



## The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

### **The Ninth Circuit Revises Earlier Opinion Regarding When Commute Time is Compensable Under California Law**

#### **Introduction**

In our September 24, 2009, edition of *The Personnel File* we addressed a U.S. Ninth Circuit Court of Appeals decision, *Rutti v. Lojack Corporation, Inc.* (August 21, 2009), regarding claims for compensation for commute time and off-the-clock work. In that decision, the Court held that requiring employees to use a company-owned vehicle does not render their commute time compensable under both state and federal wage and hour laws.

Now, on March 2, 2010, the Ninth Circuit issued a revised opinion that supersedes the August 21, 2009 decision. In this revised opinion, the Court reached a different conclusion on the issue of whether commute time is compensable under California law based on the facts of the case. The revised opinion left unchanged the previous discussion regarding the compensability of commute time under federal law and off-the-clock postliminary and preliminary and *de minimis* work activities.

As discussed below, the Ninth Circuit held in this revised opinion that commute time may be compensable under California law where employees are so restricted in their activities to be considered under the control of the employer.

#### **Factual Background**

Mike Rutti was employed by Lojack as a technician to install and repair alarms in customer cars. Most if not all of the installation and repair work was done at the clients' locations. He was responsible for clients in Orange County and was required to commute and travel to job sites in a company-owned vehicle. Rutti was a non-exempt employee paid on an hourly basis, beginning when he arrived at his first job location and ending when he completed his final job of the day. He was not paid for time spent commuting from home to his first job site of the day, or for returning home from his last job site.

Rutti filed a federal class action lawsuit against Lojack on behalf of himself and other Lojack technicians, claiming that Lojack had failed to compensate the employees for time commuting and performing "off-the-clock" activities before and after work. He alleged violations of the U.S. Fair Labor Standards Act (FLSA) and the California Labor Code. Lojack moved for summary judgment, which the trial court partially granted. Rutti then appealed.

## **Commute Time In a Company-Owned Vehicle Can Be Compensable Under California Law If the Employee Remains Subject to the Control of the Employer**

Rutti argued that, because he was required to commute in Lojack's vehicle in a restricted fashion, he was entitled to compensation for his commute time. Lojack's restrictions required that Rutti not use the vehicle for personal pursuits or for transporting passengers, and that he drive directly from home to work and from work to home. He was also prohibited from using his cell phone while driving on his commute except to take work-related phone calls from the company dispatcher. He also could not run personal errands, take his children to school, or stop for breakfast.

The Court concluded in both its original and revised opinions that, despite these restrictions, the FLSA and the federal Employee Commuting Flexibility Act (ECFA) expressly allow employers and employees to agree that the employee's commuting "*to and from the actual place of performance of the principal activity or activities which such employee is employed to perform*" is not part of an employee's principle activities and therefore not compensable. The fact that Lojack imposed this commute agreement on Rutti as a condition of employment did not violate the FLSA or ECFA.

California law is another matter. In its earlier opinion, the Court primarily relied upon Labor Code section 510(b) to hold that this commute time was not compensable under Section 510(b) provides that:

*"[t]ime spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing."*

However, the Court's revised opinion reversed this earlier position, and in a 2-1 decision, concluded that commute time under Lojack's arrangement with Rutti could still nonetheless be compensable time under California law based on the facts presented. The Court's revised opinion indicated that, while commute time is generally not compensable, California law nonetheless still requires that employees be compensated for all time when they are subject to the control of the employer. As a result, the Court ruled that commute time can be compensable under certain circumstances because of Lojack's limitations on its employees while they are commuting.

The revised opinion relied on the California Supreme Court's decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, to find that certain commute time can be compensable. In *Morillion*, the Supreme Court held that employees need to be compensated for commute time during a mandatory bus commute to and from the worksite where the employees remained under the control of the employer and were not free to engage in their own pursuits. The Ninth Circuit held that Lojack's restrictions on Rutti in his commute time to and from work paralleled those in *Morillion* for the following reasons:

- He was required to drive the company vehicle for his commute;

- He could not take passengers during his commute time;
- He could not stop for personal errands and was required to drive only to and from his home and the worksite;
- He could not use his cell phone during the commute except to take calls from the company dispatcher; and
- Lojack's computerized scheduling system dictated Rutti's first assignment of the day and the order in which he was to complete the day's jobs.

As a result, the Court found that Rutti's commute time under these restrictions in essence placed him under the control of Lojack and was therefore compensable time under California law.

## **Conclusion**

Although an employee's commute time is generally not compensable under either state or federal wage and hour laws, the *Rutti* case does point out that commute may be compensable under California law if it is severally restricted and controlled by an employer. Employers, especially those providing company vehicles, need to be careful to review any restrictions they impose on non-exempt employees in their commute to and from work to avoid imposing restrictions that can make such commute time compensable. As such an analysis can be very fact specific in light of the legal issues discussed above, employers are encouraged to contact legal counsel for advice on these matters.

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