

Time spent travelling to and from work after the Employment Reform

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Until the Employment Reform under Law 13.467/2017, employees were paid for time spent travelling to and from work in means of transport provided by the employer, if the workplace was difficult to access or was not served by public transportation. Prior to the Reform, the legislator took the view that employees travelling to and from work in such circumstances were at the employer's disposal, even if they were not actually working. And even in cases where the workplace was located in an urban area with a public transportation service, many decisions by the labor courts took the position that travel time should be paid if the public transportation service did not allow employees to travel to and from work at times compatible with their needs and safety.

This travel time, or in itinere time as it is referred to in Brazil, no longer exists. Views have changed, and travel time is not longer considered to be part of employees' working hours. The Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) now provides that "[t]he time spent by an employee in travelling from his or her residence until the employee has effectively taken up his or her work post, and in returning to the employee's residence, whether by foot or by any other means of transportation, including transport provided by the employer, is not included in time worked by the employee, as it is not time spent at the employer's disposal."

The objective in the change was to relieve businesses of the obligation of paying for travel time, and the payroll burdens in itinere pay represented, because it formed part of employees' salary and so increased the cost of all salary-based benefits. Furthermore, once relieved of this self-perpetuating burden, employers would be more likely to offer good-quality, regular transportation to their employees: after the change in the law the employers would still continue to be located in remote locations without regular public transportation, they would still need workers at the workplace, and the workers would still need jobs and transportation.

Some questions remain open, however, although with time the labor courts will provide reliable guidance. For example, with the Employment Reform, some employers are unsure whether they can simply stop paying for travel time, or if payment for travel time is an acquired right that cannot be withdrawn. Another question is whether employers can continue paying travel time to those who were receiving it at the time the change in the law was made, but not pay travel time to employees hired after the Employment Reform. Or, since pay for travel time is no longer a legal requirement, would paying employees from time spent in travelling to and from work constitute a kind of benefit?

The question that causes the most concern is perhaps the issue of accidents suffered by employees while on the way to or from work. According to article 21(IV)(d) of Law 8213/91 (which governs benefits under public pension and

social security plan), an accident that occurs while an employee is travelling to or from work is deemed to be a work-related accident, regardless of the means of transportation used, including a vehicle owned by the employee.

Now that travel time is no longer considered to be time at the employer's disposal, there is some controversy among employment law specialists as to whether an accident suffered on the way to or from work (as long as the employee does not deviate from the usual route) still constitutes a work-related accident.

The Employment Reform is relatively recent, and the labor courts have not yet had enough time to establish their position on these questions. Nonetheless, as with most questions that arise in the ordinary course of running a business, time will settle them. In the meantime, however, employers should be aware of these potential problems in making their decisions.

NOTES

[1] CLT, art. 58§2, as amended by Law 10.243/2001.

[1] CLT, art. 4.