

Do Companies Need To Pay Employees For Their Commute Back From the Construction Worksite At The End Of The Day?

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Clients often ask whether their employees need to be paid for the time that they spend travelling to and from various construction worksites at the beginning and end of the day. This issue was recently decided in a case we tried before a judge of the Lancaster County Court of Common Pleas in December 2011 on behalf of EZ General Construction, Inc.

The plaintiff in the case, a former employee, worked as a laborer for EZ General Construction, Inc., a general contractor in the construction industry. Plaintiff typically began his day by reporting to the office in the morning and punching in, when he would get the day's assignment, have a cup of coffee and a bite to eat, help load equipment onto the Company work truck, then ride with the crew to the worksite in the work truck. The travel time to these various worksites was generally no more than one hour, and was paid by the Company. At the end of the workday, Plaintiff would typically ride back to the office, punch out, and go home. This was not always the case, though -- on roughly one-third of his workdays, Plaintiff drove himself directly home from the worksite without stopping to punch out. Again, the Company paid Plaintiff for the commute time in the morning from the office to the worksite. However, the Company did not pay for the time Plaintiff spent riding from the worksite back to the office at the end of the day. In fact, important to the case, Plaintiff signed an agreement specifying that the travel time from the worksite back to the office at the end of the day is unpaid.

After Plaintiff left his employment with EZ General Construction, Inc., he filed a lawsuit seeking to recover overtime compensation for the time he spent at the end of the day riding from the worksite back to the office. He argued that he should have been paid for the trip home because (1) he was required to report to the office to punch in and out; (2) the Company work truck that he rode in carried tools and equipment necessary for the job; and (3) on the trip home, the crew occasionally stopped to empty the trash from the truck.

Federal and state wage and hour laws do not require employers to pay employees for normal home to work and work to home travel. The Portal-to-Portal Act expressly excludes such time from compensation under the Fair Labor Standards Act (FLSA). The Employment Commute Flexibility Act (ECFA) further amended the FLSA, and clarified that an employer may provide a company vehicle to an employee for travel and still take advantage of this rule that home to work and work to home travel is not compensable if (1) *the travel is within the normal commuting area for the employer's business; and (2) there is an agreement between the employer and the employee that the time is not compensable.* Also, pre-shift and post-shift activities that are not "integral and indispensable" to the employee's job -- in other words, activities that are undertaken for the employees' own convenience, that are not required by the employer, and that are not necessary for the performance of the employees' duties for the employer are also generally not compensable.

All of these factors were present in this case, therefore, the Company argued that Plaintiff's travel time from the

worksite at the end of the day did not need to be paid following reasons:

- The post-shift trips that Plaintiff argued should have been paid were all within the normal one-hour commuting area of the Company's office.
- Plaintiff signed an agreement that the trip from the worksite back to the office was unpaid.
- The Company did not require Plaintiff to report back to the office at the end of the day to punch out, and, in fact, Plaintiff elected not to return to the office to punch out roughly one-third of the time, without any discipline or adverse employment consequences.
- The carpool to and from the worksite was offered for Plaintiff's convenience, to save wear and tear on his vehicle, and to save gas money, and Plaintiff could choose to drive his own vehicle to and from the worksite instead of riding as a passenger in the work truck.
- Occasionally emptying trash from the work truck on the trip home was not required by the Company and not necessary for the performance of Plaintiff's construction job, and even if it did occur (although the Company's witnesses testified that it did not), emptying trash did not make the whole return trip compensable because it took only a minute or two.

Following trial, the court ruled in favor of EZ General Construction, Inc. and found that, under these facts, Plaintiff was not entitled to be paid overtime compensation for his post-shift commute time.

As this case demonstrates, each situation is unique and the answer to the question turns on several factors, including the nature of the written agreement with employees about paying for commute time, whether the trip is within the "normal commuting distance" of the employer, whether the employee is required to report to the office before and after work, and the extent to which any work is performed before, during, and after the commute. It is therefore important for companies that are considering entering into these types of commuting agreements to consult with counsel in advance.

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