Workforce Management
Time & Attendance Excellence

Telling Your Employees How To Travel To Work?

A cautionary tale for knowing your state and local requirements

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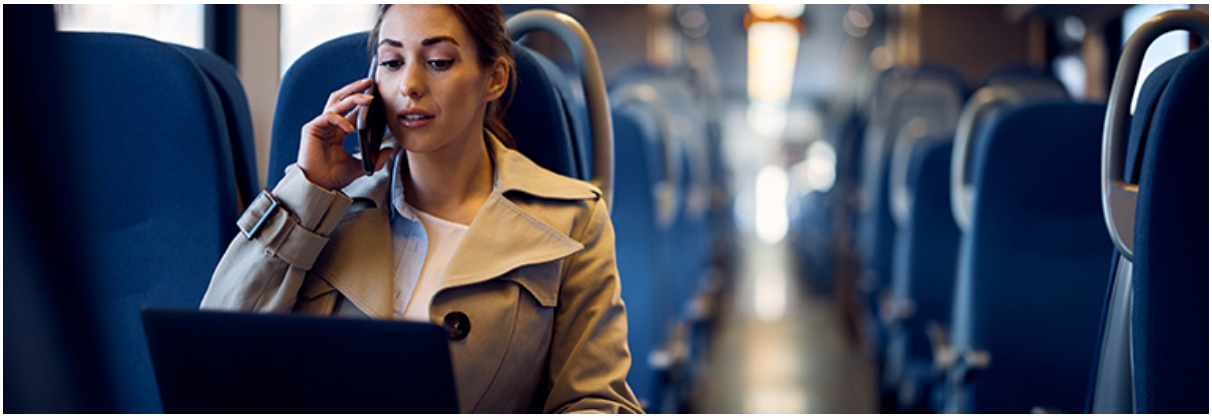
Highlights:

- Understanding state variances in travel time laws is vital for employers to ensure compliance and prevent legal repercussions.
- While the federal Portal-to-Portal Act outlines travel time norms, some states, like Maryland and California, have broader interpretations.
- Maryland and Pennsylvania mandate compensation if employers dictate presence, focusing on control, while California considers employer restrictions.
- Employers should consult legal professionals within their jurisdiction to navigate intricate travel time regulations and mitigate possible liabilities.
- The Amaya v. DGS Constr. case illustrates how Maryland's broader definition of compensable time differs from the federal PPA, impacting travel time compensation.



Are you an employer whose employees perform work somewhere else besides your office? For example, do they work at a construction worksite or at a different office park where your company does not have an office? Or maybe your company's office park has limited options for parking at the office? You might think it is a good idea to tell your employees that they cannot drive to the worksite directly or that they cannot be dropped off at the worksite or office park.

You even might further instruct them that they have to arrive at the worksite after they go somewhere to catch a ride by employer-provided transportation or that they have to take a shuttle bus from another location and ride it to your office park because you do not have parking there. You possibly do so believing that they are not "on-the-clock" for their time traveling. You do so, as the cliché says, "at your own peril."

Before issuing a travel time policy, employers should know their state and local legal and regulatory requirements. Depending on where the travel time is taking place, that time could very well be compensable work, especially if the employer takes any part in deciding how it occurs. Moreover, if your employees work full time, you could owe employees overtime, which means monetary amounts at time and a half or even higher rates of compensation depending on the legal requirements in your jurisdiction.

To understand how this could be, go back to 1938, when the Fair Labor Standards Act ("FLSA") was enacted by Congress. The FLSA originally required employers to compensate their employees whenever it was necessary for employees to report somewhere, including both on and off work premises and "for some time prior and subsequent to the scheduled working hours." *See Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 690 (1946). The Anderson decision and two other decisions by the United States Supreme Court around that time held that if the boss told an employee to be somewhere, the employee was on duty and needed to be paid for that time.

In 1947, Congress changed hands. The new majority thought that being paid for this type of time was too much. Congress passed an amendment to the FLSA, the Portal-to-Portal Act ("PPA"). In a nutshell, the PPA required that unless an employee was performing his or her primary duties or essentially spending time getting ready to perform those duties that employee was off the clock. In other words, if an employee was a construction worker, the employee had better be banging hammers and nails or doing something that aided in getting ready to be banging hammers and nails, like putting on protective gear, to be compensated for that time. The PPA also specifically took "walking, riding, or traveling to and from the actual place of performance of the principal activity" off the table as compensable work. 29 U.S.C. § 254(a)(1).

In this respect, the above-mentioned travel time examples are unlikely to be compensable time under the federal law, the FLSA. The problem for employers who are not careful, however, is that the FLSA is a legal floor. Nothing in the FLSA prevents states or localities from enacting more expansive legal and regulatory schemes that make travel time compensable. 29 U.S.C. §218(a).

This issue most recently came to a head in the Maryland Supreme Court in *Amaya v. DGS Constr., LLC,* 479 Md. 515 (Md. 2022).[1] The construction worker plaintiffs in *Amaya* filed suit for the time that they alleged they were required to spend at a parking area waiting for a bus to take them from the parking area to the worksite location, where they would be banging hammers and nails, and again at the end of the day when they were required to take the bus back from the worksite location to the parking area. The employers argued that Maryland law followed the federal PPA, and such travel time was not compensable. But the Maryland Supreme Court disagreed, explaining that "the PPA has not been adopted or otherwise incorporated in Maryland's wage enforcement laws." *Id.* at 556.

In other words, Maryland did not follow the PPA floor and had a much more expansive definition of compensable work. As the Maryland Supreme Court explained, "It would be inconsistent with the plain language of the [Maryland law] provision to require that an employee be engaged in the performance of actual physical labor or the performance of the principal work activities of employment in order to be compensated for hours of work." *Id.* at 572. The court then further explained that if these employees were required to ride the bus, they should be paid, stating, "It follows that hours of work would include time that an employee spends traveling from one prescribed workplace or location for which the employee is required to be on duty or required to be on the employer's premises to another such location." *Id.*

Importantly, Maryland is not alone. Its neighbor directly north, Pennsylvania, has a similar requirement that if the boss tells an employee to be somewhere, he or she is "on duty" and should be compensated. *See Heimbach v. Amazon.com, Inc.,* 255 A.3d 191 (Pa. 2021). California is another state with a broad definition of compensable time, which includes "[w]hen an employer directs, commands or restrains an employee . . . [such] that [the] employee remains subject to the employer's control." *Morillion v. Royal Packing Co.,* 22 Cal. 4th 575, 583 (Cal. 2000).

The bottom line for employers is that if you do not want to run afoul of your legal obligations, then you might want to stay out of your employees' transportation decisions. However, if you want to dip your toe in employees' travel time waters, make sure you have an attorney or advisor that knows the local and state laws well. Otherwise, the federal floor might fall out beneath you, leaving you open to significant liability.

Footnote

[1] Author's note that he was one of the attorneys representing the successful litigants in this matter.

Author Bio

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