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The French Supreme Court Imposes an Obligation To Monitor the Working Days of Management-Level Employees

The French Supreme Court recently rendered a widely publicized decision¹ which restates strict rules that employers must comply with to avoid the payment of overtime to employees whose work hours cannot be predetermined. Following this decision, French-based companies will have to check carefully that the working hours of management-level employees comply with the obligation to provide adequate rest and protection of health and safety as required by the French constitution and European laws.

In the early 2000s, the French government enacted laws to limit working time to 35 hours per week, or 1608 hours per year. Hours worked in excess of these legal limits must be paid at increased rates ranging from 110% to 150% of the normal hourly rates.

At the same time, and in order to maintain some flexibility, the law provided that employees carrying out management responsibilities could be exempted from the overtime payments if the number of days they worked per year was limited, provided that the implementation and control of this system was established by a collective bargaining agreement.² Originally, the maximum number of working days was 218 days per year, and this arrangement was applicable only to managerial employees. In an effort to develop flexibility for both companies and employees, it was decided in 2008 to adopt a new law extending the system to other categories of employees and allowing the yearly working days restriction to increase far beyond 218 days, up to a maximum of 282 days per year.

This system has been subject to sharp criticism by some unions and European organizations, on the ground that it could lead employees to work excessive hours,³ in contravention of the European Charter on Social Rights. In a decision dated 23 June 2010, the European Committee on Social Rights declared that this system violated the

¹ Decision dated 29 June 2011, n° 09-71107 P+B+R+I.

² This law does not apply to senior management employees ("*cadres dirigeant*"), i.e., employees with autonomous decision making responsibility, who exercise a great degree of independence regarding the organization of their work time, and who are among the highest paid employees in the company or in the establishment.

³ Because the law requires employees to get at least 11 hours of rest between work shifts, and at least one full day off per week, employees could be required under this system to work as much as 78 hours per week.

European Social Charter,⁴ which raised great concern among employers and the legal community regarding the validity of the annual working days system.

The issue came before the French Supreme Court in a matter involving the claims of an employee working as an international sales manager, who requested payment of overtime, even though his employment contract provided that he was limited to 218 working days per year and, therefore, he was exempt from the overtime requirement.

In its decision, the French Supreme Court has confirmed the validity of the annual working days system. However, it has fixed some limits that must be strictly observed by employers for the implementation of this system.

- > *The number of workdays required must remain reasonable to comply with the principle that the health of employees must be protected.*

The decision affirms that the working days system must be applied in a manner that is consistent with general European rules and regulations requiring that the duration of work must be “reasonable”; any deviation from the maximum hours rules must be applied with due regard for the general principles of protection of health and the right to rest, as provided by the European Charters and by the French constitution.⁵

- > *The protection of health and the right to rest must be preserved by the collective bargaining agreement.*

The decision of the Supreme Court also confirms that the validity of an annual working days system is subject to the existence of a collective bargaining agreement containing provisions which guarantee compliance with the limitations on working hours and with requirements for regular periods of rest (daily and weekly). In the case at hand, the court reviewed the provisions of the applicable collective bargaining agreement to determine whether it included sufficient guarantees to achieve these goals. The court found that the health and safety of the employees was adequately protected.

- > *The guarantees provided by the applicable collective bargaining agreement must be fully observed by the employer.*

Finally, the court declared that the judge must always verify that the employer actually complies with the provisions of the collective bargaining agreement before deciding whether a claim for overtime is justified.

If the requirements of the collective bargaining agreement are not strictly applied, the annual working days system is deemed not to be in force, and the employee is entitled to the payment of overtime for all hours worked in excess of 35 hours per week. The amount of overtime can be very high, as the French statute of limitations allows the employee to claim payment for five years before the filing of his claim. Moreover, the employer’s failure to enforce the agreed-upon limits on working days may, in some extreme situations, be held to constitute a violation of the employer’s duty to preserve the health and safety of the employees, and thus expose the company to the payment of damages, or even to criminal penalties in case of a work accident.

⁴ Decision on the merits, 23 June 2010, CFE/CGC v. France.

⁵ European Social Charter and Charter of Fundamental Rights of the European Union, Preamble of the French Constitution (27 October 1946).

* * *

After this decision, employers should make sure that the provisions of their collective bargaining agreements limiting employees' annual working days are sufficient to guarantee that the limitations on working hours have been respected and satisfy the obligation to protect employees' health and safety, and should take the necessary steps to ensure that these measures are effectively implemented and enforced within the company for each employee working under the annual working days system. These measures should include not only keeping accurate records of employees' working days and rest periods, but also continuous oversight of employees' workload and annual individual meetings to assess the affected employees' workload and the number of days worked during the year.

Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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