[DURATION OF WORK]

New rules on the « forfaits jours »

Law n°2016-1088 of August 8, 2016, so called « Loi Travail » or « Loi El Khomri »

The *forfait jours* is a special arrangement where the working time is computed in days and not in hours. This arrangement is provided in the individual employment contract or in a rider to this contract. It is authorized only for employees with the *cadre* status who freely organize their working schedule (and subject to conditions, to employees without the *cadre* status).

Such an arrangement is possible only if it is provided by a collective agreement entered into at company level, or, absent such an agreement, by the collective bargaining agreement entered into at industry level.

After the *forfait jours* were introduced in the labour code in 2000, most of the industry wide collective agreements have included provisions authorizing the use of the *forfait jours*, and determining under which conditions it could be used. Many individual agreements providing for a *forfait jours* were signed in accordance with these collective agreements.

In 2010 the European Committee of Social Rights of the Council of Europe has ruled that the French legislation on *forfaits jours* was not conform with the European Social Charter of 1961 revised in 1996 because it did not prevent unreasonable daily and weekly working time, and did not provide adequate guarantees. Further to this, starting 2011, the French Supreme Court nullified a number of agreements on *forfaits jours*, ruling that the collective agreement applied did not provide sufficient guarantees as to health, safety and right to a rest. This occurred for a number of collective agreements entered into at industry level.

Further to this situation, some collective agreements (for example Syntec CBA on April 1, 2014) were modified to be compliant with the principles set by the Supreme Court. However for those which were not compliant, the employers were faced to either negotiate a collective agreement at the level of the company that would be compliant, or take the risk of the individual agreements being nullified at the request of the employees, and hence the risk of paying important sums for overtime above 35 hours a week.

The *Loi Travail* sets new rules that must be included in the collective agreements (at industry level or at company level), and provides under which conditions the individual agreements are valid even if the collective agreement is not.

The collective agreements must now include additional provisions, namely:

1. The period during which the working time is computed (the civil year or any other 12-month period);
2. How the remuneration of the employees is computed when the period is incomplete (hires and end of contracts during the period);
3. Modalities of the right for the employee to disconnect from the IT tools;
4. Methods for the employer to evaluate and monitor the work load of the employee;
5. Modalities of communication between employer and employee on the work load, on the combination private life / professional life, on the remuneration and on the organization of the working time in the company.
6. The maximum number of days work per year when the employee waives his right to time off (this clause is optional; absent such a clause the legal rules applies, namely the maximum number of days work is 235 per year).

Where the collective agreement does not include the provisions 4 and 5 above, it is still possible to enter into an individual agreement with an employee (or to continue applying an existing individual agreement), whether the collective agreement is signed after the *Loi Travail* or before. In that case the employer must:

- prepare a tracking record showing the number and dates of the days (or half days) worked. This tracking record may be filled in by the employee and controlled by the employer;
- make sure that the employee's workload is compatible with the statutory 11-hour daily rest and 35-hour weekly rest;
- organize once a year a meeting with the employee during which are discussed : the work load, the organization of employee's work, the combination between professional activity and private life, and the employee's remuneration.

Where the collective agreement does not include the statutory provision on the right for the employee to disconnect, the employer must unilaterally set rules for the right to disconnect. In our opinion it would be careful either to include these rules in the individual agreement. Whether it would be sufficient to include them in the internal rules and regulations (*réglement intérieur*) may be disputed.

In the context of these new provisions, a recent decision of the Supreme Court (Cass. Soc. September 8, 2016, n°14-26256) gives interesting indications as to how the tracking record should be drafted. In this case the tracking record implemented by the employer included a box to be checked for each day work, a space where the employee was invited to indicate when he/she had not benefited from the 11-hour daily rest, and a space where the employee could alert the hierarchy and ask for a meeting in the case of difficulty on the working time. The court of appeal had judged that this was not sufficient to guarantee a reasonable duration of work and to protect employee's health and safety, and hence nullified the individual agreement. The Supreme Court invalidated this decision and ruled that this tracking record was sufficient.

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