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Less Working Hours Shall Not Mean Increased Pressure

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In three recent decisions, the French civil Supreme Court (*Cour de Cassation*) has ruled that forfaits-jours agreements (lump sum payments for work time computed in days) are not valid if a union agreement does not provide for sufficient protection of the employee's health and safety. These decisions are of great interest to French employers for two reasons: the rejection of a forfaits-jours agreement can create substantial financial risk for an employer, and the cases are part of a legal trend to increase health and safety obligations on French employers.

Background

In the year 2000, legal working time in France was reduced from 39 hours to 35 hours a week. Since then, the calculation of employees' working time has been dependent upon each employee's position. Senior officers who work hours that cannot be controlled or pre-determined may enter into forfaits-jours agreements with their employers providing that their compensation will be disconnected from their actual working time and will constitute consideration for a flat number of days worked throughout the year (up to a maximum of 218 days).

To be effective, such forfaits-jours agreements must be permitted by an industry-wide or collective company agreement negotiated by employers and the employees' unions, and extended to all companies within a specific professional and/or geographical scope by the Labor ministry. These union agreements must also provide the terms and conditions for implementing individual forfaits-jours agreements.

Recent Precedent Invalidating Forfaits-Jours Agreements

In a precedent dated June 29th, 2011, the Supreme Court reviewed a forfaits-jours agreement governed by the collective bargaining agreement for the Metallurgical Industries and set forth a test to assess whether such an agreement complies with legal requirements. According to this test, the computation of working time in days is only legal if the union agreement allowing for the lump sum in days also provides for monitoring of the employee's work hours and workload, including an assurance of sufficient resting periods. Failure to comply with this test may result in severe financial consequences for a company. By invalidating the lump sum agreement, the Court ruled that the company had to pay any overtime hours claimed by the employee, with the burden of demonstrating that the employee did not actually work such overtime resting on the employer.

In a September 26, 2012 case applying this precedent, a management level employee, whose employment contract was governed by the collective bargaining agreement for Wholesale Trade, was covered by a forfaits-jours agreement. Upon being retired by the company, the employee sued his employer before the French labor courts claiming payment of damages for unfair computation of overtime hours.[1] He was able to demonstrate that his actual working hours were from 7:15am to 8pm, and included some weekends and bank holidays due to a staff shortage. His argument was that the forfaits-jours agreement did not provide sufficient protection of his health and safety.

[1] The statute of limitation for overtime claims in France is 5 years.

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The Supreme Court agreed with the employee's argument. From a practical standpoint, the working time agreement for the Wholesale Trade industry did not allow control of the employee's daily workload nor did it provide for a breakdown of the workload per day. Indeed, it only verified the number of working days and allowed for an annual assessment of the employee's workload by the employer. The Supreme Court deemed this insufficient, as working conditions may vary from one year to the next. Thus, such provisions were not sufficient to effectively protect the employee's health and safety.

In addition, despite the addition of a company collective agreement that provided for a quarterly meeting during which the employee's supervisors were supposed to examine the practical implications of the forfaits-jours agreement, the Supreme Court ruled that the combination of both agreements was not sufficient to guarantee a reasonable burden and dispatch of work for the employee concerned.

A similar ruling was issued by the Supreme Court on September 19, 2012, for another lump sum agreement governed by the national collective bargaining agreement for the Clothing Industry. In that decision, the Court specifically stated that a company collective agreement should include provisions protecting the employee's rights to health and safety guaranteed by the constitution and EU regulations.

The Supreme Court is thus clearly setting a trend one collective bargaining agreement at a time. Companies should therefore remain vigilant and start implementing mechanisms enabling an effective control of the working hours but also of the workload of their employees, without waiting for a new precedent.

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