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Executive – executive officer – legal representative Any confusion between these notions may result in a costly litigation

Among the changes brought by the so-called Aubry Laws dated June 13, 1998 and January 19, 2000, it is worth noting the introduction in the French Labor Code ("FLC") of a legal definition of three categories of executive employees. It was hoped that the provisions setting forth the working time applicable to each defined category would limit social and labor-related risks. This is, however, not so simple. The legal definition set forth in the FLC is complemented by other definitions provided by the Retirement and Welfare National Collective Bargaining Agreement dated March 14, 1947 as well as by the specific provisions set forth in the various existing collective agreements.

In addition, job titles have evolved notably because of business internationalization. This makes it sometimes very difficult to properly interpret what is the status applicable to an executive employee. There has been for instance a drastic increase in the number of "*directeurs généraux*", whereas in France this title is commonly understood within the meaning defined by French corporate law, i.e. a company's legal representative.

And – to crown it all – if you add the frequent dysfunctions of computerized remuneration management systems, the possibility to combine a corporate mandate as legal representative and an employment contract, the confusion often made with respect to the notion of "salaried employee" which is defined differently under social security law and labor law, it clearly appears that one can easily get lost when it comes to defining the status applicable to an executive employee. This confusion is the source of disputes and/or litigations that can represent high social and labor-related risks.

This article provides, therefore, a brief description and main characteristics of the various categories of executives (1) and highlights the conditions for combining a corporate mandate and an employment contract as well as the risks associated therewith (2).

1. Executives

1.1. As per French labor law, there exist three categories of executives:

The Law of January 19, 2000 introduced in FLC specific provisions applicable to executives in relation to working time. The FLC currently contains three articles that firstly define the rules applicable in respect of working time and secondly define each category of executives.

Such provisions expressly apply to salaried employees, as defined by the FLC, not to legal representatives.

Executive officers

Pursuant to Article L.3111-2 of the FLC:

"The provisions set forth in Title II and Title III [Titles II and III respectively deal with "Working time and work scheduling" and "Rest days and bank holidays"] *do not apply to executive officers.*
Shall be considered as an executive officer any executive whose extended responsibilities and duties require a large independence in the organization of his/her agenda, who is entitled to make decisions in an autonomous manner and who receives a remuneration that is among the highest remunerations in the company's or unit's remuneration scale."

In a recent decision (Labor Chamber of the *Cour de Cassation*, January 13, 2009, n°06-46.208) the *Cour de Cassation* – confirming an established case-law – recalled that the judge must take into account the executive's actual employment conditions and that court magistrates are not bound by the provisions of the applicable collective agreement. The *Cour de Cassation* recalled that the criteria listed in Article L.3111-2 of the FLC are cumulative, which means that the number of executives who can be considered as an "executive officer" is necessarily limited and depends notably on the company's structure, workforce and organization.

Yet, an executive officer can be partly subject to the legislation governing working time and in particular to certain provisions of the applicable collective bargaining agreement ("CBA").

In a judgment dated November 12, 2008 (Labor Chamber of the *Cour de Cassation*,n°07-41.694), the *Cour de Cassation* ruled that an executive officer should benefit from the CBA provisions that granted a financial compensation for stand-by duties insofar as the CBA did not stipulate that such provisions only applied to certain categories of employees. In another case, the *Cour de Cassation* rejected the claim of an executive employee seeking to obtain a stand-by compensation because the applicable CBA did not contain any provision in this sense, which prevented the executive from requesting the enforcement of legal provisions which were not applicable to him by virtue of his status as executive officer.

Companies should therefore carefully check all CBA provisions concerning working time, including those that may apply to executive officers.

So-called "autonomous executives"

Pursuant to Article L.3121-38 of the FLC:

"The working time of employees recognized as executives pursuant to the sectoral CBA or pursuant to Article 4 – first paragraph of the Retirement and Welfare National Collective Bargaining Agreement dated March 14, 1947 and whose duties and functions makes it impossible for them to work according to the working time applicable within their workshop, department or team can be set forth in a convention individuelle de forfait [i.e. a global remuneration agreement providing for a fixed number of working hours/days ("convention de

forfait"*]).*

These agreements can provide for a fixed number of working hours/days on a weekly, monthly or yearly basis."

There is, therefore, no single pre-defined legal working time regime for executives. It is up to the company to choose the applicable working time and to define the conditions for its implementation. As such, if the executive's employment contract indicates that the applicable working time is 35 hours per week, his/her status as executive and his/her high level of remuneration do not exclude the strict application of the rules governing employees working 35 hours per week. This executive should therefore benefit (or will likely claim at the time he/she leaves the company) increased pay for worked overtime hours, RTT days (i.e. additional rest days resulting from the reduction in the working time) as well as any other increased pay that may be provided for under the applicable CBA (work on Sundays or bank holidays for example).

It must be recalled that to be valid a *convention de forfait* on a weekly basis (for example 37 working hours per week), monthly basis (for example 169 working hours per month) or yearly basis (for example 1,700 working hours per year or 215 working days per year) must be imperatively set forth in a written instrument signed by the employee and provide precise information: it is not possible for example to stipulate that all overtime hours worked by the executive shall be included in the employee's monthly fixed salary. For the employee and the labor authorities to be able to verify that the fixed remuneration provided for in the *convention de forfait* is at least equal to the applicable minimum wage – including extra pay for overtime – the number of remunerated hours must be precisely set forth.

Any hour worked in excess of the fixed number of working hours/days set forth in the *convention de forfait* must be paid to the employee as an overtime hour: for example, an employee whose employment contract provides for 37 working hours per week must be paid at the increased pay rate when he/she works in excess of this threshold.

It must be noted that the pay slip must expressly mention that the employee has entered into a *convention de forfait*.

Yet, many executives who could be subject to a *convention de forfait* still have a standard employment contract based on the legal 35 hours per week working time whereas many companies could negotiate a more realistic number of working hours, either at the time of recruitment or through an amendment to the existing employment contracts.

It is true, however, that not all executives can enter into a *convention de forfait* on an annual basis since such agreements may only be signed if there exists an applicable collective agreement that has defined the categories of employees likely to enter into such agreements.

Companies must therefore ensure that all requirements set forth in the collective agreement providing the possibility to enter into a *convention de forfait* are duly met. Many CBA stipulate that employees having entered into a *convention de forfait* must have an annual interview to discuss the workload and their working time.

The organization of an annual interview has become a legal obligation since the Law dated August 20, 2008. Companies must therefore remain vigilant and scrupulously comply with the provisions set forth in Article L.3121-46 of the FLC:

"Employers must schedule an individual annual interview with each employee having entered into a convention de forfait in order to discuss the employee's workload, the work organization within the company, the connections between the employee's professional and family life, as well as the remuneration."

If the requirements imposed by law and the applicable CBA are not complied with, the executive could request the nullification of the *convention de forfait* and seek payment of the hours worked in excess of the legal working time – which may represent a significant amount of money!

For example, an executive working 45 hours per week would be entitled to seek the payment of 2,600 hours over a five year period (this five year period corresponding to the statute of limitation). These 2,600 hours would have to be paid at a 25% increased pay rate for the first 8 weeks and at a 50% increased pay rate for the remaining weeks.

In addition, the company could also be prosecuted for illegal employment as Article L.8221-5 of the FLC stipulates that "*shall be considered as illegal employment by concealment of working activity the employer's indication on the pay slip of a number of working hours below the number of hours effectively worked, insofar this indication does not result from a CBA or working time organization collective agreement entered into in application of Part II – Book I – Title II of the FLC*".

The offense of illegal employment is punishable by 3 years' imprisonment and a fine up to 45,000 Euros for an individual and up to 225,000 Euros for a legal entity.

In case of illegal employment, the employee could also request payment of an indemnity equal to 6 months' salary should his/her employment contract be terminated.

Other executives

Article L.3121-39 of the FLC stipulates:

"Employees recognized as executives and whose functions and duties make them work according to the working time applicable within their workshop, department or team are subject to the provisions set forth in this Title in respect of working time and to the provisions set forth in Titles III to V in respect of rest days, vacation and time-saving account."

1.2. Executives, as defined in the first paragraph of the Retirement and Welfare National Collective Bargaining Agreement dated March 14, 1947:

The Retirement and Welfare National Collective Bargaining Agreement dated March 14, 1947 defined three categories of employees for retirement and welfare plan purposes.

- The category of employees falling within the scope of Article 4 of the Retirement and Welfare National Collective Bargaining Agreement: this category includes engineers and executives – in the strict sense of the word, i.e. those who are defined as such in the applicable CBA, the member of the management subject to the general social security regime for employees (i.e. chairman and managing director or manager with a minority interest for instance) as well as certain professions (salaried physicians for example).
- The category of employees falling within the scope of Article 4 bis of the Retirement and Welfare National Collective Bargaining Agreement: this category includes employees, technicians, supervisors who are "*assimilés cadres*", i.e. who are granted the executive status (mainly due to a certain hierarchical position).
- The category of employees falling within the scope of Article 36 bis of the Retirement and Welfare National Collective Bargaining Agreement: this category includes employees with a certain hierarchical position who can benefit from this Agreement by extension. They are also called "*assimilés cadres*" but must be distinguished from the employees falling within the "4 bis" category.

This classification is primarily used for retirement plans (supplementary and complementary retirement plans) and welfare plans in force within companies because the contracts implementing such plans define the applicable categories of employees by benchmarking one or several of the aforementioned categories.

The company faces many risks when it assigns an employee to a wrong category, e.g. claim lodged by an employee who has not been assigned to the right category and, as a result, has not enjoyed the retirement, welfare or medical benefits to which he/she was legitimately entitled.

There also exists a risk of reassessment by the URSSAF (social security contribution collection agency) if for example one or several employee(s) were excluded from a contract that had to be applied to the entire category. In this case, the employer's contributions paid for each employees under the relevant contract shall be re-included in contribution calculation base.

2. Executive officer or legal representative: choosing between the two or making a combination of both

In certain form of company, it is possible to combine an employment agreement and a corporate mandate as legal representative.

2.1. Requirements for combining an employment agreement and a corporate mandate as legal representative:

The combination of an employment agreement and a corporate mandate as legal representative are subject to the following requirements:

- Employment must be effective (i.e. not fictitious),

- There must be a distinction between the technical tasks performed under the employment contract and the corporate mandate as legal representative,
- There must be a subordination relationship between the employee and the company, which means remuneration, authority and a control of the performed tasks,
- The law must not have been violated, which means in this context that the employment contract must not been entered into for the purpose of preventing the termination “ad nutum” of the officer.

2.2. Securing the status granted to a corporate officer:

We recommend carefully examining each situation on a case-by-case basis before appointing someone as corporate officer in order to be in the best position to choose the status that would be best fitted for the situation and/or the company’s or officer’s objectives.

There exist several options, the main features of which are set forth below:

- A corporate mandate as legal representative: in most legal entities, legal representatives are subject to the social security general regime and, therefore, pay contributions to the same social bodies and organizations as executive employees, except as regards the unemployment insurance scheme from which legal representatives are excluded. The provision set forth by the FLC and collective bargaining agreements do not apply to legal representatives (no paid vacation, no working time requirements, etc.). Their corporate mandate may be terminated at will without any indemnity being due. A termination indemnity may, however, be negotiated in certain conditions and legal representatives may subscribe to a private insurance policy providing for a compensation if their corporate mandate is terminated. Legal representatives have the most extended powers vis-à-vis third parties but their powers may be restricted pursuant to a decision of the shareholders. Their remuneration is fixed by the shareholders or the Board of Directors.

- An employment contract conferring the status of executive officer: individuals who enter into such an employment contract are subject to all provisions set forth in the FLC, to the possible exception of the provisions governing working time. As such, they enjoy the same rights as the employees falling within their category, notably in case of termination of employment.

- The suspension of the employment contract for the whole duration of the corporate mandate as legal representative. In this case, the employment contract shall be re-activated at the expiration/termination of the corporate mandate. It is, therefore, strongly recommended to precisely define the conditions of reactivation, notably in terms of seniority and remuneration adjustment.
- The combination of the employment contract and the corporate mandate as legal representative: one of the major difficulties of this option typically arises in case of termination. While the termination of the corporate mandate is quite easy to implement and does not require burdensome formalities, the termination of the employment contract can be much more complex.

  The employment contract and the corporate mandate may be simultaneously terminated only if the termination of the employment contract is justified by a reason linked exclusively to the performance of

the contractual duties (in no event for a reason linked to the performance of the corporate mandate). In practice, it is often difficult to find such a reason and the officer may seek damages by claiming that his/her contract has been terminated for reasons linked to his/her corporate mandate and that his/her dismissal is, in his/her eyes, deprived of legitimate ground.

This combination requires a specific follow-up and termination issues must be apprehended upstream with due caution.

It is worth noting that the "*recommendations on the remuneration of executive corporate officers of companies, shares of which are traded in a regulated stock market*" issued by the *Mouvement des Entreprises de France* (French business confederation) and the *Association française des entreprises privées* (French Association of Private Companies) on October 6, 2008 stipulates that any employment agreement with an employee who becomes a company legal representative should be terminated.

Feel free to contact our Labor and Employment Department should you have any question or wish further information on the above.