

■ LEGAL ISSUES

Paying for travel time

By *Madeleine Loewenberg*

As lawyers, representing the interests of employers, we are often asked by our clients whether they must pay their employees for travel time. The question is particularly important to landscape professionals whose employees are almost always required to travel in the course of employment.

The following are some common scenarios we have been asked to consider. If you would like further clarification or assistance, please don't hesitate to give us a call.

Scenario 1

I tell my employee to show up to work at 123 Main Street at 8:00 a.m. on Monday. Do I have to pay her to drive to work?

The short answer is No. In general, commute time is not considered time worked and no compensation is due under the *Ontario Employment Standards Act* (the "Act"). Commute time is the time spent by an employee traveling to and from work.

Employment Standards cases distinguish between two types of travel time: commute time and time spent traveling within the course of a work day. An employer is not required to pay for the time spent getting to work or home. But, once an employee has arrived at the workplace, any travel done during the work-day, connected to employment, is paid time. This kind of travel is considered "for the benefit of the employer."

An employee may say, "My travel to work is also for the benefit of the employer. If I don't get to work, the employer suffers." However, this is not what we mean when we say for the benefit of the employer. "Travel for the benefit of the employer" is travel that has been directed and controlled by the employer. For example: "Please go here and do this." This is travel for the benefit of the employer, because both the "go-ing" and the "do-ing" are specifically at the direction of the employer.

There are two exceptions to the general rule that commute time is not paid time:

The first exception is when an employee is required to keep a company vehicle overnight and to drive it to and from work each day. Adjudicators have found that this type of commute time is paid time, because the arrangement

is specifically for the benefit of the employer. The employee takes, stores and brings back the vehicle for the employer's convenience. A landscape employee who brings the employer's vehicle and equipment directly to the jobsite in the morning would therefore likely be found to be completing a task for the employer's benefit. He or she must be paid for the commute.

The second exception is when the employee is directed to do something on the way to work or home (i.e., pick up a co-worker or supplies). In this case there is clear task-oriented activity incidental to the travel. Accordingly this travel time is paid time.

One further point: The *Act* requires an employer to provide landscape gardeners with 11 consecutive hours free from performing work in each day. Employers must be careful not to unintentionally violate the *Act* by extending the work day with travel time.

Scenario 2

Part (a): I tell my employee to show up at 123 Main Street at 8:00 a.m. to meet the rest of her crew, load the work truck and then drive with the crew to 155 University Avenue. When do I have to start paying her? When she arrives at 123 Main Street, or when she arrives at 155 University Avenue?

Answer: The time she spends traveling to 123 Main Street is considered a "commute to work." This is not paid time. However, once she arrives at 123 Main Street and begins to load the truck, she is working for pay. This is because the employer has directed her to load and drive.

Would our answer change if the employer had directed the employee to merely show up at 123 Main Street, do nothing there, and then catch a lift to the jobsite an hour away? Should she be paid for the hour she spends traveling from Main Street to the jobsite? After all, the employer had directed her to take the lift and travel to the jobsite.

If 123 Main St. is merely a pick-up site, the answer is no. Accepting a ride from an employer is still considered part of the commute to work.

In Niks Janitorial Services, the Ontario Labour Relations Board said the following: "Had the employees had to get themselves from their homes to the job sites, and then home again at the end of the day, they could not have

claimed travel time simply because the job sites were far from their homes. In this case the employer facilitates employees getting to and from work by providing transportation for part of the way. That is not time out of the work-day, which does not commence until they reach a job site and begin to unload the van."

On the other hand, if 123 Main St. is the employer's warehouse/office/garage, etc., then the employee's work-day begins at the time she arrives at that location. Work is deemed as performed once an employee is required to be at a place of employment.

Part (b): *Can I tell her that her payment for helping to load the truck is the lift I am giving her from Main Street to University Avenue?*

The answer is no. The *Act* requires that an employee be paid in wages by cash or cheque, in an amount at least equal to minimum wage. In-kind payment, such as a lift to work in exchange for manual labour, does not satisfy this obligation.

Scenario 3

I ask my employee to be at 155 University Avenue at 9:00 a.m. She has the option of meeting me at 123 Main Street and I'll give her a lift in, or she can drive to University Avenue on her own. When does the clock begin to run?

Answer: The key here is that your employee has the option. You offered her a ride – but only required that she be at University Avenue by 9:00 a.m. In this scenario, the employee's acceptance of the ride from the pick-up spot to the place of employment is not time worked. She was given an option how she would like to commute to work. **HR**

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