

Labor & Employment Client Service Group

From Bryan Cave, Paris

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French Working Time for Executives: Lump-Sum Remuneration Agreements Based on a Fixed Number of Working Days Per Year (so-called *Forfaits-Jours*)

Reminder on French Law Working Time Rules for Executives

The legal duration of work for employees in France is 35 hours per week, meaning that any hours required to be worked above this limit would normally be considered as overtime. Executives are, however, most often not subject to this limit. Accordingly, the French Labor Code distinguishes between three types of executives:

- managing executives: rules relating to working time would not apply to such employees;
- executives whose functions dictate that they conform to the collective working time schedule applicable to the service or team in which they are integrated (*e.g.*, 35 hours weekly); and
- other executives, who are largely autonomous, are free to organize their work and whose working time cannot be predetermined. The majority of executives fall within this category. These executives may benefit from so-called lump sum agreements, based on an annual average number of hours (generally 1.607 hours) or, especially, days worked¹. 1.5 million executives in France benefit from these so-called “forfaits-jour”. These special agreements must be authorized and provided by the applicable collective labor agreement and must be materialized by a written agreement with the employee, usually in the form of the employment agreement or an amendment thereto. In these agreements, if the working time is measured in worked days per year, the employee would work a maximum of 218 days² (or less if provided by the company or applicable collective labor agreement) and would further benefit from a minimum of 10 extra rest days per

¹ These working time arrangements may also be made available to certain non-executives (*e.g.*, salespersons or staff who are autonomous in the organization of their working time).

² Including the Pentecost (or another day as determined by the employer) day of solidarity worked but unpaid so that employers may contribute the social charges on the day's salaries to the government (to subsidize assistance to handicapped persons and the elderly).

year, instead of overtime pay. In exchange, the number of hours worked by the employee each day would not be counted. However, these employees are still subject to a mandatory rest time of 11 consecutive hours per day and 35 consecutive hours per week.

Validity of Arrangement Challenged

The validity of this working time arrangement was recently challenged in court with a claim for overtime based on the argument that this system entailed, from a practical standpoint, a breach of the mandatory daily and weekly rest times of the employees concerned, and accordingly, constituted a threat to the employees' right to health and rest time. The French Supreme Court (*Cour de cassation*) rendered its decision in this regard on **June 29, 2011**.

New Conditions for Working Time Arrangement

The Supreme Court did not invalidate the above-mentioned working time arrangement provided by collective agreement but indicated that the collective agreement implementing such arrangement (in the case at hand, the metallurgy agreement) must provide for guarantees ensuring compliance with mandatory daily and weekly minimum rest times (11 consecutive hours of rest per day, 35 consecutive hours weekly) and maximum duration of working time.

To do so, the Supreme Court indicated that the following measures, for instance, should be implemented:

- *verification by the employer of the number of worked days, in order to record the number of worked days or half-days and the number of rest days or half-days taken by the employees;*
- *issuance, by the employer, of a verification document indicating the number and the date of each worked day (or half-day), and the qualification of the rest days taken (e.g., mandatory weekly rest time, vacation, extra vacation days provided by the collective labor agreement, rest days - so-called RTT days). Such verification document may be prepared by the employee, but under the employer's responsibility;*
- *follow-up by the employee's supervisor of the employee's working time organization and workload, with an annual meeting, during which the employee's working time organization, workload and daily duration of work -- which must be reasonable -- would be discussed.*

Advice

As a result of the foregoing, if an employer wishes to implement a lump sum remuneration agreement based on a fixed number of working days per year (in exchange for rest days) for its executives and other autonomous staff, it must implement means to verify and follow the employees' activity to ensure that the employees' weekly working time is reasonable.

The employer should at least provide for the measures set forth in the collective agreement (e.g., usually an annual meeting to review work load and a verification of the number of days worked), and preferably the safeguard measures set forth by the French Supreme Court (e.g., timesheets, time keeping record distinguishing between actual work, travel time, daily or weekly rest days, RTT days, legal and other holiday leaves, annual interview).

Failing such measures, the working time arrangement based on an annual number of working days could be found to be inoperative and the employer could be liable for overtime.

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