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The new legislation on telework introduced by the reform of French labor Law is not necessarily a step towards simplification

Telework is definitively growing at a fast speed! This type of work organization has become a true societal phenomenon in France in particular since telework has been introduced in the French Labor Code following the adoption of Law dated March 22, 2012. Today, telework is a reality in the daily life of many French employees, mainly in large urban areas.

Telework was thus legitimately included in the scope of the negotiations that took place this summer to prepare the reform of French Labor law. The objective was to facilitate access to this type of work organization that is about to become common, and to implement a secured framework for employees. Ordinance n° 2017-1387 of September 22, 2017 thus recast the legal framework governing telework but does not appear to be really a progress towards simplification.

According to a survey carried out by Vivastreet, a major ads site, approximately 3 million workers out of a working population of 26 million people currently work at home at least one day a week. This type of work

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organization that is already broadly implemented within international groups that employ isolated employees in France is increasingly used across all industries, even if according to Vivastreet, some business sectors, such as real estate, IT, the Internet, telecoms or accounting/management, are more “eligible” for telework than others, and in organizations of all sizes.

Telework was thus legitimately included in the scope of the negotiations that took place this summer to prepare the reform of French Labor law. The objective was to facilitate access to this type of work organization that is about to become common in today’s working world (according to a study published by Fondation Concorde – a French liberal think tank – 6.7 million of working individuals are “eligible” for telework), and to implement a safe framework for employees.

Ordinance n° 2017-1387 of September 22, 2017 thus recast the legal framework governing telework but does not appear to be really a progress towards simplification.

(i) A new definition of telework

The French Labor Code defines telework as *“any types of work organization by which a work that could have been done within the employer’s premises is voluntarily performed by an employee outside these premises, using information and communications technologies”* (Article L.1222-9 of the French Labor Code).

The French Labor Code previously stated that telework was to be performed *“on a regular basis”*.

The deletion of the reference to the regular nature of telework opens up the possibility to implement situational telework (based, for instance, on a family status, temporary personal constraints, etc.). Telework can be performed exclusively from home or interspersed with work periods within the premises of the company.

(ii) A more constraining legal framework for the implementation of telework

French labor law no longer imposes the obligation to formalize the telework arrangement in the employment contract or in an amendment to the employment contract.

- Permanent telework arrangements must now be instituted through a collective agreement or, in the absence of such agreement, through a specific company/group policy, after having obtained the opinion of the Social and Economic Committee (new staff representative body which will supersede the “Works Council” as from 2018 in France), if there is one (Article L.1222-9 §2 of the French Labor code).

The collective agreement or, in the absence of such agreement, the company/group policy must include at least:

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- 1° the conditions for the implementation of a telework arrangement and the conditions in which the employee may return to a non-telework position;
- 2° the conditions in which the employee shall accept the terms and conditions of the telework arrangement;
- 3° the conditions in which the teleworking employee's working hours will be monitored and his/her workload regulated;
- 4° the determination of the timeslots within which the employer may usually contact the teleworking employee.

In addition to these four legal requirements, the collective agreement or the company/group policy must also specify how the costs of telework will be handled.

In the end, it is to be noted that the collective agreement or the company/group policy must include provisions that were so far incorporated in the employment contract or in the amendment on telework.

While this new framework for the implementation of telework through a collective agreement or company/group policy appears to be efficient for large companies and medium-sized businesses, it can be viewed as a further constraint for small businesses or foreign companies who have only one or few isolated employee(s) on the French Territory as they now have the obligation to draft a company policy for sometimes only one teleworking employee!

The other constraint brought about by the new framework is that it sets in stone the main provisions governing telework (such as the timeslots applicable to the employee, the conditions in which the telework-related costs will be handled, etc. which must imperatively be set forth in the collective agreement or company/group policy), and thus creates some sort of inflexibility whereas such provisions could previously be adapted on a case-by-case basis. As such, under the guise of creating "security" for employees, the new framework eventually deprives both parties of flexibility in the negotiations of specific terms and conditions for the implementation of telework!

- Fortunately, as regards situational telework, the French Labor Code stipulates that it can be established between the employer and the employee "by any means" (Article L.1222-9 §3 of the French Labor Code). As such, the employer is not required to draft a collective agreement or a company/group policy, or even to sign an amendment to the employment contract, to accept the ad hoc request made by an employee to work exceptionally at home one day because his/her child is sick.

(iii) A new obligation imposed on employers: They now must provide the reasons why they refuse a telework request

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The French Labor Code endorses the possibility for employers to refuse the telework request made by employees who are eligible for telework. However, the employer must provide the reasons for its refusal. Specifically, it must provide an objective reason which is in the company's best interests, and not of course a reason based on a discriminatory motive. We can already fear that this will lead to a growing number of disputes as employees may tend to challenge the reason put forth by the employer to justify its refusal, by pointing out that they have been the victim of discrimination as compared with other employees whose telework request has been accepted...

The employer may, however, set forth in the collective agreement or company/group policy one or several category(ies) of employment positions "eligible" for telework (and, conversely, deny the possibility for some employment positions to apply for telework). In that case, the obligation to justify its refusal will apply for employees who hold a position that is "eligible" for telework, in accordance with the terms and conditions set forth in the collective agreement or in the company/group policy (Article L.1222-9 §6 of the French Labor Code).

(iv) The employer is exposed to an enhanced risk with respect to health in the workplace: The new framework introduces a presumption of workplace accident

From now on, wherever an accident occurs in the place where the teleworker works during teleworking time, such an accident shall be presumed to be a workplace accident. This presumption shall operate both for regular telework and situational telework.

As a conclusion, even though the new framework merely codifies practices that already existed in large groups, there is a concern that it may curb the implementation of regular/situational telework within small businesses. Similarly, a surge in telework-related disputes cannot be excluded. While the reform of French Labor Law is rather a step towards increased flexibility, the new framework governing telework does not seem to be moving in the same direction. Let us hope that this well-intentioned attempt to "secure" telework (*a priori* to the benefit of employees) will not have the opposite of the intended effect and lead to a decreased use of telework in France, which would be out of step with current trends in France and elsewhere in the world.

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