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UNDECLARED WORK / SUBCONTRACTING: CONTRACTORS MUST CAREFULLY MONITOR THE ACTIVITIES OF THEIR SUB-CONTRACTORS

February 01, 2014

Pursuant to a Decree dated December 3, 2013, new measures to combat social-related contribution evasion are now enforceable. These measures include aggravated sanctions/penalties for contractors that do not comply with their duty of vigilance and care towards their sub-contractors who commit the offense of undeclared work.

The 2013 Social Security Finance Law n°2012-1404 of December 17, 2012 has hardened the conditions in which URSSAF's^[1] investigations and audits are carried out: pursuant to Decree n°2013-1107 of December 3 2013^[2] that established the new conditions in which such investigations and audits take place, two major sanctions for undeclared work are now applicable^[3]:

- if undeclared work is established, the amount of the adjustment of social-related contributions assessed at the end of the investigations and audits is subject to a 25% surcharge;
- In addition, if it is established that its sub-contractor has engaged into undeclared work, the contractor can suffer particularly adverse consequences, i.e. the cancellation of the reductions in and exemptions from social-related contributions that have been granted for its own employees, if it is proven that it has failed to make the verifications aimed at detecting undeclared work at its sub-contractor.

The announcement of these two new sanctions gives us the opportunity to provide an overview of the risks associated with undeclared work (i) and the impact that undeclared work has on subcontracting relationships (ii).

In recent years, there has been an intensification of investigations and audits to combat undeclared work. This "witch hunt" policy has necessarily a significant adverse impact on contractors in the framework of their relationships with sub-contractors.

1. Focus on undeclared work

The complexity of hiring formalities, the high social-related charges in France or even sometimes the mere desire for some flexibility may lead certain companies to let themselves engage in undeclared work practices.

Pursuant to Articles L. 8221-3 and L. 8221-5 of the French Labor Code, the

concealment of business and the concealment of paid employment are prohibited. These offenses are established when there is an intentional concealment of:

- a self-employed activity, for the purposes of making profits, in breach of business, tax or labor obligations: failure to register with the Trade Registry or with the Business Registry, failure to make the required declarations with the URSSAF and/or with the French tax authorities, etc.; this situation may notably result from the non-reporting of part of one's turnover or revenues;
- all or part of a paid employment: failure to make the prior declaration of employment, absence of pay slip or indication on the pay slip of a number of working hours below the number of hours effectively worked.
- Shall also be considered as undeclared work by concealment of paid employment the fact for an employer to intentionally fail to make the wage or social-related contribution declarations with URSSAF or with the French tax authorities.

Undeclared work is the most common type of illegal work. It accounts for 80% of the illegal employment related offenses recorded by the inspection authorities in 2011^[4]. The Central Agency for Social Security Bodies (Agence centrale des organismes de sécurité sociale or ACOSS) estimated social-related contribution evasion in 2010 between 15.5 and 18.7 billion Euros.

Undeclared work is punished by a 3-year prison term and a 45,000 Euros fine^[5] (225,000 Euros for legal entities). Additional criminal and administrative sanctions may be imposed on the perpetrator of the offense, including, but not limited to: dissolution or shutdown of the business, exclusions from public procurement procedures, non-allocation of public funding or reimbursement of public funding received (for instance in relation to apprenticeship and professional development contracts) for a maximum period of 5 years, etc.

Furthermore, in addition to these criminal and administrative sanctions, companies should keep in mind that they necessarily face the risk to see URSSAF (investigating agents systematically forward to URSSAF the reports establishing the offense of undeclared work) reassess the unpaid social-related contributions and order an adjustment in this respect, to which shall be added reinforced financial penalties.

URSSAF may thus cancel the – total or partial – reductions in and exemptions from social-security contributions or other contributions paid to social security bodies (e.g. so-called "Fillon" reduction or "rural regeneration areas" reduction, etc.).

And since January 1, 2014, if undeclared work is established, the amount of the adjustment of social-related contributions assessed at the end of the investigations and audits, can be subject to a 25% surcharge.

These sanctions/penalties can be imposed both on the party that has engaged into undeclared work (i.e. the party that has concealed its business or the employment of employees) and on its client (i.e. the contractor that subcontracted works/services), insofar as it can be established that the latter was aware or could not have been unaware that it used the services of a person/entity engaged in undeclared work practices.

2. Focus on the contractor's duty of vigilance and care

When a party (the "contractor") enters into a contract for the performance of a work, the provision of services or the performance of a business transaction worth at least 3,000 Euros^[6], it must ensure that its co-contractor (the "sub-contractor") complies with its obligations related to the declaration and payment of social-related contributions. This is the so-called "duty of vigilance" set forth in Article L. 8222-1 of the French Labor Code.

For this purpose, the sub-contractor must, since January 1, 2012, produce to the contractor a so-called "certificate of vigilance". This document, generally issued by URSSAF, must notably:

- attest to the due filing of social declarations and to the due payment of social-related contributions;
- and mention, as the case may be, the number of employees and the total amount of remunerations declared on the last summary statement of contributions.

This certificate must be delivered to the contractor at the time of conclusion of the relevant agreement and then periodically every six months until the completion of the agreement.

Pursuant to Articles L. 243-15 and D. 243-15 of the French Social Security Code, the contractor has the obligation to ensure that the delivered certificate is authentic and valid. In practice, this authentication is carried out thanks to the security code mentioned on the certificate.

The contractor must, therefore, go to URSSAF's website and enter this code. A message is displayed and confirms – or not – the validity and authenticity of the delivered certificate.

But this administrative verification is not enough. The contractor must also verify that the information available to it about its sub-contractor is consistent.

In a case adjudicated by the Cour de Cassation (French Supreme Court) on July 11, 2013, a company had made the required verifications but there existed a discrepancy between the name of the sub-contractor set forth on the K-bis extract (certificate of incorporation) and that appearing on the delivered declarations of honor, declarations of employment and contribution payment

certificates. Pursuant to the judgment of the trial judges, upheld by the Cour de Cassation, the contractor should have been aware that the sub-contractor had no legal existence and could neither be registered with URSSAF nor up-to-date in the payment of its social-related contributions^[7].

Lastly, the contractor must verify, thanks to the information on the number of employees and amount of remunerations, that the sub-contractor is able to perform the assigned work/service. In case of doubt, the contractor must obtain from the sub-contractor the assurance – by any means (hiring intentions, use of temporary employees, etc.) – that it is able to perform such work/service^[8].

If the contractor finally decides to enter into or maintain a contractual relationship with a sub-contractor or provider that has not delivered the certificate of vigilance or whose certificate of vigilance is not authentic and valid, i.e. a contractor that has not complied with its duty of vigilance and/or care, it may be held jointly liable for the offense of undeclared work.

For having failed to comply with its duty of vigilance and/or duty of care, it may be ordered, jointly with the offending sub-contractor, to pay the social-related contributions, the penalties and surcharges due by the latter as well as the remunerations, indemnities and social-related charges due in relation to the employment of undeclared employees.

In addition, the 2013 Social Security Finance Law has introduced tougher sanctions/penalties and, effective as from December 6, 2013^[9], URSSAF can order the cancellation of the reductions in or exemptions from social-related contributions granted in relation to the remunerations paid to the contractor's own employees.

The cancellation is carried out in the same conditions as those governing the cancellation that may be imposed on employers who have themselves directly engaged into undeclared work, i.e.:

- cancellation applies to each month for which it is established that the contractor has not complied with its obligations,
- up to a maximum global amount of 15,000 Euros for a natural person and 75,000 Euros for a legal entity.

Henceforth, it suffices that a certificate establishing the offense of undeclared work be drafted and sent to the Public Prosecutor for the collection body to be entitled to enforce this provision.

3. And there should be more than that...

On December 19, 2013, socialist MPs introduced a Bill for regulating the secondment of foreign workers and combatting “social dumping” and unfair competition. This Bill is designed to anticipate the transposition of the European

agreement on employees on secondment that has not yet been adopted on the date hereof.

This Bill substantially increases the liability of project owners and contractors towards their foreign sub-contractors.

Under the Bill as it currently stands, the contractor would have the obligation to verify that the foreign sub-contractor / provider has duly complied with its reporting obligations for the secondment of workers in France^[1] with the French labor authorities, failing which it would be jointly liable for the payment of wages of the employees on secondment. The contractor would also be required to ensure that the sub-contractor / provider pays to its employees the minimum wage provided for by law or by the applicable collective bargaining agreement.

A “blacklist” of companies and service providers convicted of undeclared work (for an amount of at least 45,000 Euros) would be drawn up and published on the Internet.

If criminal proceedings have been initiated for illegal work, the Bill also gives associations, professional unions and branch employee trade-unions the possibility to join the proceedings as civil parties and seek an indemnification.

The fight against undeclared work has clearly been launched and will undoubtedly intensify...

[1] URSSAF (Unions de Recouvrement des Cotisations de Sécurité Sociale et d’Allocations Familiales) is the body responsible for collecting social related contributions.

[2] Decree n°2013-1107 of December 3, 2013 on the adjustment of social-related contributions in case of undeclared work or lack of compliance.

[3] It should be also noted that a 10% surcharge on the adjustment ordered as a result of URSSAF’s investigations and audits now applies if compliance has not been achieved following first investigation.

[4] As per the terms of the 2013-2015 National Plan to combat illegal work dated November 27, 2012, issued by the National Commission against illegal work chaired by Mr. Jean-Marc Ayrault, Prime Minister.

[5] Fine doubled in case of repeated offenses and further increased in case of undeclared employment of a minor subject to compulsory schooling.

[6] The 3,000 Euros threshold is assessed on the basis of the price actually paid or agreed upon for the performance of the work/service (cost-estimate, order form, invoices, etc.), inclusive of taxes.

[7] 2nd Civil Chamber of the Cour de Cassation, July 11, 2013, n°12-21.554.

[8] As per the inter-ministerial circular dated November 16, 2012 relating to the certificate of vigilance (reporting obligations and payment of social-related contributions).

[9] Day following the publication of the December 3, 2013 implementing Decree.

[10] Articles R. 1263-3 to R. 1263-5 of the French Labor Code.

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