

Wisconsin Supreme Court Clarifies Commuter Pay Rules

Article

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On March 20, the Wisconsin Supreme Court affirmed in *Kieninger v. Crown Equipment*, 2019 WI 27, that under Wisconsin law an employer is generally not required to pay employees for time spent commuting in a company vehicle to or from their home to a job site.

Crown gave its travelling technicians two commuting options from which the technicians could choose. The first was to leave home in their personal vehicle, pick up their van at the branch office, and drive to the first job. The home-to-office/office-to-home commute would not be paid time under state or federal law. Rather, paid time would begin when the employee left the branch office for the first site, and end on the employee's return to the office at the end of the day.

The second option was to take a company van home and go directly to the first job of the day from home. With a few minor exceptions, the rule was that paid time started upon the employee's arrival at the first job.

Two technicians who chose the second option argued that under Wis. Stat. §109.03(1) and its regulatory counterpart (DWD Chapter 272), Crown had to pay them for commuting time in a company vehicle because in addition to transporting their persons, the company vehicle also transported the "integral and indispensable" tools they needed to do their work, i.e. forklift repair at customer sites.

In essence, the technicians argued that even if the law did not ordinarily require Crown to pay them for their commute, it did have to pay them for their time because they used the company's van for the commute, which meant that they were transporting the tools needed for the job which were stored in the van.

The Court rejected this argument:

But if bringing along the resources necessary to perform one's job is sufficient to make travel between home and work compensable, his argument transforms virtually every commute into a wage-earning event. A paralegal who goes home in the evening with a company-provided computer and then travels the next day to a witness's location to conduct an interview is transporting the resources necessary to do his job. So is every office-worker who brings a file home after work, and then returns it the next morning.(S)o too is anyone who merely drives to his regular place of employment each morning. An

PROFESSIONALS

Bruce B. Deadman
Of Counsel

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employee creates value for his employer, of course, by bringing his physical and mental resources to bear on the company's business. So, according to Mr. Kieninger's logic, all employees would have to be paid for their commutes because conveying an employee's physical and mental resources to the office is integral and indispensable to a principal activity, to wit, whatever they were hired to do. 2019 WI 27, ¶ 23.

The Court found that while the tools may be indispensable, so too were the people who use them, such that if the plaintiffs' position was adopted, all home-to-jobsite commutes would be compensable because "no repairs could happen without ... (their)...personal presence." 2019 WI 27, ¶ 24.

The Court also rejected both parties' arguments that it should look to federal law for guidance. The plaintiffs argued that cases under the Fair Labor Standards Act (FLSA) were persuasive authority in their favor, while Crown argued that the Employee Commuting Flexibility Act. (ECFA) and cases interpreting it should be heeded. The Court rejected both arguments and held that there was no "corresponding linkage" between State and Federal law, and that it would not create one. 2019 WI 27, ¶ 31. The Kieninger case is decided solely on the basis of Wisconsin law. The Court recognized that a federal case on the same facts came to an opposite decision, although the Court raised questions about the reasoning of the federal court's decision. While *Kieninger* is a guide to compliance with the state law in this area, it may be suspect under federal law and, as a result, employers are well advised to consider their commuter pay policies with regard to compliance with both the federal and state laws.

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