intended to clarify the Portal-to-Portal Act. This leads to the conclusion that if donning and doffing PPE is compensable under the Portal-to-Portal Act, it is not barred by § 203(o).

2. The Department of Labor opinions relied on by Kraft have changed over the years and are therefore entitled to little deference.

The Department of Labor (“DOL”) opinions relied on by Kraft contradict at least two earlier opinion letters issued by the DOL in 1997 and reaffirmed in 2001. In these early opinions, the DOL concluded that “the phrase ‘changing clothes or washing’ in section 3(o) does not include the putting on, taking off, or washing of that protective safety equipment utilized in the meat packing industry which is integral to the performance of an employee’s principal activity.” *Compare* Fair Labor Standards Act, U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. (“FLSA1997”), at 2 (Dec. 3, 1997); Fair Labor Standards Act, U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. (Jan. 15, 2001) *with* Fair Labor Standards Act, U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2002-2 (“FLSA2002-2”), at 1 (June 6, 2002) ; Fair Labor Standards Act, U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2007-10 (May 14, 2007). Therefore, the more recent opinions are entitled to little deference: “As the Supreme Court has directed, ‘[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.’” *Alvarez*, 339 F.3d at 905 n.9 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (“reject[ing] the Secretary’s new, inconsistent interpretation” of § 203(o)). *Accord Perez*, 2008 WL 2389798, at *5 (“In light of this inconsistency, I am constrained to embrace the *Alvarez* court’s conclusion that ‘[i]n view of

conflicting interpretations over such a short period of time, there is no reason for this court to give deference to the 2002 letter.”).

The 2002 and 2007 opinion letters do not provide persuasive analyses. Moreover, the most recent DOL opinion letters are extreme. Their reasoning would include as “clothes” items such as spacesuits that courts have uniformly rejected. The items the DOL opined were “clothes” in its 2002 letter – “mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts” – are so clearly outside the plain meaning of “clothes” that no deference to the DOL opinion is warranted. *FLSA2002-2*, at 1; *cf.* *FLSA1997*, at 2 (“The plain meaning of ‘clothes’ in section 3(o) does not encompass protective safety equipment; common usage dictates that ‘clothes’ refer to apparel, . . .”). In any event, the opinions of the DOL are “not controlling upon the courts.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* Because the 2002 and 2007 opinion letters lack “power to persuade,” no deference is owed them.

3. Kraft’s proposed deference rule is bad policy.

The public policy interest in ensuring workplace and food safety is best served by a narrow construction of § 203(o) that requires compensation for donning and doffing safety and sanitation equipment and thereby encourages employees to take the time they need to don and doff such equipment properly. (*See, e.g.*, A-App.36.) Moreover, a narrow construction of § 203(o) also advances the equally important policy behind the FLSA, which is to compensate employees for all time worked.

Contrary to Kraft’s assertion, the district court’s definition creates no unnecessary ambiguity. When the facts show, as they do here, that the PPE is required to serve “the very specific needs of the employer for sanitation and safety,” (A-App.35 (quotation omitted)), the fact that some employees may derive some convenience from not having to wear, soil or ruin their own clothes while they work is incidental, not serious grist for litigation. As the district court recognized, Kraft’s approach does not solve the need to determine whether articles constitute “clothes” on a case-by-case basis:

Instead of arguing over whether an article is something an employee would wear anyway, parties employing defendant’s proposed standard would argue over whether articles are sufficiently “extensive, unique and burdensome,” which are far from self defining terms. Thus, adopting defendant’s view would not eliminate the need for the difficult line drawing that defendant criticizes; it would simply move the line in a direction that favors the employer.

(A-App.9.)

In short, the FLSA requires a one-size-fits-all definition; employers and unions may only bargain for an exception to hours worked as allowed by Congress. If Congress intended to allow bargaining over safety or protective equipment, it would have said so. There is absolutely no suggestion in the legislative history, or the statutory language, that Congress intended the exception for “clothes” in § 203(o) to encompass the types of mandatory PPE at issue here. Therefore, Kraft’s § 203(o) defense fails.

4. No case law supports Kraft’s approach.

Kraft purports to support its new standard by citing cases whose outcomes have, on their facts, deferred to collective bargaining agreements. (Kraft Br. at 30-32.) However, no court has deferred to a collective bargaining agreement before first determining that the donning and doffing at issue constituted “changing clothes.” For example, in *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001), the court made no reference to the collective bargaining agreement

and instead referred to a Webster's definition in rejecting the plaintiffs' argument that the sanitary garments in that case were not "clothes" under § 203(o). In *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994), the court was concerned with the meaning of "custom" and "practice" and assumed, without discussion, that the uniforms Nestle required employees to wear were "clothes." In *Fox*, the court rejected a § 203(o) defense, holding that cases such as those relied on by Kraft that fail to examine the "clothes" at issue do "not answer the question whether the gear used by Tyson employees is 'clothing' under § 203(o)." 2002 WL 32987224, at *5. Even *Figas*, from which Kraft cites language that Congress intended that employers and employees be allowed to secure their own arrangements regarding compensation for time spent changing clothes, did not hold that employers and employees could themselves decide what constitutes "changing clothes." Rather, the court in *Figas* first held that the articles at issue were "clothes" for purposes of § 203(o) and only then turned to look at the collective bargaining agreement. 2008 WL 4170043, at *12.

Other cases further refute Kraft's suggestion that courts have adopted the parties' own definition of "clothes" for the purposes of § 203(o). *See, e.g., Kassa*, 487 F. Supp.2d at 1066 ("Whether the items that plaintiffs don and doff are 'clothes' under § 203(o) depends on what those items are, *not on what they are called by the CBA ...*") (underlined emphasis in original; italicized emphasis added); *Alvarez*, 339 F.3d at 904-05 (holding that PPE were not clothes without any discussion of the collective bargaining agreement); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp.2d 912, 930 (N.D. Ill. 2003) (finding it "unnecessary to reach the Defendant's custom and practice issue" because "donning and doffing of sanitary and safety equipment does not constitute 'changing clothes' under Section 203(o).").

Should this Court consider Kraft's § 203(o) defense without remanding to allow the district court the first opportunity to apply the stipulated facts to the law, it should adopt the well-reasoned definition set out by the district court in its pre-settlement decision and hold that Kraft's § 203(o) defense fails. Thus, judgment should be entered in favor of plaintiffs on their FLSA claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Dated this 30th day of September, 2009.

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TYPE VOLUME LIMIT CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this brief contains 13,947 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the Microsoft Word 2000 word processing program used to prepare the brief.

This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 with 12 point Times New Roman font in the body of the brief and 11 point Times New Roman font in the footnotes.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on September 30, 2009, I caused two (2) true and correct copies of the Brief of Plaintiffs-Appellees and one (1) disk containing the brief and portions of the appendix in PDF format to be served via U.S. First-Class mail upon Counsel of record at the following address:

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