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New York District Court Rejects FDNY (New York City Fire Department) Employees' Bid To Be Paid For Commuting Time

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The City of New York's compensation practices received an endorsement last week from **Southern District of New York** Judge Loretta A. Preska, who ruled that employees of the FDNY's Building Maintenance Division ("BMD") could not recover under the FLSA for time spent commuting or time spent inspecting their vehicles. *Colella v. City of New York*, 2013 U.S. Dist. LEXIS 171687 (S.D.N.Y. Dec. 5, 2013).

Plaintiffs worked as tradesmen for the BMD. In 2004, the FDNY began requiring BMD employees to choose between two commuting options. Under the first option, Employees could travel directly to and from their job location each day in an assigned FDNY vehicle. This commuting time was not compensable, although employees were reimbursed for gas and tolls within the City's five boroughs. Under option two, employees could choose to report to a central location to pick up an FDNY vehicle at the start of their shift, and then proceed to their job locations. Plaintiffs, employees who had elected the first option, claimed they were entitled to compensation for their commute time as they transported necessary work tools, materials and equipment in their FDNY vehicles.

Generally, under the **Portal-to-Portal Act of 1947** ("PPA") and the **Employer Commuter Flexibility Act of 1996** ("ECFA"), both codified at *29 U.S.C. § 254*, commute time is exempted from the FLSA even if employer-provided vehicles are used. In *Colella*, the Court found the Plaintiffs' use of the FDNY's vehicles to travel to and from work fell squarely within the auspices of the ECFA as Plaintiffs used the vehicles to travel to the five boroughs of New York City, i.e., the normal commuting area for the FDNY's business, and transporting work equipment in their FDNY-issued utility vehicles was not a "principal activity" requiring compensation, because Plaintiffs were tradesmen not truck drivers.

Plaintiffs also sought compensation for the time spent performing required vehicle inspections, stopping to secure items that shifted in transit, and speaking with their supervisors about scheduling matters while commuting. In rejecting such assertions, the Court held none of these activities constituted compensable time under the FLSA in the context of Plaintiffs' work-vehicle commutes, and even if they did Plaintiffs could not prevail on their claims because the activities occurred infrequently. The Court also recognized it would be "administratively difficult to create a system for accurately recording the time Plaintiffs spent" performing such activities, which it deemed *de minimis*.

Colella is a favorable decision for employers, and builds off of the Second Circuit's 2008 decision in *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008). There, the Court held that FDNY fire alarm inspectors need not be compensated for commuting time under the FLSA even though they were required to carry inspection documents, unless carrying requirements extended the commute duration beyond a *de minimis* amount. Employers – particularly those permitting commuting in company vehicles under the ECFA – should review commuting policies and ensure that any related commuting requirements do not convert otherwise non-compensable commuting time into compensable time.

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