La Kanzlei

Travel time = working time - ECJ decision has significant impact on French employment contracts

Arbeitsrecht

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In a judgment of 10 September 2015, the ECJ ruled that journeys made by employees without a fixed or usual place of work - i.e. typically sales representatives - between their place of residence and the customer's premises are to be regarded as working time. This was founded on the definition of working time in Article 2.1. of the Directive and the Directive's objective of protecting the health and safety of workers by ensuring a minimum level of rest periods.

This decision may also have a significant impact on French distribution and field service contracts, as it is contrary to the previous legal situation. So far, the French Supreme Court has confirmed on several occasions that even for employees without a fixed place of work, the first and last journey of the day cannot be considered as working time under Article L. 3121-4 of the French Code du Travail.

According to this case law, this time is not taken into account when calculating the maximum daily and weekly working hours, nor when calculating overtime and the related bonuses and rest periods. It merely results in financial compensation or compensatory rest periods. This assessment from French labour law is a fundamental aspect for many employers when organising the working time of their employees.

Travel time between home and the customer may take several hours, and its valuation as working time would considerably reduce the amount of working time available in individual cases. The facts on which the ECJ's ruling was based were atypical: the employees concerned had lost their fixed place of work since the closure of the employer's regional offices and the times for journeys to customers which had previously been started from the office and calculated as working time were, in the case decided, started from the place of residence and regarded as rest periods.

In several places the ECJ refers to the specific nature of these circumstances, so it is to be hoped that the principles of the judgment are not applicable to all cases. However, in view of the general wording of the decision, a full application of this solution to all workers in France without a permanent or usual job cannot be ruled out for the time being.

Since the ruling is directly and retroactively applicable, there is therefore already a risk that affected employees in France could, for example, demand repayment of overtime on this basis.

Practical advice:

For affected companies (only those whose employees don't have a permanent job and travel extensively), it is initially possible to wait and see how the case law in France and Europe develops and whether the above-mentioned decision is not limited to the individual case in question. In doing so, one will have to accept the risk that employees may be required to pay overtime bonuses. In addition to the assertion of overtime or claims for repayment, there may even be a risk of criminal liability for illegal employment and disregard of the maximum working hours.

Anyone who considers this risk to be too high (especially if there is a large number of affected employees) should examine the respective employment contracts in detail and take countermeasures if necessary. One possible solution could be to grant the employee the greatest possible freedom in the arrangement and organisation of the trips, as the criteria of being bound by instructions during the trips seems to have been one of the essential criteria of the ECJ in assessing the legal issue, according to a first analysis. Alternatively, consideration could be given to reorganising the working hours of sales staff. In doing so, attention will have to be paid to the specific circumstances of the individual case in order to reduce the risks arising from the new ECJ case law as far as possible.

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