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Following the withdrawal of an earlier opinion in *Rutti v. Lojack Corporation*, the Ninth Circuit Court of Appeals reversed course and held that the home-to-work commute by a company technician was not compensable under federal law but may be compensable under California law. While this latest opinion is less favorable to employers in California, the opinion does provide helpful guidance under federal law on the commuting time issue as well as whether work-related activities are compensable or *de minimis*.

Ninth Circuit Attempts to Navigate Through Commuting Time and Off-the-Clock Work Issues

By R. Brian Dixon and Gina M. Chang

The Ninth Circuit Court of Appeals made a "round trip" on several travel time issues when it recently issued a second opinion regarding whether commute time in company-provided vehicles and some related activities were work time under federal and California law. In *Rutti v. Lojack Corporation* (9th Cir., No. 07-56599, Mar. 2, 2010), a divided Ninth Circuit panel withdrew its August 21, 2009, opinion. In the original opinion the court of appeals had affirmed the district court's holding that the home-to-work commute by a technician in a company vehicle was not compensable work time under either federal or California law. Reversing course, the divided panel held that, while the commute was not compensable under the federal Employee Commuter Flexibility Act (ECFA),[1] it nevertheless may be compensable under California law. Although this subsequent opinion is less favorable to California employers on the commuting time issue, the opinion continues to provide helpful guidance under federal law on the commuting-time issue as well as whether work-related activities are compensable or *de minimis*.

Background

The plaintiff, Mike Rutti, was employed by Lojack as a technician to install and repair alarms in customers' cars. The plaintiff was required to travel between his home and job sites in a company vehicle. He was paid on an hourly basis starting with his arrival at the first job of the day and ending with his completion of the last job of the day. He was not paid for certain pre-commute activities or for uploading his report of the day's activities after he returned to his home in the evening. Before leaving home, the plaintiff spent time receiving assignments for the day, mapping his routes to the assignment, and prioritizing the jobs, and sometimes filling out forms for the jobs. After returning home, he had to upload data about the work he performed on a portable data terminal (PDT) device between 7:00 p.m. and 7:00 a.m. The plaintiff also had to check that the transmission was successful, and, if not, he would have to transmit again. In his lawsuit, the plaintiff claimed that he should have been paid for the commute time and the pre- and post-shift work, and brought a putative class action on behalf of all technicians.

After substantial discovery, the company moved for partial summary judgment and the plaintiff moved for class certification. The district court decided to rule on the company's motion for partial summary judgment, and granted and denied in part that motion. The district court's order disposed of all of the plaintiff's federal claims and denied his state law claim for compensation for commuting.

Case on Appeal

On appeal, Rutti raised three major issues: (1) whether his commute in a company vehicle was compensable under federal or California law; (2) whether his pre- and post-commute activities were either not part of his principal work activities for the company or were *de minimis*, and thus, not compensable; and (3) whether, under the "continuous workday" doctrine, the plaintiff's workday started at his home in the morning before he commuted to the first job and extended to the work he performed after he returned home.

With respect to the first issue, the Ninth Court held that the plaintiff's commute time was not compensable under the federal ECFA. The panel rejected the plaintiff's argument that he had to be paid for his commute time because commuting in a company vehicle was a condition of employment. The Ninth Circuit found that the plain language and legislative history of the ECFA demonstrated that an employer's requirement to use a company vehicle does not make the commute compensable under the ECFA. The court of appeals also rejected the plaintiff's second argument – that the commute time was compensable under the ECFA because of the company's restrictions against using the vehicle for personal pursuits and transporting passengers, the requirement that he drive directly from home to work and from work to home, and the requirement that he keep on his cell phone. The panel agreed that these requirements were incidental and not integral to his job, and the restrictions did not amount to "additional legally cognizable work."

The Ninth Circuit's conclusion that the plaintiff's commute time was not work time did not extend past federal law. California has no direct equivalent of the ECFA, apart from specifying that ride sharing in employer-provided vehicles is not work time.[2] In sharply conflicting opinions, one member of the three-judge panel concluded that the plaintiff had a valid claim for compensation under California law because he was required to commute in the company-provided vehicle and was prohibited from making any personal stops while commuting. The first member of the panel concluded that the ride-sharing statute did not apply to compulsory travel time. A second member of the panel found that the plaintiff's commute time was not work time under California law, reasoning that if sharing a ride with a coworker was not work time, an employee's having the vehicle to him- or herself was also not work time. The last member of the panel joined the first panel member's opinion, but did not provide an explanation as to why she no longer agreed with the second panel member's opinion that the commute time was not work time under state law. In reversing the district court's grant of summary judgment to the company, the two judges seemingly endorsed the view that the plaintiff's commute time was compensable under California law and under these specific circumstances. Ultimately, the district court must resolve on remand whether the commute time is work time under California law. The takeaway from these divided opinions is that California employers may find it appropriate to "steer clear" of the limitations that were imposed on the plaintiff and the requirement that he use the company vehicle to commute between work and home.

Principal or *De Minimis* Activities

The Ninth Circuit also re-examined whether the plaintiff's pre- and post-commute activities were compensable under federal law. The court considered whether those activities were part of the plaintiff's principal activities and therefore compensable and whether such activities were so *de minimis* as to be noncompensable. The court held that plaintiff's pre-commute activities were not integral to his principal activities because "most of his activities – 'receiving, mapping and prioritizing jobs and routes for assignment' – are related to his commute." The court also concluded that the plaintiff's completion of pre-commute paperwork took only a minute or so, and was, therefore, *de minimis*. The plaintiff's post-commute PDT transmissions, however, could be compensable because they were closely related to the plaintiff's principal activities. The panel was again sharply divided as to whether the record showed that the PDT transmissions took a few minutes or took 10 minutes or more. Ultimately, the panel declined to adopt a bright line rule that daily periods of

work for approximately 10 to 15 minutes were *de minimis*. Instead, the court remanded the issue to the district court to resolve the issue in accordance with the Ninth Circuit's previously adopted test for determining whether certain work-related activities were so *de minimis* as to be noncompensable. That test requires a consideration of: (1) "the practical administrative difficulty of recording the additional time;" (2) "the aggregate amount of compensable time," and (3) "the regularity of the additional work."[3]

Finally, the court concluded that the plaintiff's pre- and post-commute activities did not convert the commute time into work time under the "continuous workday" rule. Citing *Dooley v. Liberty Mutual Insurance Co.*,[4] the plaintiff had argued that because his work begins and ends at home, he should be paid for his travel time. The court found that the plaintiff's reliance on *Dooley* was misplaced since his preliminary activities were either not compensable principal activities or were so *de minimis* as to not be compensable work time under federal law. The court also found the plaintiff's post-commute PDT transmissions did not make the commute into work time because those transmissions could occur at any time between 7:00 p.m. and 7:00 a.m. the following day. The court relied on the federal regulation that "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked."[5] Because the plaintiff "has hours, not minutes, in which to complete this task, the intervening time is 'long enough to enable him to use the time effectively for his own purpose.'"

Conclusion

Employers that require employees to commute between home and work in company-provided vehicles will find that the *Rutti* decision provides valuable guidance under federal law. However, employers in California must, given the unresolved issues in the case, continue to approach this subject with caution.

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[1] 29 U.S.C. § 254.

[2] CAL. LAB. CODE § 510(b).

[3] *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984).

[4] 307 F. Supp. 2d 234 (D. Mass. 2004).

[5] 29 C.F.R. § 785.16.