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In a recent decision, the California Court of Appeal expanded the potential scope of employer liability for vehicle accidents caused by employees. As a result, employers now need to be concerned that they might be liable for the negligent driving of commuting employees who have used their personal vehicles for work purposes. Thus, even where an employee's use of his or her personal vehicle is not an express condition of the job, an employer might be liable for accidents caused by an employee during his or her commute to and from work if:

- The employee has agreed in some way to make the vehicle available for the employer; and
- The employer relies on the use of the personal vehicle and expects the employee to make the vehicle available on a regular basis.

Under this ruling, these factors are easy for employers to trigger, even unintentionally.

Background leading to *Lobo*

In general, when employees act in the course and scope of their employment, the principle of *respondeat superior* applies such that the employer is vicariously liable for the tortious acts of its employees. The policy reason for this rule is to ensure that employers assume liability for the actions their employees perform on their behalf or for their benefit. Employees' work-related driving is an example of actions performed for the benefit of employers, and when employees are at fault for causing injuries while driving for work, their employers are vicariously liable for those injuries.

Courts have developed a general exception to the rule of *respondeat superior*. Thus, under the "going and coming rule," employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work, based on the rationale that employees are acting outside of the course and scope of employment during their daily commutes.

However, an employer cannot rely upon the "going and coming rule" in situations where the employer receives some incidental benefit from the employee using his or her own vehicle. This is commonly known as the "required vehicle exception" to the "going and coming rule." Under this exception, if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed (implicitly or explicitly) to make the vehicle available as an accommodation to the employer, and the employer has reasonably come to rely upon its use and to expect the employee to make the vehicle available on a regular basis, then *respondeat superior* applies, and the employer may be liable for accidents caused by the employee's driving, even when the employee is driving to and from work.

Key facts and finding in *Lobo*

In the case of *Lobo v. Tamco,* (2010) 182 Cal.App.4th 297, an employee of Tamco, a steel manufacturing company, was leaving work to go home for the day, and while pulling out of a driveway in his own car, he did not notice three motorcycle sheriffs deputies approaching with their sirens on. One deputy collided with the employee's car and was killed. Tamco was sued under a theory of *respondeat superior,* even though the employee was on his way home and rarely used his car for company business. The lower court agreed with Tamco that it could not be liable for the driver's negligence, but on appeal the appellate court reversed summary judgment, finding that a jury could find that the employer was liable. In so holding, the appellate court expanded the reach of the "required vehicle exception."

The employee in the *Lobo* case was a quality control manager. Part of his job description required that he meet with customers in person to answer technical questions, and when he did so, he was reimbursed for his expenses and mileage. Despite this job requirement, the employee rarely ever actually made these customer visits. In fact, while he used his personal vehicle to drive to customer locations, he did so *ten or fewer times* over the course of his *sixteen year career*. Even with this minimal use, however, the court held that the evidence was "clearly sufficient" to support the conclusion that Tamco required the employee to make his car accessible whenever it was necessary for him to visit customer sites. In addition, the court found that Tamco benefited from the employee making his car available, and a jury could find that the "required vehicle exception" applied to make Tamco liable for the employee's negligent driving. Thus, the court found that the employer could not win on summary judgment.

The key inquiry for the court was whether the employer derived a benefit from the availability of the employee's vehicle. The fact that the employer only rarely made use of the vehicle did not mean it could escape liability.

What this means

Employers should be very careful about whether and how they expect employees to use personal vehicles. To the extent possible, they should set forth their expectations clearly, through job descriptions, employment policies, or both. Employers also should make sure they are reimbursing employees for only work-related costs and mileage, not for general commute time or other, non-work-related driving expenses.

Employers also should keep in mind that any time there is an expectation that employees will use their personal vehicles, then even on those days where the employee does nothing but report to work and sit at his or her desk, the employer still could be liable for the employee's acts commuting to and from work.

Given this potential liability, if an employer is receiving some benefit from employees making their personal vehicles available for work purposes, it should review its insurance policies and check with its insurance carriers to make sure that its employees' tortious acts while driving to and from work are covered by its existing insurance.

Our team has a great deal of litigation and counseling experience regarding these issues, including with respect to employer liability, employee conduct, handbook policies and related issues. If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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