Employers and Employees

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Wages and Hours

Time spent walking between protective gear changing area and production area and time spent waiting to doff (but not to don) gear is compensable under Fair Labor Standards Act.

IBP, Inc. v Alvarez (2005) ___ US ___, 126 S Ct 514, 163 L Ed 2d 288

After the Supreme Court held that the term "workweek" in the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201–219) included time spent walking from time clocks near a factory entrance gate to employee workstations (*Anderson v Mt. Clemens Pottery Co.* (1946) 328 US 680, 66 S Ct 1187, 90 L Ed 1515), Congress passed the Portal-to-Portal Act of 1947 (PTP Act) (29 USC §§251–262), which excepted from FLSA coverage walking on an employer's premises to and from the place of performance of the "principal activity" of employment (PTP Act §4(a)(1); 29 USC §254(a)(1)), and activities "preliminary or postliminary" to the principal activity (PTP Act §4(a)(2); 29 USC §254(a)(2)). The PTP Act did not otherwise change the Court's earlier broad descriptions of "work" or "workweek," nor did it define "workday." Regulations promulgated shortly thereafter concluded that the Act had no effect on the computation of hours within a "workday" (29 CFR §790.6(a)), which was defined, in the continuous workday rule, as the period between the "commencement and completion" of an employee's principal activity or activities (29 CFR §790.6(b)).

In *Steiner v Mitchell* (1956) 350 US 247, 76 S Ct 330, 100 L Ed 267, the Court explained that the term "principal activity or activities" embraces all activities that are an "integral and indispensable" part of the principal activities. Activities such as the donning and doffing of specialized protective gear, that are performed before or after the regular work shift, on or off the production line, are compensable under the PTP Act if they are an integral and indispensable part of the principal activities of employment and are not specifically excluded by §4(a)(1) of the Act.

In these consolidated cases from the Ninth and First Circuits (*Alvarez v IBP, Inc.* (9th Cir 2003) 339 F3d 894 and *Tum v Barber Foods, Inc.* (1st Cir 2004) 360 F3d 274), both of which involved required protective gear that the courts below found "integral and indispensable" to the employees' work, the main question is whether postdonning and predoffing walking time is specifically excluded by the PTP Act. The second question, presented only in the First Circuit case, is whether the time employees spend waiting to don and doff the gear is excluded.

IBP, Inc. (IBP) is a large Washington meat producer. Its production employees must wear a variety of protective gear, which is required to be stored in company locker rooms where the gear is also donned and doffed. IBP pays its production workers based on the time spent cutting and bagging meat.

IBP employees filed a class action seeking compensation for time spent donning and doffing required protective gear and walking between the locker rooms and production areas before and after their assigned shifts. The district court held these activities compensable, and the Ninth Circuit affirmed.

In the First Circuit Case, Barber Foods, Inc. operates a poultry processing plant in Maine. Barber's production line employees are required to wear protective gear and are paid by the hour from the time they punch in to time clocks at the entrances to the production floor.

Barber Foods employees and former employees sued to recover compensation for time spent donning and doffing the required protective gear, as well as the attendant walking and waiting. Barber prevailed on the walking and waiting claims in district court. The First Circuit concluded that the walking and waiting times were preliminary or postliminary activities excluded from FLSA coverage.

Before the Supreme Court, IBP argued that the walking time is excluded from FLSA coverage by §4(a)(1) of the PTP Act based on its text, purpose, and regulatory interpretation. The Court rejected these arguments and affirmed the Ninth Circuit.

IBP claimed that even if donning and doffing protective gear are "integral and indispensable" to its employees' principal activities (and thus not excluded from coverage under §4(a)(2)), they are not themselves "principal activities" that start or end the workday within the meaning of the FLSA; accordingly, the walking that occurs immediately after donning and immediately before doffing is not compensable. This argument for a third category of activities is foreclosed by *Steiner,* under which activities that are "integral and indispensable" to "principal activities" are themselves "principal activities." Moreover, although *Steiner* addressed the interpretation of "principal activities" in §4(a)(2), there is no plausible argument that the identical term has a different meaning in §4(a)(1). The normal rule of statutory interpretation is that identical words used in different parts of the same statute have the same meaning, and the text of §4(a)(2) refers to "said principal activity or activities," an explicit reference to the use of the identical term in §4(a)(1).

The argument that Congress' repudiation of the *Anderson* holding regarding compensable walking time reflected an intent to exclude the walking time at issue here is also unpersuasive. There is a critical difference between the cases—in *Anderson*, the walking occurred before the start of the workday because it preceded the employees' principal activity, whereas the walking here occurs after the workday commences and before it ends.

The pertinent regulations also support compensability of walking time in this case. Compensability of travel from the place of performance of one principal activity to another is unaffected by the PTP Act (29 CFR §790.7(c)), and travel from a designated location to receive instructions, perform other work, or pick up tools, to the workplace must be counted as hours worked. 29 CFR §785.38. The regulations on which IBP relied—29 CFR §790.6(b), which describes the workday as only "roughly the period 'from whistle to whistle,'" and 29 CFR §790.7(g), n 49, which hypothesizes some cases in which walking between a locker room where an employee performs the first principal activity of the day and the production line might not be covered by the FLSA—are, at best, ambiguous. They are not sufficient to overcome clear statements in the text of other regulations that support the Court's holding of compensability, and more important, the statute itself, whose meaning is definitively stated in *Steiner*.

For the same reasons discussed above regarding IBP, the time Barber employees spend walking between the production floor and the area where they don and doff protective safety gear is compensable under the FLSA. Predoffing waiting time is also compensable. Because doffing such gear is a "principal activity," the continuous workday rule mandates that waiting to doff is compensable under the FLSA.

However, predonning waiting time, which is two steps removed from productive activity on the assembly line, is preliminary to principal activity within the meaning of §4(a)(2) of the PTP Act and thus excluded from compensability. Unlike the donning of certain gear, which is always essential, waiting may or may not be necessary in every situation or for every employee. The fact that preshift activity may be necessary does not make it integral and indispensable to a principal activity. For example, walking from a time clock to a workstation is necessary, but the PTP Act clearly repudiated the holding in *Anderson* that it is compensable under the FLSA. No limiting principle distinguishes the waiting time here from the walking time in *Anderson*; both are excluded from coverage by PTP Act §4.

COMMENT: The question of when the workday begins and ends has always been difficult to answer. Perennially, it has been difficult to distinguish "working" time from time getting to and from the job because work comes in many varieties and circumstances.

The issue of "work time" acquired major significance following the passage of the Fair Labor Standards Act of 1938, which for the first time required employers to pay a minimum hourly rate of $.25 and overtime for work in excess of 40 hours weekly at the greater of 1½ times the minimum rate or the employee's pay rate.

In early factory settings, the workday was defined by the factory whistle signaling the start and conclusion of the work shift. But it was not long before more complicated whistle-less working environments became commonplace.

Many "work time" issues were addressed by the Portal-to-Portal Act in 1947, which clarified some definitional issues haunting "work time" cases and specifically reversed the United States Supreme Court's decision in *Anderson*, which had held that coming and going from the time clock to the actual work place was compensable work time. The PTP Act also clarified that time spent on activities preliminary or postliminary to the principal activity of the job also was not necessarily time worked for purposes of minimum wage and overtime requirements. The Department of Labor followed up with regulations establishing the "continuous workday" rule, which prescribed all time between the commencement of a job and its completion on the same workday as "continuous," regardless of interruptions by periods of contemplated job-related inactivity inherent in the job.

These clarifications were helpful, but certainly not dispositive. Soon thereafter, the courts began to recognize a classification of activities one step removed from the actual performance of the job, but considered integral and indispensable to the principal activities of the job—*e.g.,* showering at the end of the job to remove dangerously caustic and toxic materials, and other similar circumstances. These activities were thought to be distinct from the routine changing of work clothes before or after work. Thus was established a two-tiered definition of compensable work time: first, performance of the principal activities of the job, and second, performance of activities that were preliminary or postliminary to the job but were so integral with, and indispensable to, the principal activities as to themselves be considered principle activities.

The *IBP* case decided by the Supreme Court on November 8, 2005, dealt with the employee's contention that there was yet a third tier of activity— *i.e.*, that walking to and from the locker rooms to reach the area where required safety gear for the performance of the primary duties of the employee is donned or doffed should be paid time because it, too, is an integral and indispensable aspect of the primary activity of the job. The employer argued that just as the law was clarified in 1938 to exclude time walking to and from, and waiting at, the work site, time walking to the donning and doffing areas was not integral with, and indispensable to, the principal activities of the job. Therefore, it should be classified under the FLSA as noncompensable preliminary or postliminary activity in relation to the principal activities of the job.

The Court's conclusion was that because donning and doffing of gear required for the performance of a job were integral and indispensable to the job's principal activities, they should also be covered, as should walking time between the production line and donning and doffing. The Court drew the line in the *Barber* case at predonning waiting time, which was preliminary and noncompensable, but suggested that it, too, would be compensable under the FLSA if employees were required to report at a specific time and wait to don the gear, or there was an agreement between the parties, or it was the custom and practice in the particular industry that such waiting time would be compensable under the FLSA.

The FLSA established minimum standards in 1938, and some states, including California, have raised the 1938 standards by adding requirements of daily overtime after 8 hours of work, and higher minimum wages above the federal standards. Many have adopted their own regulations interpreting labor standards, but all are anchored by the FLSA.

The definition of "work time" has evolved along with the expanding concept of "work" or "job" in the modern world. As work becomes more conceptual and more competitive, enlightened American employers have adopted enlightened work standards, not because of the proscriptions of state and federal labor standards but because of enlightened views of human resource management. Labor research has confirmed that employees who are treated more flexibly by management are more productive and more apt to remain with the company than those whose needs are not recognized and who are forced into fixed, insensitive work rules by management.

So is it fair to say that American labor standards will follow the restrictive path of *IBP's* fine distinctions, or the path of enlightened employers who attract and retain higher-skilled and motivated workers? Unfortunately, neither will be effective in defining America's future labor standards. The hard reality is that work will increasingly bite into workers' free time not because the FLSA standards are ineffective, but because America's prevailing labor standards are increasingly being determined by the industrial practices of global, out-sourced, world competition. These practices will predominate not because of the labor policies of Congress, the states, or the United States Supreme Court, but

because they are standards found to generate the highest productivity per dollar of wage paid and, hence, are the most competitive.

Therefore, If American employers decide to pay, or not to pay, for second- or third-tier time, it will not be as a result of court decisions or legislation, but rather the exigencies of modern competition regulated informally by global competitors. Ironically, America's labor standards have come full circle, beginning with the unregulated workplace before the 1930s, moving to federal and state regulation in the 40s through the 80s and now, effectively, tethered once again to unregulated competitive conditions prevailing at work sites far out of the reach of American law. —*R.M.C.* ❖

Arbitration and Mediation

Employer that ignores employee's effort to arbitrate as required by company policy may not subsequently compel arbitration.

Brown v Dillard's, Inc. (9th Cir 2005) 430 F3d 1004

Shortly after Stephanie Brown began working at Dillard's Department Store, she and her coworkers were informed that the store had adopted an arbitration policy that employees were deemed to have accepted by continuing to work at the store. Employees were required to sign a form agreeing to be subject to "The Rules of Arbitration." When one of Brown's coworkers asked if she could take the form home and discuss it with her parents, she was told her job would be in jeopardy if she did not sign the form immediately.

Brown signed the form. Soon afterward, a dispute arose concerning Brown's time reports, and she was fired. Claiming wrongful termination, Brown filed a notice of intent to arbitrate with the American Arbitration Association, as the Dillard's arbitration rules required, and paid a $100 fee. When the AAA sought information and a filing fee from Dillard's, they received no response and could not, therefore, proceed with the arbitration. Dillard's told Brown that her claim had no merit and that the store would not participate in an arbitration.

Brown filed suit for breach of her employment contract, violation of the Labor Code, tortious termination in violation of public policy, and several other causes of action. Dillard's removed the suit to federal court and at that point, sought to compel arbitration. Finding that Dillard's arbitration agreement was substantively unconscionable, and Dillard's method of obtaining its employee's agreement to arbitrate was procedurally unconscionable, the court held that the arbitration agreement was unenforceable.

The Ninth Circuit affirmed on other grounds, finding that because Dillard's had breached its contract to arbitrate, it could not ask the court to enforce the agreement. Concluding its opinion with an award of attorney fees on appeal to Brown, the court opined that the case illustrated (430 F3d at 1027):

> . . . a dark side of our nation's policy in favor of arbitration. When a defendant in a judicial forum refuses to respond to a complaint that is properly filed and served, the court has the power to enter and enforce a default judgment. Arbitration works differently. The American Arbitration Association could not compel Dillard's to pay its share of the filing fee, and in the absence of the fee it could not proceed. Brown had no choice but to come to court. Many people in Brown's position would simply have given up. Because she did not, we have the occasion to make clear that when an employer enters into an agreement requiring its employees to arbitrate, it must participate in the process or lose its right to arbitrate.

Disability

Review granted.

Green v State of California (review granted Nov. 16, 2005, S137770; superseded opinion at 132 CA4th 97, 33 CR3d 254

The court of appeal held that the employer carries the burden of establishing, as an affirmative defense to a FEHA claim, the employee's incapacity to perform essential functions of a job with reasonable accommodations. The opinion was reported in 27 CEB CBLR 71 (Nov. 2005).

Discipline and Termination

Review granted.

Ross v Ragingwire Telecom., Inc. (review granted Nov. 30, 2005, S138130; superseded opinion at 132 CA4th 590, 33 CR3d 803

The court of appeal held that an employer does not violate the Fair Employment and Housing Act or fundamental public policy by discharging a disabled employee for using medical marijuana under the Compassionate Use Act. The opinion was reported in 27 CEB CBLR 70 (Nov. 2005).

Independent Contractors

A jury must consider whether an independent contractor was aware of the dangerous condition on the hirer's premises to determine whether the hirer or the contractor is liable for employee injuries.

Kinsman v Unocal Corp. (Dec. 19, 2005, S118561) 2005 Cal Lexis 13684

In the 1950s, plaintiff (Kinsman) was employed by a scaffolding construction company that worked frequently as an independent contractor at a Unocal refinery. Kinsman later developed mesothelioma, a lung cancer caused by his exposure to asbestos while working at the refinery.

Kinsman sued Unocal (the hirer), claiming that the company should either have warned him of the hidden danger of on-site asbestos exposure or implemented safety measures. Unocal was liable, Kinsman claimed, because the company knew of the asbestos danger and the independent contractor, through no fault of its own, did not. The trial court found for Kinsman and denied Unocal's motion for judgment notwithstanding the verdict. The court of appeal reversed. On further review, the California Supreme Court remanded, holding that the jury instructions should have required the jury to consider whether the contractor knew of the asbestos danger.

The court acknowledged that the *Privette* doctrine (*Privette v Superior Court* (1993) 5 C4th 689, 21 CR2d 72) bars an employee of an independent contractor from recovering for on-the-job injuries from the hirer. However, the court held that a hirer's failure to warn of an otherwise hidden danger that results in injury to an individual constitutes negligence. Although *Privette* allows the hirer to delegate to the contractor the responsibility for protecting against injuries from a known hazard, the doctrine does not apply if the hirer does not disclose the hidden danger to the contractor and the contractor could not independently ascertain the danger. Whether the contractor knew of the danger is a matter of fact for the jury.

Although Unocal argued that it had no control over the dangerous condition because it was caused by other contractors, the court disagreed, finding that the release of asbestos caused by other contractors became a latent hazard on Unocal's premises that the company should have discovered. As a result, the company was liable to employees under ordinary premises liability theories.

Wages and Hours

Employer is liable for a meal period penalty not only if it prohibits the employee from taking the required meal break, but also if the employee, with the employer's sufferance or permission, works during the period that he or she had been authorized to take a meal period.

Cicairos v Summit Logistics, Inc. (2005) 133 CA4th 949, 35 CR3d 243, modified at 2005 Cal App Lexis 1823

Defendant ran a warehousing business that delivered groceries and perishable goods to Safeway stores in California, Nevada, and Hawaii. Plaintiffs worked for defendant as truck drivers and were members of the Teamsters Union.

Defendant used an "Activity Based Compensation" system in determining plaintiffs' wages. Each truck had a computerized on-board system that recorded various factors such as speed, starts and stops, and time. Truck drivers had to input factors manually so the on-board computer system could keep track of activities accurately. Without an approved reason for a delay (such as road construction), a trip that took longer than expected resulted in a loss to the driver because the driver was not paid for the extra time. Defendant did not schedule meal periods or rest periods for its drivers or include an

activity code for those activities in the computer program, so neither activity was on the list of acceptable delays. Some drivers skipped meals and rest breaks to avoid losing compensation.

Labor Code §512(a) provides that:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

The language of IWC wage order No. 9 (8 Cal Code Regs §11090(11)(D)) relating to meal periods tracks the language in the Labor Code, and provides a penalty for noncompliance: 1 hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

In this case, the court held that an employer is liable for a meal period penalty not only if it prohibits the employee from taking the required meal break, but also if, with the employer's sufferance or permission, the employee works during the period that he or she had been authorized to take a meal period. An employer is deemed to have suffered or permitted the employee to work if the employer (or its agent, including managers and supervisors) knew, or reasonably should have known, that the employee was working instead of taking the required meal break.

Plaintiffs also alleged that defendant violated Lab C §226. Defendant provided an earnings statement to plaintiff drivers, but the statement did not give an accurate statement of hours worked. No matter how many hours a driver worked, the statements always listed 40 hours per week. Plaintiffs also received a "Driver Trip Summary—Report of Earnings," but this statement presented information in a confusing manner and did not clearly state the hours worked either. The court held that the wage statements did not comply with Lab C §226, because they did not show hours worked. (Nor did they show the employer's name and address, which was an additional violation.).

The union and defendant were parties to a collective bargaining agreement that provided for meal periods and rest breaks. Any dispute under the agreement had to be arbitrated. However, the agreement did not specify that statutory claims also had to be arbitrated, so plaintiffs were free to bring their claims (based on violations of the Labor Code and IWC wage order No. 9) in a judicial forum. Further, the requirement that employees in the state of California receive a meal period is what is commonly known as a "minimum state standard." A collective bargaining agreement may not be used as a tool to waive this requirement.

The court of appeal also concluded that the trial court had improperly relied on case law involving overtime claims when it applied the motor carrier exemption of 8 Cal Code Regs §11090(3)(L). The court held that when the wage order used the term "section," it referred only to the section governing hours of service and overtime, not the entire wage order. Thus, plaintiffs' meal period and rest period claims were not exempted from coverage under the wage order.

Employer may pay increased salaries to employees instead of reimbursing them for using their own cars for work.

Gattuso v Harte-Hanks Shoppers, Inc. (2005) 133 CA4th 985, 35 CR3d 260

Defendant Harte-Hanks, a marketing company, distributes weekly over 8 million advertising publications in California, including the PennySaver and the California Shopper. Harte-Hanks employs "Outside Sales Representatives" (OSRs) as well as "Inside Sales Representatives" (ISRs) to sell its products. The OSRs are required to drive their personal automobiles in the performance of their duties. The ISRs sell many of the same products as the OSRs, but do so by telephone from the office rather than by visiting customers.

OSRs are paid a higher base salary than the ISRs (*e.g.,* $15 per hour versus $11 per hour) in order to compensate them for their automobile expenses. The OSRs also earn a higher rate of commissions. The company maintained that the increased compensation was more than adequate to reimburse the OSRs for the use of their automobiles, but it did not conduct any study to determine whether the increased compensation actually resulted in indemnification for all of the OSRs automobile expenses.

Guttuso brought an action on behalf of himself and other OSRs, claiming that the company's compensation policy violated Lab C §2802, which provides in pertinent part:

> An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

No case directly addresses the issue, but the trial court and court of appeal were both guided by an interpretive bulletin issued by the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE Interpretive Bulletin No. 84–7, rev Jan. 8, 1985). According to the bulletin, an employer who requires an employee to furnish his or her own car or truck to be used in the course of employment would be obligated to reimburse the employee for the costs necessarily incurred by the employee in using the car or truck in the course of employment. "The rate of reimbursement can be that agreed to by the employer and employee, or, if there is no such agreement, any reasonable amount."

Both the trial court and court of appeal concluded that a violation of Lab C §2802 would occur only if the increased compensation was insufficient to indemnify the employees for the automobile expenses incurred in the discharge of their work-related duties. Any taxes the employees were obligated to pay on the increased compensation was to be taken into account in determining whether the employer was indemnifying the employees for all of their automobile expenses.

An employee who spends most of his work time on nonexempt activities does not qualify as exempt; court review of Labor Commissioner's opinion may not consider issues not raised below.

Murphy v Kenneth Cole Prods., Inc. (2005) 134 CA4th 728, ___ CR3d ___

Plaintiff (Murphy) was hired in 2000 as a store manager for a shoe boutique operated by Kenneth Cole Productions (KCP). His primary responsibility was to make sure the store met its sales quota. He was provided with an operations manual that advised employees of the details of handling the merchandise, and prescribed a 45-hour work week of 9-hour shifts for managers. Murphy did not have input on advertising, setting sales goals, or deciding what shoes the store would sell or how they would be priced.

Murphy often worked more than 9 hours per shift. He calculated that he spent about 90 percent of his time doing the work of a sales associate, *i.e.,* processing shipments, cleaning the store, and selling shoes. He spent up to 11 percent of his time on management tasks, including preparing employee schedules for the district manager's approval, and writing periodic employee performance evaluations, although he did not make decisions on hiring and firing. No one ever suggested that he allocate his time differently.

In 2002, Murphy resigned. A few months later he filed a complaint with the Labor Commissioner. Among his claims was a demand for $28,742.93 in unpaid overtime. The Labor Commissioner found that the defendant had failed to qualify Murphy as an exempt employee, and awarded Murphy unpaid overtime plus interest and penalties. After KCP appealed, Murphy added claims for meal and rest periods, interest, and attorney fees. The trial court awarded Murphy a total judgment of $64,206.85, plus attorney fees totaling $62,171.40.

KCP again appealed. The court of appeal found substantial evidence supporting the trial court's decision that Murphy did not exercise discretion and independent judgment to the degree required to qualify him as an exempt employee under Lab C §515, and upheld the overtime award. In California, an employee's status is based on a "purely quantitative" test that assesses the types of activities performed by the employee and the average time spent on those activities. KCP, the court found, expected Murphy to spend most of his time doing the same work as those he was managing, functioning as "a nominal coxswain who performed most of the time as an oarsman alongside the rest of the crew."

The court of appeal held, however, that Murphy could have brought the claims for failure to provide meal and rest periods in the Labor Commission proceeding, before he raised them for the first time in the appeal de novo before the trial court. Although new evidence may be introduced in the appeal proceeding, the court may not consider claims that were never submitted to the Labor Commissioner. Further, the court held, the payment imposed by the trial court for missed meal and rest periods constituted a penalty and as such should have been raised within a year of the last date the claim accrued, as required by CCP §340.

Worker Adjustment and Retraining Notification Act

California WARN Act does not apply when employees are transferred to another employer with no change in position or loss of pay.

MacIsaac v Waste Mgmt. Collection & Recycling, Inc. (2005) 134 CA4th 1076, ___ CR3d ___

In the first case to address an action brought under the California Worker Adjustment and Retraining Notification Act (WARN Act) (Labor C §§1400–1408), the court held that the transfer of 42 employees when no change occurred in the terms of their employment was not a "mass layoff" that required notice under the Act.

When plaintiff MacIsaac's employer, defendant Empire Waste, sold its contract to serve the city of Santa Rosa to North Bay Disposal, the terms of the agreement required North Bay to employ 42 Empire employees and provide those employees with the same pay and working conditions and with benefits equivalent to those Empire had provided. The transfer occurred seamlessly, with 41 of the 42 employees starting work at North Bay only 3 days after finishing their work with Empire Waste.

Plaintiff MacIsaac declined to accept the position North Bay offered him. When the Empire work force was reduced by 20 employees a short time after the employee transfer, MacIsaac filed an action claiming that under the WARN Act, Empire Waste should have given the 20- and 42-employee groups 60 days' notice of a "mass layoff."

The WARN Act defines a layoff as "separation from a position for lack of funds or lack of work." After analyzing the statutory language, the court of appeal affirmed the trial court's finding that the WARN Act did not apply here because the employees transferred from Empire were separated from their employer, not their "position." The court also found that the subsequent work reduction, affecting only 20 employees, failed to meet the statutory threshold of 50 employees needed to trigger the WARN Act's 60-day notice requirements.

The court noted further that adopting MacIsaac's interpretation of the statute would result in the transferred employees receiving "back pay" which, since they suffered no loss of income, would amount to double pay. Such a result would not be in accord with "reason, practicality and common sense," the court stated.

Workers' Compensation

Auto accident injuries not compensable when employee had extended a business trip to sightsee with his wife.

Fleetwood Enters., Inc. v WCAB (Dec. 16, 2005, E037314) 2005 Cal App Lexis 1920

John Moody was a senior employee of Fleetwood Enterprises., which manufactures RVs. On a trip to Europe to attend a trade show on behalf of Fleetwood, Moody was injured in a car accident. The accident occurred after the trade show and a scheduled visit to an RV factory, while Moody was sightseeing with his wife. Although Fleetwood treated the accident as if it occurred in the scope of employment and the Workers' Compensation Appeals Board agreed, the court of appeal found that Moody had concluded the business portion of his trip when the accident occurred and therefore his injuries were not compensable.

Moody offered evidence of work-related activities on his sightseeing tour, such as photographing unusual RVs and keeping an eye out for ideas useful to his employer. The court found that these activities were comparable to ordinary activities a conscientious employee might undertake in a

variety of situations that were not compensable. Moody argued that Fleetwood made arrangements for his trip from start to finish, including his post-trade show travels with his wife, and that the accident occurred while he was on his way to return the car the company had rented for him, on a route he would not otherwise have traveled. The court did not find Moody's evidence sufficient to establish that this travel was an integral part of the business trip.