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European Court of Justice Expands the Definition of Working Time

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The European Court of Justice ("ECJ") recently issued a decision regarding the paid working time of certain mobile employees that will have a significant impact on companies with employees in the European Union. The ECJ's decision in *Federación de Servicios Provados del sindicato Comisiones obreras (CC.OO.) v. Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA*,¹ expands the definition of working time of peripatetic employees (i.e., employees who are not assigned to a fixed or habitual place of work) to include what would normally be viewed as commute time. The impact of the decision will affect how multinational companies calculate (and thus, compensate) hours worked for those employees who do not have a fixed office or habitual place of work.

Background

The defendants in the case are Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA (collectively, "Tyco"), multinational fire and security companies that install and maintain antitheft security systems. In 2011, Tyco closed its regional offices in Spain, and assigned all employees, including its technicians, to a central office in Madrid. Tyco technicians are responsible for traveling to customer sites to install and maintain security equipment in homes and on industrial and commercial premises located within the geographical area assigned to them.

With the centralization of Tyco, the technicians lost their regional offices. Instead, the technicians are assigned to work from their homes and use a company vehicle to travel directly to and from customer locations. Each evening, the technicians receive via an application to their mobile devices a task list identifying the next day's customer appointments and locations within their geographical area. The distances from the technicians' homes to the first or last customer location for the day vary and could encompass a distance of over 100 kilometers (60+ miles) and, depending on traffic, entail a three-hour commute one way.

¹ Case C-266/14 (Sept. 10, 2015).

Tyco counted the travel time between customers as working time, but did not count the commute time between a technician's home and his/her first customer and last customer as working time. Therefore, a technician's work day would begin when he/she arrived at the first customer location of the day, and would end when the technician left the premises of the last appointment of the day. The Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.), a Spanish trade union, sued Tyco, alleging the commute time was in fact working time and the technicians should be compensated accordingly.

Procedural History

The case originated in the Spanish national court system. The case turns on the interpretation of Article 2(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning working time ("Article 2(1)" or the "Working Time Directive"), which defines working time as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice." As the matter involved the interpretation of an EC Directive, Spain's Audiencia Nacional (National High Court) stayed proceedings and sought a preliminary ruling from the ECJ regarding the definition of working time.

The Decision

The ECJ held that for employees who do not have a fixed place of work, such as the Tyco technicians, the commute time spent traveling between the employee's home and his or her first and last work locations of the day must be considered as working time. The ECJ based its decision on the following rationale: First, the journeys of employees without a fixed work location to the customer, as designated by the employer, are necessary to the performance of the technician's job, which in this case was to provide on-site technical assistance to the customer.

Second, the ECJ reasoned that during the first and last journeys, the technicians were still at Tyco's disposal. In support of this finding, the ECJ stated:

[d]uring those journeys, the workers act on those instructions of the employer, who may change the order of the customers or cancel or add an appointment. In any event... during the necessary travelling time, which generally cannot be shortened, those workers are not able to use their time freely and pursue their own interests, so that, consequently, they are at their employer's disposal.²

Finally, and closely related to its first point, the ECJ found that the employees were indeed "working" during the first and last journeys of the day. By removing the employee's fixed location, Tyco had rendered traveling between the technician's home and the first and last customer location a necessary part of the job. "The fact that the workers begin and finish the journeys at their homes stems directly from the decision of their employer to abolish the regional offices and not from the desire of the workers themselves."³ As such, the workers should not have to "bear the burden of their employer's choice."⁴

For these reasons, the ECJ held the commute time spent traveling each day by employees who do not have a habitual or fixed place of work between their homes and the premises of their first and last customers designated by their employer constitutes working time.

Implications

Although the ECJ relied heavily on the facts specific to the Tyco case, the decision offers three guiding principles as to when commute time counts as working time:

1. The position requires the employee to perform duties on-location for a customer or location such that travel is a necessary function of the position; and

² *Id.* at ¶ 39.

³ *Id.* at ¶ 44.

⁴ *Id.*

2. The company exercises control over the time and length of the commute, such as designating the time and location of the first and/or last appointment of the day; and
3. The company chooses to forgo a habitual or fixed work location for the employee (e.g. a regional office) and, instead, requires the employee to work from home or his or her vehicle.

The consequences of the decision for employees who do not have a habitual or fixed place of work are (i) their commute time must be compensated and (ii) their commute time will count towards any statutory working hour restrictions.⁵ Accordingly, employers with operations in the European Union are advised to work with their human resources and legal departments to consider taking the following steps:

- First, determine if the company has any employees working in Europe who fall within the scope of the *Tyco* decision; namely, if there are any employees who lack a habitual or fixed work location AND are required to travel to client or customer locations in the performance of their duties. Most often, this type of employee will work in outside sales, marketing, or technical support.
- Second, ensure that employees' working time, including the travel time of employees with no habitual or fixed work location, is accurately recorded to ensure their aggregate weekly and monthly working hours do not exceed the restrictions imposed under local law. Also, monitor compliance with mandatory rest periods which might be triggered sooner if the commuting time is counted as working time.
- Third, continue to monitor court and tribunal decisions that apply the *Tyco* decision and monitor changes to national legislation. The *Tyco* decision will require some jurisdictions to revise and update national legislation related to working time.⁶
- Finally, review employee handbooks, policies and practices, and employment contracts to identify those provisions and practices, if any, that require revision to comply with the expanded definition of working time.

Companies should pay particular attention to those policies and practices that relate to the organization of working time. A pivotal fact in the *Tyco* decision is that *Tyco* dictated the technician's daily route, leaving the technician with no control over his or her own time. It is possible that we will see national courts and tribunals make a distinction as to eligibility for commute time payments between employees who have their routes dictated to them and those employees who are at liberty to plan their own visits and commutes within a defined territory.

In the coming months, multinational companies will continue to see the ramifications of the *Tyco* decision exhibited in new legislation and court decisions. As this area of law swiftly changes, we encourage employers with operations in Europe to work closely with legal counsel to mitigate risks and make any necessary changes to policies and practices in a timely manner.

5 Many European countries have established limits to the number of hours an employee may work in a time period, inclusive of overtime hours.

6 For example, the Irish law that implements the provisions of the EU Working Time Directive specifically excludes the travel time of "mobile" employees, such as those in the *Tyco* case, from the calculation of working time for purposes of establishing daily and week rest breaks. These provisions are now in violation of EU law as outlined in the *Tyco* decision and, we assume, will shortly be revised.