Working time in France: a sensitive topic in social audits

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In France, the legal working week is 35 hours (i.e., 1,607 hours per year) and applies to all salaried employees, regardless of the activity carried out and the type of employment agreement (indefinite term or fixed term). Over the years however more flexible working time arrangements have been introduced to increase the working time of employees. As a result, today more than half of full-time employees work more than 35 hours per week, particularly executives.

In M&A transactions, consideration of the financial impact and legal consequences of a violation of French rules governing working time, is one of the key points of the social audits carried out as part of the due diligence process on the company or business being sold. It is very rare, if not exceptional, not to discover multiple instances of non-compliance with the applicable regulations. From experience, the risks involved in this area are generally poorly understood, and often unknown.

This article highlights the main issues that are likely to arise during an audit on working time and the most common violations, many of which can have serious financial and criminal consequences.

How to calculate the legal working hours?

Legal working time is calculated on the basis of the time actually worked by the employee, which is defined by the labour code as « *the time during which the employee is available to the employer and complies with his directives without being able to freely go about his/her personal activities* ». Therefore, time involved with breaks, transport, dressing and undressing in uniform or protective clothing are normally not considered as actual working time and are not taken into account in the calculation of the 35 weekly hours, unless otherwise specified in a company-wide agreement or in the applicable national collective bargaining agreement.

This is also the case for the travel between the employee's home and his/her workplace, meaning that the employer does not pay the employee when travelling and the time spent travelling cannot give rise to a claim for pay overtime. However, if the employee spends travelling longer than the usual travel time between home and the workplace the situation is different and so e.g., itinerant employees (such as sales representatives) who spend a significant amount of travel time between their home and their first and last clients must be compensated either in money or additional rest time.

What is the impact of exceeding the legal working hours?

Whilst 35 hours is the legal working week, an employer can arrange for employees to work longer by agreeing to pay overtime.

To limit the performance of overtime, the employer must have opted for specific arrangements, such as for example the annualization of working time. This scheme allows employees to work hours above the legal working week over certain periods of the year, which will be compensated by working less hours during off-peak periods. It is also possible to arrange working time based on a specific number of days to be worked per year. (See below)

Key points: when contemplating implementing any of these specific working time arrangements that would be more applicable to meet the demands of its business than a 35-hour week, the employer must first check that the applicable national collective bargaining agreement allows such an arrangement. If it doesn't, implementation of the arrangement is subject to the negotiation of a company-wide agreement. It should be noted that the absence of a collective agreement is a point often discovered in social audits. Absent a collective agreement, the implementation of an annualization of working time or a counting of working time in days for example is null and void. The employees are then considered to actually work 35 hours a week, meaning that they are entitled to be paid overtime for the additional hours worked at an increased rate.

How is pay for overtime calculated?

Overtime is paid at the rate of 125% of the hourly rate for each of the first eight hours (i.e., from the 36th to the 43rd hour) and 150% for any additional hours. A company-wide agreement may provide for different rates of increase provided they are at least 110% of the hourly rate. Overtime hours are paid each month and must be separately listed on the payslip for the month during which they were performed.

Overtime increases are calculated on the basis of the actual hourly wage paid to the employee, including bonuses and allowances which are the direct result of the work undertaken (e.g., performance bonuses) as well as benefits in kind. Overtime benefits from a favorable social and fiscal regime for employees since they are exempt from employee social security contributions up to a limit of 11.31% of salary and income tax up to the annual limit of 5,000 euros net. Only overtime hours worked beyond this limit are subject to income tax.

Payment of overtime may be replaced by additional days of rest (the so-called "*RTT days*") if this option is provided for in the applicable collective bargaining agreement or in a company-wide agreement, or by the decision of the employer in companies that do not have union representatives to negotiate such an agreement and provided that the social and economic committee (CSE), if it exists, does not oppose it.

Key point: any hour worked by the employee must be remunerated (or compensated by additional days of rest). However, it is often observed in social audits that all overtime worked by employees has not been paid to them. In that case, the employees are entitled to ask for payment of the arrears of salary. The statute of limitations for such claims is three years calculated from the date the employee should have received the salary payment or the date of termination of the employment contract (for terminated employees). In the latter case, a terminated employee could also claim for an indemnity equal to six months of his/her gross salary for undeclared work resulting from the fact that his/her payslips made no mention of the overtime hours worked by the employee. Failure to comply with overtime rules is also subject to criminal sanctions for undeclared work, theoretically up to three years of imprisonment for the company's legal representatives and a fine of 45,000 euros or 225,000 euros when a legal entity is convicted.

Who decides on whether overtime is required? Can the employer require the employee to work overtime?

Working overtime is decided by the employer. In principle, the employee cannot refuse to perform overtime hours except in certain cases, for example if too short period of notice is given or because of the employee's confirmed medical condition. Otherwise, the employee's refusal may justify a disciplinary sanction, or even dismissal for misconduct, when there is a history of refusal or refusal has caused a disruption to the company (e.g., the work to be done was urgent).

Key points: employers must pay particular attention to the regulation of overtime. It is recommended that the employment contract specifies that only overtime hours worked at the employer's request will be paid. Also beware of the workload that you entrust to your employees. If the employee works overtime that has not been requested by the employer but without objection from the latter, the employer is deemed to have given his implicit agreement and the overtime must be paid. The same applies if the overtime could not be avoided given the tasks assigned to the employee.

Are there any limits to the performance of overtime?

The number of overtime hours that an employee can perform each week is limited by the maximum daily and weekly working hours, namely 10 hours per day and 48 hours per week or 44 hours on average over 12 weeks (which may be increased to 46 hours in specific circumstances). Above these limits, no effective work can be requested, except in exceptional circumstances and according to specific procedures provided for by law. The performance of overtime hours is also limited by the annual quota of overtime set by the applicable collective bargaining agreement. In the absence of such an agreement, this quota is set by law at 220 hours per employee, but it is possible to reduce or increase the quota by way of a company-wide agreement. Any overtime worked beyond the annual quota must be paid at the appropriate rate. In addition, the employees concerned must benefit from mandatory compensatory rest time. It should also be noted that the social and economic committee (CSE) must be consulted if the annual quota of overtime is exceeded.

Key point: non-compliance with the provisions relating to the maximum weekly working time is punishable by a fine of 750 euros for each applicable employee, or 3,750 euros in the case of a legal entity. Employees who do not enjoy the mandatory compensatory rest time for hours worked beyond the annual quota of overtime (which from experience is quite often the case) are entitled to be paid for this period of time and for damages which compensate the possible prejudice suffered by the employee who did not benefit from his/her additional rest time (e.g., consequences on his/her health, balance between professional and personal life, etc.)

Are executives subject to overtime regulations?

Under French labour law, only senior executives are excluded from working time legislation. They are not subject to the regulations on overtime, nor entitled to daily and weekly rest periods. They only benefit from paid leave. However, this provision is subject to strict conditions aimed at limiting its application.

A senior executive is defined by the labour code as an employee (i) having autonomous decision-making power and a great independence in the organization of his/her work, (ii) receiving a remuneration among the highest of the company and (iii) who is actively involved in the management of the company. Should one of these conditions not be met, the employees concerned could challenge the application of the provision to them and claim that they work on the basis of the legal working week of 35 hours. For the company, the financial risks are those referred to above for non-payment of overtime and more generally for non-compliance with working time legislation.

Other less senior executives are entitled to payment for their overtime as they are salaried employees of the company. However, their functions often lead them to work more than 35 hours per week, and therefore to work overtime on a regular basis. This situation may lead to opting for a more flexible scheme for both the employer and the executive, the so-called "*forfait-jours*".

In this case, working time is no longer counted in hours but in number of days per year, up to a limit of 218 days. The applicable collective bargaining agreement or a company-wide agreement may provide

for a lesser number of days. In any case, as there is no longer any hourly reference for this type of working time arrangement, there is no payment of overtime. Instead of this payment, employees benefit from additional days off. These days of rest are compulsory and must be strictly observed. The executives also benefit from the minimum rest periods provided for by law. Like other employees, they are therefore entitled to a minimum daily rest period of 11 consecutive hours per day and a minimum weekly rest period of 35 consecutive hours per week.

In 2020, more than half of all executives worked under *forfait-jours*, indicating that this arrangement is very attractive to both employers and employees. But here again, it is subject to strict conditions. It only applies to executives who in fact work autonomously, which means that they must be effectively free in the way they organize their work and their working time. Moreover, the *forfait-jours* scheme must be provided for in the national collective bargaining agreement applicable to the company or in a company-wide agreement. In this regard, certain collective bargaining agreements provide for conditions relating to the hierarchical level, coefficient or compensation that employees must meet in order to be subject to a *forfait-jours* scheme.

Finally, each employee concerned must sign an agreement with mandatory clauses, including the exact number of days worked and the methods of control of the employee's workload. In other words, *forfait-jours* cannot be imposed on the employee.

Key points: the most frequent violations identified in social audits relate to (i) the implementation of a *forfait-jours* in the absence of a collective agreement, (ii) the absence of individual agreements or agreements that do not include all the mandatory information, (iii) the absence of a proper control of working time and the workload of the employees.

In each of these situations, the *forfait-jours* is null and void and the employees concerned are entitled to claim that they work on the basis of the legal working week of 35 hours. They can claim payment for overtime for the previous three years, for the period corresponding to the time off they should have benefited from and potential damages if the annual quota of overtime has not been complied with. Moreover, in case of termination of the employment contract for any reason whatsoever, the terminated employee can also claim for an indemnity equal to six months of gross salary for undeclared work.

It should be noted that litigation in this area is increasing, and the financial impact can be substantial for the company often representing several hundred thousand euros. It is therefore strongly recommended that companies using the *forfait-jours* scheme ensure that they meet the applicable legal and conventional requirements and that the drafting of the individual agreement is as precise and detailed as possible.

Based on experience, the non-compliance of such agreements is most often raised when disputes arise before industrial tribunals on the termination of the employment contract. Unfortunately, it is then too late to regularize the situation. Therefore, it may be advisable to have individual agreements provided for a *forfait-jours* reviewed by an employment lawyer experienced in litigation without waiting for litigation to arise. A review will identify the matters that need to be addressed and may include an estimate of the financial risk incurred in the event of non-compliance.

Who is responsible for controlling working time and workload for executives?

The employer is responsible for controlling the workload, the number and the length of the working days of the executives. This responsibility cannot be transferred to the employee. In practice, the employer must set up a system to regularly monitor the number of working days and the workload of the employee. For example, the employee may be required to complete a time sheet on a monthly basis

or to enter his/her working days digitally in a program set up for this purpose. The employer must also hold at least one annual interview (unless additional interviews are provided for in the applicable collective agreement) with the employee during which the latter's workload must be discussed as well as the balance between his/her working and personal life.

Key point: controlling the workload of executives is a very sensitive topic in France and gives rise to a very large number of claims with very serious financial consequences. Social audits very often highlight the lack of control required by legal or conventional provisions. It is therefore strongly recommended in M&A transactions that non-compliance with French regulations on the matter be the subject of specific representations and warranties by the seller.

Is there a general obligation to monitor all employees' working time?

From a legal standpoint, there is no general obligation for employers to monitor the working time of all employees, except employees working a certain number of days per year or employees submitted to individualized working hours (*i.e.*, who are not subject to the collective working time in force within the company).

Key point: In practice however, it is strongly recommended to provide for such monitoring (e.g., through badge systems recording the entry and exit times of all employees) in order to avoid claims relating to the duration of working time and the payment of overtime. Based on experience, many employees regularly note their daily working hours (in particular, the hours which could be considered as overtime) and keep all supporting documents proving these hours worked. In the event of a claim, it is up to the employer who disputes the alleged overtime to prove the hours actually worked. Failing that, the employer will be considered as not having complied with the regulations on working time.

To conclude, working time is an essential topic in any social audit, whether this audit is prior to an acquisition transaction (thereby allowing for a negotiation on price or the inclusion of specific warranties) or is carried out for other reasons. In each case, the aim is the same: assessing the compliance of the company's HR practices with the applicable legal rules, employment contracts or collective agreements, identifying and quantifying the major areas of risk, and recommending the appropriate solutions to minimize them.

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