

## »Business Alert

### March 2010—Employers Beware! Recent Case Illustrates How You Can Be Liable for an Employee’s Car Accident during His or Her Daily Commute

Under the theory of “respondeat superior” California employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment. An exception to this rule applies where the employee is going or coming from work. Under the “going and coming” rule, employees are generally deemed to be outside of the course and scope of employment during their daily commute.

However, California courts have recognized a limitation to the going and coming rule when the use of the employee’s car incidentally benefits the employer, which is referred to as the “required-vehicle” exception. Recently, in *Lobo v. Tamco*, decided February 24, 2010, the California Court of Appeal for the Fourth Appellate District analyzed the scope of the “required-vehicle” exception and clarified that the protection provided to employers by the “going and coming” rule is fairly narrow. *Lobo v. Tamco*, 2010 WL 625805 (Cal. App. 4 Dist., 2010).

In *Lobo*, Luis Duay Del Rosario left the premises of his employer, Tamco, in his car on his way home for the day. As Del Rosario left the Tamco driveway he collided with Daniel Lobo, a San Bernardino County Sheriff. Lobo suffered fatal injuries. Lobo’s widow and three minor children filed two separate wrongful death actions against Del Rosario and Tamco, which were consolidated. Plaintiffs alleged Tamco was vicariously liable for Del Rosario’s conduct because Del Rosario was acting within the course and scope of his employment at the time of the accident. Tamco filed a motion for summary judgment contending that Del Rosario was not acting within the course and scope of his employment when he left work to drive home in his personal vehicle. The trial court granted Tamco’s summary judgment and Plaintiffs appealed.

On appeal, Plaintiffs argued that the “required-vehicle” exception applied under these circumstances because Tamco gained some “incidental benefit” by Del Rosario using his car for work purposes. Plaintiffs presented evidence that Tamco manufactured steel bars used in construction. Tamco employed Del Rosario, a metallurgist, as the quality control manager. Tamco occasionally required Del Rosario to visit clients to address quality

control issues. On those occasions, Tamco reimbursed Del Rosario for his driving expenses. Del Rosario also kept work equipment in his care in case Taco asked him to visit a client.

Tamco countered that the “required-vehicle” exception applies only when use of a personal vehicle for job purposes is “integral” to the job. Tamco presented evidence that it only infrequently asked Del Rosario to use his own car to visit clients. In fact, Del Rosario testified at deposition that he had only used his car about 10 times over 16 years for these client visits.

The Court of Appeal rejected Tamco’s argument that the “required-vehicle” exception only applies when the use of a personal vehicle for job purposes is integral to the job. Specifically, the Court held that the application of the “required-vehicle” exception turns on whether the employer expressly or implicitly required the employee to make the vehicle available (or has reasonably come to expect that the vehicle will be available for work purposes), and whether the employer derived a benefit from the availability of the vehicle. Since Tamco required Del Rosario to use his personal vehicle for client visits and Tamco benefited when Del Rosario could promptly respond to customer complaints- even if this was rare, the Court of Appeal reversed the judgment in favor of Tamco.

This recent decision makes clear that the “going and coming” rule provides minimal protection for employers who require their employees to use their personal vehicles for work purposes. Employers who mandate such a practice, no matter how infrequently, may be exposed to liability for the torts committed by those employees while driving their personal vehicles to and from work.

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