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Inside:

When Must Employee Travel Time Be Paid?

 pg. 4
by Richard J. Simmons

4 Reasons to Keep Contract Drafts

 pg. 11
by Julie Brook, Esq.

Big Changes for CA Companies Using "Independent Contractors"

 pg. 21
by David Peyerwold, Esq.

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On our cover:



Richard J. Simmons is a partner in the Labor and Employment Practice Group in Sheppard Mullin's Los Angeles office. Mr. Simmons represents employers in various employment law matters involving litigation throughout the country and general advice regarding state and federal wage and hour laws, employment discrimination, wrongful discharge, employee discipline and termination, employee benefits, affirmative action, union representation proceedings, and contract arbitrations. He received his B.A. from the University of Massachusetts and his J.D. from the University of California, Berkeley.

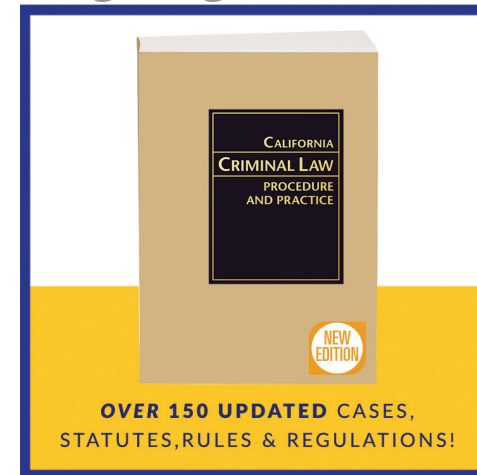
Inside:

- When Must Employee Travel Time Be Paid? 4
- 4 Reasons to Keep Contract Drafts 11
- Big Changes for CA Companies Using "Independent Contractors" 21

Resources:

- Business Law 6
- Criminal Law 14
- Employment Law 18
- Estate Planning 22
- Evidence 32
- Family Law 34
- Law Practice Skills 39
- Litigation 40
- Public Law 46
- Real Property 48
- Workers' Compensation 55
- Index 58

Highlights in this issue . . .



See page 14.



See page 19.



See page 56.

When Must Employee Travel Time Be Paid?

by Richard J. Simmons



The question of whether time is compensable arises in many contexts, but is particularly challenging when applied to travel time.

California law establishes unique rules governing when time spent is compensable “hours worked.” How these rules are applied to travel time is continuing to evolve.

Unlike federal law, under which employees need only be paid for time when they’re “suffered or permitted to work,” California law requires that an employee be paid for time if

3. The employee’s “regular rate of pay” used to calculate overtime pay is computed based on hours worked.

The question of whether time is compensable arises in many contexts, but is particularly challenging when applied to travel time. Ordinarily, commute time to and from work isn’t considered work time and need not be paid. However, the California Supreme

“California law requires that an employee be paid for time if the employee is either ‘suffered or permitted to work’ or ‘subject to the control’ of the employer. The second standard results in more compensable time under California law than federal law.”

the employee is either “suffered or permitted to work” or “subject to the control” of the employer. The second standard results in more compensable time under California law than federal law.

A finding that time must be paid as “hours worked” has these consequences:

1. It must be paid at no less than the minimum wage, which is currently \$12 an hour;
2. The time must be added to other work time when determining whether the employer owes overtime and, if so, how much overtime it owes; and

Court stated years ago in *Morillion v Royal Packing Co.* (2000) 22 C4th 575 that employees who are subject to the employer’s control while traveling to a worksite on a company-provided bus are entitled to compensation for the travel time.

The California Supreme Court concluded that the travel time had to be counted as work time because the employees were subject to the employer’s control while riding the bus. In contrast to normal home-to-work travel time, during which employees can drop their kids off for childcare or visit a store, traveling on a company-provided bus that picks employees up at a designated location and drives them to a worksite doesn’t

give employees that freedom.

The travel time issue recently surfaced in an intriguing court of appeal case. In *Hernandez v Pacific Bell Tel. Co.* (2018) 29 CA5th 131, the employer offered an optional program that allowed certain employees to voluntarily choose to drive a company vehicle home at the end of each workday. Some of the vehicles contained equipment used in

“In contrast to normal home-to-work travel time, during which employees can drop their kids off for childcare or visit a store, traveling on a company-provided bus that picks employees up at a designated location and drives them to a worksite doesn’t give employees that freedom.”

the performance of the employees’ jobs. The court concluded that the employees weren’t subject to the employer’s control or “suffered or permitted to work;” thus this driving time wasn’t compensable work time.

The *Hernandez* court paid close attention to the fact that employees transported equipment when driving the vehicles to and from work. It observed that the transportation of the equipment didn’t require additional effort or extra time; rather, it was incidental to driving the company’s vehicles. If the standard were otherwise, the court indicated that commutes of police officers who carry guns, employees who carry badges, and employees

who carry a briefcase filled with work documents or an electronic device to access work emails to and from work would need to be compensated.

The *Hernandez* case is very instructive and contributes significantly to the clarification of the wage and hour field. It clarifies the application of the “hours worked” standards to cases in which employees voluntarily take

employer-owned vehicles to and from home and the first and last locations of the day and transport equipment along with the vehicles.

Issues around compensable time are discussed in the 2019 edition of the *Wage and Hour Manual for California Employers*, which is now available through the new *CEB and Simmons Employment Law Library*. This new library features invaluable best practices, commentary, practice advice, sample documents, and more.

