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Working Around the Clock

by D. Gregory Valenza

Some people leave their jobs at the end of the day and do not even think about work until the next shift begins. Then, there is the rest of us. California's wage and hour laws are tricky, even as applied to workers on a traditional 9-5 schedule. The rules that apply to commuting, working at home, on-call time, and other incidental work performed during what is otherwise "free" time, vex even the wonkiest of employment lawyers.

Generally speaking, employers must compensate employees for "hours worked," unless they are "exempt" from the minimum wage and overtime laws (such as certain executives, administrative and professional employees). In California, "hours worked" is broadly defined as the time an employee is subject to an employer's control. The degree of control that triggers the obligation can be hard to define precisely.

Commuting

Employees generally must get to and from work without additional compensation. However, employers may have to pay employees to commute, if the employer requires workers to take employer-supplied transportation to a worksite. See, e.g., Morillion v. Royal Packing Co., 22 Cal. 4th 575, 588 (2000). When the employer merely offers optional transportation, though, there generally is insufficient control over the employees to warrant counting the time as hours worked. See, e.g., Overton v. Walt Disney Co., 136 Cal. App. 4th 263, 268 (2006).

What if the employer requires the employee to commute in an employer-provided vehicle like a service truck? The Ninth Circuit held in Rutti v. Lojack Corp., 578 F.3d 1084, 1093 (9th Cir. 2009), that neither federal nor California law requires employers to treat such a commute as working time, unless the employee is required to perform work during the commute, or the employee's activities are significantly restricted in some other way.

Traveling

Traveling is usually work time for non-exempt employees under California law. Federal rules rendering noncompensable travel time on "common carriers" or airplanes, and travel outside the regular work day, do not apply to workers subject to California law. When an employee travels between worksites during the day, all time is compensable. Even part of a commute may be deemed work time when an employee does not regularly report to the same worksite. It is permissible to offer a reduced wage rate for travel. But overtime liability can accrue quickly when non-exempt employees travel overnight. So, it is important to understand the proper compensation rules in this area.

On-Call Time

Some employers require non-exempt employees to be "on call"; that is, ready to respond to emergencies or other work-related issues, but otherwise free to engage in personal pursuits. Not all such time is counted as "hours worked."

The touchstone, again, is the degree of employer control. Relevant factors include any geographical restrictions the employer places on the employee, required time to respond to calls from work, industry practice, and the extent to which the employer's restrictions on activities would affect the employee's ability to engage in personal pursuits.

The more restrictions the employer places on a worker, the more likely all of the "on call" time will be counted as hours worked. Merely requiring an employee to wear a pager and respond to calls within a reasonable time may not be enough. But requiring an employee to report to a work location within a half-hour of receiving a call, for example, could be sufficient. Of course, employers may set a lower pay scale for compensable on-call time.

Incidental Work at Home

Sometimes employees perform work before or after the official workday. That time will be compensable if it is related to the employee's "principal" work activities and not considered "de minimus." The 9th Circuit in Rutti, supra, held that a service technician's activities, such as receiving and prioritizing jobs and mapping his route at home, were more related to his commute than his job. Therefore, these activities were not compensable. The court also deemed "de minimus" the minute or so Rutti spent completing paperwork before his shift began. However, the court found that uploading data at the end of his shift was compensable time, because it was a

principal work activity and sometimes took several minutes to accomplish. The court declined to issue a bright line rule on how much time is "de minimus."

The court noted too much incidental work at home could convert the entire commute into work time. The rationale for this "continuous workday doctrine" is that if work transforms the home into just another job site, then the travel to and from home is not a commute, but "intra day" travel. The court declined to apply this rule to Rutti's job duties.

Exempt Employees

The discussion above applies to the compensation of "non-exempt" employees, who usually are paid hourly. Exempt workers' salaries cover all of the work for the week, whether performed at home, during a commute, or otherwise.

One occasionally reads about a partner's firmwide email instructing lawyers to check email constantly, whether on vacation or not. Lawyers typically are classified as exempt, professional employees. So, a firm's requirement that lawyers check email at least hourly, before bed, or on the weekend generally will not result in claims for unpaid wages.

However, responsiveness during time off may result in unintended liability. It is lawful to deduct from an exempt employee's pay a full day's salary for a full day's absence for "personal pursuits" However, it is illegal to reduce a salary for partial day absences. The state's Division of Labor Standards Enforcement has opined that an employer policy requiring exempt employees to respond to emails or voice mails, or to be available for meetings during vacation, may preclude any

deduction from the employee's salary for the absence.

What about reducing an exempt employee's vacation balance instead of salary? The DLSE's current enforcement position is that an employer may debit a vacation balance for an exempt employee's absence of four hours or more. Requiring employees to respond to emails and check voice mail all day could preclude deduction from the vacation balance. Of course, firms rightly may conclude that the cost of inflated vacation balances is worth improved responsiveness and client service. Even so, it is important for law firm management to account for the law's effect on firm policy and payroll practices. Unbudgeted claims for wages and penalties can significantly impair profits per partner and, therefore, crimp a firm's largesse toward its associates and staff. So, wage and hour compliance is important for everyone.

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