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Itinerant employees: A new concern on the horizon!

A judgment of the Court of Justice of the European Union ("CJEU") dated September 10, 2015 (C-266/14) is creating confusion while things could already be considered as cloudy in France in terms of working time duration.

This judgment is likely to create a new source of litigation for companies that employ itinerant employees.

This judgment, handed down in connection with a Spanish request for a preliminary ruling, specifies that all journeys of itinerant employees who are not assigned a fixed or habitual place of work must be considered as effective working time. As such, the time spent by those employees travelling each day between their homes and the premises of the customers designated by their employer constitutes working time.

In the adjudicated case, the daily working hours of the relevant employees, i.e. technicians who were not assigned a fixed place of work, were calculated by counting the time elapsing between the moment they arrived at the premises of the first customer of the day and the moment they left the premises of the last customer. The distance from those employees' homes to the places where they were asked to carry out work varied a great deal and could represent up to 3 hours of travel.

The CJEU ruled that wherever employees do not have a fixed or habitual place of work, **the time spent by those employees travelling each day between their homes and the premises of the first and last customers designated by their employer constitutes "working time", within the meaning of Directive 2003/88/EC concerning certain aspects of the organization of working time**.

This should be a cause of concern for French businesses, as French law and applicable case-law are not as strict on this subject.

Indeed, Article L.3121-4 of the French Labor code, as drafted today, stipulates that:

"The business travel time to the place of performance of the employment contract is not effective working time.

Yet, if it exceeds the normal time spent travelling between home and the habitual place of work, it must be compensated for, either through the allocation of rest time or the payment of a financial consideration. This compensation is determined in the collective bargaining agreement or collective labor agreement or, in the absence of such agreement, by a unilateral decision of the employer, after consultation of the Works Council or employee representatives, if any. The fraction of this business travel time that coincides with the working hours does not entail any loss of salary".

The French Labor Code does not include any specific provision for employees who are not assigned a fixed or habitual place of work.

It should, however, be recalled that the time spent traveling during the working hours is always considered as effective working time.

In the absence of any legal provisions to the contrary, French case-law considers that it is up to the trial judges to determine whether the time spent by these itinerant employees from their home to their designated place of work exceeds the "normal" time usually spent by an employee to get to his/her place of work.

The situation of itinerant employees in France with respect to their travel time varies from one company to another. Some companies have managed to negotiate in order to lay down specific rules in this respect. Others try to deal as best as possible with the compensation provided for under the abovementioned Article L. 3121-4 of the French Labor Code.

The current situation is not comfortable because of the legal uncertainty that prevails.

Lawyers who represent employees seem to see in this judgment new opportunities for litigation. It must be said that the sums at stake could act as a real incentive. If we take an average daily travel time of two hours between the home and the place of work, each itinerant employee could claim approximately 450 hours per year. While the judgment clearly specifies that the CJEU's interpretation only applies to the organization of working time, and not to the remuneration of such time – which is an issue to be settled under national law – it remains that under French current legislation any effective working time must be remunerated and taken into account to calculate overtime.

The question arises as to whether and how the case-law of the CJEU can be applied by French courts. In this respect, the situation is certainly not as transparent as desired. It would appear that the mainstream position is the absence of direct horizontal effect, i.e. the impossibility for a private individual to invoke the case-law of the CJEU before French courts, as long as French law contains provisions to the contrary. A French employee injured by non-compliance of French law should only be able to recover damages by initiating proceedings against the French state as his/her employer may not be condemned for having complied with French legal provisions and case-law. In practice, lawyers who represent employees will rather lay emphasis on the principle according to which EU legislation prevails over national legislations.

It is thus to be feared that the judgment will create a new source of litigation. As such, it would be in the interest of companies with itinerant employees who are not assigned a fixed or habitual place of work to

review how they manage the travels between home and the place of work to attempt to limit the risks in this respect.

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