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Wisconsin Supreme Court Holds Commute Time in an Employer's Vehicle is Not Compensable

The Wisconsin Supreme Court recently issued a helpful decision to Wisconsin employers. Following the Supreme Court's decision in *Kieninger v. Crown Equipment Corp.*, 2019 WI 27, it is now clear ordinary travel time between home and work in an employer owned vehicle is not compensable work time under Wisconsin wage and hour law.

Background

The Employee Commuting Flexibility Act ("ECFA") is a federal law which essentially provides that commuting in an employer's vehicle for travel to and from home and the job site is not compensable work time, as long as the travel is within the normal commuting area of the employer's business. Although Wisconsin wage and hour laws and Department of Workforce Development ("DWD") regulations implementing those laws contain a number of provisions which are linked to federal law, neither the Wisconsin statutes nor the DWD regulations contain a provision which mirrors the ECFA.

The *Kieninger* Decision

The plaintiffs worked as field service technicians and traveled to customer locations in the employer's van, which contained the tools, equipment, and supplies necessary for the job. Employees had the option of commuting from and to home and the job in the employer's van or their own personal vehicle. If an employee opted to utilize an employer-provided van, the employee would travel directly from home to the job site at the beginning of the day and travel from the last job site to home at the end of the day. The employer would pay the employee for travel from home to a work site if the commute exceeded 45 minutes, and no pay was provided for travel time from the last job site to home. The plaintiffs were in the class of employees who opted to utilize the employer's vans for commuting from and to home.

The plaintiffs sued the employer under Wisconsin law for not paying the time spent traveling in the employer's van from and to home at the beginning and end of the workday. In essence, the plaintiffs asserted the commute time was compensable because they were carrying the tools needed to do the job. The employer countered that applicable Wisconsin regulations should be interpreted consistent the ECFA, in which case the commute time was not compensable. The circuit court agreed with the employer and dismissed the complaint. The Court of Appeals disagreed with the circuit court's reliance on the ECFA and reversed the decision for the employer. The Wisconsin Supreme Court then granted review.

Although the Wisconsin Supreme Court agreed the ECFA did not control the plaintiffs' claims, the Supreme Court found in favor of the employer based on the existing DWD regulations. Specifically, under Wis. Admin. Code DWD § 272.12(2)(g)1., normal travel from home to work is not compensable. Further, DWD § 272.12(2)(g)5. provides an instructive example which indicates traveling from the last job site of the day to home is not compensable time. Under those rules, there was no dispute the plaintiffs' commute from and to home in their personal vehicles would not be compensable. The only differences in this case were that the plaintiffs were in an employer owned vehicle which contained the tools necessary to do the job. Standing alone, those differences were not enough to convert otherwise unpaid travel time to compensable time.

The Supreme Court also took issue with the sweeping implications of the plaintiffs' argument. If, as plaintiffs argued, carrying the tools necessary to do the job made the travel time compensable, then nearly every commute would be compensable time. By way of example, the Supreme Court noted that the commute time of any office worker who brought a file home and then returned the file would be compensable. Carrying the plaintiffs' argument a bit further, simply traveling to and from work would be compensable because employees' physical and mental resources are integral to performing the job. According the Supreme Court, there was no logical limit to the plaintiffs' argument, and it was contrary to DWD regulations. Therefore, the Supreme Court ruled the plaintiffs' commute time in the employer's vehicle was not compensable.

Wisconsin employers now have clear guidance regarding their obligation to pay employees commuting in employer owned vehicles. If you have any questions about the *Kieninger* decision, or any other wage and hour questions, please contact Brett Schnepfer at bschnepfer@buelowvetter.com or 262-364-0262, or your Buelow Vetter Attorney.