



GOOD POINT

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Pay and travel time

While travel time is not normally compensable, there are exceptions.

by Aviva Kamm

Nonproductive time, such as break time for piece-rate workers and travel time, is increasingly being scrutinized by Washington employees, worker advocates, employers, and courts. The overlay of federal and state wage and hour law gets even more complicated when considering laws particular to agriculture and foreign workers.

As a general rule, travel time at the start or end of the day is unpaid. Under the Fair Labor Standards Act (FLSA) and Washington's Minimum Wage Act, employers must pay their employees the hourly minimum wage for all time spent working. But federal law is clear that employers are not required to pay employees for commuting time. Under the statute, travel to the worksite is not compensable unless the travel, or work performed immediately before it, constitutes the worker's "principal activity" or includes "activities which are preliminary or postliminary" to the principal activity.

Under Washington state law, whether workers should be paid for travel time or not depends on whether the employer exercises sufficient control over an employee during travel time that the employee is "on duty" and should therefore be paid.

This rule that commute time is unpaid applies even if the employee works at different job sites. And the rule applies even where employees travel together to a work site, either in an employee's vehicle or a company-owned vehicle, unless the employees are performing activities that are integral to their principal activities while en route to the work site. The length of time spent traveling does not make the time compensable.

Cases where courts have applied the rule include the following:

—Rig hands employed by an oil and gas well drilling company were required to travel together to well sites; travel time was as long as three and a half hours one way. Rig hands were not entitled to compensation for travel time because they were free to spend their time as they wished during the commute.

—Chili pepper harvesters rode as much as five hours round trip daily in buses provided by a farm labor contractor. Travel time was not compensable because the workers did not perform any work before boarding the buses, the workers did not load tools or equipment onto the buses, and the workers were not required to ride the buses for transportation and were free to arrange alternate transportation or to move closer to the work sites.

—A refrigerator repair mechanic traveled daily from his home to worksites as much as four hours away from home. The employer was only obligated to pay the employee between his arrival at the day's first worksite and his departure from the day's final worksite.

—Construction project electricians were required to ride on their employer's bus for 20 minutes from town to job site. The time was not compensable despite brief intermittent delivery of work information during the bus ride.

For nonresident aliens working under the H-2A program, federal regulations focus on whether the travel

is within the geographic area of intended employment for which the foreign workers were sought. These regulations take into account multiple factors to determine whether multiple sites within the area are within normal commuting distance, including access by public transportation, and average commute times for the area.

Though not an ironclad rule, travel within a metropolitan statistical area will generally be considered within normal commuting distance and not merit extra pay. However, an employer who is not generally obligated to pay for travel time may take on that burden in certain circumstances.

Exceptions

1. Special one-day assignments

Even though commute time is typically unpaid, federal law does require employers to pay employees for the extra time spent traveling when work demands same-day round-trip travel in excess of the worker's normal commute. However, courts construe the exception very narrowly. An assignment must truly be "special" and "unusual" to transform home-to-work travel into compensable time. A faraway assignment that both employers and employees contemplate as being part of the job is not considered "special," even if it occurs as infrequently as three times a year.

2. Obligations created by custom or agreement

Even where the travel would not otherwise be paid time, travel may become compensable if "a contract or custom of compensation exists between the employer and the employees." Regulations further specify that the custom will create an obligation to pay unless the custom is "inconsistent with an express contract." Case law enforcing this exception is sparse, but employers should be wary before paying employees for travel time voluntarily.

Tips to minimize liability for travel time

1. Offer transportation; don't require it.

Any company-provided transportation should be voluntary. Ensure that workers are told the address and start time for work the next day so that they can arrange transportation independently if they choose to do so.

2. Consider alternate incentives, and explain to workers how the incentives will work.

When labor supply is low, consider incentives other than travel pay to attract the workers you need. If paying for the commute is necessary, clearly explain—preferably in writing—the circumstances under which the company will pay for travel time, and how the pay will be calculated. Courts will enforce a custom of payment, but will enforce it narrowly to match the boundaries the company has historically set.

3. Consider impact on non-contract workers.

Remember that H-2A workers cannot be given preference over local workforces. Ensure that local workers are not denied access to any incentive pay offered for travel time.

4. Consult counsel about the impact of employee travel on other risk factors.

Even after correctly determining whether travel time is paid time or not, employee travel may give rise to other issues, such as workers' compensation coverage, vehicle insurance, and calculating the timing of meal and rest breaks. To reduce risk, consult with your counsel before changing your current coverages or payroll practices. ●

GOOD STUFF

A selection of the latest products and services for tree fruit and grape growers

ReTain registered for double dose

The U.S. Environmental Protection Agency has approved a new label for the growth regulator ReTain (aminoethoxyvinylglycine) that allows pome fruit growers to make a second application prior to harvest. The product blocks ethylene synthesis in the fruit, delaying maturity and controlling pre-harvest drop.

It can now be applied at higher rates or in up to two applications per season. Compared to a single application, the double application of ReTain provides growers with more flexibility in managing harvest labor and helps to maximize the amount of fruit picked at optimum maturity, according to the manufacturer, Valent USA.

For more information go to www.valent.com/retain.

Books introduce kids to farming

Octane Press, a publisher based in Austin, Texas, is producing a line of books aimed at children featuring Case IH farm equipment. The "Casey and Friends" books introduce kids to modern farming.



They show the daily work of farmers growing different crops and using tractors, combines and other equipment introduced by Casey the farmer, Tillus the worm, and other illustrated friends.

A spokeswoman for Case IH said they partnered with Octane not with any expectation of increased equipment sales, but to develop fun and educational products so all children can learn about farming.

The books are recommended for children ages 4-8 and retail for \$14.99. Books can be found at www.octanepress.com

GOOD TO GO

For a complete listing of upcoming events, check the Calendar at www.goodfruit.com

SEPTEMBER

September 13-18: International Conference on Fresh-cut Produce, University of California Davis, fresh-cut.2015.ucdavis.edu.

September 23-25: Macfrut: Italian Fruit & Vegetable Trade Fair, Rimini, Italy, www.macfrut.com.

OCTOBER

October 5-9: Irrigation course for orchard managers, Lleida, Spain, presented by University of California, Davis, and the Institute of Agriculture and Food Research Technology. For information, go to www.irta.eu or email international@irta.eu.