

WHEN DOES TRAVEL OR COMMUTE TIME COUNT AS "HOURS WORKED" UNDER WASHINGTON LAW?

Date: 22 December 2021

U.S. Labor, Employment, and Workplace Safety Alert

By: Monica A. Romero, Patrick M. Madden

Under the Washington Minimum Wage Act (MWA),¹ employers are required to pay employees for all “hours worked.” Unfortunately, whether activities count as hours worked is not a simple concept, especially when it comes to commuting and travel time. Although employers generally do not have to pay employees for their daily commute to and from work, Washington case law has identified some commute contexts that do count as hours worked. Employers should immediately update their travel time policies and practices to ensure that they are fully paying employees for all hours worked in compliance with the recent *Port of Tacoma v. Sacks*² decision.

EMPLOYERS' OBLIGATION TO PAY HOURS WORKED

The relevant MWA regulation defines “hours worked” to include “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.”³ Beyond this regulatory definition, the Department of Labor and Industries (the Department) has issued an administrative policy that provides details on the Department’s interpretation of what activities or time count as compensable hours worked.⁴

The Department’s policy distinguishes “commute time” from “travel time.” The policy defines “commute time” as the time an employee travels between work and home and “travel time”⁵ as “time spent travelling for a work-related purpose.”⁶ Importantly, the policy instructs that commute time is not compensable but that travel time is.⁷

UNDERSTANDING WHEN COMMUTE TIME OR TRAVEL TIME IS COMPENSABLE

Three Washington appellate cases underscore the difference between when employees are commuting and when they are engaging in travel time that counts as hours worked.

First, in *Anderson v. Department of Social & Health Services*,⁸ the Washington Court of Appeals interpreted what it meant for an employee to be “on duty” and held that time employees of the Special Commitment Center on McNeil Island spent riding the employer-provided ferry to and from work was commuting time and not hours worked.⁹ While the court did not define “on duty” within the context of the Department’s “hours worked” regulation, the court did find significant the fact that workers were free to engage in “various personal activities” (e.g., reading, knitting, playing cards, listening to music, and napping) while traveling on the ferry.¹⁰

Four years later, the Washington Supreme Court relied on *Anderson*’s interpretation of what it means for an employee to be “on duty” in *Stevens v. Brink’s Home Security*.¹¹ In that case, employees sought wages for time spent driving employer-provided trucks from home to their work site and from their last work site back home.¹²

The court adopted *Anderson's* approach of evaluating the extent to which employees were free to engage in personal activities and exercise control over the vehicles during their commute time.¹³ The court found significant that the employees infrequently went to the employer's office, were always on call while driving, and were prohibited from running personal errands or engaging in personal activities while in the trucks.¹⁴ Based on these facts, the court concluded that the employees were "on duty" while driving the trucks.¹⁵ Accordingly, unlike *Anderson*, the *Stevens* court held that the employees' time commuting between home and work sites was compensable time because they were "on duty" under the regulatory definition of hours worked.¹⁶

While *Anderson* and *Stevens* help define when an employee's commuting activities between home and work count as hours worked, the recent case of *Port of Tacoma v. Sacks*¹⁷ addresses what activities count as hours worked when an employee travels to a different city. In the *Sacks* case, the Washington Court of Appeals found that all travel time for an out-of-town trip—including time traveling to the airport, time in the airport, time on the flight, and time traveling to the out-of-town location—counts as compensable hours worked.¹⁸ The Court paid no interest in the fact that, at times, the employees spent substantial time on personal activities and, instead, gave deference to the Department's unpublished interpretation that all travel time "from when the employee leaves their home until they arrive at their hotel in the other city is all compensable" as is "the time from when the employee leaves the hotel . . . in the remote city until they arrive back at their home."¹⁹ The *Sacks* decision thus requires that employers pay employees for travel from their home to an airport or similar location even if that component of out-of-town travel involves less time than the employees' regular commute. In addition, the *Sacks* decision states a bright-line rule that out-of-town travel counts as hours worked even if employees are able to use significant portions of that travel time for personal activities.

PRACTICAL ADVICE

Washington employers should consider the following:

Policies

Employers should review and update their workplace employment policies and employee handbooks. These materials should clearly and unequivocally state that (1) employees are required to report all time worked and (2) the employer will compensate employees for all hours worked. In addition, employers should carefully consider how to best inform employees about the distinction between regular commute time and compensable travel time. Employers can address these issues in general work time policies and handbooks, in out-of-town travel guidelines, in company vehicle guidelines, or in internal human resources policies that result in communications to employees on an as-needed basis.

Practices

Consider whether nonexempt employees should engage in out-of-town travel. While at times this may be important for business-related purposes, full door-to-door travel costs can be expensive and there may be other options (e.g., remote participation).

Audits

Employers should periodically audit their records to ensure compliance with wage payment requirements, including the requirements relating to compensation for travel time.

Regardless, employers should carefully consider *Anderson*, *Stevens*, and *Sacks*, as well as any available Department policies or guidelines, to determine whether their employees' commute and travel time counts as compensable hours worked.

FOOTNOTES

¹ RCW 49.46.

² 495 P.3d 866 (2021).

³ WAC 296-126-002(8).

⁴ [DEPT. OF LABOR & INDUS., ES.C.2, HOURS WORKED](#), (19 July, 2021),

⁵ *Id.* at 3.

⁶ *Id.* at 2–3.

⁷ *Id.*

⁸ 115 Wn. App. 452, 63 P.3d 134 (2003).

⁹ *Id.* at 454–56.

¹⁰ *Id.* at 454.

¹¹ 162 Wn.2d 42, 169 P.3d 473 (2007).

¹² *Id.* at 45.

¹³ *Id.* at 48.

¹⁴ *Id.*

¹⁵ *Id.*

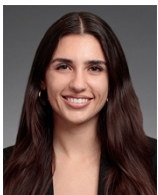
¹⁶ *Id.* at 49.

¹⁷ 495 P.3d 866 (2021).

¹⁸ *Id.* at 875.

¹⁹ *Id.* at 869. Of note, the Department guidelines to which the court gave deference were not publicly available. *Id.*

KEY CONTACTS



MONICA A. ROMERO
ASSOCIATE

SEATTLE
+1.206.370.5812
MONICA.ROMERO@KLGATES.COM



PATRICK M. MADDEN
PARTNER

SEATTLE
+1.206.370.6795
PATRICK.MADDEN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.