M. Lee Smith Publishers

Florida EMPLOYMENT Law Letter

A monthly newsletter designed exclusively for Florida employers

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www.HarperGerlach.com

Vol. 18, No. 11
January 2007

OVERTIME

Court says county drivers can get overtime for certain time spent driving

The U.S. Supreme Court recently upheld a decision from the Eleventh U.S. Circuit Court of Appeals, the federal appeals court over Florida, concerning overtime pay for county engineers. The appeals court clarified employers' obligations to pay travel time to employees who use employer-owned vehicles. As this case shows, travel time can be significant, so read on to see how this may affect your business.

On the road again

Kenneth Burton, Julius Henry, Hollis Davis, and Wayne Poole were engineers with Hillsborough County, Florida. Their job was to inspect subcontractors' work at various public work sites. In the course and scope of their employment with the county, the engineers were required to drive their personal vehicles to a secure county-operated or -owned site, drop them off, pick up county vehicles, and drive them to their work sites. County policy prohibited the engineers from taking the vehicles home at the end of the workday, so they were required to return them to the parking site and retrieve their own vehicles.

The county vehicles contained tools and equipment needed to perform the engineers' job duties, and they were required to lock the tools and equipment in the vehicles at the end of the workday. The county maintained the vehicles and paid for gas. It didn't, however, compensate the engineers for the time spent driving from the parking site to the work site or from the work site back to the parking site. Burton testified that he spent an average of 45 minutes to an hour and a half driving from the parking site to the first job site and a similar amount of time driving back to the parking site at the end of the day.

In January 2004, the engineers filed suit under the Fair Labor Standards Act (FLSA), alleging that they were entitled to overtime pay for the time spent commuting to and from the work sites in the county vehicles, among other things. The federal trial court determined they were entitled to overtime, and the county appealed.

Peace of mind comes at a price

The court analyzed the compensability of the commuting time under the FLSA and the Portal-to-Portal Act, which amends the FLSA and clarifies employers' liability for overtime pay. Under the Portal-to-Portal Act, you aren't liable for overtime for:

(1) walking, riding, or traveling to and from the actual place where the employee performs the principal activities he was hired to perform; and

(2) activities that occur before or after the principal activities.

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The Portal-to-Portal Act states:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

The court found that if activities that occur before or after the principal activities are "an integral and indispensable part of the [employee's] principal activities," they're compensable, according to the Portal-to-Portal Act. If the time spent performing those activities is minimal, however, then it's not compensable.

The court then sought to nail down the definition of "travel" under the Portal-to-Portal Act exception to determine if it covered the engineers' driving time. The court looked at the federal regulations and observed that although most commuting time isn't compensable because it's "an incident of employment," travel from "an employer-designated location to the workplace is compensable under the FLSA as that travel constitutes a part of the employee's principal activity." That's true regardless of whether the employee is using a company vehicle or his own.

So the court looked at whether the engineers' travel time was an integral and indispensable part of their principal activities. Because (1) the county required its vehicles to be stored in secure locations overnight (and not at the employees' homes) to protect them from theft or vandalism and to limit maintenance costs and (2) the engineers needed the vehicles and the tools in them to perform their jobs, their workday began at the parking site, not at the actual work site. Therefore, the travel time constituted an "integral and indispensable" part of the county's activities.

In fact, the court said, even if the vehicles didn't contain tools, the travel time would be an integral part of the employees' activities because the engineers still would be required to pick up the county vehicles and would be prohibited from taking them home. And further, since the engineers could spend as much as 15 hours per week driving the vehicles to and from their work sites, the time invested wasn't minimal. Therefore, the county wasn't exempt from paying them overtime for the time spent driving its vehicles from the parking site to the job site and back again.

The county appealed this decision to the U.S. Supreme Court, which declined to hear the case, thereby allowing the appeals court's decision to stand. *Burton et al. v. Hillsborough County, Florida*, 11th Circuit Court of Appeals, May 18, 2006, No. 05-10247, cert. denied, U.S. Supreme Court, No. 06-315.

If you provide company vehicles, pay attention

If you provide company vehicles to your employees, be aware of potential liability for the time they spend traveling to and from work in the vehicles. Although such travel time may not be compensable under the FLSA, once you require employees to perform certain tasks along the way or restrict certain activities in the cars, you increase the possibility of being liable for that time.

For example, if you require employees to fill up the gas tank at certain stations or pick up documents on their way to work, a court may view that as being an integral part of their activities. What if an employee spends commuting time on the cell phone getting instructions for the workday or discussing matters with his supervisor? That could be considered an integral part of his job, too. So make sure the time your employees spend in their vehicles on the way to work is their time alone and doesn't benefit you. Otherwise, you may open up the floodgates for significant overtime liability!

A recent survey revealed that Florida ranks first of all 50 states in wage and hour litigation. If you haven't reviewed jobs since the recent revision of the wage and hour regulations, you should do so. The editors of Florida Employment Law Letter

Web Alert

The trial court giveth, and the appellate court taketh away

HRhero.com, which is part of your newsletter services, gives you the latest national news in employment law. To read the following articles, go to www.HRhero.com/news.

- "Sixth Circuit retracts dismissal of sales manager's claims" — A federal appeals court reverses a trial court's proemployer decision, ruling that an employee's personal conduct didn't negate her hostile work environment claim.
- "Time on my hands: Tardiness becomes the workplace issue" — Wal-Mart beefs up its attendance policy to crack down on employee tardiness. Will other employers follow suit?
- "Retiring on promise of benefits not a sure thing" — Court says employee shouldn't have relied on employer's estimates of benefits when deciding to retire. ❖

will be conducting a one-day FLSA Master Class this spring (see page 8 for details). In addition, Harper Gerlach has prepared a wage and hour self-audit. For more details, go to www.HarperGerlach.com/HRStore.html. ❖

EMPLOYER INVESTIGATIONS

You can give employees lie-detector tests if they're part of theft investigation

Many employers that routinely used polygraph testing to combat the ills of employee theft and dishonesty have shied away from using them in recent years because of the passage of the Employee Polygraph Protection Act of 1988 (EPPA). This law prohibits you from requiring or asking employees to submit to a lie-detector test unless you're exempt from the EPPA for certain reasons. The following case highlights one of the exemptions to the Act and reminds us that in limited circumstances, polygraph testing may be beneficial.

Facts

Jasmine Taylor was a medical assistant at Epoch Clinic, Inc., in Orlando from August 22, 2005, to November 5, 2005. During her employment, two patients complained that money was missing from their personal belongings while they were at the clinic. Taylor's supervisor, Dora Nold, had a meeting with all clinic staff and informed them that a law enforcement investigation was under way and that all employees may be required to submit to a lie-detector test. (There were some inconsistencies between Nold's and Taylor's testimonies. Nold claimed she told the staff that law enforcement *may* require the testing. Taylor said that Nold repeatedly informed the staff that they would be *required* to take the test and that the law enforcement officer told them that Nold requested the testing.)

A law enforcement officer came to the clinic on November 4 and interviewed Taylor about the missing money. When he asked her to submit to polygraph testing, she initially agreed but then refused. Although she was scheduled to work several shifts during the next week, she didn't report to work and was later terminated because of her "no-call/no-show" violations. She claimed her rights were violated under the plain language of the EPPA.

Court's analysis

Although the EPPA says you may not "directly or indirectly . . . require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test," certain exemptions exist. You may require an employee to take a polygraph test if the following are met:

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to your business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) you have a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) you provide a statement to the examinee before the test that specifically describes her alleged misconduct.

There also are requirements for testing and polygraph examiners.

The court concluded that the circumstances in this case fell within the exemption from the EPPA's requirements. Because Nold informed the staff that the clinic and law enforcement were conducting an investigation into possible theft, the first prong was met. The second and third prongs were met because there were only five employees at the clinic and all had access to the patients' money. The court determined the fourth prong didn't need to be met because Taylor never actually took the polygraph and therefore wasn't an "examinee." Therefore, the "ongoing investigation" exemption applied to this case, and the court dismissed the suit. *Taylor v. Epoch Clinic, Inc.*, 437 F.Supp.2d 1323 (July 11, 2006).

Moral of the story

Many employers "threw the baby out with the bath water" and stopped giving lie-detector tests altogether after the passage of the EPPA. Many have concluded that if you have enough evidence to use a polygraph test, you probably have enough evidence to go ahead and fire the employee.

This case illustrates that in certain limited circumstances, polygraph tests still may be beneficial in detecting and catching employee theft. It's important, however, to ensure you fall within the exemption outlined above and comply with the law. Seek your employment counsel's advice early. ❖