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Executive employees: what type of work organization in the future?

The concept of "*cadres*" (i.e. executive employees) is a French law feature that covers in fact various types of employees – i.e. not only employees with a managerial position ("*managers*") but also sales people, engineers, etc. – to such extent that it is sometimes difficult to translate this word into English.

The "executive" employment category is, however, an essential French labor law concept since French employees have been traditionally divided between "executive" employees and "non-executive" employees. Executive employees are granted specific benefits under applicable collective bargaining agreements, including a preferential retirement scheme, but in return they are most of the time subject to a working time arrangement that departs from the (35 hours per week) legal working time duration, without any record of overtime hours nor additional remuneration for working such overtime hours. In 2010, 47.7% of the French executive employees have worked more than 40 hours per week[1].

Under the pressure of the European Union and at a time where the "*quality of life in the workplace*" is increasingly taken into account, the *Cour de cassation* (French Supreme Court), followed by trial judges, has been reshaping the status of executive employees since several months, with the objective of finding a compromise between the preservation of fundamental rights (right to health, right to rest periods, right to enjoy a personal and a family life) and the need for adaptation/ flexibility to respond to the challenges of modern work organization modes.

Unfortunately, these unpredictable case-law developments constitute a dreadful source of legal uncertainty for companies…

Executive employees are subject to derogatory working time arrangements: Overtime hours are a sword of Damoclès hanging over the head of companies

The so-called *forfait-jours* working time arrangement placed under scrutiny

It should first be recalled that the implementation of a *forfait jours* working time arrangement, according to which working time is not counted in hours but is based on a fixed number of working days per year, requires the conclusion of both:

- A (industry-wide, company-wide or site-specific) collective bargaining agreement defining the categories of employees eligible for a *forfait-jours* working time arrangement as well as the main terms of such arrangement,
- A written individual *forfait-jours* working time agreement showing the consent of the relevant employee[2].

In a landmark decision of June 29, 2011, the *Cour de cassation* had "saved" *forfait-jours* working time arrangements by holding that such arrangements were duly compliant with Community and constitutional statutes and regulations (Labor Chamber of the *Cour de Cassation*, June 29, 2011, 09-71.107). Yet, in its decision, the *Cour de Cassation* specified that any *forfait-jours* working time arrangement must be provided for in a collective bargaining agreement, the terms of which must **guarantee compliance with the maximum working time durations and daily and weekly rest periods**. In other words, collective bargaining agreements must define the practical conditions for following-up the activities of the employees in order to respect the maximum working time durations[3] and to ensure a control of the employees' work organization and workload.

In this specific case, the applicable industry-wide collective bargaining agreement, i.e. Metallurgy agreement, was considered as compliant with case-law requirements but the employer was sanctioned because it had failed to apply the provisions of the industry-wide collective bargaining agreement that imposed the obligation to establish a control document recording the number of working days and rest days, to set up a system for the superiors to follow up the employees' work and to hold an annual interview with the employee.

On the other hand, in a decision rendered on January 31, 2012, the *Cour de Cassation* invalidated the *forfait-jours* working time arrangement provided for by the collective bargaining agreement applicable within the chemical industry because the provisions thereof – quite elliptical incidentally – **were not such as to ensure the protection of the employees' health and safety** (Labor Chamber of the *Cour de Cassation*, January 31, 2012, n°10-19.807). The C*our de Cassation* ruled that the collective bargaining agreement cannot be limited to stipulating that the conditions for setting up and controlling the working time arrangement are to be specified in the individual *forfait-jours* working time agreement entered into between the employer and the employee. It should be noted that in this case, a company-wide collective bargaining agreement had been concluded but the

Cour de Cassation held that the provisions of such agreement that "*were limited to asserting that executive employees subject to a forfait-jours working time arrangement had the obligation to respect the minimum daily and weekly rest periods*" were not such as to guarantee the protection of the employees' health and safety. **As such, the industry-wide or company-wide collective bargaining agreement must include accurate provisions defining the main terms and features of the *forfait-jours* working time arrangement.**

So, even if a company has relied on the provisions set forth in the industry-wide or company-wide collective bargaining agreement in order to conclude *forfait-jours* working time agreements with its executive employees, **it is not immune from liability if such provisions do not meet the applicable legal and case-law requirements**.

Consequently, the employer must ensure that the collective bargaining agreement does contain all legal and case-law guaranties; if not, it may be advisable to retain another method for counting working time, e.g. the lump-sum remuneration clause that provides for the payment of a certain number of overtime hours in excess of the legal working time duration.

If the *forfait-jours* working time agreements entered into with executive employees are found non-compliant, the sanction for the company is quite important: **such agreements will become ineffective**, which entitles the relevant employees to **claim compensation for overtime hours** worked above the legal working time duration, retroactively for the five years preceding the claim.

In a decision dated February 28, 2012, the *Cour de Cassation* even went one step further by ordering a company to pay the **lump-sum indemnity equal to six months' salary provided for by the French Labor Code in case of undeclared work** (Labor Chamber of the Cour de Cassation, February 28, 2012, n°10-27.839). In this case, however, no individual *forfait-jours* working time agreement had been signed. According the *Cour de Cassation*, subjecting the employee to the *forfait-jours* working time arrangement without having him/her sign an individual *forfait-jours* working time agreement and thereby depriving him/her from the payment of overtime hours, was automatically constitutive of the intentional element required to find a company guilty of undeclared work.

It should also be noted that assigning to an employee the minimum classification level required under the applicable collective bargaining agreement in order to subject him/her to a *forfait-jours* working time arrangement does not automatically make the relevant employee eligible for such a working time arrangement if, in practice, he/she does not meet all the requirements set forth in the collective bargaining agreement – in particular the length of experience – to benefit from this classification level. To put it another way, the *Cour de Cassation* sanctions practices that consist in promoting an employee to a higher classification level for the sole purpose of implementing a *forfait-jours* working time arrangement.

Not anyone can be a "cadre dirigeant" (top executive)

Pursuant to Article L. 3111-2 of the French Labor Code, are considered as top executives, executives whom are entrusted with responsibilities so important that they involve a great independence in the organization of

their agenda, who are authorized to make decisions in a widely autonomous way, and who receive a wage situated within the highest levels of the remuneration system implemented within their company.

The employee falling within this employment category are exempted from an important part of the working time legislation: they are not subject to any work schedule, they are not entitled to overtime pay, they do not benefit from working time limitations and they can work on Sundays and bank holidays. Companies are therefore tempted to grant this employment status to any executives vested with responsibilities.

In a decision rendered on January 31, 2012, the *Cour de Cassation* provided an important clarification to the definition of top executives: **only executives involved in the management of the company can be granted the top executive status** (Labor Chamber of the *Cour de Cassation*, January 31, 2012, n°10-23.828, n° 10-24.412). As such, this status only applies to the members of the company's management committee or to executive employees who, in their respective areas of responsibilities, exercise the prerogatives of the employer without having to obtain a prior consent.

Executive employees' well-being in the workplace: Judges supervise due compliance by companies with their obligations and heavily sanction any breach thereof

Clearly, the obligation to protect the safety and health of employees, in particular executive employees, has been increasingly addressed by the *Cour de Cassation*.

For the *Cour de Cassation*, everybody, including top executives, is entitled to the right to health and the right to safety. In a decision dated November 30, 2011 (Labor Chamber of the *Cour de Cassation*, November 30, 2011, n°09-67.798), it recalled that the top executive status does not release the employer from its obligation to monitor the health and safety of its employees.

It should be recalled at this stage that under French law and in respect of health in the workplace, the employer is bound by a so-called ***obligation de résultat***[4] and must therefore identify and prevent workplace stress situations likely to damage the health of its employees.

In the sadly notorious decision of May 19, 2011, the Versailles Court of Appeals recognized car maker Renault's inexcusable fault in the suicide of a *Centrale*[5] engineer, after having notably pointed out the company's lack of action to remedy the high stress level of the employee and "*the absence of any process within the company to assess the workload, in particular of executive employees, the managers' absence of visibility on the workload of their colleagues, the overcommitment culture and the rising of the to-be-achieved targets*" (5th Chamber of the Versailles Court of Appeals, May 19, 2011, n°10/00954).

This is the reason why it is so important, when implementing a *forfait-jours* working time arrangement, to carefully comply with applicable legal provisions and with the terms of the applicable collective bargaining

agreement concerning not only the control of the employee's workload but also the articulation between professional life and personal life, including but not limited to during the annual performance appraisal interview.

Not putting too much "pressure" on executive employees also implies the definition of exclusively professional assessment criteria that must be precise and objective. In a judgment handed down on March 6, 2012, the First Instance Court of Paris held illegal the evaluation process implemented by the pharmaceutical group Sanofi-Aventis to assess the performance of its executive employees. This process was based on behavioral criteria, some of which were found inaccurate and inappropriate to the relevant employment positions. As such, the "*result-oriented*" criterion aimed at assessing the executive employee's capacity to set team targets by favoring pragmatic and operational solutions, taking a lead role within his team or department and being accountable for the achievement of such targets, was held too ambitious to apply to all executive employees and, according to the Court, should have been restricted to those executive employees who actually manage a team. On September 21, 2011, the Toulouse Court of Appeals suspended the evaluation process implemented by Airbus to assess its executive employees. Such process was partly based on behavioral criteria that referred to a certain number of values. The criteria "*To act courageously*" and "*To make fair, bold decisions in the interests of Airbus and to assume full responsibility for the consequences*" were found not compliant with the objectivity requirement imposed by the French Labor Code and far-removed from their purpose, which was to measure the professional skills of the employees.

The future organization of executive employees' work: towards a development of teleworking?

In the end, we realize that in modern work organization modes – with the advent of information and communication technologies – there exists a real distinction between attendance time and working time. The boundary between the working sphere and the private sphere is shrinking, which, by the way, constitutes a factor of psychosocial risks. At the same time, executives living in couples are increasingly confronted with the dual-career dilemma and are sometimes forced to refuse an interesting promotion because it implies a change of place of work, or on the contrary, they give priority to their professional career to the detriment of a certain quality of life (weekly travels to get back home), which can also contribute to ill-being at work.

More and more companies reflect on this issue – that concerns mainly, but not exclusively executive employees – and are seeking how to strike a better balance between professional life and personal life. The response given to this issue (in addition to various commitments such as reducing the number of meetings after 6:00 pm) often implies the conclusion of a collective bargaining agreement on teleworking.

Teleworking is a true societal phenomenon and it is no coincidence that it has been introduced in the French Labor Code through the Law of March 22, 2012 (L. n°2012-387, March 22, 2012, Art. 46, OJ of March 23) that created Articles L. 1222-9 et seq.

Pursuant to said Article L. 1222-9: "*Without prejudice to the application, as the case may be, of the provisions*

hereof protecting home workers, teleworking means any form of work organization in which a work, which could also have been performed within the premises of the employer, is performed by an employee outside of those premises on a regular and voluntary basis, using information and communication technologies in the framework of an employment contract or an amendment thereto".

If we take a closer look, it appears that the Law mainly enacted the provisions of the national intersectoral agreement of July 19, 2005 that already contained a precise definition of teleworking and set forth the terms and conditions for its implementation. It is regrettable, however, that the legislator did not go one step further in the construction of this work organization mode and failed to provide solutions to certain pre-existing concerns such as the workload monitoring or the coverage of occupational accidents.

This codification is in fact simply the sign of a growing political will to promote teleworking, knowing that there are, on average, 25% of teleworkers in the USA, 13% in Europe, and only 7% in France.

Nonetheless, teleworking may not be imposed by the employer (save in exceptional circumstances to be specified by Decree) and requires the employee's express approval, i.e. the signature of an employment contract or addendum. In this respect, the Paris Court of Appeals recently judged that the work organization of a sales engineer whose geographical sector was quite far away from the company' office and who was therefore occasionally required to work from home, ought to be legally re-qualified as a teleworking situation even if such situation had not been provided for in his employment contract (Paris Court of Appeals, September 6, 2011, n°09/06075).

Teleworking is thus an issue that deserves to be seriously taken into account by companies, either from a preventive perspective, i.e. as a tool for improving executive employees' "quality of life in the workplace", or from a remedial perspective, i.e. to regularize factual situations considered as teleworking situations pursuant to the French Labor Code.

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[1] DARES Study (Analyses n°023), published on March 16, 2012

[2] Articles L. 3121-39 and L. 3121-40 of the French Labor Code

[3] Maximum daily working time of 10 hours, maximum weekly working time of 48 hours, right to a daily rest of 11 hours and the right to a weekly rest of 24 hours.

[4] In respect of health and safety at work, companies have under French law an ***obligation de résultat*** and not only an ***obligation de moyens***. With an ***obligation de résultat***, a party must fulfill a specific obligation or arrive at a specific result. With an ***obligation de moyens***, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result. In other words, concerning safety and health at work, the employer will be presumed liable from the sole fact

that a professional risk occurred and caused harm to his employees.

[5] *École Centrale Paris* is the oldest and most prestigious engineering schools in France.