FIVE THINGS EMPLOYERS NEED TO KNOW ABOUT THE ECJ'S DECISION ON WORKING TIME

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Labor, Employment and Workplace Safety Alert

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The European Court of Justice decided last week that for workers without a fixed place of work, time spent travelling from home to their first customer appointment and from the last customer appointment back home counts as "working time" for the purposes of the Working Time Directive, implemented in the UK via the Working Time Regulations 1998 (WTR). The decision has been well publicised. Here, we focus on what employers need to know and do as a result.

WHO DOES IT AFFECT?

This decision only affects "peripatetic workers" without any fixed place of work. The workers in this case were technicians responsible for a particular area of Spain, who were nominally assigned to a central office in Madrid after local offices were closed, but who in reality were based from home. Each technician used a company vehicle to travel from his or her home to customer assignments and then back home again at the end of each day.

In the UK, arrangements such as this are common in particular sectors (for example, the care sector) or for particular jobs such as travelling sales representatives and domestic heating engineers.
The decision does not have any impact on employees with a fixed place of work, whether that fixed place is their home, an office, or a customer site.

WE EMPLOY PERIPATETIC WORKERS. DO WE NOW HAVE TO PAY THEM MORE?

Not necessarily. This decision was about what counts as "working time" under the Working Time Directive. In response to submissions from the UK Government that this decision would lead to an inevitable increase in costs for employers, the ECJ made clear that save in relation to paid holiday time, the Directive does not apply to the remuneration of workers and the method of remuneration would be left to national law.

In the UK, the national minimum wage (NMW) expressly does not apply to time spent travelling between home and work. So even if that time is counted as working time for the purposes of the WTR, it does not count for calculation of the NMW. Therefore employers can still ignore this time when calculating whether the hourly rates which they pay comply with the NMW.

Beyond the NMW, rates of pay are dealt with in contracts of employment or collective agreements with unions. Employers need to look at how they refer to hours worked. If there is any ambiguity in the contract over what counts as paid work, this decision could be used by employees and unions to argue that peripatetic employees should be paid more. Employers who use such workers would be well advised to ensure that going forward,

contracts and collective agreements expressly address whether travel between home and the first and last appointments of the day are paid. It is not illegal for employers to state in the contract that such time will not be paid.

EMPLOYERS NEED TO MONITOR WORKING HOURS

The WTR imposes a 48 hour limit on average weekly working hours. For peripatetic workers, travel time between home and appointments now counts towards that limit.

If the worker has opted out of the limit, which many have, then this is not an issue. If the worker has not opted out, and obtaining such an opt out is not an option for the employer, then the employer will need to closely monitor the worker's hours to ensure that the limit is not breached. Employers are already under an obligation to keep records of hours worked by workers who are subject to the limit.

The employer may be able to schedule appointments in such a way that the impact of this decision is reduced, for example, by ensuring that the first and last appointments of the day are close to the employee's home so travel time is reduced.

It is also worth remembering that the 48 hour limit is an average limit usually calculated over a 17 week reference period. If customer demand peaks and troughs, the workers may still be within the limit even if some weeks they work in excess of 48 hours.

CONSIDER REST BREAKS

The WTR gives workers the right to a 20 minute rest break for every 6 hours worked and 11 hours of uninterrupted rest in each 24 hour period. Employers should ensure that workers are still able to take these breaks if their working day is longer than previously anticipated.

DOES MORE WORK MEAN MORE HOLIDAY?

For most employees, holiday is calculated in weeks and days. A day off is a day off, whether the worker normally works 1 hour or 10. So a slightly longer working day will not result in more days being granted: the worker will still receive the same amount specified by law, the contract of employment or a collective agreement.

However, where the employer decides to pay its worker for travelling time between home and appointments as a result of this ruling, this means that the pay which an employee is entitled to receive when taking holiday will also increase.

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