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Recently adopted "Work Law": A new secured way to enter into forfait working time arrangements if the provisions of the applicable collective agreement on employees' workload are insufficient

Law of August 8, 2016 on Work, Modernization of Social dialogue and Securing Professional Careers, often referred to as the "Work Law", addresses most areas of French labor and employment law. It includes significant provisions on collective negotiation and the enshrinement of company-wide collective agreements, and makes so-called *forfait jours* and *forfait heures* working time arrangements more secure.

Highly criticized, the Work Law aims at securing these working time arrangements and offers a secured way for companies to compensate for the lack of clauses on employees' workload in applicable collective agreements.

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Law of August 8, 2016 on Work, Modernization of Social Dialogue and Securing Professional Careers, often referred to as the "Work Law" was adopted on July 21, 2016, after five months of protest and an ultimate use of Article 49-3 of the French Constitution[1]. It was published on August 9, 2016 and some of its provisions,

such as those on so-called *forfait jours* and *forfait heures* working time arrangements[2], have been applicable since then. The *forfait jours* working time arrangement was implemented by so-called AUBRY I Law of June 13, 1998 and AUBRY II Law of January 19, 2000. The purpose of these arrangements is to depart from the 35-hour working week and the provisions on overtime hours, for employment positions with a high degree of autonomy. In practice, the working time is no longer counted on the basis of a number of working hours per day or per week but on the basis of a maximum number of working days per year, up to a maximum of 218.

Yet, since the introduction of these arrangements, conflicting court decisions have significantly affected the rules that govern such arrangements, to such an extent that at one time one could even wonder whether the legislator would prohibit them.

Year after year, *forfait* working time arrangements survived and remain today one of the only ways to introduce flexibility for the purpose of counting employees' working time. They have remained very popular in recent years, even though they are subject to a strict supervision by judges, especially since the reform brought about by the Law of August 20, 2008.

The overall objective of the Work Law is to give businesses more flexibility and visibility. In this respect, it brings a (small) key for further securing *forfait* working time arrangements, a key that offers a way out to companies that currently apply non-compliant collective agreements.

1. TERMS OF IMPLEMENTATION BEFORE THE ADOPTION OF THE WORK LAW

The implementation of *forfait* working time arrangements is made by way of a company-wide or site-specific collective agreement, or, in the absence of any such agreements, by an industry-wide collective agreement.

Before the Work Law, as per Article L. 3121-39 of the French Labor Code (the "FLC"), only three mandatory clauses had to be inserted in the collective agreement:

- the categories of employees eligible for a *forfait jours* working time arrangement;
- the annual working time on which the arrangements are based;
- the main terms of such arrangements.

To guarantee the protection of the health and safety of employees who have entered into a *forfait jours* working time arrangement, the Labor Chamber of the *Cour de Cassation* (French Supreme Court) has added additional requirements: The collective agreement that provides for the implementation of such arrangements must include provisions that ensure compliance with the maximum working time duration and observance of the minimum daily and weekly rest periods[3].

Consequences of non-compliance should not be treated with levity since the Labor Chamber has ruled that any individual *forfait jours* working time agreement entered into on the basis of a collective agreement that does

not meet these requirements is null and void[4].

Following these rulings, many industry-wide collective agreements were invalidated and companies operating in such industries faced heavy financial penalties:

- Back pay for overtime hours worked above the legal working time duration,
- Indemnity equivalent to six months' salary for undeclared work.

It is in this context that the Labor Chamber of the *Cour de Cassation* invalidated the provisions on *forfait jours* working time arrangements included for example (but not exhaustively) in the Chemical industry-wide collective agreement[5] and Wholesale industry-wide collective agreement[6].

Prior to the enactment of the Work Law, the terms and conditions to ensure compliance with the maximum working time duration and rest periods had to be specified in a provision of the applicable collective agreement, and not by:

- An internal memorandum[7];
- A company Charter[8].

This line of decision created a great deal of legal uncertainty for businesses that had entered into *forfait* working time arrangements on the basis of provisions set forth in collective agreements that were *a posteriori* held invalid by the *Cour de Cassation*.

2. TERMS OF IMPLEMENTATION AFTER THE ADOPTION OF THE WORK LAW

1. The Work Law firstly enshrines the case-law established by the *Cour de Cassation* by introducing a specific legal framework for the implementation of *forfait heures* or *forfait jours* working time arrangements.

(i) According to new Article **L. 3121-63** of the FLC, as introduced by the Work Law, *forfait* working time arrangements must still be implemented pursuant to a company-wide collective agreement, a site-specific collective agreement or, in the absence of such agreements, by an industry-wide collective agreement.

"Annual forfait heures or forfait jours working time arrangements are implemented pursuant to a company-wide collective agreement, a site-specific collective agreement or, in the absence of such agreements, by an industry-wide collective agreement."

This collective agreement must include the information required under the previously applicable legislation, i.e. the number of days or hours included in the *forfait* working time arrangements and the main terms of such arrangements.

However, two new clauses must be inserted in the collective agreement:

- Definition of the reference period for the *forfait* (i.e. a period of twelve consecutive months). This period may coincide with the calendar year or any other period of time;
- Determination of the conditions in which leaves, arrivals or departures during the reference period will be taken into account for the purpose of calculating the remuneration of the employees (new **Article L. 3121-64 of the FLC**).

These two new clauses apply only to collective agreements entered into on or after August 9, 2016.

(ii) Employees working under a *forfait* working time arrangement still have the possibility to waive (through an amendment) some of their rest days in consideration for higher salary. New **Article L. 3121-59** of the FLC limits to one year the period of validity of the amendment that must specify the increased pay rate that will apply to these additional working days, and prohibits the tacit renewal of said amendment. This measure came into force on August 10, 2016.

(iii) Pursuant to Article 8 of the Work Law, the employer must regularly ensure that the workload of an employee working under a *forfait* working time arrangement is reasonable and enables a good distribution of work during his/her working time (**new Article L. 3121-60 of the FLC**).

(iv) In order to better protect employees' health and safety, the company-wide collective agreement or, in the absence of such agreement, the industry-wide collective agreement that provides for the conclusion of *forfait* working time arrangements must include new specific provisions.

As such, the agreement must specify the terms and conditions in which (new **Article L. 3121-64)**:

- the employer ensures the assessment and the regular monitoring of the employee's workload;
- the employer and the employee periodically communicate on the employee's workload, the relationship between the employee's working life and family life, his/her remuneration and the organization of work within the company;
- the employee can exercise his/her right to disconnect.

2. Above all, the biggest change brought about by the Work Law is that the employer may henceforth unilaterally compensate for the absence of collective agreement provisions on workload that are supposed to guarantee the health and safety of the employees in the workplace (new **Article L. 3121-65**).

Indeed, **new Article L. 3121-65** of the FLC reads as follows:

"I.-In the absence of any collective agreement provisions referred to in Article L. 3121-64 II §1 and §2, an individual forfait jours agreement can be validly entered into if the following requirements are met:

1° the employer must prepare a control document showing the number and dates of the worked days or half-days. This document can be completed by the employee, under the responsibility of the employer;

2° the employer must ensure that the employee's workload is compatible with observance of the daily and

weekly rest periods;

3° the employer must organize an annual review meeting with the employee to discuss his/her workload which has to be reasonable, the organization of his/her work, the relationship between his/her professional activity and his/her personal life as well as his/her remuneration.

II.- In the absence of any collective agreement provisions referred to in Article L. 3121-64 II §3, the conditions in which the employee can exercise his/her right to disconnect are defined by the employer and notified to the concerned employee by any means. In companies with at least fifty employees, these conditions must be consistent with the charter referred to Article L. 2242-8 §7."

Access to this escape route is subject to four prerequisites:

- Preparing a **control document** that sets forth the date and number of worked days or half-days;
- Ensuring that the employee's workload is compatible with **observance of the daily and weekly rest periods**;
- Organizing a **personal interview** with the employee to discuss his/her workload, the organization of his work, the relationship between his/her professional activity and his/her personal life as well as his/her remuneration;
- Defining the conditions in which the right to disconnect can be exercised and notify said conditions to the relevant employees by any means.

As such, *forfait jours* agreements entered into on the basis of a collective agreement that contains incomplete provisions with respect to the requirements imposed by the Work Law (and derived from an established case-law), could no longer be nullified or deprived of any effect if the employer implements the above measures.

These new provisions in fact confirm a standard practice implemented in many companies to compensate for the absence of any collective agreement provisions on workload supervision.

Yet, the Work Law should be given credit for making this practice more secure and removing the sword of Damocles that used to hang over the head of companies that were constantly running the risk of having *forfait jour* arrangements declared invalid, with the negative consequences recalled above.

These new provisions are a first step towards a simplified implementation of *forfait* working time arrangements.

For companies that have employees in France, these *forfait* working time arrangements constitute a flexible tool to measure the working time of executive employees with a high level of autonomy.

It is, however, deplorable, that these provisions remain a timid step forward and that the industry-wide or company-wide collective agreement (even incomplete) continues to be a mandatory and inevitable prerequisite to implement *forfait* working time arrangements.

[1] Article 49§3 of the French Constitution: "The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private Members' Bill per session".

[2] These are arrangements according to which working time is counted on the basis of a fixed number of working days (*forfait jours*) or working hours (*forfait heures*) per year.

[3] Labor Chamber of the *Cour de Cassation*, June 29, 2011, n°09-71.107.

[4] Labor Chamber of the *Cour de Cassation*, April 24, 2013, n°11-28.398, and very recently Labor Chamber of the *Cour de Cassation*, July 6, 2016, n°14-28.156.

[5] Labor Chamber of the *Cour de Cassation*, January 31, 2012, n° 10-19.807.

[6] Labor Chamber of the *Cour de Cassation*, September 26, 2012, n°11-14540.

[7] Labor Chamber of the *Cour de Cassation*, December 17, 2014, n°13-23.230.

[8] Labor Chamber of the *Cour de Cassation*, January 27, 2016 n°14-14.293.