

## Management Alert

# The Ninth Circuit Changes Its Mind, Holding That Commute Time May Be Compensable Under California Law

An important issue for many employers is whether an employee's time spent commuting to and from work is compensable. Generally, employee commute time does not need to be compensated. California courts have recognized an exception to this general rule where an employer requires employees to use employer-provided transportation.

On March 2, 2010, in *Rutti v. Lojack Corp.*, the Ninth Circuit Court of Appeals reversed its prior ruling on this issue in the same case and expanded this exception—holding that under California law an employer must compensate its employees for time spent commuting when the employee is driving a company-provided vehicle with restricted use.

### The Facts and Lower Court Decision

Plaintiff Mike Rutti brought a class action on behalf of all California repair technicians who installed car security devices for Lojack. Most of the installations performed by technicians took place at the customers' locations. Rutti brought claims under the Fair Labor Standards Act and California law, seeking compensation for: (1) commuting time in a company-provided vehicle; and (2) time spent planning his work at home before his scheduled shift and uploading his work data into Lojack's computer after his shift ended.

The district court granted Lojack's motion for summary judgment, finding that none of the time was compensable. The Ninth Circuit originally upheld the district court's ruling in *Rutti v. Lojack Corp.*, 578 F.3d 1084 (9th Cir. 2009). However, after a petition for rehearing was granted, the Ninth Circuit changed its mind and reversed in part the district court's decision.

### The Ninth Circuit's Decision

The Ninth Circuit reaffirmed most of its prior decision, concluding that, under federal law, time spent commuting in a company-provided car is not compensable under the Employee Commuter Flexibility Act (ECFA), which is part of the Portal-to-Portal Act. Under the ECFA, an employer need not pay an employee for time spent commuting to and from work in a company-provided vehicle so long as the use of the vehicle is subject to an agreement between the employer and the employee. This is true even if the use of the vehicle is restricted (such as prohibiting passengers or requiring that the car be used for work only).

Under California law, however, the Ninth Circuit held that commute time in a company-provided vehicle may be compensable. Citing the California Supreme Court's decision in *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000), the Ninth Circuit held that the commuting time was compensable in this case because the employees were subject to the control of Lojack. The court focused on the fact that the employees were required to use the company car and answer work calls while driving, and

were prohibited from making personal calls and giving rides to passengers. The court also noted that Lojack limited the use of the car to work only.

The court also addressed the application of the *de minimis* rule, which provides that an employer need not pay an employee for small amounts of time worked per day. Courts have interpreted *de minimis* to mean between 5 to 10 minutes per day. The court concluded that Rutti's time spent working before his shift was not compensable under the *de minimis* rule because his pre-shift tasks only took about one minute. The court further noted that Rutti failed to explain why this work had to be done before his shift started.

The court held that time spent performing Rutti's post-shift task of uploading data onto Lojack's computer system, however, was not *de minimis* and should be compensated. The court explained that the data transmission was a recurring daily task, and was primarily for the benefit of Lojack. Further, there was evidence that the time spent on this task was not *de minimis* because in some instances the computer system failed to work, requiring employees to spend additional time confirming the data transmission took place.

## What the *Rutti* Decision Means for Employers

For employers outside of California, *Rutti* reaffirms that employees need not be paid for commuting time in company-provided vehicles.

Employers in California, on the other hand, should pay special attention to their policies regarding employer-provided vehicles. If an employer does not want to compensate its employees for commute time in company-provided vehicles, the employer should: (1) make the use of company-provided vehicles or transportation optional, not mandatory; and (2) not impose restrictions limiting the personal use of that vehicle by the employee (such as restricting use for "work purposes only," prohibiting passengers, etc.).

*Rutti* confirms that *de minimis* amounts of work need not always be compensated. To receive the benefit of the *de minimis* rule, the employer must show that: (1) it would be practically and administratively difficult to record the time; (2) the total amount of time worked is relatively small; and (3) the additional work is not regularly performed. Employers, of course, may avoid the *de minimis* issue entirely by prohibiting employees from working before or after their shift, and by restricting employees' ability to access to electronic data off-site, such as e-mails, web-sites, or intranet sites.

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