THE RECORDER

134RD YEAR NO. 10 www.therecorder.com APRIL 7, 2011

Off the Clock, or on the Hook?

Matthew Schechter,
McManis Faulkner partner

During the course of 2010, courts at both the federal and state level issued a number of decisions in the employment law field for employers to be aware of. In particular, the Ninth Circuit U.S. Court of Appeals, in two opinions, considered one of the more common questions in employment law: When do employees have to be paid for preliminary and postliminary activities, including "donning and doffing"?

Rutti v. Lojack Corp., 596 F.3d 1046 (9th Cir. 2010), involved a plaintiff who wanted to bring a class action on behalf of Lojack-employed technicians, who install the Lojack alarm system in customers' cars. In considering the trial court's order granting summary judgment for Lojack, the Ninth Circuit discussed federal law and its applicability to claims for compensation for time spent commuting to and from work in company vehicles.

Simply put, the court held that under *federal law*, such time was not generally compensable, where the use of the vehicle is subject to an agreement on the part of the employer and the employee, and it is not part of the employee's principal activities. Moreover, the fact that Lojack imposed conditions on the use of the vehicle also did not make the plaintiff's time compensable. Rather, an individual must perform additional legally cognizable work while driving to his or her workplace in order to compel compensation for the time spent driving. As Lojack's conditions did not constitute "additional legally cognizable work," plaintiff Mike Rutti was not entitled under federal law to compensation for the time he spent commuting in Lojack's vehicle.

Because Rutti contended that he should be paid for the time spent in the morning receiving assignments, mapping routes and prioritizing jobs, as well as his time after work when he was required to upload data about his work to the company, the court also considered when preliminary and postliminary work was compensable. The court held that in order to be paid for such work, a plaintiff must show that his off-the-clock activities are related to his principal activities for the employer. In addition, Ninth Circuit case law indicates that activity that might otherwise be compensable is not if the time involved is *de minimis*.

For purposes of "principal activities," the court considered two of its own earlier decisions: *Lindow v. United States,* 738 F.2d 1057 (9th Cir. 1984), and *Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers,* 971 F.2d 347 (9th Cir. 1992), as well as a case from the Fifth Circuit, *Dunlop v. City Elec., Inc.,* 527 F.2d 394 (5th Cir. 1976). The court concluded that "*Lindow* requires that we give 'principal activities' a liberal construction no matter when the work is performed ... *Dunlop* suggests that we pay particular attention to whether the activities are performed as part of the regular work of the employees in the ordinary course of business[, and] ... *Owens* counsels that we consider the extent to which the work impacts the employee's freedom to engage in other activities." *Rutti*, 576 F.3d at 1056 (internal quotations and citations omitted).

In determining if time is *de minimis*, the court applies the three-prong test set forth in *Lindow*: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time and (3) the regularity of the additional work.

Ultimately, the court concluded that Rutti's preliminary activities were simply not integral to his principal activities, and even if they were, did not rise above the *de minimis* standard, thereby making the time uncompensable. On the other hand, the court determined that the transmissions Rutti was required to make at the end of each day were an integral part of Rutti's principal activities. Moreover, the court vacated the summary judgment order on this particular issue because there is no precise amount of time that may be denied compensation as *de minimis*, and because the record did not compel a determination that the time consumed by this function is *de minimis*.

The other Ninth Circuit case, *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010), considered when, under the FLSA, the "donning and doffing" of, in this case, police uniforms and gear, was compensable activity. The court explained that it is axiomatic that employers must pay employees for all hours worked. However, that such activity is work as a threshold matter does not mean without more that the activity is necessarily compensable. The Portal-to-Portal Act of 1947 relieves an employer of responsibility for compensating employees for activities which are preliminary or postliminary to the principal activity or activities of a given job.

In order to determine if the donning or doffing of uniforms and gear is preliminary or postliminary to the principal activity or activities undertaken by the officers, the court turned to a three-stage inquiry set forth in *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003). Stage one is

Matthew Schechter is a partner at McManis Faulkner. He has a varied civil litigation practice with a particular emphasis in employment law and can be reached at (408)279.8700 or via email at mschechter@mcmanislaw.com.

whether the activity was, in fact "work," defined as physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Stage two looks at whether the activity was an integral and indispensable duty. And stage three considers whether the activity was *de minimis*.

The court noted that, because the donning and doffing of the uniforms were not required by the employer to be performed at the workplace, the officers' claim could simply fail under the first *Alvarez* prong. Instead, the court acknowledged the argument that the police department required its officers to wear a uniform and safety gear, and turned to the second *Alvarez* prong, where it held the officers' claim failed. Here, the employer did not require any on-premises donning and doffing, nor did the officers cite to any law, rule or regulation that required donning and doffing at work. Moreover, the reasons sought for compensation of the donning and doffing time primarily benefitted the officers, not their employer. Because the activity in dispute was not necessary to the principal work performed and done for the benefit of the employer, it was not compensable.

What does this all mean from a federal law perspective? The answer is not as simple or as straightforward as either employees or employers would like. As one can tell from *Rutti* and *Bamonte*, the question of whether one is entitled to pay for preliminary or postliminary activities is quite fact-specific. Thus, questions such as what is the activity in dispute, is the activity necessary to the job or required by the employer, and is the time spent on such activity *de minimis*, are all relevant inquiries that will help in deciding if an employee is entitled to compensation. Granted, the courts have devised various tests to determine if something is work, if the work is integral to the employer, and/or if something is *de minimis*. Similarly, there are some bright-line rules in place — an activity that is deemed to be *de minimis* is not compensable. Even so, the results of such tests, or the application of any bright-line rule, remains dependent on the particular facts and circumstances present in each case. Thus, it is important that any employee in bringing a suit, or an employer in defending one, be certain to know the particulars of the situation. The devil, as they say, is in the details.

Reprinted with permission from the April 7, 2011 online edition of The Recorder. © Copyright 2011. ALM Media Properties, LLC. All rights reserved.
Further duplication without permission is prohibited. For information, call 415.490.1054 or cshively@alm.com.