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The Compensability of Home-to-Work Travel Under the Employee Commuting Flexibility Act

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Employers with home-based employees who commute to work in employer-provided vehicles have recently been subjected to litigation seeking compensation for time employees spend commuting between their home and their first and last worksites of the day. However, the Employee Commuting Flexibility Act makes such commuting time non-compensable travel under the Fair Labor Standards Act so long as certain conditions are met.

Since the US Supreme Court rendered its decision in *IBP v. Alvarez*[1] some employers that permit their employees to commute between home and work in an employer-provided vehicle have been the target of suits alleging that the employer must pay for the time the employee spends commuting. In these cases, employees have argued that because they perform "principal" activities at home either before or after their commute, and because they are driving an employer-provided vehicle, their commute to and from work is part of their continuous workday and must be compensated. The rule of law in these cases is simple. Employees need not be compensated for the time they spend commuting in employer-provided vehicles so long as the following three conditions are met:

1. The employer and employee have an agreement regarding the employee's use of the employer's vehicle for commuting;
2. The employee's travel to his or her job site(s) is within his or her normal commuting area; and
3. The activities the employees perform before or after their commute are "incidental" to their use of the employer's vehicle for commuting.

The application of the rule can become more difficult, depending on the nature of the duties the employee performs at home either before or after his or her commute.

Under federal law, the statute that is determinative of the issue is the Fair Labor Standards Act (FLSA) and the amendments made to the FLSA pursuant to the Portal-to-Portal Act (the Portal Act) and the Employee Commuting Flexibility Act (ECFA).[2]

THE FLSA AND THE PORTAL ACT

Congress passed the FLSA in 1938.[3] Generally, the FLSA requires employers to pay an employee for all hours worked by the employee on the employer's behalf.[4] The FLSA did not define what constitutes "work," but rather left the meaning of the word for courts to decide.

In 1946, the US Supreme Court rendered its decision in *Anderson v. Mt. Clemens Pottery.*[5] The *Anderson* court, among other things, held that the time employees spend walking from the time clock (after punching in) to their first job station of the day was compensable.[6] Because most employers did not pay their employees for the time they spent traveling to their first principal activity of the day, the *Anderson* decision caused a flood of litiga-

tion.[7] Congress quickly responded by passing the Portal Act in 1947. The original Portal Act provided:

> (a) Activities not compensable.
>
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engage in or after 1947—
>
> (1) *walking, riding or traveling to and from the actual place of performance of the principal activity* or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.[8]

Thus, the Portal Act established that, not only was time spent commuting between home and work non-compensable under the FLSA, but also time spent traveling to/from an employee's first/last principal job duty is also non-compensable. Regulations promulgated by the Department of Labor (DOL) under the Portal Act confirm this meaning by providing several examples of at-work travel that is non-compensable, such as time spent by mine workers traveling from the portal of the mine to the face of the mine.[9] Regarding commuting time, the regulations state:

> Home to work; *ordinary* situation.
>
> An employee who travels from home before his regular workday, and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a *normal* incident of employment. *This is true whether he works at a fixed location or at different job sites. Normal* travel from home to work is not worktime.[10]

Thus, the time an employee spends driving between his home and his normal job site(s) is generally not compensable.

The Regulations promulgated under the Portal Act also clarified that any work conducted during the "workday," defined as the period between the commencement and completion of an employee's principal activity or activities, remained compensable.[11] Courts and the DOL have defined "principal activities" broadly to include all activities that the employee is "employed to perform."[12] Thus, many work-related activities have been deemed "principal activities" giving rise to the start (or end) of the workday.

THE EMPLOYEE COMMUTING FLEXIBILITY ACT

In the years following the Portal Act, a substantial amount of litigation again evolved regarding whether commuting time was compensable if either:

1. It occurred in an employer-provided vehicle; or

2. It immediately followed or preceded the performance of principal activities at home.

Some courts concluded that, when the vehicle was necessary to the performance of the employee's duties (*i.e.*, contained tools and equipment) at the job site, the delivery of the vehicle itself was a "principal activity" and therefore compensable work.[13] Other courts concluded that if the employee performed no work while commuting in an employer-provided vehicle, the time was non-compensable.[14] Some courts concluded that the drive time in an employer-owned vehicle was compensable because the employee performed certain principal activities before leaving home.[15] Other courts concluded preliminary activities performed at home did not convert a subsequent commute into compensable time.[16]

Between 1994 and 1996, the DOL issued a series of opinion letters regarding the compensability of time spent commuting between home and work in employer-provided vehicles. The first letter, dated August 5, 1994, stated that if the employee was required to drive the vehicle and if the employee was required to call a dispatcher from home to receive his first assignment, then the commuting time would be compensable work.[17] However, on April 3, 1995, the DOL retracted its August 5, 1994, opinion letter and opined that commuting time in an employer-provided vehicle would not be compensable if:

1. The employee voluntarily agreed to drive the employer's vehicle;

2. The employer's vehicle was a normal commuting vehicle;

3. The employee incurred no extra expense from driving the employer's vehicle; and

4. The employee's work sites were within the employee's normal commuting area.[18]

Then on November 20, 1995, the DOL issued another opinion letter stating drive time in an employer-provided vehicle would be compensable if the employer *required* the employee to drive the vehicle.[19]

In 1996, Congress acted to resolve the confusion created by the conflicting court decisions and DOL Opinion Letters by amending the Portal Act with the Employee Commuting Flexibility Act (ECFA). With the ECFA amendment, the Portal Act now provides:

(a) Activities not compensable.

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engage in or after 1947—

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. *For purposes of the subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of the employee.*[20]

Thus ECFA clarified that time spent commuting between home and work sites in an employer-provided vehicle is non-compensable if:

1. There is an agreement between the employer and employee regarding the employee's use of the vehicle; and

2. The employee is traveling within his or her normal commuting area.

This is true even if employees are performing "principal" activities that are "incidental" to their use of the employer-provided vehicle before or after their commute.

ECFA'S AGREEMENT REQUIREMENT

Under ECFA the "agreement" between the employer and employee regarding use of the employer's vehicle need not be a formal, written one; even an informal understanding between the parties will constitute an "agreement" under the Act.[21]

Moreover, the "agreement" under ECFA need not be voluntary. The legislative history for ECFA confirms Congress: (1) specifically rejected a proposal that the "agreement" must be voluntary; and (2) concluded instead that employers may compel employees to commute in employer owned vehicles as a condition of employment.[22]

Courts interpreting ECFA have repeatedly confirmed that so long as an understanding has been reached with regard to the use of the employer's vehicle, ECFA's "agreement" requirement has been satisfied.[23]

ECFA'S "NORMAL COMMUTE" REQUIREMENT

Under the FLSA, an employee's "normal" commute is the distance the employee normally travels from home to work, even if the employee travels to different job sites.[24] Courts interpreting the meaning of "normal commute" under the FLSA have given it a very broad definition.[25] In *Kavanaugh*, a refrigerator and utility mechanic alleged he was due wages for time he spent commuting from his home to his service area, which covered part of New York, New Jersey, and Connecticut.[26] Despite the fact that the plaintiff sometimes commuted seven to eight hours per day, the *Kavanaugh* court held his travel time was non-compensable because it was within the "normal travel" contemplated by the employment relationship:

> We interpret 'normal travel' as used in [29 C.F.R. § 785.35] to refer to the time normally spent by a specific employee traveling to work. The term does not represent an objective standard of how far most workers commute or how far they may be reasonably expected to commute. Instead, it represents a subjective standard, defined by what is usual within the confines of a particular employment relationship. This construction is consistent with the overall regulatory scheme and with the interpretation given by other courts and the Department of Labor itself when confronted with similar cases.[27]

The legislative history for ECFA establishes that "normal commute" under the amendment has the same meaning it always has had under the FLSA. Legislators rejected invitations to establish time or mileage limits for the "normal" commute and opted instead to define "normal commute" as the *Kavanaugh* court had:

"There are a variety of problems in trying to establish a specific mileage limit. Differences between urban, suburban and rural locations make a relationship between the distance traveled and the time involved impossible. Employees may reside outside the service area where they are employed and employers may or may not maintain a physical establishment in the service area."[28]

Accordingly, for the purposes of ECFA, the employee's "normal commuting area" is whatever the employer and employee agreed to in the context of any particular employment relationship.

ECFA'S "INCIDENTAL ACTIVITY" REQUIREMENT

ECFA itself does not expressly define what constitutes an activity 'incidental" to the use of the employer's vehicle for commuting.[29] However, the legislative history of ECFA provides a non-exhaustive list of the types of duties that should be deemed "incidental" to the use of the employer's vehicle for commuting. Those duties include vehicle inspections, communicating with an employer to receive assignments or to report work progress, and transporting tools and equipment.[30]

Prior to ECFA, some of these activities may have been considered "principal activities" that would begin the compensable workday.[31] However, to accommodate commuting in employer-provided vehicles, the Legislature made these duties "non-principal" activities as a matter of law. ECFA expressly states that "activities performed by an employee which are incidental to the use of such vehicle for commuting *shall not be considered part of the employee's principal activities.*"[32] Because the duties cannot be principal activities, they cannot mark the beginning or end of the work day.[33] Consequently, any commuting that immediately precedes or follows a principal activity is not compensable travel within the workday.

THE IBP DECISION AND ECFA

In 2005, the US Supreme Court revisited the issue of what constitutes a "principal activity" sufficient to begin the workday in the context of the Portal Act. In that case, a class of meat packing employees claimed that they were entitled to be compensated for the time they spent walking to their first meat cutting assignment of the day after donning protective gear, as well as time spent walking to the locker room at the end of the day to doff the protective gear. The employer argued that travel occurring immediately after donning protective gear and immediately before doffing the protective gear was non-compensable "travel" under the Portal Act. The Supreme Court concluded that the donning and doffing of the protective gear was integral and indispensable to the performance of the employees' meat cutting duties, and consequently, the donning and doffing were "principal activities" that marked the beginning and end of the workday.

Lawsuits have been filed asserting that, since the IBP decision, the compensability of travel time under ECFA has been called into question. Specifically, litigants have argued that if they perform duties at home that are integral and indispensable to their performance of their job duties generally, any intervening travel time in an employer-provided vehicle must be compensable. This argument must fail for two reasons.

First, under the principles of checks and balances, the Legislature is empowered to create the laws, and courts can only interpret the meaning of the laws. Therefore, ECFA governs the compensability of commuting time in an employer-provided vehicle; the *IBP* decision does not and cannot.

Second, through ECFA Congress established that certain activities cannot, as a matter of law, constitute "principal activities." Specifically, the Legislature concluded that any activity "incidental" to using the employer's vehicle for commuting cannot be a principal activity. As discussed above, "incidental" activities include, at a minimum, conducting vehicle inspections, communicating about work assignments, and transporting tools. This is not an exhaustive list. What additional activities constitute "incidental" activities will likely be determined on a case-by-case basis. At this point, courts have not yet been called upon to define the scope of activities that may be classified as "incidental" under ECFA.

NOTES

1. 126 S. Ct. 514 (2005).

2. State law varies regarding the compensability of travel in employer-provided vehicles. This article does not address the intricacies of state law.

3. *See* 29 U.S.C. § 201, *et seq*.

4. *See* Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1285 (10th Cir. 20061, citing United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1116 (10th Cir. 1999); Adams v. U.S., 65 Fed. Cl. 217, 221 (2005).

5. 328 U.S. 680 (1946).

6. *Id*. at 691.

7. H.R. No. 71 at 1031 (1947). "Following the decision in the Mount Clemens Pottery case, many suits were filed in all parts of the country seeking to recover large amounts claimed to be due under the formula laid down in that case…between July 1, 1946, and January 31, 1947, 1,913 such cases were filed in the Federal district courts. Of this number, 398 did not claim a definite amount but left the court to establish how much was due. The remaining 1,515 cases claimed a total of $5,785,204,606." H.R. No. 71 at 1031.

8. 29 U.S.C. ¶ 254(a). (Emphasis added.)

9. *See* 29 C.F.R. § 790.4.

10. 29 C.F.R. § 785.35. (Emphasis added.)

11. 29 C.F.R. § 790.4.

12. *See* Dunlop v. City Electric, Inc., 527 F.2d 394, 398 (5th Cir. 1976); 29 C.F.R. § 790.8.

13. *See*, *e.g.*, DA&S Oil Well Servicing, Inc. v. Mitchell, 262 F.2d 552 (10th Cir. 1958).

14. *See, e.g.*, Reich v. New York City Transit Authority, 45 F.3d 646 (2d Cir. 1995).

15. *See, e.g.*, Graham v. City of Chicago, 828 F. Supp. 576 (N.D. I11. 1993). The *Graham* decision appears to no longer be valid law. *See, e.g., Adams*, 65 Fed. Cl. at 228-230 and cases cited therein ("The *Graham* analysis appears to be in a distinct minority and is probably no longer good law.")

16. *See, e.g.*, Andrews v. Dubois, 888 F. Supp. 213 (D. Mass. 1995).

17. *See* Dep't of Labor, Opinion WH-538, 1994 DOLWH LEXIS 2 (Aug. 5, 1994).

18. *See* Dep't of Labor, Opinion WH-543, 1995 DOLWH LEXIS 26 (April 3, 1995).

19. *See* Dep't of Labor, 1995 DOLWH LEXIS 55 (Nov. 20, 1995) (Emphasis added).

20. 29 U.S.C. § 254(a). (Emphasis added.)

21. *See* H.R. Report No. 104-585 (1996) ("While H.R. 1227 [the ECFA bill1 does not require a written agreement, this requirement may be satisfied through a formal written agreement between the employee and employer…or an understanding based on established industry or company practices").

22. The Minority Views in the House Report on ECFA reads in pertinent part:

The majority's choice of quotes [testimony from the business community to the effect that employees commonly choose to commute in company vehicles] is interesting because it points out a principal difference between what has been customary (truly voluntary employee decisions) *and what is allowed under HR 1227 (compelled use of an employer's vehicle)*. The bill explicitly provides that use of the employer's vehicle for commuting purposes is not compensable if "the use of the employer's vehicle is subject to an agreement on the part of the employer and employee." Further the Majority's views specify that such an agreement need not be in writing, but may rest on "an understanding based on established industry or company practice." Notably, during Committee mark-up, *the Majority specifically rejected an unambiguous amendment offered by Representative Andrews (D - NJ) providing such an agreement must be knowing and voluntary, and may not be a condition of employment. The majority chose to leave HR 1227 weak on the issue of employee voluntariness, preferring to grant employers wide latitude to impose, as a condition of employment, non-volunta y and non-compensable employee use of the employer's vehicle.* H. R. Report No. 104-585. (Emphasis added.)

23. *See Adams*, 65 Fed. Cl. at 225 (2005). *See also* Bartholomew v. City of Burlington, Kansas, 5 F. Supp. 2d 1161, 1169 (D. Kan. 1998) (finding ECFA "agreement" requirement met where employees understood employer's practices regarding the use of the vehicle).

24. 29 C.F.R. § 785.35.

25. *See*, *e.g.*, Kavanaugh v. Grand Union Co., 192 F.3d 269, 272 (2d Cir. 1999).

26. *Id*. at 272-273,

27. *Id*. at 272-273 (citing United Transp. Union Local 1745 v. City of Albuquerque, 178 F. 3d 1109. 1120-1121 (10th Cir. 1999); Vega v. Gasper, 36 F. 3d 417, 424-425 (5th Cir. 1994)); 29 C.F.R. § 790.7cc); Dep't of Labor, Opinion 1997 DOLWH LEXIS 32 (July 28, 1997); Dep't of Labor, Opinion WH-543, 1995 DOLWH LEXIS 26 (April 3, 1995); see also Imada v. City of Hercules, 138 F.3d 1294 (9th Cir. 1998) (travel to training locations noncompensable because it was neither special nor unusual, but was a "normal, contemplated and indeed mandated incident of [employee's] employment. . . .").

28. H.R. Report No. 104-585 (1996).

29. In fact, Congress explicitly refused to provide an exhaustive list of

"incidental" activities: "It is not possible to define in all circumstances what specific tasks and activities would be considered incidental to the use of an employer's vehicle for commuting." H.R. No. 104-585 at 5.

30. H.R. No. 104-585 at 5 ("Communication between the employee and employer to receive assignments or instructions, or to transmit advice on work progress or completion, is required in order for these programs to exist. Likewise, routine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable. Merely transporting tools or supplies should not change the non-compensable nature of the travel."); *see also* DOL, Opinion 1999 DOLWH LEXIS 9 (January 29, 1999).

31. Even in the absence of ECFA, if the activities at issue are *de minimis* they would not be compensable. See Lindow v. U.S., 738 F.2d 1057 (9th Cir. 1984). However, the contour of the *de minimis* doctrine is beyond the scope of this article.

32. 29 U.S.C. § 254(a). (Emphasis added.)

33. 29 C.F.R. § 790.4.

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