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COURT OF APPEALS ISSUES IMPORTANT TRAVEL TIME DECISION

On September 21, 2021, Division II of the Court of Appeals issued a significant decision that could affect the travel time policies of many municipal corporations in Washington. In *Port of Tacoma v. Sacks,* #54498-9-II,[1] Division Two made it clear that Washington will apply the state Minimum Wage Act (MWA), and the interpretation of that law by the Department of Labor & Industries (LnI), rather than using the applicable provisions of the federal Fair Labor Standards Act (FLSA). The FLSA only requires compensation for travel time when it occurs during the employee's normal working hours. The MWA, as interpreted by LnI and now Division Two, is more protective of employees than the FLSA, as it requires payment for all travel time, if going to authorized or required work. This means that, at least if the activity for which the travel is necessary is considered "hours worked" or "on duty" time, then all travel—portal to portal, i.e. from home to the ultimate hotel—is considered "hours worked" as well.

In the *Port of Tacoma* case, the workers were crane maintenance employees. The Port authorized them to travel to China to observe the manufacturing process and for quality inspection purposes. There was no dispute about the time

[1] https://www.courts.wa.gov/opinions/pdf/D2%2054498-9-II%20Published%20Opinion.pdf

spent doing that activity—it was clearly work and therefore "hours worked". The only issue was whether all travel time was also compensable as "hours worked."

Division Two relied upon, and gave deference to, the Department of Labor & Industries' (LnI) interpretation of the law embodied in WAC 296-126-002. Essentially, LnI and the Court of Appeals would apply a three-prong test to the issue: The out-of-town travel time must be paid time if all three of these factors are satisfied: (1) an employee is "authorized or required" by the employer; (2) to be on duty (in other words, the travel destination must involve work for the employer, not work done for one's own benefit or education); and (3) on the employer's premises or at a prescribed workplace.

This three-part test can be gleaned from just two definitions in the above-cited WAC provision. The word "employ" is there defined to mean "to engage, suffer or permit to work." This is why the word "authorized" is added to "required" in the first prong above. The term "hours worked" is there defined to mean "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." So there we have the basis for the second and third prongs of the three-prong test.

We believe the important thing to keep in mind is this: The activity necessitating the travel must not only be somehow related to the employee's occupation, it must also be "hours worked", or in other words, the employee must be "on duty" during the activity. In determining whether someone is "on duty", I would consider it relevant to ask, "Is the employee being paid by the employer for the time actually spent engaging in the activity?" Are your employees paid during the training or conference itself? That is the key question to me.

The reason that I ask these questions is because some municipal employers also allow their employees to participate in trainings or conferences on their own time, when they are off work, and even pay their tuition or travel expenses such as airline tickets in some circumstances. What if you had a policy allowing employees to do shift trades or use vacation to attend these optional, non-mandatory trainings or conferences? Does this decision or the LnI interpretation of the regulations on "hours worked" convert those travel time hours to compensable or invalidate your collective bargaining agreement on such non-mandatory training? We contend that it does not, because *Port of Tacoma v. Sacks* is distinguishable. It only applies to travel that is necessary to get to paid activities, i.e. on duty hours worked.

We simply apply the three-prong test to illustrate the application of the law to these different facts. If the employee is attending and participating in the training or conference on their own time such as vacation or some other leave (and not getting paid for that time) then the travel time to that unpaid, non-work activity is not compensable. They are not being "authorized or required" to be "on duty" at a "prescribed workplace." Recognizing that it is commendable for employees to attend such trainings or conferences on their own time, as it may

constitute professional advancement or education, some employers pay tuition or other expenses. Does this change anything under the LnI interpretation? We do not think so; it is not a gift of public funds, as it does advance the employer's interest and the public interest for such employees to further their education. That does not make it "hours worked", however, in our humble opinion.

STATUS UPDATE ON LITIGATION

Many of our readers are aware of an action brought in King County Superior Court by a group of plaintiffs/employees of various fire departments located in the state of Washington, alleging discrimination under the First Amendment to the U.S. Constitution. The plaintiffs allege they were refused a religious exemption or reasonable accommodation, due to their failure or refusal to be vaccinated against COVID-19. Many of the plaintiffs were granted a religious exemption, only to learn that there was no reasonable accommodation that could be reached that would allow them to continue to provide health care to the public.

Governor Inslee mandated that all health care providers, including EMTs and paramedics who work or volunteer at fire departments be fully vaccinated no later than October 18, 2021. The gubernatorial proclamation did allow exemptions for religious and medical reasons. We have written about it a lot already in these pages.[2]

As this is written, we believe there is a motion for an injunction pending on January 14, 2022. Although our firm is not directly involved in the litigation, four of our client departments are defendants in the case. We are not clear at this point what the plaintiffs seek to enjoin, but presumably they want to prevent or enjoin loss of their jobs. We believe that several of the plaintiffs have been accommodated and are still employed. Others have already been granted a leave of absence. We do not see how those plaintiffs can have any cause of action, especially if their union bargained the impacts of the proclamation and reached an agreement allowing for accommodations unless undue hardship existed.

There will also arise at some point a question of class certification, as the plaintiffs have alleged that the case qualifies as a class action. Since the question of granting or denying religious exemptions and the consequent issue of agreeing to a reasonable accommodation requires an individualized determination in each case, we find it difficult to understand how class action status can be granted. We believe the individual cases are too different or even unique in some instances.

Time alone will tell how (or when) these issues will ultimately be resolved.

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[2] https://www.firehouselawyer.com/Newsletters/AugustSeptember2021FINAL.pdf