



# HR CORNER

FEES & BURGESS, P. C.



Volume 5, Issue 9

September 2009

## Wage and Hour Refresher 9th Circuit Case Examines Working Hours

Fees & Burgess, P.C.,  
Emphasizes:

A recent 9th Circuit Court of Appeals case provides a good example of the importance of properly calculating the hours that a non-exempt employee “works.” In this case, the employee worked as a technician who travelled each day in a company vehicle to repair recovery systems in cars. Each day before leaving his home, the employee would complete some minimal paperwork and plan his routes for the day. After completing his last assignment each evening, he was required to upload data to his employer’s main computer systems. The company paid him for hours worked between the start of his first daily assignment and when he completed his last assignment for the day.

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The employee sued under the Fair Labor Standards Act (FLSA), arguing that his employer denied him pay for the time he spent commuting in his company vehicle, and for the time he spent working outside of his specific repair duties. The 9th Circuit analyzed each separate claim for payment. First, the court noted that time commuting is “presumptively non-compensable.” Furthermore, the activities spent at the beginning of his day were preliminary and de minimis, for which no compensation was required. However, in analyzing the work performed after his final assignment each evening, the court held differently. It noted that the nature of his postliminary work required compensation. Specifically, his evening work involved mandatory reporting requirements which consumed a measurable period of time. This work was necessary to his business and primarily for the benefit of his employer. As such, the employee should be paid for such postliminary activities.

This case demonstrates the growing challenges of an evolving workplace. Increasingly, employees are working outside of a traditional office setting, and this has created difficulties for employers to properly track working hours. Even so, employers should review their procedures for compensating non-exempt employees. While a few hours of back pay to one employee for inadvertent violations of the FLSA may be immaterial, consider the ramifications of similar mistakes for larger groups of employees performing similar jobs across your company. Consider also the availability of interest and liquidated damages for such violations. Even for unintentional mistakes, FLSA violations can become expensive, so internal audits of current procedures may provide significant cost-savings.

The case is Rutti v. Lojack Corporation, Inc., 2009 WL 2568661 (9th Cir. Aug. 21, 2009).

## 11th Circuit Upholds Use of Outside Sales Exemption

The 11th Circuit Court of Appeals (covering Alabama) recently reviewed a claim by a title insurance marketing representative which alleged she was mischaracterized as an exempt employee under the FLSA and was therefore entitled to \$10,000 in unpaid overtime compensation. During her employment, the title company characterized her as an exempt employee pursuant to the outside sales exemption. However, the employee argued that, since she never consummated any sales, she was not qualified for this exemption. Furthermore, the employee argued that the true nature of her job involved promoting the company's services without obtaining the actual sales of title insurance.

In reviewing this claim, the 11th Circuit provides a summary of FLSA requirements for outside sales representatives. The court notes that such sales reps must have a primary duty of making sales and be customarily engaged away from the employer's place of business. Furthermore, "making sales" may include obtaining service orders, even if the orders will be performed by someone else. In deposition testimony, the employee admitted that she worked to obtain orders for title services and that she received a commission for any such orders obtained. As a result, the 11th Circuit held that she was properly classified as an exempt employee who was free from the overtime compensation requirements.

While this case may be an easy win for the employer based on the employee's deposition testimony, it serves as a good reminder to exercise caution in determining exemptions under the FLSA. These cases are heavily fact-specific and depend on the particular duties exercised by the employee at issue. Job titles are not determinative of status under the FLSA. In this case, despite the employee's title as a "marketing representative," she was still properly classified as an outside sales representative. The opposite result is often possible – an employee with a title of "outside sales representative" who performs primarily inside sales or who does not work to obtain sales for a company may not qualify for the outside sales exemption.

The case is [Gregory v. First Title of America, Inc.](#), 555 F.3d 1300 (11th Cir. 2009).



**Fees & Burgess, P.C.—Calendar of Events****September 30, 2009 — Madison, Alabama**

[ABC Labor/Human Resources Law Update](#), sponsored by Associated Builders & Contractors of North Alabama, Inc., and presented by attorneys from the law firm of Fees & Burgess, P.C. This program will provide critical and timely updates on new developments including:

- New Family Medical Leave Act regulations, certifications, and other requirements
- New amendments to the Americans with Disabilities Act
- Employee Free Choice Act updates
- Current status of E-Verify and I-9 Requirements
- Genetic Information Non-discrimination Act (GINA)
- Pending Executive Orders Encouraging and Supporting Union Activity
- Alabama HB362 Firearms in Parking Lot
- Lilly Ledbetter Fair Pay Act, and other pending legislation

Approved for 1.5 HRCI accreditation hours. E-mail [sarah@abcnalabama.org](mailto:sarah@abcnalabama.org), or call 256-355-1168 regarding registration.

**October 7, 2009 — Webinar; 12:00 - 1:00 P.M., CST**

[Contracting on Your Own Terms / Reducing Risk in Purchasing Terms and Conditions](#)

This one-hour webinar will cover Do's and Don'ts of:

- Systemic Purchase Terms Coverage and Communication
- "Battle of the forms" issues
- Important coverage areas
- Getting your terms in a real-time contracting environment
- "Flow through" of purchasing terms from vendors through resellers to customers
- Issues with purchasing through distribution
- Material liability, warranty, and indemnity issues
- International Procurement
- Key terms and conditions
- International contracting tips

This webinar is pending approval for 1.0 ISM and NCMA credit hours. To register, click [here](#).

**October 21-22, 2009 — Scottsdale, Arizona**

[IPC Electronics Industry Executive Summit](#)

This presentation will address contracts from an EMS-supplier standpoint. A few key topics included: contracts with distribution and with direct purchases including fabricated items (metal, plastics, pcbs), as well as off-shore (Asian) procurement contracts.

If you would like more information on these seminars, please go to [www.feesburgess.com](http://www.feesburgess.com)



**SPEAKERS**

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact Sylvia Taylor at [staylor@feesburgess.com](mailto:staylor@feesburgess.com).

**NEWSLETTERS**

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