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PERSPECTIVE

Employer expanded responsibility for worker commutes

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Under California law, employers are vicariously liable for tortious acts committed by their employees during the course and scope of their employment. The "going and coming" rule, however, exempts employers from liability for tortious acts committed by employees while on their way to and from work as part of their daily commute. Nevertheless, as an *exception to the exception*, employers may still be held liable for employee conduct occurring outside of work in their vehicle while going to and from their place of employment where their personal vehicle is used for business purposes, whether required by the job or as evidence by routine practice.

Generally, every person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care under the circumstances. *Rowland v. Christian*, 69 Cal. 2d 108, 112 (1968). This duty involves a careful balancing of the foreseeability of harm to the injured party, the degree of certainty that they will suffer injury, the closeness of the connection between the conduct and the injury suffered, the moral blame attached to the conduct, the policy of preventing future harm, the extent of the burden to the party and consequences of the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Although such a duty exists, an employer is not liable for its employees' tortious acts committed while on their daily commute to and from work. *Lobo v. Tamco*, 182 Cal. App. 4th 297, 301 (2010). Such daily travel is considered to be outside of the course and scope of employment. Several exceptions to this general exception, however, are available that have the effect of situating an employee's conduct within the scope of employment when such conduct would otherwise fall outside the scope.

One such exception to the going and coming rule is the "required vehicle" exception. When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purpose of respondeat superior liability. The key inquiry is whether the employee having his or her car available during work hours provides an incidental benefit to the employer. *State Farm Mut. Auto. Ins. Co. v. Haight*, 205 Cal. App. 3d 223 (1988). This exception arises where the use of the vehicle provides some incidental advantage to the employer. Where the employer approves or requires an employee to furnish a vehicle as a condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment — even if the employee's actual use of the vehicle for work-related purposes is infrequent. *Lobo*, 182 Cal. App. 4th at 301-03 (2010); *Moradi v. Marsh USA, Inc.*, 219 Cal. App. 4th 886, 895 (2013).

The required vehicle exception occurs where the use of a personally owned vehicle is either an express or implied condition of employment, or alternatively, if the employee has agreed to make their vehicle available for business use as an accommodation to the employer. Public policy facilitating the required vehicle exception is to reallocate the risks inherent in the employee's commute to the employer who is requiring a vehicle as a condition of employment. An employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because he, rather than the innocent injured party, is best able to spread the risk through prices, rates or liability insurance. *Rodgers v. Kemper Const. Co.*, 50 Cal. App. 3d 608, 618 (1975). So long as the risk is created within the scope of the employee's employment, the scope of employment must follow the risk assuming it proximately causes an injury. *Bussard v. Minimed, Inc.*, 105 Cal. App. 4th 798, 804-06 (2003).

Whatever path an employee takes on the commute should be viewed as if that path is the employer's place of business. In addition, whatever circumstances an employee encounters on his commute should be treated as if the employee confronted those same circumstances within the four corners of his place of employment. When the employer incidentally benefits from the access to and use of a personal vehicle in performing a job, the employer also incidentally benefits from the employee's commute to and from work because the commute itself is the necessary step an employee must take to make her required personal vehicle available.

As illustrated in *Lobo*, a metallurgist, Del Rosario, was driving home from work in his personal vehicle when he struck and killed a deputy sheriff. According to his written job description, one of his responsibilities was to answer all customer complaints and if necessary, visit customer's facilities to gain information and/or maintain customer relations. If a customer called with quality concerns, Rosario would accompany a sales engineer to the site so that he could answer any technical questions. No company car was provided. Although he would most often ride in the sales engineer's car, he did on occasions use his own car for that purpose if no sales engineer was available. When Rosario used his own car to visit a customer site, he was reimbursed for mileage. Prior to the accident, he had used his personal vehicle fewer than 10 times in 16 years to meet with clients. The *Lobo* court concluded that there was clear evidence to support the conclusion that Tamco requires Rosario to make his car available whenever it is necessary for him to visit customer sites and that Tamco derives a benefit from the availability of Rosario's car. As such, he fell under required vehicle exception to the going and coming rule and his employer was held liable.

Despite efforts towards tort reform and limitations on the availability of deep pockets to compensate third-party victims for wrongful conduct, courts continue to carve-out exceptions to hold employers responsible for events occurring within the scope of its employees conduct, including when such conduct goes beyond the four walls of its place of employment so long as it involves a vehicle being used somehow for the benefit of the employer.

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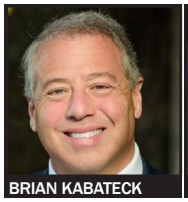
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