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Exceptions to California's "Going and Coming" Rule

In *Lynn v. Tatitlek Support Services, Inc.*, E063585, Super.Ct.No. CIVBS1200525, 2/22/17, the plaintiffs appealed a summary judgment at the California Court of Appeal granted to Tatitlek Support Services, Inc. in a wrongful death action after temporary employee Abdul Formoli caused a fatal automobile accident. The plaintiffs argued the "going and coming" rule, which precludes employer vicarious liability, did not apply because of the nature of Mr. Formoli's employment preceding the accident. Due to the remoteness of the job site, they argued that Formoli's employment required him to undertake a lengthy commute home after working long hours over three and a half days. The plaintiffs further argued that under such circumstances, three exceptions to the going-and-coming rule applied: the ordinary commute incidental benefit exception, the compensated travel-time exception and the special risk exception.

Ordinary commute incidental benefit exception: Under the going-and-coming rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work because employees are engaged in activities outside the course and scope of employment during their daily commute. However, if the employer expressly or impliedly makes the commute a part of the workday, or derives an incidental benefit from a particular employee's commute beyond that of the other members of the workforce, then the employer's vicarious liability will continue during the course of the commute. For liability to arise for use of a personal car, the benefit must be sufficient enough to justify making the employer responsible for the risk inherent in the travel.

In *Tatitlek*, the accident occurred while Formoli was driving home after completing his temporary job. The court concluded that the plaintiffs did not provide evidence establishing that the incidental benefit exception applied. Even though Formoli had a long commute, there was no evidence that Formoli's use of a personal vehicle was a condition of employment or that Formoli agreed to make his personal vehicle available as an accommodation to his employer. Formoli's commute home also did not provide an

incidental benefit to the employer. Formoli's commute was a personal activity, which did not occur within the course and scope of his employment.

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Compensated travel-time exception: Courts also have excepted from the going-and-coming rule those cases in which the employer and employee have entered into an employment contract in which the employer agrees to pay the employee for travel time and expenses associated with commuting, thus making the travel time part of the working day by their contract. The plaintiffs argued that there was evidence that Formoli was paid for eight hours of work on the day of the accident. However, under his employment contract, Formoli was paid for out-processing work and actually worked only a few hours that day. The court found that the plaintiffs were unable to establish that Formoli was paid for actual travel on the day of the accident.

Special risk exception: The "work-related special risk" exception to the going-and-coming rule applies when an employee endangers others with the risk arising from or related to work. Courts apply the foreseeability test when considering the special risk exception to determine if employees have caused car accidents. Here, the plaintiffs were unable to provide evidence that there was a foreseeable risk of a third-party injury from a car accident created by Formoli's employment. There also was a lack of evidence regarding Formoli's fatigue from working long hours as the proximate cause of the accident. In other words, the plaintiffs failed to provide any admissible evidence that Formoli's employment was a substantial factor in causing or contributing to the accident.

The Court of Appeal concluded that the plaintiffs lacked evidence supporting these exceptions to the going-and-coming rule. This is an important decision that supports employers' lack of liability for an employee's long-distance commute after working hours. For the time being, it appears that California courts will not hold employers responsible for acts of their employees under the going-and-coming rule without clear proof of an exception to the rule.

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Los Angeles: The Latest City to Ban the Box

Effective January 22, 2017, Los Angeles became the latest major city to "ban the box" and prohibit employers from obtaining information about an applicant's criminal history during the initial stages of employment. The Los Angeles Fair Chance Initiative for Hiring makes it unlawful for employers to inquire into an applicant's criminal history on an employment application or at any point during the interview process until after a conditional offer of employment is made.

The Initiative applies to all employees who perform, on average, at least two hours of work per week within the City of Los Angeles and who are entitled to the California minimum wage. An "employer" is defined by the Initiative to mean any individual, firm, corporation, partnership, labor organization, group of persons, association or other organization, however organized, that is located or doing business in the City of Los Angeles, and that employs 10 or more employees, including the owner or owners and management and supervisorial employees. It does not include the City of Los Angeles or any other local, state or federal governmental units.

Even after an employer makes a conditional offer of employment, however, the employer may not take adverse action against an employee with a criminal record unless it conducts a written assessment that analyzes the applicant's specific criminal history and the risks inherent in the duties of the position sought.

In performing this assessment, the Initiative requires employers to consider, at a minimum, the factors set forth by the U.S. Equal Employment Opportunity Commission, which include the:

- Nature and gravity of the applicant's offense
- Facts and circumstances surrounding the offense
- Number of offenses for which the individual has been convicted
- Applicant's age at the time of conviction or release
- Applicant's employment history before and after the offense or conduct
- Rehabilitation efforts by the applicant
- Time elapsed since the offense or completion of the sentence.

Employers also are required to consider other factors that may be required by rules and guidance issued by the Los Angeles Department of Public Works, Bureau of Contract Administration.

Prior to taking any adverse action, such as withdrawing an offer of employment, the employer must provide the applicant with written notice of the proposed action along with a copy of the written assessment and any other written information that supports the proposed action. The employer also must permit the applicant to complete the "Fair Chance Process." This means the applicant must be given an opportunity to submit documentation and other information relevant to his/her criminal history and any other information the employer should consider in its written assessment. In accordance with the Fair Chance Process, the employer must postpone any adverse action and may not fill the position for at least five business days.

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If the applicant provides additional information or documentation regarding his/her criminal history, the employer must review such information and prepare a written reassessment. Thereafter, an employer that moves forward with an adverse action based on the applicant's criminal background must advise the applicant and provide him/her with a copy of the written reassessment.

There are some exceptions. The Initiative specifically does not apply when:

- An employer is required by law to obtain information regarding an applicant's conviction history
- The applicant would be required to possess or use a firearm in the course of employment
- An applicant who has been convicted of a crime is prohibited by law from holding the position sought, regardless of whether that conviction was expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation
- The employer is prohibited by law from hiring an applicant who was convicted of a crime.

Starting July 1, 2017, the Initiative will impose fines of up to $500 for the first violation, up to $1,000 for the second violation and up to $2,000 for each subsequent violation. Prior to July 1, 2017, the Department of Public Works, Bureau of Contract Administration will issue written warnings to employers that violate the law.

Employers also should be sure to follow the Initiative's posting and record-retention requirements. Violations of these requirements will result in administrative fines of up to $500 per violation.

At a minimum, covered employers should conduct a review of their employment applications, including online and hardcopy versions, to ensure they comply with this Initiative. Employers also should consider training all employees involved in the hiring process so they are aware of the complex nature of the Fair Chance Process.

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Potential Shifts in Employment Law under the Trump Administration

With stories of "fake" news, agency leaks and Russian election influence continuing to dominate the headlines, the Trump Administration's impact on the employment law landscape is not getting much attention. However, savvy employers, executives and insurance professionals are monitoring how the new administration will impact, and in some cases likely remarkably change, the employment law landscape.

Immigration Reform: In terms of policy positions, immigration reform has been the early mark of President Trump's Administration. While the highly publicized ICE raids in early 2017 were likely in the offing before President Trump took office, many expect ICE to increase staffing and expand enforcement and detention actions under the new administration. Employers anticipate an increase in the number of raids and department audits, which could result in employee shortages and penalties. While such efforts would likely impact industries using less-skilled foreign workers, such as farming, manufacturing or hospitality, change also may be afoot for employers using skilled immigrant workers.

President Trump has commented on his desire to eliminate abuse in the H-1B program, which is designed to give American employers access to highly skilled foreign workers. More recently, lawmakers introduced legislation aimed at increasing the floor for minimum, prevailing wages for such workers, which would curtail the ability of businesses to use these types of educated workers. Employers would do well to audit their immigration practices to ensure hiring practices and documentation are in order in the event of an audit. As they do so, they should consider whether their immigration practices will spur claims. For example, state laws such as California Labor Code §1019 make it unlawful for employers to misuse employment authorization verification systems, threaten false reports to state or federal agencies, or threaten to contact immigration authorities.

Secretary of the Department of Labor: Certainly, President Trump's appointee to Secretary of the U.S. Department of Labor (Department) will directly influence the national employment law environment. His initial nominee, Andrew Puzder, drew attention for his public opposition to raising the minimum wage and perceptions about his experience as the head of a fast-food conglomerate. After Mr. Puzder withdrew amid controversy, President Trump nominated Alexander Acosta, a former labor secretary at the National Labor Relations Board and assistant attorney general in the Justice Department's civil rights division under President George W. Bush.

While many see Mr. Acosta as less controversial than Mr. Puzder, it is widely assumed President Trump will aim to scale back regulatory efforts initiated by the previous administration. President Trump has already directed federal agencies to freeze all pending regulations, including the Department's Overtime Exemption Rule, which would have raised the minimum salary requirement for employees covered by the FLSA's white-collar exemption. President Trump's freeze also impacted the Department's Persuader Rule, which would have expanded the required disclosures for consultants

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assisting employers with union avoidance and collective bargaining. More recently, President Trump ordered the acting Secretary of Labor to review the Obama Administration−backed "fiduciary rule."

Finally, the Trump Administration may address the Department's enforcement strategies. Under the Obama Administration, the Department increased its staff of investigators dramatically and took up "strategic enforcement" efforts aimed at proactively investigating industries or employers it targeted for investigation (rather than simply responding to complaints as they were lodged by employees). With President Trump issuing hiring freezes and publicly criticizing the size of the federal government, the Department may well scale back these types of enforcement efforts.

Transgender Rights & Discrimination: The Trump Administration recently rescinded student bathroom access guidance issued by the Obama Administration specifying Title IX gave transgender students the right to use bathrooms corresponding with their gender identity. In *Gloucester Co. School Board v. G.G.*, the Supreme Court recently refrained from ruling on the legality of a Virginia school district policy requiring students to use the bathroom of their birth sex because of the current administration's reversal of the federal guidance. At the same time, the Trump Administration recently indicated it did not plan to repeal President Obama's 2014 Executive Order providing protections for gay, lesbian, bisexual and transgender employees of federal contractors. Employers with transgender employees should continue to monitor these developments to ensure they stay in line with federal laws and regulations, while remaining mindful of the many state laws offering such employees even greater protections.

Nomination to the Supreme Court: On April 6, 2017, the U.S. Senate voted to allow nominee Hon. Neil Gorsuch to move to final confirmation with a simple majority of 51 votes, as opposed to 60. The vote is expected to go forward on Friday, April 7, 2017. If appointed, Judge Gorsuch could serve as a swing vote on several important employment law cases coming before the Supreme Court in 2017, including a series of cases – *Ernst & Young v. Morris, NLRB v. Murphy Oil and Epic Systems Corp. v. Lewis* – raising the question of whether an employer violates the National Labor Relations Act or Federal Arbitration Act by requiring employees to sign class action waivers.

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California Supreme Court on Employee Rest Periods

The California Supreme Court recently published *Augustus et al., v. ABM Security Services, Inc*. holding that California law prohibits on-duty and/or on-call rest periods, and instead requires employers to relieve their employees of all work-related duties and employer control during 10-minute rest breaks.

In *Augustus*, plaintiff security guards sued employer ABM Security Services, Inc. (ABM) for failure to provide state-mandated rest periods. The guards alleged that during rest break periods they were required to keep their pagers and radios on, and to remain vigilant and responsive to calls when needs arose (such as escorting tenants to parking lots and notifying building managers of mechanical issues). The trial court granted class-wide summary judgment to the security guards finding that each and every guard remained on call during rest breaks in violation of California law. The Court of Appeal reversed, concluding that state law does not require employers to provide duty-free rest breaks; moreover, "simply being on call" does not constitute performing work.

Reversing the Court of Appeal decision, the California Supreme Court found that rest breaks by their very nature must be duty-free. The Industrial Welfare Commission (IWC) Wage Order 4, subdivision 12, Subdivision 12(A) provides, in pertinent part, "every employer shall authorize and permit all employees to take rest periods…." Applying the plain-meaning test to this section of the Wage Order, the Court concluded that a reasonable reader would understand the ordinary meaning of "rest period" to mean "an interval of time free from labor, work, or any other employment-related duties."

The Court further concluded that California Labor Code section 226.7's parallel meal and rest period provisions support an inference of identical employer responsibility as to both. The Court noted that such interpretation is most consistent with the protective purpose of the Labor Code and wage orders.

The Court also addressed on-call rest periods, finding that neither Wage Order 4 nor section 226.7 provides a straightforward answer to whether on-call rest periods are permissible. Nonetheless, the Court found that "one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communication devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." Accordingly, the Court determined that requiring the security guards to keep their pagers and radios on and to remain vigilant and responsive to calls did not relieve them from duty.

Employers should examine their policies and practices and train managers and supervisors to make sure employees are relieved of all duty while on break and without interruption. In certain circumstances where it appears impossible to relieve employees of all duty during such breaks, employers may seek an exemption from the Division of Labor Standards Enforcement (DLSE). Wilson Elser's Employment & Labor practice attorneys are well versed in employment law matters and would be pleased to respond to questions you may have about this ruling or related matters.

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