

Made in Germany

LaborLawMagazine

In this issue

Best practice – Minimum Wage Act – Compliance – HR practice –
Data-protection law and compliance – Restructuring law – Pension law – Working Hours Act



Is travel time always working time?

Working Hours Act versus payment obligation: an overview

By Dr. Thomas Barthel and Roman Parafianowicz

Working time according to the working Hours Act

Despite its practical importance, the question of whether and to what extent travel time is working time is not absolutely clear. In practice, the legal situation is not transparent, mainly due to different interpretations in case law with regard to public working-time law (Working Hours Act) on the one hand and paid work on the other.

In order to protect employees, the Working Hours Act (*Arbeitszeitgesetz, ArbZG*) contains limitations for maximum daily and weekly working time.

The Federal Labor Court (*Bundesarbeitsgericht, BAG*) does not consider an employee's travel time from a private home to a permanent place of employment and back to be working time within the meaning of the *ArbZG*.

With regard to business trips, *BAG* distinguishes among three types of time: travel time for an outward and return journey,

working time in the strict sense, and the waiting period at the destination and after finalization of the actual work.

The question of whether the performance of work as such must be regarded as working time within the meaning of the *ArbZG* is easy to answer: Of course it does.

The question of whether the waiting time at the destination that occurs before and after the actual work and travel time (for which the employee has not been given any instructions on how to use such time) is considered working hours within the meaning of the *ArbZG* cannot be answered that easily. *BAG* denies this for travel time during which employees do not need to drive themselves and have not been instructed by their employer to, for example, read and write texts or e-mails, prepare or follow up on appointments, etc. According to *BAG*, this is even truer for the waiting period at the destination as employees are even less restricted in what they do during such waiting periods.



Wait and see? A contractual agreement for travel times is strongly recommended.

© Digital Vision/DigitalVision/Thinkstock/Getty Images

would have been performed at his or her desk on the business premises, the health and safety of such an employee would not be endangered by exceeding the daily maximum working time of 10 hours as provided by the law (according to *BAG*). Employees may prefer to deal with private matters, relax or even sleep during business travel if they have not been instructed to drive a vehicle themselves. They would only be asked to "spend some leisure time," *BAG* argues.

If, however, the employer instructs an employee to perform work in the strict sense or duties comparable with normal work during travel and waiting times or to drive a vehicle, travel and waiting times have to be regarded as working time within the meaning of the *ArbZG*.

The (perhaps surprising) outcome is that certain periods are considered working time for the driver but not for the passenger. This is of crucial importance for the next day's rotas in terms of rest periods because the prescribed statutory rest period before the start of work →

Degree of stress as decisive factor

According to *BAG*, the crucial factor is the degree of stress employees are under ("stress theory"). Unless the employer has instructed an employee to use travel and waiting times to perform work comparable with actual work in the strict sense, for example, editing files or e-mails or preparing or following up that otherwise

on the following day begins for the driver when he or she parks the car but for the passenger had already started during the trip.

As a result, the question of whether these times are working times within the meaning of the *ArbZG* should preferably be answered affirmatively because breaches of the *ArbZG* constitute administrative offenses, in certain cases even criminal offenses (§§ 22, 23 *ArbZG*) and may lead to exclusion from participating in public procurement processes.

Payment for Travel and Waiting Time

The legal situation regarding payment for travel and waiting time (paid working time) differs from the above principles concerning the classification of time as a working period under the *ArbZG*.

According to *BAG* case law, the following applies if no individual contractual arrangement regarding the classification of travel and waiting times as working time has been made and no definition exists in a relevant collective-bargaining or work agreement.

Travel and waiting times within the agreed regular daily working hours must be paid unless otherwise stipulated.

Details on arriving at this result will not be discussed at this point as there are a number of different approaches that lead to the same result.

BAG's assessment of the issue of a payment obligation for travel and waiting times outside the agreed regular daily working time is different. *BAG* holds that such time must be remunerated only if remuneration has expressively been agreed on or, if no agreement exists, in line with § 612 (1) of the *BGB* (Civil Law Act), can be expected under the given circumstances. There is no general principle to the effect that all travel and waiting times beyond the agreed normal daily working hours must be paid.

Without an agreement, travel and waiting times outside the agreed regular daily working hours only have to be paid for activities in the interest of the employer. Nevertheless, not all activities in the interest of the employer have to be compensated. These must be paid under the circumstances. The judiciary's approach to answering this question also draws from the stress theory of working time legislation within the working hours act. If employees are free to decide what to do during their travel and waiting times (except the fact that they are passively traveling in a car, train or plane), such

time is not remunerated working time. The situation is different, for instance, if an employee has been instructed by the employer to drive a vehicle by him- or herself.

According to § 612 (1) of the *BGB*, what can be expected under the circumstances also depends on the employee's standard remuneration, which could possibly cover a certain amount of travel and waiting time in addition to regular daily working hours. There are, however, no fixed thresholds. In their decisions, the courts have sometimes held that even employees in higher but not necessarily executive positions have to accept a certain amount of traveling in their leisure time. It was further ruled that an employee does not have to be additionally paid for two hours of travel per day. The use of such terms as "higher position" and "above-average salary" in court rulings without further definition proves that no legal certainty can be expected.

Practical advice concerning payment for travel and waiting time

Due to these uncertainties, a contractual agreement concerning the remuneration paid for travel times is strongly recommended. The principles described above can be waived through individual or

collective agreements; that is, even if remuneration would be expected under the circumstances, a different agreement can be reached within the limits of a higher-ranking principle of law.

Especially in cases where employees have to travel frequently, a practical need exists for an explicit provision that defines paid travel and waiting times that go beyond the agreed regular working time and travel and waiting times covered by the employee's salary. The law allows for employer-friendly rules. In terms of motivating employees to travel on behalf of the employer, a balance should be found between what is legally permissible and paying for all travel times in full. ←



Dr. Thomas Barthel,
Rechtsanwalt, Licensed Specialist for
Labor Law, Beiten Burkhardt Rechts-
anwalts-gesellschaft mbH, Berlin
thomas.barthel@bblaw.com



Roman Parafianowicz,
Rechtsanwalt,
Beiten Burkhardt Rechtsanwalts-
gesellschaft mbH, Berlin
roman.parafianowicz@bblaw.com