



LEGAL ALERT

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Place of work in construction services vs. the obligation to pay subsistence allowance

On December 9th, 2011, a three-judge panel of the Supreme Court adopted a resolution under the file symbol II PZP 3/11 stipulating that a construction worker whose contractual place of work is specified as the place in which the employer is currently engaged in construction does not travel on business and is not eligible to receive any subsistence allowances.

The Supreme Court's standpoint is that an employee of a construction establishment engaged in constructing investments in various locations may have the place of work specified in the contract of employment as the place in which the employer is engaged in construction activity or other type of work, or alternatively . as the area involved. In the latest ruling passed by the Supreme Court, the permanent place of work for such an employee, within the meaning of Art. 77⁵ § 1 of the Labour Code, is each time the place from amongst locations specified in the contract of employment, in which the employee works systematically for a prolonged period. What it means in practice for employers is that employees whose place of work is specified in this way **do not travel on business**, and thus they are not eligible to be reimbursed for any related costs, and specifically they are not entitled to receive **subsistence allowances**.

In said resolution, the Supreme Court extended its hitherto standpoint to explain that the place of work may be specified in the contract of employment in three different ways:

- **as a point (address)** . in practice it is usually the address of the establishment operated by the employer or the employee's address of residence (e.g. in case of teleworking). A place of work designated in this way is characteristic for those employees who do work based in a permanent location, e.g. office staff or factory workers.

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Hence, if the permanent place of work is the employer's registered address, the employee will travel on business in a situation where, at the employer's request, he performs work outside the address over a short period of time.

- **as a specified geographic area** . applicable to mobile workers, e.g. drivers or trade representatives. The geographic area specified in the contract of employment must correspond to the actual area within which the employee moves as part of his contractual duties.

A mobile worker will thus travel on business only when he is assigned some tasks to be done outside the area, and the change in work done will be of short and incidental nature.

- **as a moving (shifting) place of work** . the Supreme Court is of the opinion that this specific type of designation of a place of work may only be used where the employer operates in construction business or other type of activity. If the shifting place of work has been properly specified in the contract, fixed places of work, within the meaning of Art. 77⁵ § 1 of the Labour Code, shall be the specific locations to which the employee is delegated to perform the agreed type of work, and thus the condition necessitating payment of a subsistence allowance is non-existent.

It is important that, in case of construction workers, the contract of employment must not provide for the place of work as a certain geographic area only (which is reserved for mobile workers). However, it is possible that the contract of employment provides for a place of employment as shifting, e.g. as construction site whereon the employer constructs an investment within a designated area. If the place of work is so identified, the employee does not travel on business.

Consequently, the contract of employment for an employee of a construction establishment engaged in constructing investments in various locations may indicate a place of work as a location in which the employer operates construction projects or other type of work, or optionally it may specify the geographic area concerned.

A fixed place of work for such an employee, within the meaning of art. 77⁵ § 1 of the Labour Code, shall each time be the place, within the boundaries stipulated in the contract of employment, in which the employee provides work systematically for a prolonged period, i.e. the construction site operated by the employer.

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The Courts' standpoint is that any other interpretation would lead to the conclusion that, whenever the employee is delegated to work in another construction site, it is necessary to terminate the current terms and conditions of employment or the employer must incur additional costs of employee's travel expenses, although the work provided is not of an *ad hoc* nature. If this was the case, employers would not be willing to conclude contracts of employment for indefinite period and they would tend to enter in specific-time agreements for the duration of a construction project.

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