

# Working time of employees posted on a business trip

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## **Abstract**

*Posting of workers to a Member State of the European Union under the law of the Slovak Republic may be realised by the institute of business trip, the temporary assignment of employees to another employer, or agreed place of work abroad. Using the institution of the business trip opens up many application problems. The author is in his paper focused on selected application problems of the business trip, relating to working time, particularly when considering working time on a business trip as well as continuous rest after returning from a business trip, respectively at the end performed work.*

**Keywords:** *business trip, working time, daily rest, Labour Code, Act on Travel Allowances, Directive 2003/88/EC.*

**JEL Classification:** K31

## **1. Business trip in the legislation of the Slovak Republic**

The Slovak legal system does not solve the posting of employees by independent institute; posting is carried out by other institutes through which can be treated with a temporary place of employment. It is an institute of business trip, the temporary assignment of employees to perform work for another employer or agreed place of work abroad.

Every performance of work abroad must be considered as a business trip according to the section 57 of the Act no. 311/2001 Coll., the Labour Code, as amended (hereinafter the "Labour Code").<sup>2</sup> This is the reason of very frequent use of this institute. But despite being one of the most important means of changing the content of the employment contract, the Labour Code does not contain a precise definition of this term. According Barancová<sup>3</sup> business trip can be defined as a time-limited change of agreed place of work (or regular workplace) in the employment contract. Other definition of business trip is contained in the Act no. 283/2002 Coll., on Travel Allowances, as amended (hereinafter as the "Act on Travel Allowances"). This Act regulates provision of compensation of expenses incurred during business trips, both for employees or appointed persons who act based on agreements other than the employment contract, persons who are members of company's bodies (such as the statutory), etc. According to this Act business trip is time from the onset of the employee travel to place other than his regular workplace, including the performance of work in that place until the end of this journey. A business trip under the Act on Travel Allowances is also journey

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<sup>2</sup> Highest Court decision No. 7Sžso/39/2010.

<sup>3</sup> Barancová, H.: *Zákonník práce. Komentár*. 4 ed., Bratislava: C. H. Beck, 2015, p. 507.

that lasts from the onset of an authorized person<sup>4</sup> for the journey to fulfil for his/her actions arising from their special status, including the performance of activities until the end of this journey. A foreign business trip is the time of a business trip abroad, i.e. outside the Slovak Republic, including performance of work abroad till the end of the journey. If an employee is posted to a Member State of the European Union, according to the Act on Travel Allowances he is entitled to the same extent of the travel expenses as if he would be in the case of compensation as for business trips abroad.

A business trip can be also characterized as limited assignment of the employee by the employer to perform work in different place than agreed in the employment contract.<sup>5</sup> Although business trip duration is not limited by any specific time the employee may be sent on a business trip only for the period of time necessary.

The employer must therefore determine the duration of a business trip before its beginning. Definition of a necessary period has to prevent employer from circumvent of the Act on Travel Allowances provisions on the prohibition of unilateral transfer of the employee to another place of work than agreed in the employment contract.<sup>6</sup>

In addition to the duration of a business trip is the employer posting the employee to a business trip required to determine in writing the place of its onset, place of work, mode of transportation and the place of ending of a business trip, optionally other conditions of a business trip. In doing so, shall take into account the legitimate interests of the employee.

On the basis of the Labour Code, we can distinguish between two types of business trips namely the business trips to which it is possible post the employee without his consent and the business trips to which the employee can post only with his consent. Posting on a business trip is a unilateral act of the employer, which may be subject to the consent of the employee. The consent of the employee with posting to the business trip the employer does not need in case of business trip within the municipality of the regular workplace or residence of the employee and where posting to a business trip pertains directly to the nature of the agreed type of work or the workplace. Labour Code does not specify where it could be concluded that the consent of the employee can be performed even tacitly.

Frequently a phenomenon in practical application is obtaining of the consent with the posting on a business trip right in the employment contract. Employee is in this case in advance and for total duration of the employment committed to accept the posting on a business trip, which place and duration is not at the time of signing the employment contract known to him. So can arise,

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<sup>4</sup> These are persons, which are stipulated by a special regulation, or persons who are appointed or elected to the bodies of a legal person and not to the legal person in the employment relationship if they are not provided compensation pursuant to special regulation or persons which fulfill for legal person or natural person tasks and are not to legal or natural person in an employment relationship or in another legal relationship, if so agreed.

<sup>5</sup> Bělina, M. a. o.: *Zákoník práce. Komentář*. 1 ed., Praha: C. H. Beck, 2012, p. 265.

<sup>6</sup> Barancová, H.: op. cit., p. 509.

especially in case of employee whose posting to a business trip does not arise from the nature of the work, questions about a possible conflict with good morals, or whether such posting may be an unlawful act of the employer. In doing so, refusal to go on ordered business trip without serious reason, is of serious breach of work discipline and a reason for immediate termination of the employment.<sup>7</sup>

Meanwhile, the employment contract may specify more than one place of work. In this case it is necessary to agree on regular workplace, which may not be identical to the place of work according to the employment contract. Regular workplace has fundamental importance for the provision of the travel allowances. Due to the Act on Travel Allowances, regular workplace is the place agreed in writing with the employee. If such a place is not agreed, the regular workplace is a place of work agreed in the employment agreement or in an agreement on work performed outside the employment relationship. The Act on Travel Allowances admits an exception from that principle, thus for the employees whom frequently change of workplace arises from specific nature of the profession (e.g. Professional drivers, employees at the assembly, in construction industry, etc.).<sup>8</sup>

If in the employment contract is agreed to more places of employment, business trip is understood only posting of employee outside, such in the contract agreed to places of work. For these employees may regular workplace be also their place of residence. By broader agreement of place of work in the employment contract is not extended only dispositive competence of the employer, but simultaneously ceases employer possibility to order the performance of a business trip to an employee. As a consequence of that, the employee performs his working tasks at the place of work and ceases his entitlement to the travel expenses. A similar situation can arise if an employee has as a place of work agreed to the employer's headquarters and as a regular workplace territorial district (p. e. drivers in public transport). In fact, the work is performed on a business trip - if it takes place outside the place of work - and in terms performance of work on a regular workplace, does not require the consent of employee and the travel expenses does not belong to the employee, as according to the Act on Travel Allowances, the employee is not on a business trip.<sup>9</sup> The current legislation thus allows to the employer in case of a business trip on which employee can post only with his consent, to avoid the need of achieving the consent by a broader definition of the place of work.

## 2. Working time on a business trip

A simplified view on a business trip, as the change of the agreed place of employment, does not reflect other effects of the business trips. They affect especially in the field of working time, rest after work, liability relations or are the factors in financial claims of employees against their employer.

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<sup>7</sup> Regional Court Decision No. 24Co/173/2011.

<sup>8</sup> Cf. Barancová, H.: op. cit., p. 509.

<sup>9</sup> Cf. Toman, J.: *Individuálne pracovné právo. Všeobecné ustanovenia a pracovná zmluva*. Bratislava: Friedrich Ebert Stiftung, 2014, p. 205.

During business trips often a situation occurs, where employees must spend time on business trips, even it is not their working time. Therefore, comes into consideration question how to properly consider such time spent on business trip and whether it is or may be considered for overtime.

Problematic is already relationship between both legislation governing business trip. In relation to the Act on Travel Allowances Labour Code has subsidiary competence,<sup>10</sup> but according to another opinion,<sup>11</sup> Labour law represents the *lex generalis* and the Act on Travel Allowances focuses mainly on the financial aspects of the business trip - although in some aspects provides specific regulation of legal relations, which the Labour Code does not contain. Generalization of specific legislation of the Act on Travel Allowances to another, by this Act unregulated, relationships can cause contradiction in assessing the employee claims.<sup>12</sup> The mentioned situation is just such a case.

Working time during a business trip under the current legislation is not considered as working time, but we cannot identify nor rest time. From 2013 it is possible to apply the provision § 96b of the Labour Code, which deals with compensation for loss of time of employee at the business trip outside working hours if such time cannot be classified as overtime. According to this provision, the employee is for the time for work-related travel outside the scope of work shift schedules that is not overtime work or work standby entitled to agreed monetary compensation or substitute time-off from work with wage compensation equal to the employee's average earnings. These claims, however, the employee may enforce only when they are provided and enshrined in a collective agreement or that have been specifically agreed between the employer and the employee representatives. Problem in this provision can also be seen in the Labour Code that provides a compensation for loss of the time only as an option and not as an obligation of the employer. Similarly problematic is that the application of this provision is not an option, even when there are no employee representatives at employer.

In resolving this question is relevant whether it is possible in addition to the provisions of § 37 of the Act on Travel Allowances apply the provisions of § 85 of the Labour Code. According to some opinions, the time on a business trip falls within the employee's working time, spent without his fault, other than the work done can be regarded as working time, other argue with the provisions § 37 of the Act on Travel Allowances and indeed treated it as performance of work, but without taking into account Labour Code provisions on working time and its arrangements.<sup>13</sup>

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<sup>10</sup> Barancová, H.: op. cit., p. 507.

<sup>11</sup> Švec, M., Schuszteková, S.: *Pracovná cesta v kontexte nepretržitého odpočinku po práci a miesta výkonu práce*. In.: ŠVEC, M. (ed.): *Kultúra sveta práce. Aplikáčné nedostatky právnej úpravy pracovnej cesty*. Bratislava: Friedrich Ebert Stiftung, 2014, p. 23.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

In the period during which the employee is posted on a business trip, can distinguish several periods where the assessment is not definite. Term business trip does not coincide with length of the work shift - in addition to the period when actually occur duty, the concept of the business trip includes travel time of employee at the place of work, eventually return from it, and the period when employee, although does not perform work, however, he is at the place of work and he is waiting for the next work performance. In addition, it raises for example the question of the assessment period, which interferes into daily continuous rest after work.

Definition of a business trip under provision §2 section 1 of the Act on Travel Allowances from the perspective of its duration is applicable only for the purposes of this Act Under provision § 37 of the Act on Travel Allowances time, that the business trip falls within the employee's working time, spent without his fault, other than performing of work, for the purposes of this Act is considered as work performance. Act on Travel Allowances however, does not solve the assessment of period of the business trip outside of working time that an employee do not spend by performance of his tasks without his fault.

This period thus is considered as the period of business trip for providing the travel allowances, but has no effect on the working time provisions contained in the Labour Code. Labour Code opposed to the Act on Travel Allowances essentially distinguishes between two kinds of periods namely the working hours and the rest periods Under provision § 85 of the Labour Code, working time is the time segment when an employee shall be at the disposal of the employer, performs work and discharges obligations pursuant to the employment contract, a rest of the period shall be any period which is not working time.

Although the Court of Justice of the European Union (hereinafter as "the Court of Justice") has repeatedly held that the Directive of the European Parliament and Council Directive 2003/88/EC concerning certain aspects of the organization of working time<sup>14</sup> (hereinafter as "the Directive 2003/88/EC") defines that concept as any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive.<sup>15</sup> The Court of Justice also stated, that the Directive 2003/88/EC does not provide any intermediate category between working time and rest periods.<sup>16</sup> Case-law of the Court of Justice also shows, that that the concepts of 'working time' and 'rest period' within the meaning of Directive 2003/88/EC constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that directive, which is

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<sup>14</sup> OJ 2003 L 299, p. 9.

<sup>15</sup> Cf. judgments in C-151/02 Jaeger, 2003 I-08389, paragraph 48; C-14/04 Dellas and others, 2005 I-10253, paragraph 42, C-437/05 Vorel, 2007 I-00331, paragraph 24, and C-258/10 Grigore, 2011 I-00020, paragraph 42.

<sup>16</sup> Cf. judgments in C-14/04 Dellas and others, 2005 I-10253, paragraph 43, C-437/05 Vorel, 2007 I-00331, paragraph 25, and C-258/10 Grigore, 2011 I-00020, paragraph 43.

intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States.<sup>17</sup>

In order to answer this question, must be therefore examined whether the basic elements of the concept of 'working time' as their distinguishing Court are fulfilled at the time of transfer to and from the place of work, respectively when an employee works although does not perform, however, he is at the place of work and he is waiting for the next working performance.

According to the first essential element of the concept of working time employees must carry out their activity or duties. Here can be said that the business trip is always performance of the legal duties of an employee with all the legal consequences that arises from it.<sup>18</sup> On a business trip the employee must realize a business trip manner and under such conditions that follow from them. The employer during business trip has the authority over the employee and determines him not only quantitative but also qualitative conditions for its realization.<sup>19</sup> This requirement can be regarded as fulfilled.

Under the second element of the concept of 'working time' is employee required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need.<sup>20</sup> In order for an employee to be regarded as being at the disposal of his employer, the employee must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out his activity for that employer.<sup>21</sup> Conversely, it is evident from the case-law of the Court of Justice that the possibility for employees to manage their time without major constraints and to pursue their own interests is a factor capable of demonstrating that the period of time in question does not constitute working time within the meaning of Directive 2003/88/EC.<sup>22</sup> The Court of Justice stated a time ago, that an employee who is obliged to be available to his employer at a certain place throughout the duration of emergency is exposed to considerably to greater restrictions because he must stay away from his family and social environment and has less opportunity to organize its time, during which he is not demanding to perform working activities. Under those conditions an employee available at the place determined by the employer, cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional

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<sup>17</sup> Judgments in C-14/04 Dellas and others, 2005 I-10253, paragraphs 44 a 45, C-437/05 Vorel, 2007 I-00331, paragraph 26, a C-258/10 Grigore, 2011 I-00020, paragraph 44.

<sup>18</sup> Barancová, H.: op. cit., p. 507.

<sup>19</sup> Švec, M., Schuszteková, S.: op. cit., p. 26.

<sup>20</sup> Cf. judgments in C-14/04 Dellas and others, 2005 I-10253, paragraph 48, C-437/05 Vorel, 2007 I-00331, paragraph 28, and C-258/10 Grigore, 2011 I-00020, paragraph 63.

<sup>21</sup> Judgment in C-266/14 Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA., not yet published, paragraph 36.

<sup>22</sup> Cf. judgment in C-303/98 Simap, 2000 I-07963, paragraph 50.

activity.<sup>23</sup> This can be applied analogously to the employees on business trip, because he is at the employer's disposal throughout the whole duration of business trip and staying away from his family and social environment. As he is located outside his residence in a foreign environment during the period when the work was not actually performed, he has less possibility to organize its time without serious obstacles cases to pursue its interests.

Under the third element of the concept of working time the Court's case law requires, that an employee must be at work during the period. The term "at work" Directive 2003/88/EC, nor the case law further does not explain. From EU law thus is not clearly apparent that the term "at work" is identical with the concept of workplace, under this situation, however it is subsumed, e.g. employees who carry out their activities and responsibilities at the time of transfer between residents and clients.<sup>24</sup> If the employee remains away from their usual workplace on the employer's instruction, may be considered that even this condition is met.

As already mentioned, the current legislation of working time contained in the Labour Code determines that the time spent on business trip is not considered as working time. Therefore, according to section 85 paragraphs 2 of the Labour Code, this time must be considered as a rest period. So paradoxical situation occurs when an employee is during this rest period required to fulfil the instructions of the employer and in case of failure to fulfil them could face sanctions for breach of work discipline. At the same time it applies that during rest periods an employee is not bounded by the employer instructions. Time laid down for the rest after performed work can be freely used, not only to rest in the proper sense, but also to satisfy various personal needs and interests aimed at raising the quality of life.<sup>25</sup> On the other hand, it must be recognized that in such a case may also feel a certain disproportion in comparison with the traditional perceptions of working time, which comes to the actual performance of work, respectively, of the work done.<sup>26</sup>

From the above argumentation, arises the conclusion that the employee's time spent on business trip should be regarded as working time. This conclusion, however, involve significant application problems. As Directive 2003/88/EC, as well as the Labour Code provides maximum working time of the employee, which would be in the case of business trip longer than 48 hours or posting of employee to another Member State of the EU quickly filled and the employee would have been prevented from performing work.<sup>27</sup>

This situation is also complicated by the fact that pursuant to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996

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<sup>23</sup> Judgment in C-151/02 Jaeger, 2003 I-08389, paragraph 65.

<sup>24</sup> Judgment in C-266/14 Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA., not yet published, paragraph 34.

<sup>25</sup> Barancová, H.: *Zákoník práce. Komentár*. 4. vydanie. Bratislava: C. H. Beck, 2015, p. 709.

<sup>26</sup> Švec, M., Schuszteková, S.: op. cit., p. 27.

<sup>27</sup> For example, if an employee has to undergo a business trip, the whole working time would run out by travelling without being to perform work ever occurred. The same is applies for posting of employees which could stay in a foreign country only two days a week.

concerning the posting of workers in the framework of the provision of service<sup>28</sup>, maximum work time and minimum rest periods belong to conditions of so-called "hard core" that are employers, regardless of the law applicable to the employment relationship, required to ensure to the employees posted to the territory of the another Member States.

However now, under the influence of EU legislation we can observe major interest in innovation of new strategies and policies which fit in the present context for improving the quality of life and working conditions. In this regard, the main policy issues emphasise the standards and instruments to maintaining work flexibility, to adopt various patterns and forms for maintaining and increasing the rate of employment, to harmonise private life with work satisfaction and to ensure the active work time during the lifetime<sup>29</sup>.

### 3. Continuous daily rest during and after a business trip

The current legislation of the business trip also brings a problem in relation to the provision of continuous daily rest. Under the provisions § 92 of the Labour Code, an employer shall be obliged to arrange working time in such a way that, between the end of one shift and beginning of another shift, an employee has the minimum rest of duration of 12 consecutive hours within 24 hours, which may be reduced only in cases stipulated by the law. Under the current legislation, the period that an employee spends to transfer to and from the place of work or on which the employee works although does not perform, however, he is at the place of work and is waiting for the next performance of work (except periods of on-call service at the workplace) is not considered as working time. An employer is not obliged to the personnel who returns from a business trip before the midnight, provides the necessary rest from end of the business trip to start work, if since end of the work (but not since return from a business trip) passed more than 12 hours. In doing so, may not even be a situation which according to § 92 paragraph 2 of the Labour shortening continuous daily rest period would allow.

Between the performance in the workplace and the time spent on a business trip there is practically no difference, more so if this time spent by exhaustive travelling or in a foreign environment. For not keeping periods of uninterrupted rest after the end of the business trip completed before midnight, therefore we see no reason. On the other hand, the provision of uninterrupted rest after work is relevant to the health and safety at work, and this right should be maintained for the employee.

As it is apparent from the Labour Code, uninterrupted daily rest period is not possible to replace by the financial compensation, but must be used in nature. Travel expenses are to reimbursement of expenses incurred to posted employees, so they cannot replace time which an employee spent on a business trip neither rest

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<sup>28</sup> OJ L 18, 21.1.1997, p. 1–6.

<sup>29</sup> Zamfir, E., *Flexible working time arrangements in Romania*, "Revista de Cercetare si Interventie Sociala", 2010, vol. 28, p. 61.

which had not be provided. From this perspective, can critically evaluate the provisions of § 96b of the Labour on compensation for loss of time.

#### 4. Conclusion

Despite the apparent simplicity of the business trip, when is regulated only by provisions of one section of the Labour Code, this simplicity is a source of many application problems. Most of them comes to the fore the question of assessment period of the business trip when it is not clear whether this period can be regarded as working time or not. We are inclined to conclusion that this period should be regarded as working time within the meaning of the Directive 2003/88/EC, what the situation would make even more complicated.

In order to avoid these problems in future, it would be necessary, as in the event of on call service performed at workplace or work overtime, at European level reflect on introduction of a new intermediate category between working time and rest periods, which would reflect the specificities of the business trip. However, the question remains, as to how to such an application will face Member States or the Court of Justice, because in the case of time limits of the business trip would not see a direct connection with safety and health at work. It should also be adopted, such as a regulation, which would provide adequate rest for employee performing work on a business trip and after return before the midnight.

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