

USE OF EMPLOYER VEHICLES

MAY 20, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Economic and Educational Opportunities, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 1227]

[Including cost estimate of the Congressional Budget Office]

The Committee on Economic and Educational Opportunities, to whom was referred the bill (H.R. 1227) to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. PROPER COMPENSATION FOR USE OF EMPLOYER VEHICLES.

Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: "for purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting areas for the employer's business or establishment of the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee."

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.

PURPOSE

The purpose of H.R. 1227 is to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer-provided vehicles.

COMMITTEE ACTION

H.R. 1227 was introduced by Representative Harris W. Fawell on March 14, 1995. The Subcommittee on Workforce Protections held a hearing on H.R. 1227 on November 1, 1995. The witnesses who testified at the hearing were: Mr. Jack Herbert, McAllister Fuels Service Company, Pennsauken, New Jersey; Mr. Patrick T. Jopek, President, Merit Mechanical Systems, Inc., Darien, Illinois; and Mr. Manny Maderos, International Brotherhood of Electrical Workers.

On December 13, 1995, the Subcommittee on Workforce Protections approved H.R. 1227 by voice vote and ordered the bill favorably reported to the Full Committee. On March 21, 1996, the Committee on Economic and Educational Opportunities ordered the bill favorably reported to the House of Representatives by voice vote with an Amendment in the Nature of a Substitute.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute which was adopted by the Committee on Economic and Educational Opportunities on March 21, 1995, is explained in this report.

COMMITTEE STATEMENT AND VIEWS

Background

On August 5, 1994, the U.S. Department of Labor's Wage and Hour Division issued an opinion letter in response to an investigation regarding the compensation of travel time for employees who travel to and from work in employer-provided vehicles.¹ In the letter, the Department of Labor ruled that the time spent by an employee traveling from home to the first work assignment, or returning home from the last assignment, was similar to that of traveling between jobs during the day and therefore represented a principal activity, which must be compensated. No compensation would be required in cases where employees used their own personal vehicles.

The policy was based on the Portal-to-Portal Act of 1947² which sets forth the requirements for determining whether an employee must be compensated for an activity which occurs before ("preliminary") or after ("postliminary") the principal activity for which the employee is employed to perform. Examples of these types of activities are: walking, riding, or traveling to and from the actual place of the performance of work; checking in or out and waiting in line to do so; changing clothes; washing up, showering, or bathing; and retrieving or returning tools of the trade. Such activities can be considered to be part of an employee's principal activities, depend-

¹ U.S. Department of Labor, Wage and Hour Division, Opinion Letter dated August 5, 1994 (hereinafter "August 1994 opinion letter").

² 29 U.S.C. § 251-262.

ing on the individual facts of each case. For example, miners who must travel substantial distances underground before beginning work are more likely to be compensated for travel time than are individuals walking from a parking area to the factory.

The August 1994 opinion letter interfered with what is the customary practice in many industries, whereby employees commute directly from home to the job site and use of the company vehicle for such commuting is a matter of convenience for both the employer and the employee. A significant number of companies operate programs where employees are allowed to use company vehicles for this purpose. As Mr. Jack Herbert testified before the Subcommittee on Workforce Protections:

For many years, servicemen and women have had the use of company vehicles to commute to and from their homes without charge. This practice, while voluntary, is eagerly chosen by virtually all servicemen and women because of its significant benefit to them. This practice is used throughout the oil heat industry and many other service industries.

In response to numerous letters from Members of Congress expressing concern and opposition to the Department of Labor's position, the Department of Labor suspended enforcement of the August 1994 opinion letter.³ The Department of Labor subsequently issued a revised opinion letter on April 3, 1995,⁴ withdrawing the August 1994 opinion letter and modifying its position on the issue.

The April 1995 opinion letter held that time spent traveling between the employee's home and the first work site of the day and between the last work site of the day and the employee's home need not be compensated if: (1) driving the employer's vehicle between the employee's home and work sites at the start and end of the workday is strictly voluntary and not a condition of employment; (2) the vehicle involved is the type of vehicle which would normally be used for commuting; (3) the employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere; and (4) the work sites are within the normal commuting area of the employer's establishment.

The Committee recognizes that the April 1995 opinion letter is a retreat from the policy which was put forth by the Department of Labor in the August 1994 opinion letter, yet a number of issues remain unclear. The Department of Labor's most recent position would allow employers to treat travel from home to the first work site and from the last work site to home as ordinary, noncompensable commute time. However, in order for an employer not to count commute time in a company vehicle as compensable, all of the conditions delineated in the April 1995 opinion letter must be met. Those employers who do not meet each of the requirements may be vulnerable to back pay lawsuits by both the Department of Labor and employees.

³Letter dated October 19, 1994, from Secretary Robert B. Reich, U.S. Department of Labor, to the Honorable William D. Ford, Chairman of the Committee on Education and Labor, U.S. House of Representatives.

⁴U.S. Department of Labor, Wage and Hour Division, Opinion Letter dated April 3, 1995 (hereinafter "April 1995 opinion letter").

In addition, the Committee believes that because the Department of Labor has, within a short time period, issued two different opinions as to how the Portal-to-Portal Act applies to this area points to the need for clarifying legislation. Indeed, given the Department of Labor's inconsistency, courts may give little weight to the Department of Labor's current interpretation (see, e.g. *Teddy W. Baker, et al., v. GTE North Incorporated* (No. 3:94-CV-885RM) N.D. Indiana 1996). Thus it is important for Congress to clarify the intention of the Portal-to-Portal Act with regard to employee use of employer-provided vehicles for commuting.

Legislation

H.R. 1227 provides clarification regarding the use of an employer-provided vehicle for travel from an employee's home to the first work location at the start of the workday and from the last work location to the employee's home at the end of the workday. Such travel is not considered to be part of the employee's principal activities and therefore, the time spent in such commuting is not required to be compensated under the Fair Labor Standards Act of 1938.⁵ The limitation applies only if the use of the vehicle is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement between the employer and the employee or employee's representative. This clarification regarding an employee's "principal activity or activities" applies as well to activities performed by an employee which are incidental to the use of the employer-provided vehicle for travel by the employee at the beginning and end of the workday.

H.R. 1227 does not apply to time spent traveling between job sites. H.R. 1227 is an amendment to section 4(a) of the Portal-to-Portal Act. Section 4(a) applies only to activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities. Thus it is not necessary to repeat in H.R. 1227 that the language only applies to travel time which occurs at the beginning and end of the workday.

H.R. 1227 requires that in order for the travel time to be considered noncompensable, the use of the vehicle by the employee must be conducted under an agreement between the employer and employee or the employee's representative. This requirement is intended to balance the interests of both the employer and the employee while permitting maximum flexibility under the law. While H.R. 1227 does not require a written agreement, this requirement may be satisfied through a formal written agreement between the employee and employer, a collective bargaining agreement between the employee's representative and the employer, or an understanding based on established industry or company practices.

The April 1995 opinion letter establishes a requirement that in order for an employee's travel time to be considered noncompensable, the work sites must be located within the normal commuting area of the employer's establishment. The same test is used in H.R.

⁵ 29 U.S.C. § 201-219.

1227. Some have suggested that there should be a specific mileage limit, such as 30 miles. There are a variety of problems in trying to establish a specific mileage limit. Differences between urban, suburban and rural locations make a relationship between the distance traveled and the time involved impossible. Employees may reside outside of the service area where they are employed and employers may or may not maintain a physical establishment in the area.

H.R. 1227 limits noncompensable travel to travel between the employee's home and work sites within the normal commuting area of the employer's establishment or service area. This language is intended to recognize the differences that exist between geographic regions, industries, etc. that cannot be easily defined. H.R. 1227 is not intended to address travel outside the normal commuting area.

Activities which are merely incidental to the use of an employer-provided vehicle for commuting at the beginning and end of the workday are similarly not considered part of the employee's principal activity or activities and therefore need not be compensable. It is not possible to define in all circumstances what specific tasks and activities would be considered "incidental" to the use of an employer's vehicle for commuting. Communication between the employee and employer to receive assignments or instructions, or to transmit advice on work progress or completion, is required in order for these programs to exist. Likewise, routine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable. Merely transporting tools or supplies should not change the non-compensable nature of the travel. The Committee expects that the Department of Labor will provide guidance in this area, consistent with the purposes of H.R. 1227.

It is important to address two issues which are not specifically covered by H.R. 1227 but have been raised in conjunction with it. The first issue concerns the type of vehicle used for commuting. To be considered noncompensable travel time, the courts and the Department of Labor have generally considered that driving a company vehicle be similar to commuting in a private vehicle. The fact that a vehicle may have been modified for special purposes, displays company logos, or is specially equipped does not alter the nature of such travel.

While H.R. 1227 does not specifically address this issue, it is the intent of the Committee that the vehicle should be of a type that does not impose substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting. The fact that the vehicle may have been modified to meet the employer's specifications or requirements should not be considered a determining factor.

The second issue concerns cost to the employee for use of the employer's vehicle. It is the intent of the Committee that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer's vehicle in connection with commuting in employer-provided vehicles. However, the employer shall not be responsible for unrelated expenses, such as an employee's tax liability under the provisions of the Internal Revenue Code which may result from the employee's personal use of the employ-

er's vehicle or for traffic violations resulting from the improper operation of the vehicle by the employee.

Section 2 of H.R. 1227 makes the bill effective upon enactment and applicable to civil actions pending on the date of enactment, in which a final decision has not been entered. It clarifies a provision of the law that has been the subject of inconsistent and contradictory interpretations by the Department of Labor and the courts. The purpose of H.R. 1227 is to clarify the intent of the Portal-to-Portal Act as it applies to employee use of employer-provided vehicles for commuting at the beginning and end of the workday. It is therefore appropriate to apply the clarification to pending cases, as well as to future programs established by employers and employees. H.R. 1227 addresses a provision of law that has been ambiguous and the source of conflicting and contradictory interpretations by the Department of Labor. Thus, it is fair and reasonable to apply the clarification to pending cases as well as to any future situations.

SUMMARY

H.R. 1227, as amended, would amend the Portal-to-Portal Act of 1947 to clarify that use of an employer's vehicle for travel by an employee and any incidental activities performed by an employee which are related to the use of the vehicle for commuting shall not be considered to be part of the employee's principal activities if: (1) the use of the vehicle is subject to an agreement between the employer and the employee or representative of such employee; and (2) the vehicle is used for travel within the normal commuting area for the employer's business or establishment. The legislation would take effect upon enactment and would apply to any case in which a final judgment has not been entered.

SECTION-BY-SECTION ANALYSIS

Section 1. Proper compensation for use of employer vehicles

This provision would add language to the end of section 4(a) of the Portal-to-Portal Act of 1947 to specify that the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of the vehicle for commuting shall not be considered to be part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the vehicle is subject to an agreement between the employer and the employee or representative of the employee.

Section 2. Effective date

This section provides that H.R. 1227 would take effect upon the date of enactment and would apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before or on the date of enactment.

EXPLANATION OF AMENDMENT

The Amendment in the Nature of a Substitute is explained in this report.

OVERSIGHT FINDINGS OF THE COMMITTEE

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

INFLATIONARY IMPACT STATEMENT

In compliance with clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment into law of H.R. 1227 will have no significant inflationary impact on prices and costs in the operation of the national economy. It is the judgment of the Committee that the inflationary impact of this legislation as a component of the federal budget is negligible.

GOVERNMENT REFORM AND OVERSIGHT

With respect to the requirement of clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 1227.

COMMITTEE ESTIMATE

Clause 7 of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 1227. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

APPLICATION OF LAW TO LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. This bill amends the Portal to Portal Act of 1947 as it relates to the payment of wages to employees who use employer owned vehicles. Consistent with Section 225 of the CAA and Section C501.106 of the Regulations submitted by the Office of Compliance and adopted by the House of Representatives on April 15, 1996, the Portal to Portal Act is applicable to the legislative branch in that it defines and delimits the rights and protections of the Fair Labor Standards Act which is made applicable to the legislative branch by the CAA under section 102. Hence, the provisions of this bill which amend the Portal to Portal Act apply to the legislative branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. The Committee received a

letter regarding unfunded mandates from the Director of the Congressional Budget Office and has such the Committee agrees that the bill does not contain any unfunded mandates. See *infra*.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirement of clause 2(1)(3)(B) of rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 2(1)(3)(C) of rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1227 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 3, 1996.

Hon. WILLIAM F. GOODLING,
*Chairman, Committee on Economic and Educational Opportunities,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1227, a bill to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer-owned vehicles, as ordered reported by the Committee on Economic and Educational Opportunities on March 21, 1996. CBO estimates that enactment of the bill would have no significant effect on federal spending. H.R. 1227 contains no intergovernmental or private sector mandates as defined in Public Law 104-4, and would impose no direct costs on state, local, or tribal governments. The bill could in fact save federal, state and local governments and private sector employers money by reducing payroll liabilities.

The bill would amend the Portal-to-Portal Act by clarifying that incidental commuting time an employee spends in an employer-owned vehicle shall not be considered to be part of the employee's principal activities, provided that the use of the employer's vehicle is subject to an agreement between the employer and the employee, and that the travel is within the normal commuting area for the employer's business. It would reduce potential liability of employers, particularly in the state and local government sector.

Current law does not classify commuting time as a principal employment activity. However, some employees argue that because a vehicle is employer-owned, commuting time spent in such a vehicle should be subject to minimum wage and maximum hour requirements. In April 1995, the Wage and Hour Division of the Department of Labor retracted an earlier opinion that would have required compensation for such commuting time (The earlier opinion was not being enforced at the time that it was retracted). Consequently, many employers do not factor in commuting time when computing a worker's compensation.

Currently, a number of cases are pending that could affect state and local governments whose employees commute in government-owned vehicles. If, under current law, the courts determine that the time spent commuting in a company vehicle and on incidental activities is subject to compensation, state and local governments

would face additional costs. H.R. 1227 would eliminate this potential liability.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christi Hawley.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 4 OF THE PORTAL-TO-PORTAL ACT OF 1947

PART III

FUTURE CLAIMS

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particularly workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. *For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.*

* * * * *

MINORITY VIEWS

We oppose H.R. 1227, as reported, because it effectively eliminates the right of workers to choose how they will commute to work, eliminates the ability of workers to exercise discretion over what they do while they are commuting, and allows employers to require employees to work off the clock, without being paid for their services. At a time when corporations are making historic profits, while working families are seeing their wages decline, the Republican Majority is seeking to enact legislation that deprives employees of their personal time and hard-earned money.

The reported bill amends the Fair Labor Standards Act (FLSA) to allow employers to require workers to perform work without being paid for it. We are struck by the irony that a majority of the Republican Members of Congress oppose increasing the minimum wage, but, as evidenced by this legislation, are perfectly willing to take the time and effort to make sure that work does not always pay.

H.R. 1227, as introduced, was originally described as seeking to do no more than codify the Department of Labor's April 3, 1995, opinion letter (hereinafter referred to as the "April 30 DOL opinion") which specified when an employee must be compensated for commuting in an employer-owned vehicle.

That letter provided four conditions that must be met if an employee is not to be compensated for time commuting between home and work in an employer's vehicle:

The employee must voluntarily choose to use the employer's vehicle.

The employee cannot incur costs as a result of using the employer's vehicle.

The vehicle must be of a type that is normally used for commuting.

The commute must be within normal commuting distance.

For numerous reasons, H.R. 1227, as reported bears little resemblance to the Department of Labor's policy. First, the bill permits an employer to compel an employee to agree to use the employer's vehicle for commuting purposes, *as a condition of employment*. The Majority asserts that it has been customary in many industries for employees to use employer vehicles for commuting purposes without being compensated for that time. The Majority cites the testimony of Mr. Jack Herbert:

For many years servicemen and women have had the use of company vehicles to commute to and from their homes without charge. This practice, **while voluntary**, is eagerly chosen by virtually all servicemen and women because of its significant benefit to them (emphasis added).

The Majority's choice of quotes is interesting because it points out a principal difference between what has been customary (truly voluntary employee decisions) and what is allowed under H.R. 1227 (compelled use of an employer's vehicle). The bill explicitly provides that use of an employer's vehicle for commuting purposes is not compensable if "the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee." Further, the Majority's views specify that such an agreement need not be in writing, but may rest on "an understanding based on established industry or company practice." Notably, during Committee markup, the Majority specifically rejected an unambiguous amendment offered by Representative Andrews (D-NJ) providing that such agreement must be knowing and voluntary, and may not be required as a condition of employment. The Majority chose to leave H.R. 1227 weak on the issue of employee voluntariness, preferring to grant employers wide latitude to impose, as a condition of employment, non-voluntary and non-compensable employee use of the employer's vehicle.

Second, H.R. 1227, as reported, provides that an employee may be required to perform any duties "incidental" to the use of the vehicle without compensation for that time. The Majority states in its views,

Activities which are merely incidental to the use of an employer-provided vehicle . . . are similarly not considered part of the employee's principal activity or activities and therefore need not be compensable. It is not possible to define in all circumstances what specific tasks and activities would be considered "incidental" to the use of the employer's vehicle for commuting.

The Majority goes on to state that activities such as "routine vehicle safety inspections or other minor tasks **have long been considered preliminary or postliminary activities and are therefore not compensable**" (emphasis added).

The Majority's characterization that such activities have long been considered "incidental" and therefore non-compensable under current law is simply not true. The Fifth Circuit, in *Dunlop v. City Elec., Inc.*, 527 F.2d 394, articulated the parameters between "incidental" and "principal" activities:

. . . Decisions construing the Portal-to-Portal Act in conjunction with the F.L.S.A. [Fair Labor Standards Act] make clear that the excepting language of section 4 was intended to exclude from F.L.S.A. coverage those activities "predominantly . . . spent in [the employees'] own interests." [*Jackson v. Air Reduction Co.*, 402 F.2d 521, 523 (6th Cir. 1968).] No benefit may inure to the company. [*Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283, 287 (5th Cir. 1969).] The activities must be undertaken "for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." [*Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).] The exemption was not intended to relieve employers from liability for "any work of consequence performed for an employer" [(*Secretary of*

Labor v. E.R. Field, Inc., 495 F.2d 749 (1st Cir. 1974)], from which the company derives “significant benefit”. [*Cherup v. Pittsburgh Plate Glass Company*, 350 F. Supp. 386, 391 (N.D. W. Va. 1972)].

In *Dunlop*, as quoted in *Teddy W. Baker, et al., v. GTE North Incorporated* (the case referenced in the Majority’s views):

The Fifth Circuit . . . found that the plaintiff electricians’ pre-shift activities, including filling out time, material, and supply and cash requisition sheets, **checking job locations, cleaning out and loading their trucks with the necessary materials, fueling the trucks, and picking up the electrical plans for the day’s jobs**, were “within the broad range of ‘principal activities’ performed at their employer’s behest and for the benefit of the business.” [*Teddy W. Baker, et al., v. GTE North Incorporated*, No. 3:94–CV–885RM, (N.D. Indiana 1996) at page 13.] (emphasis added).

Therefore, in light of overwhelming case law establishing that the determinative question is who benefits from the activities rather than whether the activities are “preliminary” or “postliminary,” we are wholly unpersuaded by the Majority’s assertion about what “incidental” means.

Third, beyond denying employees compensation for services for which employers must pay under current law, H.R. 1227, as reported, effectively enables employers to transfer to employees the costs of maintaining the employer’s vehicle. The Majority’s views state that “It is the intent of the Committee that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer’s vehicle . . .”. If that is, in fact, the intent of the Committee, we question why the Majority did not agree to include such a limitation within the plain language of the statute. Again, the Republican Majority rejected the Andrews amendment which expressly codified the April 3 DOL opinion by providing that employees would incur “no cost for driving, parking, or otherwise maintaining such vehicle.”

Nowhere within the plain language of the legislation is there any restriction regarding the assumption of cost of the use of the employer’s vehicle by the employee. Indeed, assuming the “agreement” between the employer and the employee (which, again, may be imposed as a condition of employment) required the employee to assume costs associated with the operation of the vehicle, there is no basis within the plain language of the legislation for a court to reach any conclusion other than that use of the employer’s vehicle remains outside of the employee’s principal activities. Further, the fact that the Committee specifically requested an amendment including such a limitation is more persuasive legislative history than the legislative dicta contained in the Majority’s views. Rather than “codifying” the April 3 DOL opinion, the Majority opted to muddy matters.

Fourth, H.R. 1227, as reported, effectively permits an employer to require the employee to use any vehicle, from a farm tractor to 16-wheel tractor trailer, for commuting purposes. The Majority views state that “it is the intent of the Committee that the vehicle

should be of a type that does not impose substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting." The plain language of H.R. 1227, however, includes no limitation whatsoever on what kind of vehicle may be used for commuting purposes. The Andrews amendment would have made the provision clear by requiring that vehicles used for commuting purposes be "of a type that does not impose substantially greater difficulties to drive than the type of vehicle that is normally used by employees for commuting." The Republican Majority rejected that clarification, too.

H.R. 1227 applies retroactively to pending litigation, notwithstanding the fact that the bill bears little relationship to the April 3 DOL opinion, or to any other previous policy enunciated by the Department of Labor regarding the treatment of time spent commuting in an employer-owned vehicle. In short, the bill substantially modifies current law and intentionally seeks to immunize employers who violated the law.

The original theory behind the exemption for commuting time was that an employee who is commuting to and from work is on his or her own time. The employee may choose the means by which he or she commutes. The employee may choose the route by which to go. The employee may perform any errand of his or her choice on the way to, or from, work. The employee may pick up and drop off passengers as he or she desires. In short, other than being required to be at a certain place by a certain time, the employee's commuting time has nothing to do with the employer. It is the employee's own time to do with as he or she sees fit. In such circumstances, regardless of whether the employee is using his or her own vehicle or the employer's, the employer should not be required to compensate the employee. No one contends otherwise.

Under this legislation, however, it is the employer, and not the employee, who can control and manipulate the employee's commuting time. Here is the most obvious example of how an employee's discretion is compromised: It is extremely common for parents to drop off their children at school on the way to work. For insurance reasons, however, employers restrict the use of their vehicles to "employees only"; non-employee passengers in such vehicles are uniformly prohibited. Therefore, an employee who can be required to use an employer's vehicle to commute to work, pursuant to this legislation, is also effectively prohibited from engaging in the very common and often necessary family task of dropping off his or her child at school on the way to work.

No one contends that this legislation confers upon an employee the free use of the employer's vehicle. Employers have a legitimate interest in regulating the use of their vehicles and typically do so. Employees are not generally permitted to use the vehicles for personal errands; rather they are restricted to using them only to travel to, and from, the job site. Employers also regularly and typically restrict the kinds of activities an employee may engage in while traveling to and from the job site in an employer-owned vehicle. For example, under the plan at issue in *Teddy W. Baker, et al., v. GTE North Incorporated*, company rules covering the use of vehicles for commuting purposes explicitly stated:

Vehicles are to be used only for business purposes. No personal use shall be authorized. No rider shall be allowed in the vehicles while traveling. No authorized stops will be allowed while the employees are traveling except for fuel. The employee may stop **in route** home to purchase milk, bread, cigarettes, etc. [Id. at page 17.] (emphasis added.)

Even though employees were on their own time and were not being paid, GTE North required employees to adhere to all company rules as if they were being paid and restricted where the employees could go, where they could stop, and even regulated what they could purchase. Unlike H.R. 1227, however, in the GTE plan the employees freely and voluntarily chose to use the employer's vehicle and could have used their own vehicles to commute to and from work without being subject to such restrictions. Employees do not have that option under H.R. 1227.

Adding salt to the wound, H.R. 1227 enables employers to require employees to perform services for free that employers are otherwise required to pay for under current law. The employer can require the employee to load the vehicle, to fuel the vehicle, to maintain the vehicle, to take job assignments, or to perform any other duty "incidental" to the commute without paying the employee for those services. In any other circumstance, an employer is unquestionably required under the FLSA to pay the employee for each and all of those services.

In conclusion, the Republican Majority contends in its views that "it is important for Congress to clarify the intention of the Portal-to-Portal Act with regard to employee use of employer-provided vehicles for commuting." In seeking this purported clarity, however, the Majority attributes limitations to the legislation that cannot be sustained by a facial reading of the legislation. Further, it mischaracterizes "incidental" duties in a manner that bears no relationship to the present state of the law. In fact, the Majority views more accurately describe the Andrews' amendment, which it rejected, than its own reported bill. The inevitable consequence of distorting the description of the provisions of the legislation is not the clarity that the Majority claims to desire, but years of litigation caused by vagueness and ambiguity. The plain language of H.R. 1227 and the Majority's views are inherently inconsistent, inimical to current case law and customary employer practices, and injurious to the ability of workers to control their own time.

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