

FRENCH SUPREME COURT: WORKING TIME AGREEMENTS INVALID DUE TO INADEQUATE MONITORING OF EMPLOYEE WORKLOADS

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French Labor, Employment, and Workplace Safety Alert

By: Christine Artus, Essya Zaraq

To ensure the protection of the safety and health of employees, the French Supreme Court reiterated the need to include provisions in collective bargaining agreements guaranteeing the reasonableness of the scope and workload for an employee covered by an individual working time agreement of days worked over the year (the "lump sum").

A lump sum agreement can be concluded only with the employee who has sufficient autonomy in the organization in relation to his or her working time. An employee with a lump sum is required to work a certain number of days per year (the French labour code provides for a maximum of 218 days worked per year, but the collective bargaining agreement applicable within the company may provide for less).

The employee under a lump sum agreement is not subject to the maximum daily and weekly working times (i.e., 10 hours per day, 35 hours per week). However, the employee continues to benefit from the legal guarantees provided for in terms of daily and weekly rest periods, paid holidays, and public holidays not worked at the company. In order to ensure that the company complies with these guarantees, the employer must regularly check (i) that the employee's workload is reasonable and allows for a good distribution of working time and (ii) a balance between the employee's professional activity and his/her personal life.

In the absence of such guarantees, the lump sum agreement would be invalid, notably triggering the risk of payment for overtime hours and damages equivalent to six months' salary for concealment of work. In this court decision dated 6 November 2019, a managing director was covered by the collective bargaining agreement of young workers. The employee sought the nullity of his lump sum agreement and the payment of overtime hours.

The collective bargaining agreement provided for the following monitoring and workload provisions:

- An annual interview in the year of conclusion of the lump sum, in which the employee's workload will be examined and which will be subject to a report;
- In subsequent years, the length of the working day was to be examined at the annual performance review; and
- Days worked and days off were to be counted monthly.

The French Supreme Court considered these safeguard to be insufficient to guarantee the protection of the safety and health of employees. The French Supreme Court stated that, regardless of the employee's position, the company must ensure the effective monitoring of working time, including for a managing director.

In practice, it is not enough to provide an annual interview on the employee's workload or a monthly count of days worked and days off. The monitoring of the employee's working time on a daily basis must make it possible to adjust quickly a workload that would be incompatible with reasonable working hours.

In order to limit the risk of sanction, employers must:

- Check that the provisions of the national collective bargaining agreement for the sector to which they belong comply with the provisions of French case law; and
- If necessary, conclude a company or establishment agreement that would set the necessary guarantees for the protection of the health and safety of employees on a lump sum.

Since the last French legal reforms, a lump sum which does not comply with all the provisions of French case law may still be validly executed if the employer implements individually the following supplementary measures:

- A control document showing the number and date of the days or half days worked, signed by the employee;
- Measures to ensure that the employee's workload is compatible with compliance with daily and weekly rest periods; and
- The organization of an interview with the employee, at a minimum of once per year, to discuss his or her workload, organization of work, the relationship between the employee's professional and personal life, and his or her remuneration.

Companies that have not recently concluded a company working-time agreement are recommended to particularly focus on developments in French case law on this subject and to comply with legal provisions, collective bargaining agreements and French case law in order to limit, as far as possible, the risks of being sentenced for concealment of work payment of overtime hours over the past three years, which, in practice, is often a major source of claims from employees.

KEY CONTACTS



CHRISTINE ARTUS
PARTNER

PARIS
+33.1.58.44.15.38
CHRISTINE.ARTUS@KLGATES.COM

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