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**Employment Law—Mandatory-Workplace Donning and Doffing—All in a Day's Work: A Review of Gerber Products Company v. Hewitt, 2016 Ark. 222, 492 S.W.3d 856.**

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EMPLOYMENT LAW—MANDATORY-WORKPLACE DONNING AND DOFFING—ALL IN A DAY’S WORK: A REVIEW OF *GERBER PRODUCTS COMPANY V. HEWITT*, 2016 ARK. 222, 492 S.W.3D 856.

I. INTRODUCTION

A factory employee’s shift does not begin for another hour, but she arrives early for work to perform activities that are required and strictly controlled by her employer whose goal is to produce high quality food products. Some of the activities include changing into and lint rolling her work uniform as well as putting on her protective gear. It is only after performing these mandatory pre-shift “donning”<sup>1</sup> activities, and walking a lengthy distance to her workstation, that she is allowed to clock in for the start of her shift. These activities and the subsequent walking are performed without pay and extend her workweek beyond the forty-hour maximum. Highly unsatisfied with this practice and collective-bargaining efforts, she and some coworkers demand overtime payment for the time that they had spent donning, waiting, walking, and “doffing”<sup>2</sup> in the past years.

This scenario partly summarizes the facts of *Gerber Products Company v. Hewitt*, a case of first impression decided by Arkansas’s highest appellate court in 2016.<sup>3</sup> In *Gerber*, hourly employees working at a Gerber facility in Fort Smith, Arkansas, filed a class action against Gerber for failing to compensate them for time they had spent completing mandatory donning and doffing activities at the workplace.<sup>4</sup> Eventually, Gerber appealed the lower court’s ruling and judgment in favor of the employees.<sup>5</sup>

Despite the sharp divide<sup>6</sup> among the Arkansas Supreme Court justices, the court held that mandatory<sup>7</sup> donning and doffing activities constitute “work” and must be compensated pursuant to the overtime provision of the

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1. See *infra* note 12 and accompanying text.

2. See *infra* note 13 and accompanying text.

3. 2016 Ark. 222, 492 S.W.3d 856, *superseded by statute*, Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

4. *Id.* at 1–2, 492 S.W.3d at 858.

5. *Id.* at 7, 492 S.W.3d at 861.

6. The sharp divide resulted from a 4–3 split among the justices. See *Gerber*, 2016 Ark. 222, 492 S.W.3d 856. (Associate Justice Karen Baker, writing for the majority, was joined by Associate Justices Robin Wynne, Courtney Goodson, and Paul Danielson. Former Chief Justice Howard Brill and Associate Justice Josephine Hart joined the dissenting opinion written by Associate Justice Rhonda Wood.)

7. In this context and throughout this note, “mandatory” means activities or work that are “integral and indispensable” to an employee’s primary responsibilities. See *infra* note 56 and accompanying text.

Arkansas Minimum Wage Act (AMWA).<sup>8</sup> The court further held that it would not engraft the special carve-out exception for unionized employers found in the Fair Labor Standards Act (FLSA) into the AMWA.<sup>9</sup> Consequently, Gerber and the union could not agree to waive compensation for mandatory donning and doffing at the workplace through the collective-bargaining process.<sup>10</sup> In 2017, the Arkansas General Assembly responded to the *Gerber* decision by amending the AMWA and simultaneously overturning *Gerber*.<sup>11</sup>

In the workplace, to don means to remove personal clothing and shoes usually before the start of one's shift in order to change into a work uniform, shoes, and/or protective gear such as a hairnet, a bump cap, safety glasses, and ear plugs.<sup>12</sup> When one doffs in the workplace, he reverses the process: he takes off the work clothing, shoes, and/or protective gear and changes back into his personal clothing and shoes typically after his shift.<sup>13</sup> Although relatively simple tasks, pre-shift donning, post-shift doffing, and related matters have led to an influx of litigation in federal courts within the past few years.<sup>14</sup>

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8. *Gerber*, 2016 Ark. 222, at 14, 492 S.W.3d at 864.

9. *Id.*, 492 S.W.3d at 864.

10. *See id.* at 10–14, 492 S.W.3d at 863–64.

11. Representative Charlie Collins sponsored “an act to amend and clarify the Minimum Wage Act of the State of Arkansas; to overrule *Gerber Products Company v. Hewitt*, 2016 Ark. 222, 492 S.W.3d 856; to declare an emergency; and for other purposes.” H.R. 1846, 91st Gen. Assemb., Reg. Sess. (Ark. 2017). Eventually, the Arkansas General Assembly passed the bill, and Governor Asa Hutchinson signed it into law on April 5, 2017. *See Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).*

12. *Gerber*, 2016 Ark. 222, at 5, 492 S.W.3d at 860.

13. *Id.*, 492 S.W.3d at 860.

14. *See, e.g., Adair v. ConAgra Foods, Inc.*, 728 F.3d 849, 853 (8th Cir. 2013) (holding that neither the time spent by laborers for donning and doffing uniforms nor the walking time between the clothes-changing stations and the time clock were compensable under the FLSA); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) (holding that the FLSA § 203(o) provision applied to the donning and doffing activities at issue); *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007) (holding that donning and doffing of a helmet, safety glasses, and steel-toed boots were not integral and indispensable to plaintiffs' principal activities); *Helmert v. Butterball, LLC*, 805 F. Supp. 2d 655, 662 (E.D. Ark. 2011) (holding that donning and doffing of smocks by employees were integral and indispensable to their principal activities and should be compensated under the FLSA); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 962 (W.D. Wis. 2008) (granting in part summary judgment for the employees that required donning and doffing of protective gear and walking to work stations were compensable under the FLSA and Wisconsin state wage law); *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1243–47 (D. Kan. 2007) (denying summary judgment for the employer on the basis that the Portal-to-Portal Act did not bar compensation for time spent donning and doffing standard protective clothing and gear and that prior injunction did not permit employer to pay for reasonable time as opposed to actual time spent donning and doffing). *See also Amanda Walck, Taking It All Off: Salazar v. Butterball and the Battle over Fair Compensation Under the FLSA's "Changing Clothes"*

Donning and doffing issues are prevalent in the food-processing industry and in other industries where the law, the employer, or the nature of the job requires protective equipment.<sup>15</sup> Despite requiring employees to don and doff clothing and protective gear at the workplace according to strict procedures, some employers still fail to compensate their employees for the time required to complete these mandatory activities, and such failure becomes “fertile ground for collective action litigation by employees.”<sup>16</sup>

In such actions, employees argue that pre-shift donning and post-shift doffing extend the workweek beyond the forty-hour period, which entitles them to overtime compensation.<sup>17</sup> Normally, employees choose to file their claims under the FLSA, but a miniscule percentage of cases have instead been filed under state minimum wage laws only because some state minimum wage laws lack certain employer-friendly exceptions found under the FLSA.<sup>18</sup> *Gerber* falls into the latter group.

Routinely in these cases, courts examine the meaning of “work”, which is not defined under the FLSA or under many state minimum wage laws such as the AMWA.<sup>19</sup> In defending their pay practices, some employers turn to the FLSA § 203(o) exception and argue that they are not required to compensate for time spent engaging in strict, mandatory-workplace donning and doffing activities pursuant to a custom or practice under a collective-bargaining agreement.<sup>20</sup> Arkansas law does not include an analogous exception.<sup>21</sup>

Despite legislative action to overturn *Gerber*, this note argues that the Arkansas Supreme Court properly decided the *Gerber* case. Part II explains the historical context and treatment of the donning and doffing issue while

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*Provision*, 89 DENV. U. L. REV. 549, 561–62 (2012) (discussing multi-million-dollar settlements on behalf of employees who were not compensated for donning and doffing of personal protective equipment).

15. Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 ABA J. LAB. & EMP. L. 363, 370 (2011) (citing U.S. DEP’T OF LAB., WAGE & HOUR DIV., ADMIN. INTERPRETATION NO. 2010-2 (June 16, 2010), *superseded in part by case*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014)).

16. Joseph Gumina & Erica Reib, *A Primer for Inside Counsel on Donning & Doffing under the FLSA*, INSIDE COUNSEL (Mar. 20, 2015), <https://www.law.com/insidecounsel/almID/550aecb5150ba01826500f7a/> (summarizing when federal courts generally treat mandatory donning and doffing as compensable and non-compensable).

17. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1055 (2016); *Mitchell v. JCG Indus.*, 842 F. Supp. 2d 1080, 1082 (N.D. Ill. 2012); *Gerber*, 2016 Ark. 222, at 2–3, 492 S.W.3d at 858.

18. *See, e.g.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856.

19. *See* 29 U.S.C. §§ 201–219 (2012); ARK. CODE ANN. §§ 11-4-201 to -221 (Repl. 2012 & Supp. 2017); *infra* Part II.A–C.

20. *See infra* Part II.A–C.

21. *See infra* Part II.B–C.

simultaneously surveying the history of relevant federal and state laws.<sup>22</sup> Part II concludes by thoroughly examining the facts, holding, and subsequent history of *Gerber*.<sup>23</sup> In highlighting the differences between the majority and minority opinions, Part III argues that the *Gerber* decision was neither a departure from precedent nor an unjustified ruling.<sup>24</sup> From a policy perspective, Part IV elaborates on why *Gerber* was the right decision, signifying that the decision was justified and that it would not have hindered employer and employee relations in Arkansas.<sup>25</sup> And finally, Part V proposes a legislative fix to a major, potential issue left unanswered by the 2017 amendment of the AMWA.<sup>26</sup>

## II. BACKGROUND

This section begins by discussing the federal statutes, cases, and regulations that affect the FLSA overtime-compensation requirement.<sup>27</sup> After discussing the interconnecting federal legal framework, this section continues by exploring the development and purpose of state minimum wage and overtime laws and their effect on compensation, with a special emphasis on the AMWA.<sup>28</sup> Finally, this section concludes by thoroughly examining the procedural history, facts, holding, and subsequent history of *Gerber*, which involves some discussion about the FLSA and interpretation of the AMWA.<sup>29</sup>

### A. Federal Statutes, Cases, and Regulations

An overview of the federal laws that affect the FLSA overtime-compensation requirement provides the context for the evolvement of donning and doffing litigation. This subsection first examines the FLSA itself, which is the leading federal source governing wage and hour law.<sup>30</sup> Then, this subsection discusses the Portal-to-Portal Act, which is a relevant FLSA amendment that excludes certain types of activities from compensation.<sup>31</sup> This subsection continues by reviewing mandatory compensation under the continuous-workday doctrine established by the

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22. See *infra* Part II.A–B.

23. See *infra* Part II.C.

24. See *infra* Part III.A–C.

25. See *infra* Part IV.

26. See *infra* Part V.

27. See *infra* Part II.A.

28. See *infra* Part II.B.

29. See *infra* Part II.C.

30. See *infra* Part II.A(1).

31. See *infra* Part II.A(2).

Supreme Court of the United States.<sup>32</sup> Lastly, this subsection describes another relevant FLSA amendment known as the FLSA § 203(o), or “changing-clothes” exception, which honors customs and practices under bona-fide collective bargaining that exclude time for changing clothes from compensable work hours.<sup>33</sup>

### I. FLSA

Enacted in 1938,<sup>34</sup> “[t]he FLSA establishe[d] minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.”<sup>35</sup> This law provides individual coverage for employees engaged in interstate commerce or in the production of commercial goods for interstate commerce,<sup>36</sup> and enterprise coverage for businesses with a total annual gross sales volume of \$500,000 or more.<sup>37</sup> The FLSA covers most workplaces because courts have defined the phrase “interstate commerce” broadly.<sup>38</sup>

Specifically, the FLSA overtime provision provides, for non-exempt employees:

[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.<sup>39</sup>

The FLSA expressly defines “employ” as “to suffer or permit to work.”<sup>40</sup> However, the statute does not define “work,” and the Supreme Court of the United States, when first defining the term, stated,

[W]e cannot assume that Congress here was referring to *work* or *employment* other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or

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32. See *infra* Part II.A(3).

33. See *infra* Part II.A(4).

34. FLSA of 1938, 29 U.S.C. §§ 201–219 (2012).

35. U.S. DEP’T OF LAB., WAGE & HOUR DIV., *Compliance Assistance - Wages and the Fair Labor Standards Act (FLSA)*, <https://www.dol.gov/whd/flsa/> (last visited Feb. 23, 2017).

36. 29 U.S.C. § 203(s)(1)(A).

37. *Id.*

38. Barbara Kate Repa, *Who is Covered by the Fair Labor Standards Act?*, <http://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter2-2.html> (last visited Feb. 23, 2017).

39. 29 U.S.C. § 207(a)(1).

40. *Id.* § 203(g).

required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.<sup>41</sup>

The Court clarified the definition of “work” by including duties that did not encompass any exertion.<sup>42</sup> After that clarification, the meaning of “work” continued to evolve.<sup>43</sup>

In *Anderson v. Mount Clemens Pottery Company*,<sup>44</sup> the Court defined the “statutory workweek” as “includ[ing] all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace,”<sup>45</sup> thereby, further expanding the meaning of “work” to include preliminary activities controlled by and performed for the benefit of the employer.<sup>46</sup> In that case, the preliminary activities included donning duties, such as removing personal clothing; putting on aprons, overalls, and finger cots; and taping or greasing arms.<sup>47</sup> The Court also ruled that time “spent walking to [a place to perform] work on the employer’s premise . . . was working time within the scope of [the FLSA].”<sup>48</sup>

## 2. *Portal-to-Portal Act*

After the Supreme Court of the United States expanded the meaning of “work” in its *Anderson* decision, Congress responded by amending the FLSA with new legislation known as the Portal-to-Portal Act.<sup>49</sup> Congress took action in hopes of limiting what it perceived to be unfettered discretion displayed by the Court.<sup>50</sup> It elaborated by stating “that the [FLSA] . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers . . . .”<sup>51</sup> Therefore, the Portal-to-Portal Act excludes the following from the FLSA coverage: (1) the time spent traveling to and from the location where an employee performs “principal activities”

41. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. §§ 251–262 (2012) (emphasis added).

42. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (stating that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen”).

43. *See Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), *superseded by statute*, Portal-to-Portal Act, 29 U.S.C. §§ 251–262 (2012).

44. 328 U.S. 680 (1946).

45. *Id.* at 690–91.

46. *Id.* at 693.

47. *Id.* at 692–93.

48. *Id.* at 691.

49. *See* Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262 (2012).

50. *See id.*

51. *Id.* § 251(a).

and (2) both preliminary and postliminary activities occurring as a result of any “principal activity.”<sup>52</sup>

The United States Department of Labor<sup>53</sup> defined “principal activities” to include those “which the employee is employed to perform”<sup>54</sup> along with “all activities which [sic] are an integral part of a principal activity.”<sup>55</sup> Moreover, the Court, during its first analysis and interpretation of the Portal-to-Portal Act exemptions, created an exception to the exemptions by ruling that preliminary and postliminary activities, that are “an integral and indispensable part of the principal activities” whether performed “before or after the regular work shift, on or off the production line,” are compensable regardless of their bare-bones status as preliminary and postliminary under the Portal-to-Portal Act.<sup>56</sup> This interpretation applies to both non-unionized and unionized work settings.<sup>57</sup>

### 3. *Continuous-Workday Doctrine*

Compensable work time is calculated based on the continuous-workday doctrine established by the Supreme Court of the United States.<sup>58</sup> A “workday” is “the period between the commencement and completion on the same workday of an employee’s principal activity or activities.”<sup>59</sup> This definition created an additional exception to the Portal-to-Portal Act exemptions:

[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last

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52. *Id.* § 254(a)(1)–(2).

53. The Department of Labor is an agency of the federal government responsible for administering employment regulations including wage and hour standards; the FLSA established the Department’s Wage and Hour Division to administer and enforce the Act. See U.S. DEP’T OF LAB., *Wage and Hour Division History*, <https://www.dol.gov/whd/about/history/whdhist.htm> (last visited Feb. 23, 2017).

54. 29 C.F.R. § 790.8(a) (2016).

55. *Id.* § 790.8(b).

56. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). See also *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902–03 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21, 125 S. Ct. 514, 163 L.Ed.2d 288 (2005) (defining “integral and indispensable” as “necessary to the principal work performed” and “done for the benefit of the employer”) (citing *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 50 (8th Cir. 1984), *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2116, 85 L.Ed.2d 480 (1985); *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976)).

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

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

59. 29 C.F.R. § 790.6(b).



principal activity on a particular workday, the provisions of [§ 4 of the Portal-to-Portal Act] have no application . . . .<sup>60</sup>

In other words, compensation is required for activities occurring between the first and last “principal activities” of the day, even when the Portal-to-Portal Act expressly provides otherwise.<sup>61</sup> The Court’s broad interpretation of activities that are “integral and indispensable” to a “principal activity” means that even those activities that an employer would not necessarily consider “principal activities,” such as intermittent donning and doffing, are “principal activities” that are compensable under the continuous workday.<sup>62</sup> Similarly, employees must be compensated for activities, such as post-donning and pre-doffing waiting and walking, despite the Portal-to-Portal Act exemptions.<sup>63</sup>

#### 4. *FLSA § 203(o): The “Changing-Clothes” Exception*

In 1949, Congress further amended the FLSA to include what has become known as the “changing-clothes” exception<sup>64</sup> for unionized employers and employees.<sup>65</sup> In determining the number of hours worked, this provision provides:

[T]here 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.<sup>66</sup>

Congress sought to preserve the contractual freedom and rights of unionized employers and employees granted through collective bargaining when it created the “changing-clothes” exception, which disregards the compensation requirement for all donning and doffing activities whether or not “integral and indispensable” to unionized employees’ primary jobs.<sup>67</sup>

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60. *Id.* § 790.6(a) (further stating that “[p]eriods 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 Act had not been enacted”).

61. *Id.*

62. *Alvarez*, 546 U.S. at 37.

63. *Id.*

64. Throughout this note, the “changing-clothes” exception and special carve-out exception are used interchangeably.

65. 29 U.S.C. § 203(o) (2012). *See* 95 Cong. Rec. 11,433 (daily ed. Aug. 10, 1949) (comments of Rep. Herter) (stating that § 203(o) was enacted to “avoid[] another series of incidents which led to the [P]ortal-to-[P]ortal legislation . . .”).

66. 29 U.S.C. § 203(o).

67. *See id.* § 251(b).

A typical donning and doffing case construing this exception involves the issues of whether donning and doffing protective gear is the same as “changing clothes” and whether compensation has been expressly waived through either a custom or practice under a bona-fide collective-bargaining agreement.<sup>68</sup> In *Sandifer v. United States Steel Corporation*,<sup>69</sup> the Supreme Court of the United States held that some protective gear is clothing<sup>70</sup> and as such, is subject to the “changing-clothes” exception for unionized employers.<sup>71</sup> The Court also held that certain protective gear may not qualify as clothing,<sup>72</sup> and changing into such gear must be compensated if a substantial amount of time is required to put on and remove those items.<sup>73</sup>

## B. State Minimum Wage and Overtime Laws: The AMWA

The federal FLSA allows states to enact their own wage and hour laws.<sup>74</sup> Most states enact these requirements to establish more protective standards for employees already covered under the FLSA or to establish provisions for employees who are not covered by the federal law.<sup>75</sup> When both the federal and state laws apply, employers must comply with the more stringent standard.<sup>76</sup>

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68. See *infra* notes 69–73 and accompanying text.

69. 134 S. Ct. 870 (2014).

70. *Id.* at 878. See *id.* at 876 (defining clothes as “items that are both designed and used to cover the body and are commonly regarded as articles of dress”) (citing WEBSTER’S NEW INT’L DICTIONARY OF THE ENG. LANGUAGE 507 (2d ed. 1950); 2 OXFORD ENG. DICTIONARY 524 (1933)).

71. *Id.* at 879.

72. *Id.* at 878 (excluding the following items from the definition of clothes: wearable accessories, tools, and equipment that are not commonly regarded as articles of dress) (citing *Salazar v. Butterball, LLC*, 644 F3d 1130, 1139–1140 (10th Cir. 2011)).

73. *Id.* at 880 (quoting in part *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)) (In *Anderson*, the Supreme Court of the United States summarized its *de minimis* doctrine: “[t]he workweek . . . must be computed in light of the realities of the industrial world. 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.”).

74. See 29 U.S.C. § 218 (2012).

75. See *id.* See also Gerald Mayer, Benjamin Collins & David H. Bradley, CONGRESSIONAL RES. SERV., THE FAIR LABOR STANDARDS ACT: AN OVERVIEW (2013), <https://fas.org/spp/crs/misc/R42713.pdf>.

76. See 29 U.S.C. § 218(a) (stating in part that “[n]o 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 . . .”).

In 1968, the Arkansas General Assembly passed the AMWA.<sup>77</sup> The AMWA established a minimum wage for employees in Arkansas to protect their health, efficiency, and general well-being.<sup>78</sup> It covers employers who employ more than four employees,<sup>79</sup> but the statute leaves uncovered several categories of employees.<sup>80</sup> It includes an overtime provision identical to that of the FLSA<sup>81</sup> and does not define the term “work.”<sup>82</sup>

The AMWA has been amended several times.<sup>83</sup> With the 2007 amendment, the Arkansas General Assembly incorporated certain provisions of the FLSA into the AMWA,<sup>84</sup> but these revisions to the AMWA did not incorporate the special carve-out exception.<sup>85</sup> Additionally, the Arkansas General Assembly overturned the *Gerber* decision concurrently with its 2017 amendment of the AMWA.<sup>86</sup>

### C. *Gerber v. Hewitt*

This subsection analyzes the *Gerber* case according to its procedural posture by first reviewing the relevant aspects of the circuit court’s

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77. AMWA of 1968, ARK. CODE ANN. §§ 11-4-201 to -222 (Repl. 2012 & Supp. 2017).

78. *Id.* § 11-4-202.

79. *Id.* § 11-4-203(4)(B). Originally, the AMWA exempted employers covered by the FLSA, but in 2006, it was amended to include all employers with four or more employees regardless of prior FLSA coverage. *See* “An Act to Revise the Minimum Wage Act of the State of Arkansas . . .” (Act of Apr. 10, 2006, No. 16, 2006 Ark. Acts 16; Act of Apr. 10, 2006, No. 15, 2006 Ark. Acts 15). The amendment also provided a private right of action under § 11-4-218. *Id.*

80. For example, excluded from the definition of employee includes students performing services for schools that they attend, federal employees, bona fide independent contractors, and workers engaging in the production of livestock. *See* ARK. CODE ANN. § 11-4-203(3)(A)–(R). *See* ARK. DEPT. OF LABOR, *Fact Sheet on the Increase of the Arkansas Minimum Wage*, <http://www.labor.arkansas.gov/Websites/labor/images/FactSheetIncreaseArkansasMinimumWage.pdf> (last visited Feb. 23, 2017) (exempting employees from both the minimum wage and overtime provisions or just the overtime provision solely).

81. ARK. CODE ANN. § 11-4-211(a) (stating that “[e]xcept as otherwise provided in this section and §§ 11-4-210 and 11-4-212, no employer shall employ any of his or her employees for a work week longer than forty (40) hours unless the employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half (1 1/2) times the regular rate of pay at which he or she is employed”).

82. *See id.* § 11-4-203.

83. *See, e.g.*, Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914; Act of Apr. 11, 2013, No. 1128, 2013 Ark. Acts 1128; Act of Mar. 21, 2013, No. 457, 2013 Ark. Acts 457; Act of Mar. 28, 2007, No. 545, 2007 Ark. Acts 545.

84. Appellees’ Brief at Arg. 4, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (citing “An Act to Amend the Minimum Wage and Overtime Law to Parallel Certain Provisions of Federal Minimum Wage and Overtime Law . . .” (Act of Mar. 28, 2007, No. 545, 2007 Ark. Acts 545)).

85. *Id.*

86. Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914.

decision.<sup>87</sup> Subsequently, this subsection reviews the relevant aspects of the appellate court's decision.<sup>88</sup> In reviewing the appellate court's decision, this subsection first summarizes the majority opinion,<sup>89</sup> which is followed by a summary of the dissenting opinion.<sup>90</sup> This subsection concludes by discussing the legislative action to overturn *Gerber* in 2017.<sup>91</sup>

### *I. Trial Level*

On June 6, 2012, a group of employees filed a class action against Gerber Products Company ("Gerber") in the Sebastian County Circuit Court in Arkansas.<sup>92</sup> Subject to the AMWA overtime requirement, the named Plaintiffs, serving as the proposed class-action representatives, worked as non-exempt, hourly employees at Gerber's baby-food processing and manufacturing facility in Fort Smith, Arkansas.<sup>93</sup> The putative class included non-exempt, hourly persons required to perform mandatory-workplace donning and doffing activities without compensation.<sup>94</sup> The class also included individuals who were or would be employed by Gerber at the Fort Smith facility "at any time within the three years prior to the filing of the [c]omplaint through the date of the final disposition of [the] action."<sup>95</sup>

Plaintiffs asserted that Gerber had violated the AMWA by not fully compensating them for all the time worked at the facility.<sup>96</sup> Specifically, Plaintiffs first alleged that they had not received any compensation for time spent donning, doffing, sanitizing clothing and equipment, washing their hands, and walking to and from their work stations, which were all "necessary and indispensable to their principal [job]" of producing safe food products.<sup>97</sup> They alleged that these activities had extended their work time

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87. *See infra* Part II.C(1).

88. *See infra* Part II.C(2)–(3).

89. *See infra* Part II.C(2).

90. *See infra* Part II.C(3).

91. *See infra* Part II.C(4).

92. Plaintiffs' Complaint at 1, *Hewitt v. Gerber Prod. Co.*, No. CV-12-715 (Ark. Cir. Ct. June 6, 2012). *See also* *Gerber Prod. Co. v. Hewitt*, 2016 Ark. 222, at 1–2, 492 S.W.3d 856, 858.

93. Plaintiffs' Complaint at 2–3, ¶¶ 7–11, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

94. Plaintiffs' Complaint at 2, ¶ 4, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

95. *Id.*

96. Plaintiffs' Complaint at 2, ¶ 2, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

97. Plaintiffs' Complaint at 2, ¶ 3, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

beyond the maximum forty-hour workweek, and thus, they were entitled to overtime pay.<sup>98</sup>

Plaintiffs described their workday in the following manner. Gerber had required them to wear their personal clothing onto the premises.<sup>99</sup> Subsequently, they had to walk through an electronic-controlled turnstile that records the time when each employee arrives to begin the workday.<sup>100</sup> After walking through the turnstile, Plaintiffs had to walk to locker rooms and dressing areas to don Gerber-supplied uniforms and shoes that were required to be kept at the facility.<sup>101</sup> They had to use a lint roller to remove lint and fuzz from their clothing; had to don protective gear such as hairnets, beard nets, ear plugs, and bump caps; and had to wash their hands.<sup>102</sup> After all this, Plaintiffs were finally allowed to clock in after walking a significant distance.<sup>103</sup> Once their shifts were completed, they were required to clock out and then were permitted to doff their protective clothing and gear in order to change back into their personal clothing and shoes.<sup>104</sup>

In its answer, Gerber disputed the facts and asserted that federal law preempted Plaintiffs' state law claims because Plaintiffs joined the union as members, that the union negotiated with Gerber to decide whether time spent donning and doffing required both clothing and protective gear, and that the union also negotiated whether such time would be compensable.<sup>105</sup> Gerber unsuccessfully tried to remove the case to federal court twice,<sup>106</sup> and each time, the federal court remanded it back to the state circuit court.<sup>107</sup>

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98. Plaintiffs' Complaint at 4, ¶ 17, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 858.

99. Plaintiffs' Complaint at 4, ¶ 19, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

100. Plaintiffs' Complaint at 4, ¶ 19, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 858.

101. Plaintiffs' Complaint at 4-5, ¶ 20, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 2-3, 492 S.W.3d at 858.

102. Plaintiffs' Complaint at 5, ¶¶ 22-23, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 858.

103. Plaintiffs' Complaint at 5, ¶ 24, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 858.

104. Plaintiffs' Complaint at 5, ¶ 25, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 858.

105. Defendant's Answer at 8, ¶¶ 2-3, *Hewitt*, No. CV-12-715. See also *Gerber*, 2016 Ark. 222, 492 S.W.3d 856.

106. See *Hewitt v. Gerber Prod. Co.*, No. 2:13-CV-02117, 2014 WL 4494736 (W.D. Ark. July 18, 2014) (second removal attempt). See also *Hewitt v. Gerber Prod. Co.*, No. 2:13-CV-02117, 2013 WL 5786089 (W.D. Ark. Oct. 28, 2013) (first removal attempt).

107. *Hewitt*, No. 2:13-CV-02117, 2014 WL 4494736; *Hewitt*, 2:13-CV-02117, 2013 WL 5786089.

The parties filed cross-motions for summary judgment in August 2014.<sup>108</sup> The circuit court allowed Plaintiffs' AMWA claim to proceed to trial,<sup>109</sup> and three days before the start of trial, the circuit court granted Plaintiffs' motion for partial-summary judgment and denied Gerber's motion for reconsideration.<sup>110</sup> The order specifically said in part,

The Court concludes that the [AMWA] requires that the employer, [Gerber], treat the time required by employees to complete the mandatory Donning and Doffing activities at issue in this lawsuit as compensable work time, notwithstanding any contrary custom or practice under a collective bargaining agreement applicable to those employees or any express agreement. The [AMWA] does not incorporate the federal 203(o) exemption for clothes changing time in unionized facilities. There is no genuine issue of material fact that Gerber employed 4 or more individuals and that the class members worked more than 40 hours in one or more workweeks. Gerber did not treat the mandatory Donning and Doffing activities as compensable work time, and thereby violated the AMWA by failing to pay overtime as required by the Act.<sup>111</sup>

The circuit court entered its final judgment pursuant to both its January 2015 order and the parties' stipulations to the remaining issues of fact and procedure.<sup>112</sup> Therefore, the circuit court awarded damages in the amount of

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108. Plaintiffs argued the following: changing clothes, washing, walking, and waiting are "work" under the AMWA; the AMWA is not a carbon copy of the FLSA, the AMWA does not incorporate the FLSA § 203(o) exception, and the exception does not fit within the contours of the AMWA; and the Labor Management Relations Act does not preempt the AMWA. *See* Brief in Support of Plaintiffs' Motion for Partial-Summary Judgment at 7–26, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d 859. Gerber asserted that the donning and doffing claim under the AMWA should be dismissed because the AMWA should be interpreted consistently with the FLSA; that the donning and doffing time is not compensable under the FLSA; that the FLSA's "hours worked" definition, i.e. § 203(o), applies to the AMWA; and that the Plaintiffs' claim for walking time must be dismissed as well. *See* Brief in Support of Defendant's Motion for Summary Judgment at 16–29, *Hewitt*, No. CV-12-715. *See also Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 859.

109. Circuit Court Order, *Hewitt*, No. CV-12-715 (Nov. 3, 2014). *See also Gerber*, 2016 Ark. 222, at 4, 492 S.W.3d at 859.

110. Circuit Court Order, *Hewitt*, No. CV-12-715 (Jan. 23, 2015). *See also Gerber*, 2016 Ark. 222, at 4, 492 S.W.3d at 859.

111. Circuit Court Order, *Hewitt*, No. CV-12-715 (Jan. 23, 2015). *See also Gerber*, 2016 Ark. 222, at 5–6, 492 S.W.3d at 860–61. (The circuit court also viewed post-donning and pre-doffing walking time as compensable work time, i.e., walking occurring after mandatory donning and walking occurring before mandatory doffing are a part of the continuous workday. The circuit court did not rule on a formula for the calculation of damages; it set a trial date of January 26, 2015 for a jury to decide the amount of time required by the employees to perform the mandatory donning and doffing).

112. Circuit Court Order, *Hewitt*, No. CV-12-715 (Aug. 4, 2015). *See also Gerber*, 2016 Ark. 222, at 6–7, 492 S.W.3d at 861.

\$3,001,669.84, plus pre-judgment and post-judgment interest, to Plaintiffs.<sup>113</sup>

## 2. *Appellate Level – Majority Opinion*

Unsatisfied with the circuit court's ruling and judgment, Gerber appealed,<sup>114</sup> and the Arkansas Supreme Court heard the matter.<sup>115</sup> The court first decided the issue of "whether the mandatory donning and doffing activities constitute compensable work time pursuant to the AMWA despite contrary custom and practice under [Gerber and the union's] collective-bargaining agreement."<sup>116</sup> The Arkansas Supreme Court reviewed the statutory interpretation issue *de novo* while giving effect to the intent of the Arkansas General Assembly.<sup>117</sup>

After acknowledging that the AMWA does not specifically define the term "work," the majority defined "work" according to its ordinary and plain language as "an 'activity in which one exerts strength or faculties to do or perform.'"<sup>118</sup> Subsequently, the majority held that the mandatory donning and doffing activities constitute "work" because Gerber required that these activities be performed according to strict procedures and that such activities benefitted Gerber by reducing workplace injury and contamination.<sup>119</sup> The Arkansas Supreme Court also relied on the Arkansas Department of Labor's<sup>120</sup> (ADOL) regulations to support its holding.<sup>121</sup>

113. Circuit Court Order, *Hewitt*, No. CV-12-715 (Aug. 4, 2015). *See also Gerber*, 2016 Ark. 222, at 7, 492 S.W.3d at 861.

114. *Gerber*, 2016 Ark. 222, at 7, 492 S.W.3d 861.

115. *See* Arkansas Supreme Court Order Granting Transfer (Feb. 25, 2016), *Gerber*, 2016 Ark. 222, 492 S.W.3d 856. *See also* Appellees' Motion to Transfer This Appeal to the Arkansas Supreme Court, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (alleging that the appeal "involves an issue of first impression, presents significant issues needing clarification of Arkansas law, and involves substantial questions of law concerning the construction and interpretation of the [AMWA]").

116. *Gerber*, 2016 Ark. 222, at 7, 492 S.W.3d at 861.

117. *Id.* at 8, 492 S.W.3d at 861.

118. *Id.* at 9, 492 S.W.3d at 862 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 2634 (1993)).

119. *Id.*, 492 S.W.3d at 862.

120. The Arkansas Department of Labor is a governmental agency in charge of enforcing Arkansas labor laws. It is composed of four divisions, including the Labor Standards Division which oversees the states' minimum wage and overtime laws. *See* ARK. DEP'T. OF LAB., *Mission, Vision, Values*, <http://www.labor.arkansas.gov/mission> (last visited Feb. 23, 2017).

121. *Gerber*, 2016 Ark. 222, at 9, 492 S.W.3d at 862 (citing 010 ARK. CODE R. § 14.1-108(A)(1) which states that "[w]ork not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time;")

After interpreting the definition of “work” to include mandatory donning and doffing activities controlled by and for the benefit of the employer, the court then answered whether Gerber and the union were allowed to negotiate away compensable work time through the collective-bargaining process.<sup>122</sup> The majority examined Gerber’s arguments and stated that when reading the entire AMWA in an effort to ascertain the legislature’s intent, it is clear that had the Arkansas General Assembly wanted to include a “changing-clothes” exception for collective-bargaining units, it would have done so.<sup>123</sup> The majority chose not to engraft the “changing-clothes” exception into the AMWA, thereby, affirming the circuit court’s ruling.<sup>124</sup>

### 3. *Appellate Level – Dissenting Opinion*

The three-member dissent stated that litigation would increase in Arkansas and that the collective-bargaining process would be less effective as a result of the majority’s holding in *Gerber*, which mimicked the past mistakes of the federal government.<sup>125</sup> In declaring these points, the dissent discussed the clashing between the Supreme Court of the United States and Congress that resulted from the Court’s initial interpretations of “work” and “workweek” following the enactment of the FLSA.<sup>126</sup> Likewise, the dissenting justices viewed the majority’s holding in *Gerber* as detrimental and analogized it with the Court’s holdings prior to Congress amending the FLSA with the Portal-to-Portal Act and the special carve-out exception.<sup>127</sup>

The dissent further argued that the ADOL, pursuant to the AMWA regulations, is instructed to use the FLSA precedent established under federal law.<sup>128</sup> The dissent asserted that not only is the ADOL instructed to look to federal guidance when interpreting the AMWA but that the Arkansas Supreme Court usually turns to federal guidance when a state statute is silent on an issue.<sup>129</sup> In other words, the dissent contended that the majority

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citing ARK. CODE R. 010 § 14.1–108(A)(3) which states, “In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them;” citing ARK. CODE R. 010 § 14.1–108(B)(2) which “provides that waiting time, while on duty, is considered worktime if the employee is unable to use the time effectively for his own purpose”).

122. *Id.* at 10–11, 492 S.W.3d at 863.

123. *Id.* at 11–14, 492 S.W.3d at 863–64.

124. *Id.* at 14, 492 S.W.3d at 864.

125. *Id.*, 492 S.W.3d at 865 (Wood, J., dissenting).

126. *Id.* at 14–15, 492 S.W.3d at 865 (Wood, J., dissenting).

127. *Gerber*, 2016 Ark. 222, at 14–15, 492 S.W.3d at 865 (Wood, J., dissenting).

128. *Id.* at 15–16, 492 S.W.3d at 865–66 (Wood, J., dissenting).

129. *Id.* at 16, 492 S.W.3d at 865–66 (Wood, J., dissenting).



departed from precedent by failing to follow the FLSA because the AMWA is silent on the special carve-out exception.<sup>130</sup> For additional support, the dissent mentioned that other state courts have turned to the FLSA for direction when their state labor statutes failed to address certain issues.<sup>131</sup>

The dissent continued by stating that Gerber and the union are sophisticated parties; therefore, their long-established contracts and customs should not be disregarded.<sup>132</sup> It specifically argued that the AMWA should be interpreted in a way that does not hinder collective bargaining and stated that the majority's holding has now obviously interfered with the parties' right to bargain as they see fit.<sup>133</sup> Lastly, the dissenting justices contended that an employee is only entitled to the AMWA remedies when an employer has failed to pay, at the very least, the required minimum wages, and that was not the case in *Gerber* because many of the employees in the class earned almost three times the minimum wage.<sup>134</sup>

#### 4. *The AMWA Amended and Gerber Overturned*

Using the dissenting opinion as its basis, the Arkansas General Assembly enacted an Act (the "Act") in 2017 to amend and clarify the AMWA and to overrule *Gerber*.<sup>135</sup> First, the legislature amended sections 11-4-205 (Rights of Collective Bargaining Not Affected) and 11-4-218 (Employee's Remedies) of the AMWA.<sup>136</sup> Then, it added a new section, 11-4-221, that excuses employers who fail to provide compensation for certain types of activities.<sup>137</sup>

As amended, section 11-4-205, which the dissent used for support, states, "Nothing in this subchapter, including the provisions of § 11-4-218(b), shall be deemed to interfere with, impede, or in any way diminish the right of employers and employees to bargain collectively . . . in order to establish wages or other conditions of work."<sup>138</sup> The legislature added the words "including the provisions of § 11-4-218(b)," which did not exist when the Arkansas Supreme Court decided *Gerber*. Section 11-4-218(b) states that "[a]ny agreement between the employee and employer to work for less

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130. *Id.*, 492 S.W.3d at 865–66 (Wood, J., dissenting).

131. *Id.* at 17, 492 S.W.3d at 866 (Wood, J., dissenting).

132. *Id.*, 492 S.W.3d 866 (Wood, J., dissenting).

133. *Gerber*, 2016 Ark. 222, at 17–18, 492 S.W.3d at 866–67 (Wood, J., dissenting) (citing ARK. CODE ANN. § 11-4-205 (Repl. 2012)).

134. *Id.* at 18, 492 S.W.3d at 867 (Wood, J., dissenting) (citing ARK. CODE ANN. § 11-4-218(a)–(b)).

135. Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

136. *Id.*

137. *Id.*

138. ARK. CODE ANN. § 11-4-205 (Repl. 2012 & Supp. 2017).

than minimum wages [including overtime pay] shall be no defense to” a lawsuit filed under the AMWA.<sup>139</sup> The legislature inserted the additional words to prevent section 11-4-218(b) from interfering with collective-bargaining rights under section 11-4-205.<sup>140</sup>

The Arkansas General Assembly also added subsection (f) to section 11-4-218.<sup>141</sup> The AMWA now includes language indicating that a court may look to other state and federal decisions interpreting the FLSA as guidance when interpreting the AMWA.<sup>142</sup> Furthermore, the newly added section 11-4-221 is an exact rendition of the Portal-to-Portal Act,<sup>143</sup> which currently amends the FLSA. Therefore, preliminary and postliminary activities, such as mandatory-workplace donning and doffing, are not automatically compensable unless expressly provided for in a contract, through custom, or through practice.<sup>144</sup>

### III. ARGUMENT

Despite the dissent’s attack on the *Gerber* holding and the subsequent enactment of the 2017 Act, this note argues that the Arkansas Supreme Court properly decided *Gerber*. Specifically, all mandatory-workplace donning and doffing activities constitute “work” under the AMWA. The *Gerber* decision, serving as the bright-line law, had required compensation for these activities,<sup>145</sup> but the Arkansas General Assembly’s action destroyed this clarity.<sup>146</sup>

Considering that federal precedent is only viewed as persuasive authority when interpreting the amended AMWA,<sup>147</sup> one question that remains unresolved is how should courts interpret the Arkansas Portal-to-Portal Act in matters not involving collective-bargaining agreements that expressly waive compensation for these mandatory activities.<sup>148</sup> This question is not addressed by the 2017 Act<sup>149</sup> and will pose a problem for courts should it arise.<sup>150</sup> Additionally, when the Arkansas Supreme Court

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139. Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914.

140. *Id.* See ARK. CODE ANN. § 11-4-218(b).

141. Act of Apr. 5, 2017, No. 914.

142. ARK. CODE ANN. § 11-4-218(f). See Act of Apr. 5, 2017, No. 914.

143. ARK. CODE ANN. § 11-4-221. See Act of Apr. 5, 2017, No. 914.

144. *Id.*

145. See *Gerber*, 2016 Ark. 222, 492 S.W.3d 856.

146. See Act of Apr. 5, 2017, No. 914.

147. See ARK. CODE ANN. § 11-4-218(f) (Supp. 2017).

148. See *infra* Part V (proposal to address this issue).

149. See Act of Apr. 5, 2017, No. 914.

150. See *infra* Part V.

decided *Gerber*, the majority had interpreted the AMWA correctly.<sup>151</sup> Thus, excluding the FLSA § 203(o) special carve-out exception was proper.

The subsequent discussion counterattacks the dissent's arguments while simultaneously addressing the 2017 Act. The dissent's arguments are categorized into three broad categories: repeating the past mistakes of the federal government,<sup>152</sup> failing to seek federal guidance,<sup>153</sup> and undermining the collective-bargaining process.<sup>154</sup> Each argument is addressed accordingly.

#### A. Repeating the Past Mistakes of the Federal Government

The majority's holding was not a rendition of the alleged federal government's past mistakes.<sup>155</sup> In emphasizing that litigation in Arkansas will increase and businesses will suffer, the dissent quoted the Supreme Court of the United States saying, "In the six months following this Court's decision in *Anderson* [determining the "statutory workweek"], unions and employees filed more than 1,500 lawsuits under [the] FLSA. These suits sought nearly \$6 billion in backpay and liquidated damages for various preshift and postshift activities."<sup>156</sup> The dissent acknowledged Congress's quick enactment of the Portal-to-Portal Act.<sup>157</sup>

Had *Gerber* not been overturned, it is possible that Arkansas courts might have experienced an increase in cases that relate to mandatory-workplace donning and doffing if employers had failed to compensate employees for these activities. However, this possibility would have substantially dissipated as time passed. Most significantly, the holding provided Arkansas unions, employees, and employers with a definitive answer as to whether mandatory-workplace donning and doffing activities constitute "work" under the AMWA.<sup>158</sup> Under Arkansas law, the *Gerber* holding clearly stated that all mandatory-workplace donning and doffing of both clothing and protective gear, which were considered "work" before

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151. *Gerber*, 2016 Ark. 222, 492 S.W.3d 856.

152. *See infra* Part III.A.

153. *See infra* Part III.B.

154. *See infra* Part III.C.

155. *See Gerber*, 2016 Ark. 22, at 14, 492 S.W.3d at 864 (Wood, J., dissenting).

156. *Gerber*, 2016 Ark. 222, at 15, 492 S.W.3d at 865 (Wood, J., dissenting) (quoting *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 517 (2014)).

157. *Id.*, 492 S.W.3d at 865 (Wood, J., dissenting).

158. *See Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 862. *See also* Kevin McGowan, *Gerber Liable for \$3M in Donning and Doffing Case* (May 31, 2016), <https://www.bna.com/gerber-liable-for3m-n57982073244/> (quoting Plaintiffs' Attorney Tim Steadman saying, "The ruling should 'ultimately reduce litigation' because the court provided a definitive answer to an open issue under state law.").

*Gerber* was overturned, must be compensated.<sup>159</sup> With this understanding, litigation in Arkansas would have decreased due to the majority's clarity in answering an open issue of state law.

However, the recently added AMWA provision, that grants courts with the permissive discretion to seek guidance from other state and federal courts when interpreting the AMWA, adds no real substance and could potentially create inconsistent rulings.<sup>160</sup> For a case involving a non-unionized employer or unionized employer without a collective-bargaining agreement that expressly waives compensation, one court may choose to review federal guidance. In doing so, the court would recognize that mandatory-workplace donning and doffing activities that are "integral and indispensable" to an employee's principal job require compensation in spite of the Portal-to-Portal Act exemption for preliminary and postliminary activities.<sup>161</sup> On the other hand, now that the AMWA has its own Portal-to-Portal Act language,<sup>162</sup> a court choosing not to review federal guidance would not necessarily be inclined to require compensation for such mandatory activities based on the AMWA statutory language alone. Without any binding-state case law, such potential inconsistency runs the risks of creating uncertainty and diluting judicial efficiency. At the very least, the *Gerber* ruling provided all Arkansas employers with clarity to an open issue of state law, i.e., it affirmatively answered whether mandatory-workplace donning and doffing activities constitute "work," which should be compensated, in both non-unionized and unionized settings.<sup>163</sup>

Secondly, the AMWA statute of limitations period is three years;<sup>164</sup> therefore, any claims under the AMWA must be brought within three years from their accrual. The statutory period applies equally to all alleged claims of compensation violations, including those relating to mandatory-workplace donning and doffing under Arkansas law.<sup>165</sup> This statute of limitations period serves as a defense for employers and limits which cases proceed through the litigation process.<sup>166</sup>

Lastly, employees deserve to be paid for their work. While Congress sought to minimize the effects of the broad interpretations of "work" and "workweek" by the Supreme Court of the United States, one must

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159. See *Gerber*, 2016 Ark. 222, at 2, 492 S.W.3d at 862.

160. See ARK. CODE ANN. § 11-4-218(f) (Repl. 2012 & Supp. 2017). See also Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

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

162. See ARK. CODE ANN. § 11-4-221 (Supp. 2017).

163. *Gerber*, 2016 Ark. 222, at 10, 492 S.W.3d at 862.

164. *Douglas v. First Student, Inc.*, 2011 Ark. 463, at 6, 385 S.W.3d 225, 228.

165. *Id.*, 385 S.W.3d at 228.

166. *Id.*, 385 S.W.3d at 228.

understand that Congress enacted the FLSA to benefit employees.<sup>167</sup> Consequently, any reasonable interpretation of the FLSA must be in favor of employees.<sup>168</sup> This standard is equally true for the AMWA.<sup>169</sup>

When deciding *Gerber*, the majority recognized that the AMWA is to be liberally construed in favor of its public policy or purpose.<sup>170</sup> “To establish *minimum wages* for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency, and well-being.”<sup>171</sup> The term “minimum wages” can reasonably be construed to include overtime compensation as well.<sup>172</sup> Accordingly, the statute’s employee-driven purpose supports the majority’s former interpretation of “work” under the AMWA, which included compensable mandatory-workplace donning and doffing activities under the AMWA.<sup>173</sup>

## B. Failing to Seek Federal Guidance

Before *Gerber* was overturned, neither the ADOL nor the courts had been required to seek or follow other state or federal law, and the same still holds true although *Gerber* has been overturned. The AMWA regulations instruct the ADOL to turn to two sources of federal law as a guide,<sup>174</sup> but when the dissent stated that the ADOL is instructed to look to federal guidance when interpreting the AMWA, the dissent had ignored the permissive language of “may” and the phrasing “*except to the extent a different interpretation is clearly required,*” which is found in the applicable regulation.<sup>175</sup>

“May” simply implies “[t]o be permitted to” or “[t]o be a possibility.”<sup>176</sup> Although some courts interpret “may” as meaning “shall,” Arkansas courts have reviewed many statutes that include the term “may”

167. See *Anderson*, 328 U.S. 680; *Tenn. Coal*, 321 U.S. 590. See also Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535–38 (2001) (introducing and explaining the historical background of the FLSA).

168. See Clemons, *supra* note 167, at 535–38.

169. See *infra* notes 170–73 and accompanying text.

170. ARK. CODE ANN. § 11-4-204(b) (Repl. 2012).

171. *Id.* § 11-4-202 (emphasis added).

172. See *id.* § 11-4-218(a)(1). See also *infra* Part III.C.

173. See *id.* § 11-4-202.

174. “The department *may* rely on [1] the interpretations of the U.S. Department of Labor and [2] federal precedent established under the Fair Labor Standards Act in interpreting and applying the provisions of the Act and Rule 010.14-100 through -113, *except to the extent a different interpretation is clearly required.*” ARK. CODE R. § 010.14–112 (emphasis added).

175. *Id.*

176. *May*, BLACK’S LAW DICTIONARY (9th ed. 2009).

and have expressly indicated that such interpretation is not mandatory or direct.<sup>177</sup> If that holds true for statutes, the same reasoning can be applied to regulations that include the same permissive wording. Because “may” is generally considered permissive, the ADOL is not obligated to look to sources of federal law when interpreting or applying the AMWA.

The phrasing in the ADOL regulation, which says, “*except to the extent a different interpretation is clearly required,*” actually restricts when the ADOL should seek federal guidance when interpreting the AMWA.<sup>178</sup> The AMWA does not contain the FLSA “changing-clothes” exception.<sup>179</sup> Because there is no analogous AMWA special carve-out provision, there would not have been any need for the ADOL, if it were involved with the *Gerber* case, to seek federal guidance for a provision that does not exist.<sup>180</sup> Thus, a different interpretation of the AMWA, in comparison to federal guidance, would have been required.

Furthermore, the FLSA “changing-clothes” exception itself is neither an interpretation of the United States Department of Labor nor federal precedent.<sup>181</sup> It is a mere policy choice incorporated into the FLSA by Congress in response to federal precedent set by the Supreme Court of the United States and to interpretations supplied by the United States Department of Labor.<sup>182</sup> Accordingly, the exception itself would not have to be relied upon by the ADOL because it is not a federal interpretation or precedent.<sup>183</sup>

Secondly, the dissent’s forceful contention that the majority departed from precedent by failing to look at analogous federal statutes and precedent<sup>184</sup> is an exaggeration at best. The dissent stated that the Arkansas Supreme Court typically turns to federal statutes and precedent when state statutes are silent on an issue.<sup>185</sup> This assertion led the Arkansas General Assembly to add section 11-4-218(f), which states, “[A] court *may* look for

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177. “The operative word in this statute is ‘may.’ The word ‘may’ is usually employed as implying permissive or discretionary, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used.” *Marcum v. Wengert*, 344 Ark. 153, 164, 40 S.W.3d 230, 237 (2001); see Michael W. Mullane, *Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach*, 2005 Ark. L. Notes 73.

178. Appellees’ Brief at Arg. 14, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966).

179. Compare ARK. CODE ANN. §§ 11-4-201 to -222 (Repl. 2012 & Supp. 2017), with 29 U.S.C §§ 201–219 (2012).

180. Appellees’ Brief at Arg. 14–15, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Gerber*, 2016 Ark. 222, at 16, 492 S.W.3d at 865–66 (Wood, J., dissenting).

185. *Id.*, 492 S.W.3d at 865–66 (Wood, J., dissenting).

guidance to state and federal decisions interpreting the [FLSA] . . . as it existed on January 1, 2017, which . . . shall have persuasive authority.”<sup>186</sup>

In response to the dissent’s argument, Arkansas courts have sought guidance from federal law on some state matters, but Arkansas courts have not followed federal guidance in every case. For example, when the Arkansas Supreme Court discussed assessing costs to a losing party in a case where such costs are authorized by rules or statutes, it stated, “[C]ontrary to [Appellant’s] assertion, federal case law offers no guidance. The federal rule (Fed.R.Civ.P. 54(d)) differs from our own, and there are federal statutes which specifically authorize taxing certain costs.”<sup>187</sup> Likewise, in *Faulkner v. Arkansas Children’s Hospital*,<sup>188</sup> the Arkansas Supreme Court reviewed the term “disability” under the Arkansas Civil Rights Act and the Americans with Disabilities Act (ADA) and refused to use the ADA and its interpretations as guidance to expand the state statutory definition of “disability.”<sup>189</sup> To reiterate, the Arkansas Supreme Court does not always follow federal guidance.

Moreover, the dissent’s implication that other state courts have followed the FLSA precedent when state labor laws are silent on issues<sup>190</sup> is untenable. The cases that the dissent cites in support of this assertion are cases decided by federal courts construing state labor statutes.<sup>191</sup> It is quite natural for federal courts to construe open issues of state law like that of federal law, but these interpretations are not binding authority on state courts.<sup>192</sup>

The very fact that the United States District Court for the Western District of Arkansas remanded the *Gerber* case back to the state circuit court twice is significant. This federal court found that it had lacked jurisdiction

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186. Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

187. *Wood v. Tyler*, 317 Ark. 319, 321–22, 877 S.W.2d 582, 583 (1994).

188. 347 Ark. 941, 69 S.W.3d 393 (2002).

189. *Id.*, at 954, 69 S.W.3d 393, 401 (2002) (stating that “[t]he Eighth Circuit Court of Appeals recently offered its view that our court would interpret the Arkansas Civil Rights Act’s definition of “disability” in identical fashion to its federal corollary,” but the Arkansas Supreme Court recognized that the Eighth Circuit’s decision is not binding).

190. *Gerber*, 2016 Ark. 222, at 17, 492 S.W.3d at 866 (Wood, J., dissenting).

191. *Id.*, 492 S.W.3d at 866 (Wood, J., dissenting) (citing *Thompson v. Blessed Home, Inc.*, 22 F. Supp. 3d 542, 550 (E.D.N.C. 2014) (the Eastern District of North Carolina interpreting the North Carolina Wage and Hour Act); *Mitchell v. JCG Indus.*, 929 F. Supp. 2d 827, 833 (N.D. Ill. 2013) (the Northern District of Illinois interpreting the Illinois Minimum Wage and Hour Law); and *Kirchoff v. Wipro, Inc.*, 894 F. Supp. 2d 1346, 1350 (W.D. Wash. 2012) (the Western District of Washington interpreting the Washington Minimum Wage Act)).

192. *Faulkner*, 347 Ark. at 954, 69 S.W.3d at 401–02.

based on all three arguments asserted by Gerber for removal.<sup>193</sup> Most notably, it concluded that it had lacked federal question jurisdiction because “the parties ha[d] a dispute over interpretation and application of Arkansas state law, not over the interpretation of a provision in the [collective-bargaining agreement].”<sup>194</sup> The Western District concluded that such a matter was best suited for state court and that it did not require the examination of any provisions governed by federal law or the application of any federal law.<sup>195</sup>

Furthermore, the Arkansas Supreme Court decided *Gerber* as a case of first impression.<sup>196</sup> The case itself revealed the dearth of donning and doffing litigation decided in *state courts* under *state minimum wage and overtime laws* solely.<sup>197</sup> Two Illinois state cases have only referenced, but not resolved, the issue of whether state law requires compensation for mandatory-workplace donning and doffing.<sup>198</sup> Without any binding precedent, the Arkansas Supreme Court had the right to construe the AMWA and resolve the instant statutory interpretation issue. This was consistent with state precedent, not a departure from it.<sup>199</sup>

Although the amended AMWA now contains a provision that states a court *may* use persuasive authority when interpreting the AMWA, such an amendment is still permissive in nature.<sup>200</sup> The added provision only confirms what has always been understood: that courts can always look to other state and federal courts as persuasive authority to interpret similar statutory language.<sup>201</sup> However, courts are not required to do so.<sup>202</sup> To reiterate, the provision adds no real value and could potentially create inconsistent court rulings.

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193. *Hewitt v. Gerber Prod. Co.*, No. 2:13-CV-02117, 2014 WL 4494736 (W.D. Ark. July 18, 2014) (second removal attempt); *Hewitt v. Gerber Prod. Co.*, No. 2:13-CV-02117, 2013 WL 5786089 (W.D. Ark. Oct. 28, 2013) (first removal attempt).

194. *Hewitt*, 2:13-CV-02117, 2014 WL 4494736; *Hewitt*, 2:13-CV-02117, 2013 WL 5786089.

195. *Hewitt*, 2:13-CV-02117, 2014 WL 4494736; *Hewitt*, 2:13-CV-02117, 2013 WL 5786089.

196. *Gerber*, 2016 Ark. 222, at 8, 492 S.W.3d at 861.

197. Appellant’s Brief at Ab. 17 & 23, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (acknowledging the scarcity of applicable cases).

198. *Carletto v. Quantum Foods, Inc.*, No. 1-05-3163, 2006 WL 2018250 (Ill. App. Ct. June 5, 2006); *Porter v. Kraft Foods Global, Inc.*, No. 4-12-0258, 2012 WL 7051311 (Ill. App. Ct. Dec. 10, 2012).

199. See Michael W. Mullane, *Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach*, 2005 ARK. L. NOTES 73 (2005).

200. ARK. CODE ANN. § 11-4-218(f) (Repl. 2012 & Supp. 2017). See Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

201. See § 11-4-218(f). See also Act of Apr. 5, 2017, No. 914.

202. *Id.*



### C. Undermining the Collective-Bargaining Process

Before the Arkansas General Assembly overturned *Gerber*, employers, employees, and unions could have still negotiated donning and doffing related matters despite the *Gerber* holding. The collective-bargaining process remained intact. Although the dissent suggested otherwise, the collective-bargaining process had not been weakened, which is evidenced by *Gerber* and the union's own actions. In negotiating the 2013–2016 collective-bargaining agreement, the union had proposed that *Gerber* pay all union employees “30 minutes per day for donning and doffing including (changing of uniforms, shoes, linting off, washing hand[s] and donning [personal protective equipment]).”<sup>203</sup> Ultimately, the negotiations led *Gerber* to treat the mandatory-workplace donning and doffing time as compensable, but the agreement had restricted the terms of compensability.<sup>204</sup> With prior agreements, *Gerber* had refused to provide compensation for these mandatory activities.<sup>205</sup>

According to the 2013–2016 agreement, *Gerber* and the union had determined the amount of compensation by the length of time it took a *Gerber* employee to don and doff,<sup>206</sup> and they had determined the length of time required to don and doff according to the employee's work area.<sup>207</sup> Therefore, *Gerber* and the union's collective bargaining had determined that employees would be compensated for donning and doffing time that ranged between six to twelve minutes.<sup>208</sup>

*Gerber* had maintained control as to how much time it would pay an employee to don and doff.<sup>209</sup> This process confirms that employers and unions would have been allowed to negotiate a reasonable length of time in which employees would be paid for mandatory-workplace donning and doffing, and these contracts would have been enforceable. This contradicts any contention that suggests the collective-bargaining process was undermined.

Secondly, when the court decided *Gerber*, there was evidence suggesting that the Arkansas General Assembly intentionally omitted the FLSA special carve-out exception. Beginning in 2007, the Arkansas General Assembly amended the AMWA three times, but these amendments had

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203. Brief in Support of Defendant's Motion for Summary Judgment at 10, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

204. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

205. *Gerber*, 2016 Ark. 222, at 3–4, 492 S.W.3d at 859.

206. Brief in Support of Plaintiffs' Motion for Partial-Summary Judgment at 5, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

207. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

208. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

209. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-12-715).

never incorporated the FLSA special carve-out exception.<sup>210</sup> The Arkansas General Assembly passed a bill to initiate the 2007 amendment entitled “An Act to Amend the Minimum Wage and Overtime Law to *Parallel Certain Provisions of Federal Minimum Wage and Overtime Law*; And For Other Purposes.”<sup>211</sup> The fact that this amendment did not include the FLSA special carve-out exception was probative because the Arkansas General Assembly had intended for the amendment to align the AMWA with the FLSA in some ways.<sup>212</sup> The omission suggested that the AMWA should have been interpreted in a way that disregarded the special carve-out exception. Omitting the exception was furthered supported by the fact that the version of the statute, in place when the Arkansas Supreme Court decided *Gerber*, had indicated that agreements between the parties that had reduced minimum wage, including overtime compensation, would not serve as an employer defense for an action filed under the AMWA.<sup>213</sup> Therefore, if a collective-bargaining agreement eliminating overtime compensation would not have been applicable at the outset, then most certainly an omitted special carve-out exception would have been inapplicable also.

Besides, there were and currently are many differences between the FLSA and AMWA,<sup>214</sup> making it inappropriate to interpret the statutes in the same manner. Similarly, the Arkansas Supreme Court has held that it will not read a provision into a statute that has been left out by the Arkansas General Assembly.<sup>215</sup> To do so would amount to legislating, which is not a

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210. Appellees’ Brief at Arg. 4, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (citing Act of Mar. 28, 2007, No. 545, 2007 Ark. Acts 545).

211. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (citing Act of Mar. 28, 2007, No. 545, 2007 Ark. Acts 545) (emphasis added).

212. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (citing Act of Mar. 28, 2007, No. 545, 2007 Ark. Acts 545) (emphasis added).

213. *Gerber*, 2016 Ark. 222, at 10–14, 492 S.W.3d at 863–64.

214. Compare ARK. CODE ANN. §§ 11-4-201 to -222 (Repl. 2012 & Supp. 2017), with 29 U.S.C §§ 201–219 (2012). See Brief in Support of Plaintiffs’ Motion for Partial-Summary Judgment at 13–14, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (highlighting the following differences between the two statutes: AMWA has a 3 year statute of limitations while the FLSA has a 2 year statute of limitations unless the violation is willful; AMWA limits an employer’s allowance for furnishing board, lodging, or apparel to \$0.30 per hour while the FLSA allows an employer to pay all wages through facilities; Under the AMWA, movie theater employees are not exempt from overtime requirements, but these same employees are exempt under the FLSA).

215. “We decline to expand the statutory definition of disability in this manner as it would be akin to legislating.” *Faulkner v. Arkansas Children’s Hosp.*, 347 Ark. 941, 955, 69 S.W.3d 393, 402 (2002) (citing as examples *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001) (refusing to judicially legislate a fighting-words exception into an otherwise constitutionally infirm statute); *Four County (NW) Regional Solid Waste Mgmt. Dist. Bd. v. Sunray Serv., Inc.*, 334 Ark. 118, 971 S.W.2d 255 (1998) (rejecting *de novo* review of legislative action as judicial legislation violative of the separation-of-powers doctrine)).

function of the judiciary.<sup>216</sup> The majority did nothing wrong by failing to incorporate the FLSA special carve-out exception into the AMWA, especially when it was not supported by the whole reading and interpretation of the AMWA before its amendment in 2017.

Likewise, the ADOL would have intentionally incorporated the FLSA special carve-out exception into the AMWA through accompanying regulations if it had a desire to do so.<sup>217</sup> The ADOL imposed certain regulations to incorporate certain definitions and provisions from the FLSA into the AMWA,<sup>218</sup> but none of these regulations had included the special carve-out exception.<sup>219</sup>

Finally, section 11-4-205 of the AMWA, which recognizes established contracts between parties, could not have been read in isolation, despite the dissent's claims to the contrary. Rather, the majority read the statute in its entirety to ascertain the true meaning of the statute.<sup>220</sup> So, construed in conjunction with sections 11-4-202, 11-4-204, and 11-4-218,<sup>221</sup> the entirety of the statute had indicated that section 11-4-205 did not impact the majority's holding.

Section 11-4-202 demonstrates that the Arkansas General Assembly enacted the AMWA to benefit employees.<sup>222</sup> Section 11-4-204, entitled "*Law Most Favorable to Employees Applicable—Liberal Construction*," provides further in subsection 11-4-204(b) that the AMWA is to be "liberally construed in favor of its purposes and shall not limit any law or policy that requires payment of higher or supplemental wages or benefits."<sup>223</sup> From the onset, the statute makes clear that it is employee-centered.

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216. *Id.*

217. Brief in Support of Plaintiffs' Motion for Partial-Summary Judgment at 15–16, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966) (citing as examples 010 Ark. Code R. § 14-100(B)(3) (incorporating work exempt under the FLSA into the AMWA definition of "agriculture"); 010 Ark. Code R. § 14-104 (incorporating the FLSA's authorization to pay sub-minimum wage to learners, student learners, or apprentices); 010 Ark. Code R. § 14-106(B)(1)(a) (incorporating FLSA regulations 29 C.F.R. Part 541 for purposes of defining and delimiting certain minimum wage and overtime exemptions).

218. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966).

219. *Id.*, *Gerber*, 2016 Ark. 222, 492 S.W.3d 856 (No. CV-15-966).

220. *See* Ryan & Co. v. Weiss, 371 Ark. 43, 263 S.W.3d 489 (2007).

221. *See infra* notes 222–26.

222. "It is declared to be the public policy of the State of Arkansas to establish minimum wages for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency, and well-being." ARK. CODE ANN. § 11-4-202 (Repl. 2012).

223. *Id.* § 11-4-204(b) (emphasis added).

The then-existing section 11-4-218 reaffirmed the AMWA's preferential treatment of the employee.<sup>224</sup> Subsection 11-4-218(a)(1) states that an employer is liable to an employee if that employer pays less than the required minimum wages, including *overtime compensation*.<sup>225</sup> Then, the former subsection 11-4-218(b) added, "Any agreement between the employee and employer to work for less than minimum wages shall be no defense to the action."<sup>226</sup>

Although the latter subsection does not mention overtime compensation specifically, it is fairly reasonable, when these two subsections are read in conjunction, to say that the latter subsection includes overtime compensation. Besides, the Arkansas Supreme Court held the power to interpret the phrase "minimum wages" to include overtime compensation upon a careful analysis of the whole statute. Accordingly, the majority properly rejected Gerber's defense, which asserted that Gerber and the union's pre-2013 agreements that treated mandatory donning and doffing as non-compensable for overtime compensation purposes were binding. For this reason, the legislature sought to eliminate the majority's holding by preventing section 11-4-218(b) from interfering with collective-bargaining rights under section 11-4-205. In essence, this action will provide unionized employers with exempt status from the AMWA, basically excusing them from all liability, and that is contrary to the spirit of the AMWA.

Lastly, the dissent misinterpreted section 11-4-218(a)(1) when it asserted that Gerber did nothing wrong because it had not violated the minimum wage requirement of the AMWA.<sup>227</sup> As previously stated, the current AMWA provides that an employer is liable to an employee if that employer pays less than the required minimum wages, *including overtime compensation*.<sup>228</sup> Plaintiffs did not receive any overtime wages for the time required to don and doff prior to the 2013–2016 collective-bargaining agreement.<sup>229</sup> Therefore, Gerber had violated the AMWA by failing to pay overtime compensation despite paying the required minimum wages.

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224. *Id.* § 11-4-218 (entitled Employee's Remedies).

225. *Id.* § 11-4-218(a)(1) (emphasis added).

226. *Id.* § 11-4-218(b).

227. *Gerber Prod. Co. v. Hewitt*, 2016 Ark. 222, at 18–19, 492 S.W.3d 856, 867 (Wood, J., dissenting).

228. ARK. CODE ANN. § 11-4-218(a)(1) (emphasis added).

229. *Gerber*, 2016 Ark. 222, at 3, 492 S.W.3d at 858.

## IV. SIGNIFICANCE

The risk of donning and doffing litigation would have likely decreased over time in Arkansas if *Gerber* had not been overturned.<sup>230</sup> The Arkansas Supreme Court provided clarity when interpreting mandatory-workplace donning and doffing as compensable “work” under the AMWA.<sup>231</sup> Most importantly, employers and employees would have been well aware that mandatory-workplace donning and doffing constituted “work,” thus, triggering compensation.<sup>232</sup> For judicial administration purposes, such clarity would have contributed to judicial efficiency.<sup>233</sup>

Despite economic claims that *Gerber*’s holding would have resulted in greater liability and costs for Arkansas employers,<sup>234</sup> liability would have only been imposed if an employer had failed to compensate its employees for mandatory donning and doffing at the workplace as in *Gerber*.<sup>235</sup> Employees would have had to comply with the statute of limitations and other requisite matters to pursue a claim under the AMWA.<sup>236</sup> Theoretically, it is unlikely that all, or substantially all, Arkansas employers require mandatory-workplace donning and doffing. For the employers that do not require such activities, the *Gerber* holding simply would not have applied.

From an economic perspective, non-unionized and unionized employers and employees could have minimized increasing costs that might be associated with mandatory donning and doffing activities at the workplace. If feasible, not requiring mandatory donning and doffing *at the workplace*, which results in no additional costs for employers, would have been the simplest way to avoid costs. However, if that were not possible, another option could have required the employers and employees to be creative, such as discussing and implementing non-monetary incentives as a way to compensate the employees instead of the employers paying out actual money.<sup>237</sup> And as previously discussed, unionized employers and employees could have negotiated a reasonable length of time in which the

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230. *See supra* Part III.A.

231. *See supra* Part III.A.

232. *See supra* Part III.A.

233. *See supra* Part III.A.

234. *Gerber*, 2016 Ark. 222, at 14–19, 492 S.W.3d at 865–67 (Wood, J., dissenting).

235. *Id.*, at 1–14, 492 S.W.3d at 856–64.

236. *See Douglas v. First*, 2011 Ark 463, 385 S.W.3d 225.

237. *See, e.g.,* Beatriz Valenzuela, *Long Beach Police Lawsuits Go to Council for Vote*, PRESS-TELEGRAM OP. (Apr. 10, 2014; 8:38 p.m.), <https://www.presselegram.com/2014/04/10/long-beach-police-lawsuits-go-to-council-for-vote/> (discussing a settlement offering police officers extra vacation time for their workplace donning and doffing claims against the city).

employers would pay for the time associated with mandatory-workplace donning and doffing activities.<sup>238</sup>

Based on the majority's correct interpretation of the former AMWA, the fact that Arkansas is not a heavily unionized state supported the court's decision not to engraft the FLSA "changing-clothes" exception into the AMWA.<sup>239</sup> Rated below a five percent in 2016, Arkansas's union membership rate scored among the lowest of the states and fell far below the 10.7% union membership average rate among the states.<sup>240</sup> There are increasingly more non-unionized employers in Arkansas than unionized ones.<sup>241</sup> From a social point of view, interpreting the AMWA to benefit employees and to exclude the special carve-out exception would have affected only a relatively small percentage of unionized employers in Arkansas.<sup>242</sup> Likewise, it is unlikely that all Arkansas-unionized employers require some or substantially all of their employees to engage in mandatory-workplace donning and doffing, and for the unionized employers who do not require it, the *Gerber* ruling would not have applied to them.

## V. PROPOSAL

Due to the Arkansas General Assembly's action of overturning *Gerber*, one potential problem remains unaddressed by the amended AMWA: how should courts interpret the added Portal-to-Portal Act language inserted into the AMWA in matters *not* involving collective-bargaining agreements that expressly waive compensation for mandatory-workplace donning and doffing activities at the workplace? Part III discusses how this problem may arise.<sup>243</sup> As a reminder, the amended AMWA grants courts with permissive discretion to follow federal guidance when interpreting the AMWA.<sup>244</sup> In other words, one court may choose to follow federal guidance, and another court may decide not to follow it. This would definitely lead to inconsistent

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238. *See supra* Part III.C.

239. The Bureau of Labor Statistics reported that almost 1.2 million people composed Arkansas's total employed population. *See* BUREAU OF LAB. STAT., UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY STATE, 2015-2016 ANNUAL AVERAGES, (2017), <https://www.bls.gov/news.release/pdf/union2.pdf>. Of Arkansas's total employed population, only about five percent, or i.e. 59,000, were represented by unions. *Id.*

240. Bureau of Lab. Stat., UNION MEMBERSHIP RATES BY STATE, 2016 annual averages, Table 1, <https://www.bls.gov/news.release/pdf/union2.pdf> (last visited Mar. 17, 2017).

241. *See id.*

242. *Id.*

243. *See supra* Part III.A–B.

244. *See* Ark. Code Ann. § 11-4-218(f) (Repl. 2012 & Supp 2017). *See also* Act of Apr. 5, 2017, No. 914, 2017 Ark. Acts 914 (codified at ARK. CODE ANN. §§ 11-4-205, -218, -221).

court rulings should the issue arise.<sup>245</sup> To resolve this issue, the legislature should amend the AMWA by adding language stating that courts *must* follow federal guidance.<sup>246</sup>

That way, in cases involving non-unionized employers or unionized employers without collective-bargaining agreements that expressly waive compensation, adding this mandatory language will require courts to recognize mandatory-workplace donning and doffing as activities that are “integral and indispensable” to an employee’s principal job.<sup>247</sup> Absent any agreements to the contrary, this recognition will require these employers to compensate their employees for these mandatory activities in spite of the Arkansas Portal-to-Portal Act exemption for preliminary and postliminary activities.<sup>248</sup> That is because the Supreme Court of the United States created the “integral and indispensable” exception to the federal Portal-to-Portal Act language, which exempts employers from compensating their employees for performing preliminary and postliminary activities that are necessary in order to perform their principal jobs.<sup>249</sup>

Without mandating that courts follow federal guidance, now that the AMWA has its own Portal-to-Portal Act language,<sup>250</sup> a court choosing not to review federal guidance would not necessarily be inclined to require compensation for mandatory-workplace donning and doffing activities based on the AMWA statutory language alone. As of right now, there is no binding-Arkansas case law that imposes the “integral and indispensable” exception with respect to the Arkansas Portal-to-Portal Act exemption for preliminary and postliminary activities. Without any binding-state case law, the potential inconsistency runs the risks of creating uncertainty and diluting

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245. See ARK. CODE ANN. § 11-4-218(f) (Supp. 2017). See also Act of Apr. 5, 2017, No. 914.

246. For example, courts must interpret the Missouri Minimum Wage Law in accord with the FLSA and applicable regulations. See Mo. Rev. Stat. § 290.505(4).

247. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). See *supra* Part II.A(2).

248. *Steiner*, 350 U.S. at 256. See *supra* Part II.A(2).

249. *Steiner*, 350 U.S. at 256. See *supra* Part II.A(2).

250. See ARK. CODE ANN. § 11-4-221 (Supp. 2017).

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judicial efficiency; therefore, the legislature should impose the requirement that courts must follow federal guidance. Plus, the amendment would benefit employees because employees deserve to be paid for their work.

## VI. CONCLUSION

The *Gerber* case allowed the Arkansas Supreme Court to provide clarity to an open issue of state law. Therefore, this note argues that the Arkansas Supreme Court properly decided *Gerber*. In responding to the legislative action overturning *Gerber*, this note also proposes an additional amendment to the AMWA that would address the proper application of the Arkansas Portal-to-Portal Act in matters not involving collective-bargaining agreements that expressly waive compensation for mandatory-workplace donning and doffing activities.

To summarize, the *Gerber* holding did not repeat the alleged past mistakes of the federal government, did not fail to follow federal precedent, and did not undermine the collective-bargaining process between employers and unions. Unfortunately, overturning *Gerber* destroys the positive impact that the case was bound to have upon Arkansas. Moreover, the 2017 Act does not address all potential issues that could arise. With a specific focus on the Arkansas Portal-to-Portal Act, this note proposes that the legislature amend the AMWA, once more, to include a mandatory provision that require courts to follow federal guidance when interpreting the AMWA. The mandatory provision would eliminate the risks of creating uncertainty and diluting judicial efficiency, and it would allow employees to be compensated for work that is deemed “integral and indispensable,” for which they are required to perform at their workplaces.

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