



Avoiding the Pitfalls of Travel Pay

by Lisa Ryan, J.D.; Partner, Cook | Brown LLP

Despite all the remote working options available today, many California employees still must travel beyond their “normal” daily commute. For employers in the Golden State, what has become more complex is determining when they are required to pay employees for time spent traveling.

According to the Industrial Welfare Commission’s Wage Orders, “hours worked” means the time during which an employee is “subject to the control” of the employer, and includes all the time an employee is “suffered or permitted” to work. In general, this means that the time an employee spends commuting to his/her job is not compensable as “hours worked” under California law. However, such time may be compensable if the employer exercises sufficient control over the employee during that commute time.

For example, in the influential case of *Morillion v. Royal Packing Co.*, the California Supreme Court held that employers were required to compensate workers for travel time if the workers were subject to the employer’s control (*Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000)).

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In this case, the employer required that workers meet at designated parking lots to then be transported by employer-provided buses to and from their actual worksite. Although the workers were allowed to read or sleep on the buses, they could not do other personal activities such as dropping off their children at school or running other errands that required use of a car. Thus, the court held that the employees should be compensated due to the level of the employer's control over its employees.

Calculating Hours Worked for Extended Business Travel

Generally, California employers must pay wages for all hours an employee spends traveling on behalf of the employer. Unlike federal law, California law doesn't distinguish between hours worked during normal business hours versus outside normal hours, according to the Division of Labor Standards Enforcement (DLSE) Enforcement Manual § 46.1.1. For example, under California law, time spent traveling to and from the airport to attend a conference, waiting to purchase a ticket, check baggage, and board the plane is considered compensable travel time. Time spent taking a break from travel, however — to eat a meal, sleep or engage in purely personal pursuits not connected with traveling — is not compensable. This means that if the employee is free to engage in purely personal pursuits once the employee is checked into the hotel, they are "off the clock," as such time is no longer compensable.



While employers are legally entitled to establish a separate travel time pay rate, doing so can get a little tricky. For starters, it must equal at least the minimum wage and the employee must get advance notice of the travel time rate. Determining the appropriate overtime rate is somewhat complex, however, and employers often get it wrong.

The reason? When an employee with more than one rate of pay works overtime, you must calculate his/her regular rate of pay to determine the overtime premium rate. The method used to determine the regular rate of pay is called the "weighted average" method. Determine the weighted average by dividing the workweek's total earnings — including earnings during overtime hours — by the total hours worked during the workweek, including the overtime hours. So it's imperative that nonexempt employees are required keep detailed time records, including daily travel.

The level of employer control over employees often is more determinative about whether commute time is compensable than where the employee starts his/her drive each day.

Employees Without a Specific Workplace

It's common for workers not assigned to a specific workplace, such as those in the service or construction industries, to routinely report to various worksites — leading to a reasonable expectation that daily travel to different job sites is part of those employees' normal commute, according to a 2003 DLSE Opinion Letter.

The Labor Commissioner has historically recognized that an employee with no fixed job site is not entitled to compensation for time spent traveling between his/her home and the worksite provided the commute is within a reasonable distance. But the DLSE also has suggested that there could be instances where “unreasonably extended travel” could be compensable. The amount of compensable time is measured “by the difference between the normal commute and the time to the new location.”

When the worker is required to report to the employer’s shop to check in before proceeding to an off-premises worksite, all time from the moment of reporting until the employee is released to go home is subject to the control of the employer — and it therefore constitutes hours worked. Similarly, all employer-mandated travel that occurs after the first location where the employee’s presence is required by the employer, such as travel from job site to job site or travel after the first activity of the day, is compensable.

The Labor Commissioner’s Office recently cited a fitness chain more than \$8.3 million in labor law violations on behalf of employees who worked at 15 locations throughout Southern California. Some of the fitness trainers and assistants were paid only for each class taught and therefore were shorted on wages due for travel between the class sites.



After an employee checks into the hotel and is free to engage in **purely personal pursuits** — like exploring the city, enjoying dinner at a nearby restaurant, watching TV in the hotel room or sleeping — this time is not compensable, which means the employee is **off the clock**.

If the employee’s travel involved delivery of any equipment, goods or materials on behalf of the employer, all such travel would be compensable.

Employees with Company-Provided Vehicles

Commute time for employees required to drive company vehicles to and from job sites is likely compensable. In a 2010 case, the Ninth Circuit found that an employee who was required to drive the company’s vehicle directly to and from jobsites from his home was subject to the employer’s control during this time. Company rules precluded the employee from carrying out personal activities he could have pursued had he provided his own transportation. He could not stop for personal errands, could not take passengers and could not use his cell phone — except to answer calls from the company dispatcher (*Rutti v. Lojack Corp., Inc.* 596 F. 3d 1046 (2010)).

But the circumstances matter, as proven by a California court’s subsequent ruling in 2015. The court held that an employee’s commute time in a company vehicle was not compensable as “hours worked” even though the employee was subject to the employer’s control pursuant to its vehicle policy. In this case, however, the employer did not require that the employee start his shift from home. Instead, the employee was given the option to either use his own vehicle to commute to one of the employer’s facilities and retrieve a company vehicle or to keep a company vehicle at home each night. The employee chose to keep the company vehicle and start his shift from home (*Novoa v. Charter Communications, LLC*, 100 F.Supp.3d 1013 (E.D. Cal. 2015)).

Subsequent cases have considered additional factors when determining the degree of control the employer exercises over its employees who drive company vehicles from their home, including whether the employer provided sufficient secure parking spaces to store company vehicles (*Alcantar v. Hobart Service*, 2016 WL 6666809 (C.D. Cal. 2016)).

Ultimately, the level of the employer's control over its employees often is more determinative than where the employee starts his/her commute each day.

Company Liability

So who's liable when an employee traveling on behalf of his/her employer experiences a tragic car crash?

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But that changes if the employee is on an errand for the employer — from the time the employee starts that errand, his/her conduct is within the scope of employment.

There are myriad cases where the courts grapple with the facts to determine whether an employee was on compensable travel time or a business errand for the employer. For example, if the employee is asked to deviate from his normal commute to pick up supplies, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons (*Sumrall v. Modern Alloys, Inc.*, 10 Cal.App.5th 961 (2017)).

What to Do?

Employers should carefully review their travel practices to both ensure compliance with California wage law and limit liability for its employees' actions when they're commuting to and from work. A simple travel policy often can reduce confusion among employees as to when travel time is compensable, as well as when employees are subject to their employer's control. With consistent monitoring of payroll and record-keeping practices, employers can minimize any surprise travel violations. 



Remember Those Expenses!

In addition to travel time, employers also must reimburse employees for expenses related to travel to prevent employers from passing their operating costs on to employees. **California's Labor Code requires an employer to cover all necessary expenditures incurred while employees are carrying out work duties.** Mileage, for instance, is compensable when an employee is required to use his/her personal vehicle for work-related activities (*Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554 (2007)). The employer can choose to use the IRS mileage rates or a different rate that sufficiently reimburses employees for the actual expense of using their vehicle.

Other costs that may be reimbursable include:

- **Parking and tolls incurred while carrying out work duties** (*Tan v. GrubHub, Inc.*, 171 F.Supp.3d 998 (N.D. Cal. 2016));
- **Bus fares** (*Taylor v. W. Mar. Prods., Inc.*, 2014 WL 1779279 (N.D. Cal. 2014)); and
- **Using a personal mobile phone for business purposes when required by the employer** (*Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (2014)).

Currently, the courts are addressing whether using personal cell phones for timekeeping purposes is enough to trigger reimbursement requirements (*Castro v. ABM Industries, Inc.*, No. 17-CV-3026-YGR (N.D. Cal., 2018)). What's more, recent court decisions have opined that simply having a reimbursement policy may not be enough if companies fail to engage in efforts to encourage reimbursement requests and audit reimbursement entitlements (*McLeod v. Bank of America, N.A.* 2017 WL 63 73020 (N.D. Cal. 2017), *on appeal*).