FOCUS: LABOR AND EMPLOYMENT LAW

The Unknown Impact of Technology Upon the Portal-to-Portal Act in the Second Circuit

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The question of whether an employer must pay its employees for their commute has reappeared as the COVID pandemic wanes and employees who are used to working remotely return to the office more and more. It may seem obvious that an employer should not compensate employees for their commute, but it is not so cut and dry. Employees who are used to working from home, at the local coffee shop, or even at the beach find themselves sitting on trains or buses with the same ready access to work programs and electronic devices, allowing them to work on their commute. An employer might be liable for unpaid wages without a thorough understanding of the laws regarding commute/travel time.

In 1938, Congress passed the Fair Labor Standards Act ("FLSA") and created a country-wide minimum wage and overtime rate.[1] While the FLSA led to significant advances and protections for employees, it also opened the door to substantial liability for employers. To curb some of this liability, Congress passed the Portal-to-Portal Act (the "Act") in 1947, which eliminated an employer's obligation to compensate employees for "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 activities which are preliminary to or postliminary to said principal activity or activities…."[2] Based on this language of the Act, an employee generally will not be compensated for commuting time.

A question arises, however, when employees perform tasks relevant to their jobs during the commute. Any "work" an employee performs while commuting is indeed compensable.[3] For purposes relevant to this article, the United States Supreme Court has defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[4] De minimus activities that take only a few minutes beyond regular work hours are excluded.[5] Thus, to be compensated during commuting time, an employee must demonstrate that (1) the employee's activities during the commute constitute work and (2) the work was "an integral and indispensable part" of the job.[6] This two-part inquiry is highly fact dependent and rests on what exactly the employee did during the commute and whether this activity was done for the employer's benefit. For example, in *Reich v. New York City Transit Auth.*[7] and *Singh v. City of New York*,[8] the Second Circuit found that the employees were not entitled to compensation for their commute. The *Reich* plaintiffs transported police dogs during their commute. The *Singh* plaintiffs transported documents required for their jobs. In both cases, the plaintiffs alleged that their commutes were somewhat lengthened, responsibility during travel was heightened, and after work social opportunities were limited. The court held that these factors did not make the commute compensable.

In *Clarke v. City of New York*,[9] the physical weight of the items being transported during the commute resulted in a different potential outcome than *Reich* and *Singh*. The *Clarke* plaintiffs similarly alleged that they carried equipment back and forth from home to work every day during their commute. The court's decision turned on whether the plaintiffs had "to carry equipment that is significantly more burdensome than that typically carried in an ordinary commute."[10] The Second Circuit determined that those plaintiffs who commuted by car could not make this argument because the equipment merely sat in the car. The commute time could be compensable for those plaintiffs who used public transportation, however, depending on the weight of the equipment.[11]

This fact-based analysis is not limited to tasks performed during the commute. Activities performed before or after the commute may also be compensable.[12] The *Clarke* Court determined that the plaintiffs could also be compensated for the time they charged their laptops and printer batteries at home, if it was necessary to have charged equipment to conduct a critical portion of their job, i.e., inspections.[13] The court held that there was a question of fact as to whether these activities constituted "work," since plaintiffs claimed they had to switch out batteries and monitor the charging status.[14] Similarly, in *Medina v. Ricardos Mech., Inc.*,[15] the District Court for the Eastern District of New York determined that an employee who had to drive to a waystation to pick up tools needed to be compensated for his commute when the employee performed some sort labor, like loading necessary equipment into a van. When the employee was simply picking up the van without loading tools or if the tools were not necessary for work, however, it did not involve labor, and thus was not compensable.[16]

These cases demonstrate the fact specific analysis that goes into effectuating the purposes of both the FLSA and the Act. In an increasingly technology-based world, the inquiry becomes even more difficult. It is an everyday sight to see employees sending a work email while out to dinner or standing in line, and even more so on public transportation to the worksite. Where the courts will draw the line for the compensability of work performed electronically during a commute remains to be seen. It is likely a court would rule that an employee on an hour-long commute who takes fifteen minutes preparing and responding to a substantive email should be paid for that fifteen-minute period. But what if there was no reason for the employee to respond to the email at that time? What if the employee spent those fifteen minutes cleaning out junk emails from her work account, will that be considered an "integral and indispensable part" of the job? And how much work will be sufficient to make the whole commute compensable? The line will be drawn in each individual case. Until there is clear guidance from a court, one weapon for employers against unwittingly finding themselves having to pay for an employee's commute is to limit non-exempt employees' access to work programs and devices after work hours. Another, less drastic option is to institute a policy that work should only be performed during business hours, not during commuting/travel time. Any employee who breaks this rule would nonetheless have to be paid for the work performed but should be subjected to disciplinary action. These options are not likely to work for all employers, particularly those that adhere to the (unspoken or not) philosophy that employees should be available around the clock. Those employers run the risk of having to pay for the employee's commute, which may have potential overtime implications.

Specifically, if the "clock" starts an hour before the employee actually reports to the worksite because the employee engaged in a principal activity during the commute, that extra hour may push the employee over the forty-hour mark into overtime. Further, employers may find themselves paying for an extra half hour of work while an employee sits on the train watching a television show merely because the first half hour of the commute involved responding to substantive emails. Of course, employees should get paid for the work they do, but the many gray areas in our technology-driven world may lead to significant exposure to employers. Any employers wishing to get out in front of the potential exposure would be wise to either limit employee access or implement and enforce policies prohibiting work during their employees' commute.

1. 29 U.S.C. §§ 202, 206.
2. 29 U.S.C. §254(a).
3. 29 C.F.R. §785.41.
4. *Tennessee Coal, Iron & R. Co. v. Musoda Local No. 123*, 321 U.S. 590, 598 (1944) (holding superseded by 29 U.S.C. §254); see *also Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (discussing definition of "work" as set forth in *Tennessee Coal, Iron & R. Co.*).
5. *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (holding superseded by 29 U.S.C. §254); see *also Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (discussing definition of "workweek" as set forth in Anderson).
6. *Singh v. City of New York*, 524 F.3d 361, 368 (2d Cir. 2008).
7. *Reich v. New York City Trans. Auth.*, 45 F.3d 646, 653 (2d Cir. 1995).
8. *Singh v. City of New York*, 524 F.3d 361, 370 (2d Cir. 2008).
9. *Clarke v. City of New York*, 2008 U.S. Dist. LEXIS 47683 at *12-13 (S.D.N.Y. June 16, 2008).
10. *Id.* at 18.
11. *Id.* at * 20-21.
12. 29 C.F.R. §790.6.
13. Clarke, 2008 U.S. Dist. LEXIS 47683 at *18.
14. *Id.* at 24-25.
15. *Medina v. Ricardos Mech., Inc.*, 2018 U.S. Dist. LEXIS 140940 at *1, 17 (E.D.N.Y. Aug. 20, 2018).
16. *Id.* at *11.

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