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Court Of Appeals Finds That Some Work Performed At Home Or While Commuting To Work May Have To Be Paid

The Ninth Circuit Court of Appeals held on March 2, 2010 in Rutti v. Lojack Corporation, Inc. that some work performed by employees at home, as well as time spent commuting, may have to be paid in certain circumstances.

The plaintiff in Rutti was a technician for Lojack, Inc. ("Lojack") who installed car alarms. In the morning, Rutti, as well as Lojack's other technicians, would receive their assignments for the day, map the route to their assignments, and prioritize the jobs. While traveling to the first job in the morning, as well as when traveling home at the end of the day, technicians were required to keep their cell phones on and drive directly between home and the job site without making any additional stops. After returning home, technicians were required to upload data received at the job sites from a portable data terminal ("PDT") to the company by hooking the PDT up to a modem.

The Ninth Circuit determined that the technicians' commute time was compensable under state law, but not federal law. The federal Portal-to-Portal Act, as amended by the Employment Commuter Flexibility Act, explicitly provides that employers need not compensate employees for time spent traveling to and from where they perform their job duties. The result under federal law was not changed by the fact that Lojack's technicians drove company cars, or that they were subject to certain employer-mandated restrictions while driving.

California, however, maintains stricter wage and hour laws. Under California law, the relevant question is whether the employee's time is "subject to the control" of the employer. The Ninth Circuit found that because technicians had to keep their cell phones on, and could not make additional stops while going to and from the job site (such as dropping children off at school), the time was subject to the employer's control and had to be paid under California law.

The Ninth Circuit went on to find that under federal law, the technicians' job tasks before the "start" of the work day were not compensable, but that time spent uploading data from the PDT "after work" might have to be paid. Under federal law, the question of whether these types of "preliminary and postliminary" activities must be paid depends on whether they are part of the "principal activities" that the employee is employed to perform. Even if these tasks are part of the employee's "principal activities," they need not be paid if they are *de minimus*. In deciding whether certain job tasks are *de minimus* under federal law, courts examine the practical administrative difficulty of recording the additional time, the aggregate amount of time at issue, and the regularity of the additional work.

Applying those factors, the Court held that even if the tasks performed by technicians prior to leaving home were part of their "primary activities," they were *de minimus*. These tasks took only a matter of minutes to complete, and it would be very difficult to record the time that technicians spent working on them. However, time spent uploading data from the PDT might be compensable. There was evidence that this task took anywhere from 5 to 15 minutes each night. While the Court acknowledged that there would likely be some administrative difficulty recording this time, it found that the time added up to over an hour per week, and was a regular part of the employees' job duties, and therefore might not be *de minimus*. Accordingly, the time might have to be paid, depending on the specific facts.

Still, even if this activity was found to be compensable under federal law, that did not mean that the technicians' travel time home had to be compensated, even under the "continuous workday doctrine." Under this doctrine, which the U.S. Department of Labor has adopted, an employee's workday generally lasts until he has completed all of his principal activities during the day. The Ninth Circuit found that the "continuous workday" rule did not apply in these circumstances because technicians were relieved of all duties upon returning home, and could input the data from the PDT at a time of their choosing. Federal regulations preclude application of the "continuous workday doctrine" where employees are relieved from all duty for a long enough period to be able to use that time for their own purposes. Still, this commute time generally has to be paid under California law. Here, the Ninth Circuit did not reach the issue of whether the "preliminary and postliminary" activities performed by the technicians had to be paid under California state law.

This case reminds employers that there can be significant differences between federal and state law in the wage and hour areas, and that they need to ensure that their practices comply with both sets of laws.