

Working Time Directive Guidance Update

Issue

The European Court of Justice (CJEU) has recently ruled that time spent travelling between home and the location of the first and last appointments of the day must be considered 'working time' for those who do not have a fixed or habitual place of work (see case [C-266/14](#) – Federación de Servicios Privados del sindicato Comisiones obreras v. Tyco Integrated Security SL).

The Judgment placed particular relevance on the fact that during the first and last journeys to customers, workers were 'at their employer's disposal' (because they were not able to use their time freely or pursue personal interests during that time).

UK Implications

This Judgment will impact how the Courts and Tribunals in the UK now interpret working time for peripatetic workers. Whilst there is no statutory requirement under the UK Working Time Regulations that this additional working time should be paid, average pay for the total hours worked must not fall below the UK National Minimum Wage.

Rest Breaks

The CJEU ruling may also affect rest breaks. The UK Working Time Regulations require that workers have 20 minute rest breaks for every 6 hours worked as well as a minimum gap of 11 hours between each working day. The change to include travel time as working time may mean that work schedules need to be adjusted to comply with these regulations.

Optical Sector Implications

In the optical sector, this Judgment is likely to apply to peripatetic practitioners, such as those who work in domiciliary eye care, who do not have a fixed or habitual place of work to report to at the start and end of each working day, for example to collect a vehicle or equipment.

The Judgment is unlikely to apply to practitioners who work from a fixed location, even where such location changes on a regular or daily basis, for example under typical locum arrangements.

NB: The Judgment is likely to apply to locum practitioners who are engaged to cover a domiciliary post to which the ruling applies as above.

Whilst locums are often self-employed contractors, you should note that depending on how locums are engaged and incorporated into your business they may be deemed to be workers, so the ruling may apply to them. You should seek advice from your Optical Confederation representative body or company solicitor if you engage locums as contractors to work for you on a regular basis.

Timescale

This ruling does not require any change to EU or UK legislation and so applies immediately.

Please see Annex 1 for a more detailed description of the Judgment and its implications in relation to relevant legislation. We also include some guidance for you to consider alongside a review of your own specific circumstances.

Contact Details

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Annex 1

The Judgment

This ruling comes from a CJEU case ([C-266/14](#)) brought by Spanish workers against their employer Tyco – a security system provider. Tyco installs and maintains security systems within several geographical regions but operates from a central office. Its employees had previously operated from regional bases but more recently had been attached to its central office. On a day-to-day basis, employees (technicians) operated from home to install and maintain systems within a set geographical region. The technicians were informed of the daily schedule by phone the previous evening and were required to travel up to three hours between home and the first and last customers of the day.

The CJEU held that workers who have a regular place or places of work can decide whether the travel distance between their home and such place of work is acceptable. Workers with a place of work that varies on a daily basis, often with limited warning, do not have this option. They are required to be available to their employer during their travel time (for example, to be redirected to a different customer location) and cannot use their time freely to pursue their own interests. The time they spend commuting both between home and customers is therefore seen as time ‘at the employer’s disposal’ and thus working time. Also of particular relevance in this case was the CJEU’s finding that the first and last journeys of the day to customers were regarded as working time before Tyco’s regional offices had been abolished and the technicians came to start their working day from home rather than the regional office. The nature of those journeys did not change, only the departure points.

Implications

Working Time Regulations

Under UK [Working Time Regulations](#) workers cannot work more than 48 hours per week (or more than 40 hours per week if the worker is under age 18) unless they choose to opt out. For workers over age 18 this is calculated by reference to average hours over a 17 week period, so in some cases workers might be able to work over 48 hours in a specific week. Travel time between home and customers may now be included in this total for those peripatetic workers who do not have a fixed or habitual place of work.

Employers may ask a worker to opt out of this limit, but they cannot require it or dismiss, refuse to employ or otherwise penalise a worker for refusing. The decision to opt out can be cancelled at any time with a notice period of at least seven days but up to 3 months as specified in the opt out agreement. An example of the agreement to opt out and cancellation of this agreement is contained in Annex 2.

The Working Time Regulations also mandate that workers have suitable rest breaks. Workers must be allowed a 20 minute break or rest period for every 6 hours worked as well as a minimum gap of 11 hours between each working day. Note that under the Judgment, the break or rest period will be calculated from the time a worker arrives at home at the end of a day’s work to when they set off again for their first customer the next day.

What action is required?

- An opt out agreement must be in place if the addition of travel time to and from the first and last customer of the day means that a worker's average total working hours over a 17 week period are more than 48 hours per week.
- Work schedules must be adjusted to allow workers to have a break every 6 hours with reference to when working time now starts and finishes.
- Work schedules must be adjusted if the Judgment means that workers do not have a minimum gap of 11 hours between arriving at home and setting off again the next day.

National Minimum Wage and Living Wage

As of 1 October 2015 the National Minimum Wage is £5.30 for 18-20 year olds and £6.70 for workers age 21 and over. The Government recently announced the introduction of a National Living Wage for workers age 25 and older, which will bring salaries up to £9 per hour by 2020. The first stage of the National Living Wage comes into effect on 1 April 2016, from which point employers to be required to pay workers over age 25 at least £7.20 per hour.

In the UK there is no statutory requirement to pay workers for additional hours beyond their standard hours of work. Specific terms agreed in contracts may vary as to pay for variable hours of work or overtime. However, workers' average pay for the total hours worked must never fall below the National Minimum Wage, or the National Living Wage where this applies.

How a worker's total hours and pay are calculated will depend on the National Minimum Wage Regulations, the specifics of their contract and the period over which they are paid – the 'pay reference period' (e.g. weekly, monthly, quarterly). The [National Minimum Wage Regulations](#) should be consulted to ensure that the correct calculation has been made. The rules are complex as to what counts towards working time and pay for these purposes. As a starting point, average pay rate can be determined by dividing the total hours worked in a pay reference period by the total remuneration in that period:

$$\text{Hours worked in period} / \text{Pay in period} = \text{Average pay per hour}$$

For workers who do not have a fixed or habitual place of work, time spent travelling between home and the first and last customers of the day is time spent at the employer's disposal and must be included in this calculation even if the time itself is not paid.

What action is required?

- Changes to pay and/or working pattern must be made if the addition of travel time causes an employee's average pay to fall below the National Minimum Wage – or National Living Wage if applicable.
- The relevant sections of the National Minimum Wage Regulations 2015 (Part 3 for hourly paid workers and Part 6 for salaried workers) should be consulted to ensure that the correct wage and working time calculations has been made for the type of workers and their specific contract conditions.

Employment Contracts

Many contracts state that travel time between home and the first and last customers of the day is excluded from working time. Whilst the contractual position is not changed, the statutory position under the Working Time Regulations (opt out and rest breaks) and the National Minimum Wage Regulations (minimum pay) will take precedence for workers who do not have a regular or fixed place of work.

There are a number of different contract types and terms whose interpretation may be impacted by this Judgment. For example, some contracts state that workers will be paid 'for all hours of work,' which arguably may now be interpreted to include time spent travelling between home and customers for those who do not have a regular or fixed place of work.

Other employment contracts may specify the number of hours of work that can be done before overtime pay is triggered. Time spent travelling may now count towards these hours, meaning that overtime pay could be due for what has previously been treated as normal working hours.

It will be necessary to look at the details of employment contracts to determine the effects of this Judgment and what changes to practice may be required in specific cases.

What action is required?

- Employment contracts must be evaluated to determine the specific implications of the Judgment in each case.
- Employers and workers should take legal advice where appropriate.
- Employers should consider updating their contracts with the new ruling in mind and should bear in mind that they may need to, and indeed it is best practice to, consult and/or reach agreement with staff affected before making any changes to existing contracts.

Annex 2

Opting out of the 48 hour week

You can choose to work more than 48 hours a week on average if you are over 18.

Your employer can ask you to opt out, but they cannot force you to opt out and you cannot be dismissed or treated detrimentally for refusing.

You can opt out for a certain period or indefinitely. It must be voluntary and in writing.

Example of opt-out agreement:

I [worker's name] agree that I may work for more than an average of 48 hours a week. If I change my mind, I will give my employer [amount of time between 7 days and 3 months] notice in writing to end this agreement.

Signed..... Dated.....

Cancelling an opt-out agreement

You can cancel your opt out agreement at any time, even if it is part of your employment contract. You must give your employer at least 7 days' notice. You may have to give more notice (up to 3 months) depending upon what is written into your opt out agreement. Your employer cannot force you to cancel your opt out agreement.