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Promoting Law Enforcement Officer Safety: Compensation for Donning and Doffing

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COMMENT

**Promoting Law Enforcement Officer Safety:
Compensation for Donning and Doffing***

*Glenn Fair***

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* I use male pronouns such as “him,” “his,” and “he” throughout the article for convenience; I make no judgment about either gender’s ability to be a law enforcement officer and have proudly worked with many female officers, including my wife.

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I. INTRODUCTION

Imagine seeing a police car on the street. It has someone pulled over; red and blue lights are flashing. You see a person exit the driver's side of the police car and immediately see something is amiss. The person is not in uniform, does not have a gun belt—or a gun—and yet still seems to be a police officer. Why would an officer be working in civilian clothing? Surely, the officer's department provides him with uniforms and other needed equipment. It is common knowledge in the United States that police officers do not normally work out of uniform or without the tools of their trade, such as guns, handcuffs, batons, radios, and bullet resistant vests; yet, there he is wearing street clothing and conducting a traffic stop.

This is (of course) a fictitious scenario because patrol officers must dress in a fashion that allows the public to readily identify them as law enforcement.¹ Officers are also required to carry their tools of the trade while on duty.² Consider the difficulty of making an arrest without handcuffs, or the potential fatal consequences of not having a firearm and bullet resistant vest when facing an armed and violent assailant. For law enforcement officers to properly perform their duties, certain equipment is mandatory; therefore, many agencies have rules where failure to wear the appropriate uniform and carry the required tools can result in disciplinary actions against the officer, including termination.³ The justification for rules requiring equipment and gear is that law enforcement officers cannot properly protect the public without certain equipment.⁴ Unfortunately, even though uniforms and the tools of the trade are necessary for officers to perform their assigned duties, many government agencies expect—and frequently demand—that officers put on (don) and remove (doff) their uniforms, tools of the trade, and safety gear during their off-duty time and without pay.⁵

Donning and doffing of uniforms and gear is not simply changing clothes as some law enforcement administrators and courts have reasoned; it is actually a time-consuming process that starts with the officer stripping down to his underwear.⁶ Next, he must put on his work pants and combat style boots. After this, a breathable, moisture-wicking undershirt is sometimes used to facilitate

¹ *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1204 (N.D. Cal. 2007); *see also* *Martin v. City of Richmond*, 504 F. Supp. 2d 766, 767-68 (N.D. Cal. 2007).

² *See Martin*, 504 F. Supp. 2d at 768.

³ *See e.g.*, *Jeffery L. Brice, Sr., v. Department of Veterans Affairs* 2004 M.S.P.B. 2665, 5 (2004) (upholding discipline against a law enforcement officer who did not wear his uniform and equipment as required).

⁴ *See Martin*, 504 F. Supp. 2d at 768.

⁵ Hereinafter “tools of the trade” and “safety gear” will be identified as “gear” unless otherwise stated.

⁶ *See infra* notes 7–12 and accompanying text.

ventilation as bullet resistant vests do not breathe. After the undershirt comes the bullet resistant vest. The vest is bulky, semi-rigid, and requires adjusting prior to the officer securely strapping the vest into place. The adjustments vary from day-to-day and often it takes two or three attempts to correctly secure the vest. Failure to properly adjust and secure the vest can be fatal because a bullet could strike too close to the edge of a vest panel or even pass between seams that are not properly aligned or overlapped.⁷

Then, many officers put on a radio earpiece, a backup gun, or a folding knife. The officer generally secures these items on top of the vest and under the uniform shirt to secure and conceal them. Finally, the uniform shirt is then put on. Once the shirt is on, buttoned (or zipped) up, tucked in, and the undershirt equipment is secured, the officer can fasten his trouser belt and put on his gun belt (also called a Sam Browne or duty-belt).⁸

To fully secure the duty-belt, it must be physically attached to the trouser belt with four to six fasteners called keepers. These keepers go in between the various pieces of equipment on the duty-belt, then under the trouser belt, and wrap around the outside of the duty-belt to secure it in place. This is important and necessary because when an officer is running or otherwise moving, his duty-belt can shift and make it difficult (or impossible) to retrieve items from the belt. Applying the keepers is cumbersome because the officer must reach his back to find the right spot for at least half of the keepers. The officer is working blind and the bullet resistant vest limits mobility making the keeper application even more time-consuming.⁹ The entire donning process generally takes ten to fifteen minutes for a veteran officer who is using the minimum mandatory equipment; for less experienced officers, it can take even longer.¹⁰ At the end of the shift, removing and storing the same equipment takes another ten to fifteen minutes.

Many agencies require, usually as an unwritten rule, that officers arrive fifteen to thirty minutes prior to the start of their workday, or shift, and remain for an equal amount of time after the end of their shift, in order to complete the lengthy donning and doffing activity.¹¹ This activity is generally unpaid

⁷ NATIONAL INSTITUTE OF JUSTICE, BALLISTIC RESISTANCE OF BODY ARMOR, NIJ STANDARD-0101.06, 7.6.1 *Minimum Shot-to-Edge Distance*, (implying that bullet strikes within 2 inches of the edge of an armor panel are at a higher risk for penetration through the armor and into to the wearer's body) (2008).

⁸ See *Maciel v. City of L.A.*, 542 F. Supp. 2d 1082, 1091 (C.D. Cal. 2008).

⁹ Female officers must repeat this "keeper" process every time they take a bathroom break.

¹⁰ Derived through personal discussions with hundreds of officers, personal experiences through a career as an officer, and experience from teaching and training dozens of rookie officers over the course of a 20+ year law enforcement career.

¹¹ See, e.g., *Freeman v. Berkeley Contract Packaging, LLC*, 2014 U.S. Dist. LEXIS 93190, 4 (S.D. Ill. July 9, 2014); REPORT OF WILLIAM M. TOMS, Ed. D, 2014 Misc. Filings LEXIS 4982, *9 (illustrating the prevalence of both written and unwritten rules that require officers to arrive prior to their regularly scheduled work shifts).

time at the workplace because many law enforcement administrators, and even some courts, classify the donning and doffing of uniforms and gear as simply changing clothes.¹²

This overly simplistic definition of donning and doffing uniforms and gear as pre/post-shift changing clothes conveniently invokes exclusion from compensation under the Fair Labor Standards Act (FLSA) as amended by the Portal-to-Portal Act of 1947.¹³ The Act states that “activities which are preliminary to or postliminary to said principal activity or activities” are non-compensable.¹⁴ However, police officers are non-exempt employees for the purposes of the FLSA; therefore, their employer should compensate them for the time needed to don and doff required uniforms and gear.¹⁵

Part I of this comment was an introduction and Part II considers how the FLSA applies to law enforcement employees.¹⁶ This section will also discuss the difference between an exempt and non-exempt employee as well as the compensation implications of each status.¹⁷ Part III will discuss the compensable workday including the FLSA rules which govern the workday.¹⁸ Part IV discusses an employer’s defense under the *de minimis* rule.¹⁹ Further discussion of compensation for all work hours is discussed in Part V, which also includes a discussion on the Portal to Portal Act.²⁰ Part VI discusses why donning and doffing safety equipment is an indispensable activity on behalf of the employer and thus police officers should be compensated for such activities.²¹

¹² See, e.g., *Perez v. City of New York*, 832 F.3d 120, 124 (2d Cir. 2016), *Bamonte v. City of Mesa*, 598 F.3d 1217, 1231 (9th Cir. 2010), *Reed v. County of Orange*, 266 F.R.D. 446, 448, 465 (C.D. Cal. 2010) (illustrating that some police agencies and courts view donning and doffing of uniforms and safety gear as non-compensable activity).

¹³ Portal to Portal Act, 29 U.S.C.S. § 254(a)(2) (2017); Fair Labor Standards Act of 1938, 29 U.S.C.S §§ 201, *et. seq.* as enforced by the United States Department of Labor under Title 29 of the Code of Federal Regulations §§ 541.0, *et. seq.*; *see also id.* § 254(a), *et. seq.* (excluding activities from compensation which are preliminary to or postliminary to an employee’s principal activity).

¹⁴ Portal to Portal Act, 29 U.S.C.S. § 254(a)(2) (2017); Fair Labor Standards Act of 1938, 29 U.S.C.S §§ 201, *et. seq.* as enforced by the United States Department of Labor under Title 29 of the Code of Federal Regulations §§ 541.0, *et. seq.*; *see also id.* § 254(a), *et. seq.* (excluding activities from compensation which are preliminary to or postliminary to an employee’s principal activity).

¹⁵ 29 C.F.R. § 541.3(b)(1)–(4) (2012).

¹⁶ See *supra* notes 1–36 and accompanying text.

¹⁷ See *infra* notes 23–36 and accompanying text.

¹⁸ See *infra* notes 37–47 and accompanying text.

¹⁹ See *infra* notes 48–52 and accompanying text.

²⁰ 29 U.S.C. § 254(a) (2012); *see infra* notes 51–66 and accompanying text.

²¹ See *infra* notes 69–110 and accompanying text.

II. EXEMPT AND NON-EXEMPT EMPLOYEES UNDER THE FLSA

A. *Exempt Employees*

According to the FLSA, employees fall under one of two categories: exempt employee or non-exempt employee.²² The exempt employee is classified as such because they are exempt from the minimum wage requirements of the FLSA.²³ The employer is also exempt from providing the mandatory receipt of overtime pay required by the FLSA.²⁴ Specifically, the FLSA defines exempt individuals as “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman.”²⁵ Employers are not required to pay exempt employees on an hourly basis and are exempt from overtime requirements; therefore, the issue of donning and doffing of uniforms and gear does not impact exempt employees.

In contrast, non-exempt employees are all employees the exemption section of the FLSA does not list.²⁶ The FLSA requires employers to pay non-exempt employees at least the federal minimum wage for their regular hours.²⁷ Employers must also pay their non-exempt employees overtime “for a workweek longer than forty (40) hours . . . at a rate not less than one and one-half times the regular rate at which he is employed.”²⁸

B. *Regardless of Job Title, the First Responder Is a Non-Exempt Employee*

Some employers of law enforcement officers attempt to classify officers with such supervisory responsibilities as management and thus as exempt employees.²⁹ The FLSA does not allow this type of pigeonholing because “[a] job title alone is insufficient to establish the exempt status of an employee [and] the . . . status of any particular employee must be determined [based on] whether the employee’s salary and duties meet the requirements of the regulations in this part.”³⁰

²² 29 U.S.C. § 213(a) (2012).

²³ *See id.* § 213(c).

²⁴ *Id.* § 213(a); *see also id.* § 207(a)(2)(C) (requiring non-exempt employees to be paid at least one and one-half times their regular hourly rate for all hours in excess of forty hours of work per week).

²⁵ *Id.* § 213(a).

²⁶ *Id.* § 213(a) (providing an exhaustive list of exempt employees).

²⁷ *Id.* § 206.

²⁸ *Id.* § 207(a)(1).

²⁹ *See supra* notes 23–30 and accompanying text.

³⁰ 29 C.F.R. § 541.2 (2016).

One example of pigeonholing can occur with first line supervisors such as sergeants and lieutenants. These supervisors may cannot be classified as management—and therefore exempt employees—because they routinely respond to calls from the public to investigate crimes and apprehend offenders.³¹ Since these supervisors are not strictly office or administrative employees, they “do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer.”³²

The Department of Labor enacted the following rule to expressly prohibit these types of “pigeonhole” classifications:

exemptions and the regulations [of section 213 of the FLSA] also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers . . . and similar employees, *regardless of rank or pay level*, who perform work such as . . . preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.³³

This regulatory amendment to the FLSA made it clear that any law enforcement officer who conducts regular law enforcement activities, regardless of rank or title, is a non-exempt employee and must be paid for all hours worked.³⁴

III. THE OFFICER’S COMPENSABLE WORKDAY

A. *Integral and Indispensable Activities to Define the Start of the Work Day*

The Supreme Court weighed in on principal activities in *Steiner v. Mitchell* and held, “the term principal activity or activities in [the Portal-to-Portal Act] embraces all activities which are an ‘integral and indispensable part of principal activities,’ and that the activities in question [30 minutes for pre-shift dressing and post shift showering] fall within this category.”³⁵

³¹ See *Id.* § 541.3(b)(1)–(4).

³² *Id.* § 541.3(b)(2).

³³ *Id.* § 541.3(b)(1) (emphasis added).

³⁴ *Id.* § 541.3(b)(1)–(4); *supra* notes 24–31 and accompanying text.

³⁵ *Steiner v. Mitchell*, 350 U.S. 247, 251–53 (1956) (discussing that changing clothes, coupled with health and safety risks associated with work which are beyond normal conditions, is compensable under the FLSA).

The *Steiner* court noted that the unique health and safety risks associated with battery manufacturing are beyond what is considered “normal” working conditions.³⁶ Ultimately, the *Steiner* court held that pre- and post-shift safety activities were principal activities which are compensable under the FLSA.³⁷

Even if one discounts the *Steiner* rule for law enforcement officers, there are other cases which also support compensation for donning and doffing activities as indispensable and integral activities.³⁸ In *Perez v. Mountaire Farms, Inc.*, the court held that employees should be compensated for donning and doffing activities when the “articles [of clothing] plaintiffs are donning and doffing are not items employees would normally wear.”³⁹ In an appeal of the *Perez* case, the 4th Circuit ultimately held that donning and doffing safety gear are “integral and indispensable” activities which are compensable under the FLSA.⁴⁰

Beyond *Perez*, courts have applied the two-part test found in *Spoerle v. Kraft Foods Glob., Inc.*, which asks “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?”⁴¹ The *Steiner*, *Perez*, and *Spoerle* cases represent a cross section of American jurisprudence.⁴² These cases originated in the 6th, 4th, and 7th Circuits, respectively, and all held that donning and doffing of safety gear is an “integral and indispensable and integral” activity of the various employees’ work.⁴³

B. *The Continuous Workday Rule*

Beyond rules that cover integral and indispensable activities, the Department of Labor has enacted a regulation that is similar to the *Steiner* holding

³⁶ *Id.* at 248.

³⁷ *Id.* at 256.

³⁸ See e.g. *Perez v. Mountaire Farms, Inc.*, No. AMD 06-121, 2008 U.S. Dist. LEXIS 52844, *15–16 (D. Md. June 10, 2008); *Spoerle v. Kraft Foods Glob., Inc.*, 527 F. Supp. 2d 860, 867 (W.D. Wis. 2007).

³⁹ *Mountaire Farms, Inc.*, 2008 U.S. Dist. at *15–16.

⁴⁰ *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365-66 (4th Cir. 2011) (holding that the “[d]onning and doffing of protective gear at the beginning and the end of a work shift are acts ‘integral and indispensable’ to the employer’s principal activity when the donning and doffing are: 1) necessary to the principal work performed; and 2) primarily benefit the employer.”).

⁴¹ *Spoerle*, 527 F. Supp. 2d at 867; see also *Weissman v. Tyson Prepared Foods, Inc.*, 838 N.W.2d 502 (2013) (holding that *inter alia* the nature of the work to change clothing on the employer’s premises, the activity of donning and doffing sanitary and protective equipment and clothing was integral and indispensable to the employees’ principal activities and was thus compensable under the FLSA).

⁴² See *supra* notes 37–43 and accompanying text.

⁴³ *Mountaire Farms, Inc.*, 650 F.3d at 365–66; See *supra* notes 37–43 and accompanying text.

with respect to what constitutes the compensable workday.⁴⁴ The Continuous Workday Rule states that “periods of time between the commencement of the employee’s first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal-to-Portal Act had not been enacted.”⁴⁵ This rule is relevant to law enforcement officers because it supports the idea that donning and doffing of safety gear is compensable activity.

IV. DONNING AND DOFFING OF UNIFORMS AND GEAR IS NOT *DE MINIMIS*

Opponents of compensated donning and doffing time may concede that the donning activity is a preliminary activity, but is still non-compensable because it is *de minimis*.⁴⁶ *De minimis* is defined as follows:

When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.⁴⁷

The *de minimis* rule is about trifles, or seemingly insignificant time, and the problems in recording the insignificant time.⁴⁸ Congress appeared to use an efficiency rationale for not requiring the recording of minuscule time periods when they wrote, “in recording working time under the [FLSA], insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.”⁴⁹ However, the Code of Federal Regulations also notes that “10 minutes a day is not *de minimis*.”⁵⁰ As mentioned in the introduction, an officer typically spends a total of 20 to 30 minutes each day donning and doffing his uniform and gear.

⁴⁴ See 29 C.F.R. § 790.6(a) (2016).

⁴⁵ *Id.*

⁴⁶ See *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984) (holding that even if the activity is not preliminary, it was *de minimis* and therefore not compensable).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 29 C.F.R. § 785.47 (2016).

⁵⁰ *Id.* (citing *Hawkins v. E. I. Dupont De Nemours & Co.*, Civil Action No. 1318, 1955 U.S. Dist. LEXIS 4196, *3 (E.D. Va. Feb. 4, 1955) (holding that plaintiffs were entitled to be paid for the ten-minute periods that they had not been previously paid for, and when this with their regular eight-hour shift work amounted to more than forty hours a week, they should receive time-and-a-half for the time over forty hours during the work week).

V. EMPLOYEES MUST BE COMPENSATED FOR ALL TIME
WHILE WORKING ON THE EMPLOYER'S BEHALF

The FLSA requires employers to pay their employees for the hours they work each week.⁵¹ *Tennessee Coal, Iron and Rail Company v. Muscoda Local Number 123*, originally defined work “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.”⁵² Donning and doffing was a covered compensable activity for law enforcement officers under the *Muscoda* definition because police officers require their uniforms and gear to perform job duties.⁵³

The *Muscoda* court’s creation of newly compensable activities produced billions of dollars in new litigation.⁵⁴ Congress quickly responded by passing the Portal-to-Portal Act, which modified the definition of work to specifically exclude “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.”⁵⁵

The Portal-to-Portal Act exclusions created disputes over whether the donning and doffing of uniforms and gear is a principal activity of law enforcement officers which is compensable under the FLSA.⁵⁶ Many law enforcement agencies argue that donning and doffing is not compensable because it “is merely a convenience to the employee and not directly related to his principal activities.”⁵⁷ The employer’s argument would be plausible if they required only regular clothing to be worn, *sans* police safety gear; however, donning and doffing is much more complex than simply changing clothes.⁵⁸

⁵¹ See 29 U.S.C. § 206(a) (2012) (mandating the payment of at least a minimum hourly wage for employees).

⁵² *Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944) (subsequently limited by 29 U.S.C.S. § 254(a) (1947)) (emphasis added).

⁵³ See *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1204-05 (N.D. Cal. 2007) (recognizing that officers must have uniforms and safety gear to perform their duties).

⁵⁴ See *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 516 (2014) (internal citations omitted) (explaining that during the six-month period after the *Muscoda* case ruled that travel and walking time was compensable, over 1,500 lawsuits were filed seeking over \$6 billion in compensation, *vacated on other grounds in Busk v. Integrity Staffing Sols., Inc.*, 797 F.3d 756 (9th Cir. 2015)).

⁵⁵ Portal to Portal Act of 1947, 29 U.S.C. § 254(a) (2012).

⁵⁶ See *e.g.*, *Maciel v. City of L.A.*, 542 F. Supp. 2d 1082 (C.D. Cal. 2008); *Martin v. City of Richmond*, 504 F. Supp. 2d 766, 767-68 (N.D. Cal. 2007); notes 34–46 and accompanying text (arguing that donning uniforms and safety gear is the first daily principal activity of law enforcement officers).

⁵⁷ 29 C.F.R. § 790.8(c) (2016).

⁵⁸ See *supra* notes 6–13 and accompanying text.

At least one federal court expanded the changing clothes rule and held that “if changing clothes on the employer’s premises is required by law, rules of the employer, or *nature of the work*, it would be an integral part of the employee’s ‘principal activity.’”⁵⁹ Interestingly, in *Maciel*, the court recognized that law enforcement officers’ “donning and doffing activities constitute work because the activity is pursued necessarily and primarily for the benefit of the employer.”⁶⁰ In *Maciel*, the law enforcement officers were required to be in uniform while on duty, which meant the donning and doffing benefitted the law enforcement agency.⁶¹ The *Maciel* court also found an implied rule that the employer intended to require its law enforcement officers to change at the station where the employer provided a locker room and lockers to the law enforcement officers for equipment storage.⁶² Despite these findings, the *Maciel* court ultimately held in favor of the defendant employer under section 203(o) of the FLSA because there was a valid collective bargaining agreement (CBA) which expressly barred payment for donning and doffing time.⁶³ Section 203(o) states, “any time spent in changing clothes . . . 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*.”⁶⁴ The *Maciel* court presents a convincing analysis, which other courts and legislatures should adopt to compel the payment for donning and doffing to law enforcement officers where a CBA lacks an explicit prohibition.

VI. ANALYSIS

Police officers should be compensated by their employer for the time needed to don and doff required uniforms and gear because the process takes twenty minutes or more per day and is a principal activity which is an integral and indispensable part of their job.⁶⁵ Pre- and post-shift safety steps, in the form of donning and doffing gear, are required in order for an officer to mitigate the hazards associated with the unique risks presented by their jobs.⁶⁶ These unique risks to law enforcement officers are much like the risks faced by the *Steiner* employees in that the risks are *because of* the law enforcement officer’s job.⁶⁷

⁵⁹ *Maciel*, 542 F. Supp. 2d at 1086 (emphasis added).

⁶⁰ *Id.* at 1091.

⁶¹ *Id.*; see also *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1208 (N.D. Cal. 2007).

⁶² *Maciel*, 542 F. Supp. 2d at 1091.

⁶³ 29 U.S.C. § 203(o) (2012); see also *Maciel*, 542 F. Supp. 2d at 1092 (asserting that § 203(o) is a default rule which can be altered through an express CBA).

⁶⁴ 29 U.S.C. § 203(o) (emphasis added).

⁶⁵ See *supra* notes 36–44 and accompanying text.

⁶⁶ See *supra* notes 6–12, 36–44 and *infra* notes 76–91 and accompanying text.

⁶⁷ See *supra* notes 76–91 and accompanying text.

A law enforcement officer's first principal activity occurs when he begins the process of donning his uniform and gear because the items are integral and indispensable to police work as they mitigate safety risks; this risk mitigation activity is extremely similar to the *Steiner* employees.⁶⁸ All courts should follow the rule laid out in *Steiner* and require compensation for law enforcement officers' indispensable and integral pre- and post-shift risk mitigating activities.⁶⁹

There is support for compensation of donning and doffing activities beyond the *Steiner* case. The *Perez* case should also apply to law enforcement officers because uniforms and safety gear are not items that one normally wears when not working in a law enforcement environment; further, the uniforms and gear are necessary for law enforcement work and primarily benefit the employer through officers' presence in public.⁷⁰

The *Spoerle* two-part test also supports compensation for law enforcement officers donning and doffing because uniforms and gear are not something officers wear anyway and because the police officers wear the items for a strictly job-related reason.⁷¹ The *Steiner*, *Perez*, and *Spoerle* cases present multiple convincing analyses, which clearly justify compensation for law enforcement officers donning and doffing activities.⁷²

A. Law Enforcement Officers Are Required to Use Certain Safety Gear to Perform Duties for the Benefit of the Employer

It is common knowledge in the law enforcement community that officers cannot do their job without certain equipment.⁷³ In addition to the vest as safety equipment, most employers require officers to carry handcuffs, at least one less

⁶⁸ See *supra* notes 1–13 and accompanying text.

⁶⁹ See *supra* notes 1–13, and accompanying text. The principal activities rule is not invoked with respect to law enforcement officers who have a take home car because both the officers and their employers receive a benefit through the use of their employer's vehicle. *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 26, 153 P.3d 179, 184 (finding that the employee receives a cost of transportation savings and the law enforcement agency benefits from reduced response times for an emergency call-out situation). As a result, law enforcement officers (and agencies) who have take-home cars are beyond the scope of this article because "[t]he FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced." 29 C.F.R. § 541.4 (2016).

⁷⁰ See *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1208 (N.D. Cal. 2007) (finding that if the uniform is required by the law enforcement agency, there is a presumption that it benefits the agency since it would not have required the uniform otherwise); see also *supra* notes 2–12, 39–41 and accompanying text.

⁷¹ See *Lemmon*, 538 F. Supp. 2d at 1208; see *supra* note 42 and accompanying text.

⁷² See *supra* notes 30–35 and accompanying text.

⁷³ See *Maciel v. City of L.A.*, 542 F. Supp. 2d 1082, 1084, n.4 (C.D. Cal. 2008); see *supra* notes 6–13 and accompanying text.

than lethal weapon, and a firearm.⁷⁴ For accessibility at all times, an officer carries these safety items on his duty-belt.⁷⁵ Many people and courts recognize that duty-belts are used by law enforcement officers to help identify them and to secure equipment to their person.⁷⁶

What most do not realize is that handcuffs, less lethal weapons, and firearms are safety gear that are unique to law enforcement officers.⁷⁷ Every officer is required to carry handcuffs because one cannot make an arrest without them, and a primary function of a law enforcement officer is making arrests.⁷⁸ The ability to restrain a person preserves a law enforcement officer's safety because the restraints reduce an offender's ability to attack.⁷⁹

Tennessee v. Garner constitutionally prohibits law enforcement officers from simply shooting any suspected offender who flees from them.⁸⁰ In *Garner*, the Supreme Court held, “[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”⁸¹ *Garner* stands for the rule that an officer may not just shoot any offender; accordingly, officers need to have access to less than lethal weapons to subdue a resisting or violent offender when weaponless techniques have failed or are impractical.⁸²

Most officers carry various non-lethal weapons on their duty-belt along with the handcuffs and a firearm.⁸³ Some of the most common less than lethal weapons are OC (pepper) spray, Tasers, and batons.⁸⁴ Less than lethal weapons are safety

⁷⁴ *Maciel*, 542 F. Supp. 2d at 1084.

⁷⁵ *Id.* at 1901.

⁷⁶ See e.g., *Stevens v. Sch. City of Hobart*, No. 2:13-CV-336-PRC, 2015 U.S. Dist. LEXIS 106349, at *9 (N.D. Ind. Aug. 6, 2015). (recognizing that police officers wear the same equipment on a daily basis); *State v. Adigwe*, No. A-5352-12T3, 2014 N.J. Super. Unpub. LEXIS 2507 at *9 (Super. Ct. App. Div. Oct. 21, 2014) (recognizing that wearing police equipment is a common method used to identify a law enforcement officer).

⁷⁷ See *Maciel*, 542 F. Supp. 2d at 1091–92.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

⁸¹ *Id.* at 11.

⁸² *Whitfield v. City of Newburgh*, No. 08 CV 8516 (RKE), 2015 U.S. Dist. LEXIS 169667, *40–43 (S.D.N.Y. Dec. 17, 2015).

⁸³ See *Maciel*, 542 F. Supp. 2d at 1084, n.4.

⁸⁴ See e.g., *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1083 (E.D. Cal. 2014) (discussing some less-lethal weapons); *Morris v. Opsahl*, Civil Action No. 12-cv-2134-RPM, 2014 U.S. Dist. LEXIS 21990 at *5 (D. Colo. Feb. 21, 2014) (discussing use of force and the use of less lethal weapons); RICHARD M. THOMPSON II, *Police Use of Force: Rules, Remedies, and Reforms*, Congressional Record Service, Report No. R44256, 9–11 (Oct 30, 2015) (listing certain less-lethal weapons).

equipment because officers who can deploy a less than lethal weapon to seize an offender decrease the likelihood of harm or at least reduce the officer's severity of injury.⁸⁵ Likewise, the offender also benefits because these less than lethal weapons reduce the offender's potential injury (or death), which may occur if a firearm is used.

The firearm is the final piece of safety equipment. Some may say that a firearm as safety equipment is an oxymoron. However, a firearm is an effective tool of protection that enhances the safety of the officer and others. A firearm allows one to protect himself and others when other means of defense are impractical or have failed, because the firearm can be used at a distance to permanently stop a threat.⁸⁶

Safety gear, whether mandated by policy or by practicality, is required for law enforcement officers to perform their jobs.⁸⁷ Just like the employees in *Steiner*, a law enforcement officer's donning and doffing of gear to protect the officer from the inherent risks of the job should be recognized as an activity that is indispensable and integral to his primary activity and thus compensable.⁸⁸

B. Employers should not escape liability for non-compensation of donning and doffing activities under the de minimis doctrine

Donning and doffing uniforms and gear for law enforcement officer's is not trivial because it is a time consuming and complex process.⁸⁹ It is neither split-second nor does it take less than ten minutes.⁹⁰ As described above, the donning and doffing process takes between twenty and thirty minutes every workday for a veteran officer.⁹¹

Donning and doffing time is easily recorded with modern timekeeping systems and, thus, can easily be added to a law enforcement officer's working hours on a daily basis. In the alternative, law enforcement agencies can simply allot ten to fifteen minutes at the beginning and end of each work shift for donning

⁸⁵ Zaychenko & Verdun-Jones, *Police Use of Conducted Energy Weapons: A Review of the Canadian Jurisprudence*, 49 ALBERTA L. REV. 149, 152 (2011).

⁸⁶ See e.g., *United States v. Williams*, No. 15-00273-01-CR-W-RK, 2016 U.S. Dist. LEXIS 106936 at *6 (W.D. Mo. July 26, 2016); *Hodge v. Keene*, No. CIV-10-1283-D, 2013 U.S. Dist. LEXIS 12505 at *17-18, n.4 (W.D. Okla. Jan. 30, 2013) (recognizing the police firearm as a defensive tool).

⁸⁷ See *Maciel*, 542 F. Supp. 2d at 1091-92.

⁸⁸ See *Steiner v. Mitchell*, 350 U.S. 247, 251-53 (1956); see *supra* notes 30-35 and accompanying text.

⁸⁹ See *supra* notes 1-13 and accompanying text.

⁹⁰ See *supra* notes 1-13 and accompanying text.

⁹¹ See *supra* notes 1-13 and accompanying text.

and doffing. This allowance does not present an undue hardship on law enforcement agencies because nearly all of them have overlapping work shifts.⁹² Thus, donning and doffing law enforcement officer uniforms and gear is a complex process that falls outside of the *de minimis* doctrine.

C. Donning and Doffing Activity is a Principal Activity under the Continuous Workday Rule

Officers' donning/doffing activity should be considered his first and last principal activity of each workday because his uniforms and safety gear are indispensable to his work.⁹³ Requiring an officer to change at home and wear his uniform in public while off-duty is a dangerous practice which can have fatal results.⁹⁴ Wearing uniforms and safety gear while off-duty is also problematic because it can "confuse the public during the officers' commute";⁹⁵ it also puts officers at risk because "the components of the police uniform trigger *instant recognition* of police officers."⁹⁶ This instant recognition can create an unprovoked attack which is not a risk that other types of employees' encounter.⁹⁷

One example of instant recognition that led to an unprovoked attack of a uniformed—but off-duty—law enforcement officer occurred at a fast food restaurant in Texas.⁹⁸ The officer was waiting in line to order when he saw a man with a marijuana cigarette behind his ear standing in front him.⁹⁹ The officer tried to talk to the man but upon seeing the uniformed officer, the man produced a gun.¹⁰⁰ In response to having a gun drawn on him, the off-duty officer shot the man and killed him.¹⁰¹

It is reasonable to assume that the man instantly recognized the officer as such. In this example, the officer was placed at risk of death *because of* his

⁹² Police officers doing shift-work is common knowledge throughout the industry and the U.S. as policing is a 24/7 profession. Even small communities make allocations for police coverage around the clock.

⁹³ See *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1204–05 (N.D. Cal. 2007); see *supra* notes 56–66 and accompanying text.

⁹⁴ *Officer Survival*, Nevada Peace Officers Standards and Training Academy, Western Nevada College, Carson City, Nevada; see *infra* notes 99–107 and accompanying text.

⁹⁵ *Lemmon*, 538 F. Supp. 2d at 1208.

⁹⁶ *Id.* at 1204 (emphasis added).

⁹⁷ *Officer Survival*, Nevada Peace Officers Standards and Training Academy, Western Nevada College, Carson City, Nevada.

⁹⁸ Jolie McCullough and Alexa Ura, *Unholstered: Even Off Duty, Police Have Wide Discretion to Shoot*, TEX. TRIB. (Aug. 30, 2016), <https://apps.texastribune.org/unholstered/off-duty/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

uniform and safety gear. This situation clearly illustrates why it is dangerous for officers to be in uniform while off-duty. It also shows how the employer benefits from having uniformed officers in public because it is unknown what this armed person in possession of a controlled substance would have done had the officer not been there.

Incidents of violence against officers are frequently shocking to the public because most do not realize that law enforcement uniforms and gear can be targets *per se*; however, law enforcement officers are acutely aware of this fact.¹⁰² Both the public and the officers' employers derive a benefit from the officers' use of their uniforms and safety gear.¹⁰³ It should be clear that the donning of safety gear is the first principal activity which starts every officer's workday. The Continuous Workday Rule should be applied to officers accordingly and they should be compensated from the time they begin donning their uniforms and gear until the time doffing is completed at the end of their shift.

VII. CONCLUSION

The law requires that employers pay non-exempt employees for all hours worked.¹⁰⁴ Law enforcement officers are non-exempt employees under the FLSA.¹⁰⁵ It is commonplace for the public to view law enforcement officers as on-duty anytime they are seen in uniform.¹⁰⁶ No other professional is randomly targeted and attacked by citizens merely for the clothing they wear and the jobs they do. These risks are unique to law enforcement officers, and these risks put them in a special category because no other profession is viewed as being at-work whenever they are wearing work clothes and carrying work equipment. To avoid confusion of work status and to promote public safety, law enforcement officers should be paid for the daily time needed to don and doff their uniforms and gear.

¹⁰² Damian Trujillo, *Police on Alert Following Attacks on Off-Duty Officers in Bay Area*, NBC BAY AREA (Jan. 13, 2016), <http://www.nbcbayarea.com/news/local/Police-on-Alert-After-Attacks-on-Off-Duty-Officers-in-Bay-Area-365216641.html>.

¹⁰³ *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1208 (N.D. Cal. 2007).

¹⁰⁴ *See supra* notes 23–35 and accompanying text.

¹⁰⁵ *See supra* notes 28–36 and accompanying text.

¹⁰⁶ *Lemmon*, 538 F. Supp. at 1204; *Martin v. City of Richmond*, 504 F. Supp. 2d 766, 767–68 (N.D. Cal. 2007).