

Farm workers and time spent in transit

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For employment law purposes, time spent in transit or time *in itinere* is the time workers spend getting to their workplace. As a rule, time spent in transit is not considered to be time during which employees are at the employer's disposal, and so it is left up to employees to weigh the difficulties of getting to and from work when they accept an offer of employment.

Little by little, however, the Labor Courts had taken the position that when the workplace was difficult to reach, or was not served by public transportation, time spent by employees in transportation provided by the employer counted as time worked.

The various details dealt with by the precedents were summarized in Restatements of Precedents 90 and 320 issued by the Superior Labor Appeals Court (TST – *Tribunal Superior de Trabalho*), which provide that incompatibility between the times at which the working day begins and ends and the public transportation schedule is sufficient to entitle workers to pay for time in transit; the same holds true when the employer charges workers for part or all of the cost of employer-supplied transportation; and if public transportation is available part of the way, then employees are entitled to pay only for the portion not covered by public transportation.

In the past, article 58§2 of the Consolidation of Labor Laws (CLT – *Consolidação das Leis de Trabalho*) provided for payment of time spent in transit along the same lines as the precedents, but it was amended in 2017, in the Employment Law Reform. The CLT now provides that time spent by employees in getting from their homes to their work stations (and getting back), whether by foot or other means of transportation (even if provided by the employer), is no longer included in calculating time worked by employees.

In the rural context, the changes introduced by the Employment Reform have raised some questions: Is it possible to stop paying time in transit to employees who were receiving it when the Reform came into effect? What risks are associated with cancelling payment for time in transit? Can employers pay time in transit to some employees and not to others?

In point of fact, even before the courts could start defining a new position on these and other questions, labor unions began to deal with the issue, either through collective agreements with individual employers, providing that employees will be paid a fixed amount for time spent in transit, or through collective conventions with employer associations that set out rules very similar to those in effect prior to the Reform. Some employers therefore continue to pay their employee for time spent in transit by virtue of collective bargaining instruments.

In the absence of a collective bargaining instrument governing pay for time in transit, a cautious approach is advisable. A number of recent decisions have held that, given the rural context and the peculiarities of farm work, the

amendments made to article 58 of the CLT do not apply, and consequently that when employers provide transportation to the place of work, time spent in transit counts as time worked, within the meaning of TST Restatement of Precedents 90, and article 4 of the CLT, which deals with time spent at the employer's disposal.

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