

Costly Commutes: An Overview of When Employers Must Pay for Employee Travel Time

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The general rule for when employers are required to pay employees for time spent traveling seems easy enough: commute time to and from work is not compensable, while travel time during the workday is compensable. Unfortunately for employers, the rule only seems easy to apply. No longer is a workday simply based on when an employee punches in and out. As technology changes, so too does the average workday. More employees are working from home or doing work on the road before and after the normal workday takes place. As the typical workday changes, employers must come to understand how these changes affect whether employees must be compensated for their travel time.

Under the Fair Labor Standards Act (FLSA), employers are not required to compensate employees for time spent commuting from home to work or for any activities that are “preliminary to or postliminary to” their principal activities at work. The U.S. Department of Labor (DOL) has clarified that “normal travel from home to work [whether at a fixed location or at different job sites] is not work time” because it is an “incident of employment,” and is therefore not compensable. The term “normal travel,” as used in the regulation, does not represent an objective standard of how far most workers commute or how far they may be reasonably expected to commute, but rather represents a subjective standard that is defined by a particular employment relationship.

Where courts are currently struggling, however, is with the issue of what activities trigger the start of the workday because once the workday begins, all time spent traveling will almost always be considered compensable travel time and no longer part of the employee’s non-compensable “commute”. In addition, employees must be compensated for any work performed during the commute that is integral and indispensable to a principal activity of their employment. This article addresses the various circumstances that can take place before, during, or after the commute and whether the courts and the DOL have found that such activities transform non-compensable commute time into compensable time.

Circumstances That DO NOT USUALLY Make Commute Time Compensable

The good news for employers is that commute time is generally not compensable. And courts and the DOL tend to agree that this rule remains true even when the following factors (without more) are present:

Company Vehicle: Otherwise noncompensable commute time is not compensable merely because an employee commutes in a company-provided vehicle, provided that (1) the work sites are within the normal commuting area

of the employer's establishment and (2) the use of the vehicle is subject to an agreement or mutual understanding between the employer and the employee. Employer restrictions, such as prohibiting the vehicle to be used for personal pursuits or transporting passengers or requiring employees to have their cell phone on them at all times while driving a company vehicle, do not make otherwise noncompensable commute time compensable.

Job Assignments: The mere receipt of a job assignment or other instruction before or during a commute does not require commute time to be compensable.

Carrying Equipment: Transporting ordinary parts, tools and equipment needed to perform a job does not make commute time compensable.

Loading Equipment: Loading personal equipment (such as gloves, uniforms, safety equipment) is preliminary in nature and does not trigger the start of a workday requiring commute time to be compensable.

Other *De Minimis* Activities: *De minimis* activities are activities that are conducted infrequently, take a minimal amount of time to perform, and are administratively impractical to record. *De minimis* activities, even if performed during the commute, do not make commute time compensable.

Circumstances That MAY MAKE Commute Time Compensable

In contrast, if an employee's activities at home trigger the start or end of the workday, then the employee's drive from home to work or work to home occurs within the workday and at least part of that time must be compensated. This is known as the "continuous workday doctrine." While courts have been wrestling with what activities trigger the start or end of the workday for years, there are certain facts that typically are viewed as starting the workday.

Remote Reporting Site: Where employees are required to report to a remote site to pick up equipment, receive instruction, or drop off personal vehicles, the travel time from the remote site to the work site is compensable.

Transporting Special Equipment: Where transporting specialized or heavy equipment is a principal activity and a regular part of the employee's daily travel, such time may be compensable. The DOL has stated that special equipment does not include typical or usual work or repair tools such as laptops, manuals, briefcases, gloves, wrenches, etc.

Special Assignment: Where an employee regularly works at a fixed location, but is given a special assignment in another city, such travel is not ordinary home-to-work travel because it is performed for the employer's benefit to meet the needs of a particular and unusual assignment. Notably, all of the time spent traveling to the special assignment is not necessarily compensable – the amount of time it would have taken the employee to commute from his home to the fixed location may be subtracted, as it remains non-compensable.

After Hours/Emergency Work: While the DOL recognizes that there may be instances where an employee is called back into work to perform emergency work after completing his shift, the DOL has expressly refused to take a position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

Work During Commute: If the employee performs principal activities during the commute, which are not merely *de minimis* in nature, such time is compensable.

While the above-discussed rules provide some guidance for employers in determining whether commute time is compensable, each employment relationship is fact specific and requires some analysis before determining whether an employee's commute time is compensable. The following cases illustrate how courts have handled some of the more difficult fact patterns that have surfaced in recent years.

For example, in Dooley v. Liberty Mutual Insurance Co., a federal court in Massachusetts held that an insurance appraiser who, in the morning and still while at home, received phone calls, checked email, responded to messages, reviewed the day's assignments, and mapped out her route for the day was required to be compensated for commute time. It typically took the insurance appraiser about 30 minutes to complete these tasks. The court found that the employee's activities performed at home were principal activities that commenced the workday, and the employee's commute from home to the first appraisal site was therefore compensable.

In Hiner v. Penn-Harris-Madison School Corp., a federal court in Indiana held that a bus driver who kept his bus at home and was required to perform extensive inspections before leaving for his first stop was required to be compensated for his travel time between his home and first stop.

In both the Dooley and Hiner cases, the courts found that the employee's activities were more than *de minimis* because they were frequent activities (in these cases, they occurred daily) conducted at the behest of the employer, easy to record, and usually took a significant amount of time (in both cases, more than a half hour). In addition, the courts noted that travel was integral to the employee's job duties (i.e., insurance appraisers and bus drivers). Accordingly, travel to the first work site was not treated as traditional commute time.

By comparison, in Rutti v. Lojack Corp., Inc., the Ninth Circuit Court of Appeals recently denied a technician who installed car alarms compensation for his commute time under the FLSA. There, the technician argued that his workday started at home by receiving, mapping, and prioritizing jobs and routes for assignment and ended at home by sending a Personal Digital Assistant (PDA) transmission to his employer concerning all the jobs he performed during the day. With respect to the start of his workday, the court held that mapping his route was related to his commute, took no more than a few minutes each morning, and was therefore *de minimis* and noncompensable. The court also refused to require compensation for the employee's drive home, because the employer only required the PDA transmission to be sent sometime between 7 p.m. and 7 a.m. The court held that, while the employee was required to be compensated for the actual time it took to send the transmission (typically about 10 minutes), his commute home was not compensable because the employer provided enough time to enable him to use the time effectively for his own purpose. In other words, the workday ended after the last assignment, since the employee was free to do as he chose with his night, so long as the transmission was sent by 7 a.m. the next day. As a cautionary note to California employers, however, the court in Lojack did find the employee's commute time compensable under California law, which is broader than the FLSA.

Similarly, the Federal Circuit Court of Appeals in Bobo v. United States rejected a claim for commute time by a group of border patrol agent dog handlers for the time spent transporting their dogs from home to the border patrol office. The handlers argued that during the drive, they were required to monitor their radios, wear their uniforms, report mileage, lookout for suspicious activity, and occasionally make stops to allow the dogs to exercise or relieve

themselves. The court found that the activities were *de minimis* and noncompensable, as the activities were performed infrequently, of little duration, and were administratively impracticable to measure.

In both the Rutti and Bobo decisions, the courts found that the employees were minimally restricted by the employer during the commute, the activities performed were *de minimis* in nature, and the activities performed did not materially alter the employees' commutes.

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