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Driving for Dollars

by D. Gregory Valenza

The daily commute would be more pleasant if workers were paid for their time. The only thing that could make listening to music, talking on the phone, and sipping a hot beverage while driving more fun would be wages accruing with each lurch forward. Traffic jams, the risk of accidents, and insufferably bad driving no doubt would be less frustrating, too.

In most cases, though, unpaid commuting time is a fact of life. The general rule under both federal and state wage and hour laws is that the time it takes to get to work and return home is not counted as “hours worked,” the legal standard for compensable work time. There are exceptions, though. The Ninth Circuit’s recent u-turn in *Rutti v. Lojack Corp.*, ___ DJDAR ___ (Mar. 2, 2010), will pave the way for more commuting pay claims. Caution: more bad puns and metaphors ahead.

Mike Rutti worked for Lojack as a technician who installed alarms in customers’ cars. As part of his job, he drove a company truck, which he used to commute to and from work. He attempted to bring a class action, seeking compensation for the time technicians spent commuting to worksites in Lojack’s vehicles, as well as for other uncompensated time Rutti believed counted as “hours worked.”

Rutti’s road to trial featured twists and turns. Granting Lojack’s motion for summary judgment, the district court

put the brakes on Rutti’s claims. On appeal, the Ninth Circuit affirmed, except for Rutti’s claim that time spent uploading data after work potentially was compensable under federal law. By a 2-1 vote, the majority initially rejected Rutti’s commute-based claim under both federal and California law.

But Rutti refused to yield and sought re-hearing from the panel. Judge Cynthia Holcomb Hall reversed course regarding Rutti’s claim for commuting time, turning Judge Silverman’s original partial dissent into a majority opinion. Why did two circuit judges hold that Rutti can claim commuting to and from work may be compensable? Here is a roadmap.

California employers must pay at least minimum wage for all “hours worked.” The Industrial Welfare Commission’s Wage Order 4-2001, § 2(K), defines “hours worked” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

So, an employee may be working when merely “subject” to the employer’s control. How much control is enough? In *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968 (1995), the court of appeal held: “When an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus

prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer’s control.” In *Aguilar v. Association for Retarded Citizens*, 234 Cal. App. 3d 21 (1991), the court held the time an employer required personal attendant employees to spend on the employer’s premises, even when the employees were allowed to sleep, should be considered “hours worked.” Thus, in both cases, the courts held that the employees did not have to be “working” to be paid; the employer’s exercise of some control over workers’ activities was sufficient.

The California Supreme Court in *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000), applied the “hours worked” definition to commuting. There, agricultural employees commuted from their home to a central location. Then, the employer required them to board a company-supplied bus which transported them to worksites in the fields.

The Supreme Court held the employer exercised sufficient control over the employees by requiring them to finish commuting on the company-owned bus. The employer’s imposition of mandatory departure times and disciplinary action for employees who drove their own cars to the fields was sufficient to satisfy the control requirement.

The Court noted that the employees' initial commute to the centralized location was *not* compensable time because the employees were free to choose their routes, mode of transportation, departure time, and to stop for errands while in their own cars. The Court also observed that an employer's merely providing a vehicle would not result in a finding of control. Thus, in *Overton v. Walt Disney Co.*, 136 Cal. App. 4th 263 (2006), the court of appeal decided that time spent on a shuttle bus from distant employee parking lots to Disneyland's work areas was not compensable under *Morillion*. The key issue for the court was the fact that Disney did not require employees to use the company-provided shuttles.

Against this backdrop, the panel in *Rutti* divided over whether Rutti's commuting in Lojack's vehicle constituted "hours worked." Judge Consuelo Callahan in dissent opined that Rutti's commute was not compensable because he was merely driving a company-owned vehicle from home to work, which *Morillion* refused to hold was hours worked.

But the 2-1 majority decided that Lojack exercised more control than just giving Rutti the use of a vehicle. The majority found that Rutti was

"required to drive the company vehicle, could not stop off for personal errands, could not take passengers, was required to drive the vehicle directly from home to his job and back, and could not use his cell phone while driving except that he had to keep his phone on to answer calls from the company dispatcher. In addition, Lojack's computerized scheduling system dictated Rutti's first assignment of the and the order in which he was to complete the day's jobs."

At the same time, the panel unanimously agreed Lojack's policies did not render Rutti's commute time compensable under *federal* law. The federal Employee Commuter Flexibility Act, 29 U.S.C. § 254(a), is a 1996 amendment to the federal Portal-to-Portal Act. That law permits employers to require employees to use company-owned vehicles and place conditions on their use. The test for hours worked under § 254(a) was whether Rutti was required to perform actual work during the cdommute. Because Rutti was not required to perform any work while commuting, his time was not compensable under federal law.

California law does not include an analog to the Employee Commuter Flexibility Act. Employers who

provide vehicles to employees in California must evaluate their policies in light of *Rutti*. Repairmen, mobile installers, insurance adjusters and other mobile employees may drive company cars from home to their first work assignments of the day. Bona fide outside salespersons also may use company vehicles. But they are typically exempt from overtime law and unlikely to benefit from Rutti's expansion of "hours worked."

Merely requiring an employee to use a company car to commute is not risky, even after *Rutti*. Employers that do not impose strict limitations on employees' activities during the commute may continue their practices. But the ruling will be problematic for those employers that limit employees' use. It is impossible to tell at what point Lojack would have prevailed if it had imposed fewer restrictions, such as allowing employees to stop for errands, or not requiring employees to take dispatch calls during the commute. The panel's 2-1 decision and Judge Hall's ambivalence suggest *Rutti* was a close case. Therefore, employers must carefully consider whether the degree of control they exercise will change the commute into a part of the work day.

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