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Geographical mobility of employees

Just like numerous other clauses in employment agreements, provisions addressing the issues of employees' place of work and employees' geographical mobility have been at the center of several landmark decisions. This led us to address this subject and provide a status report on the possibilities which are now offered to employers when dealing with employees' mobility.

1. The employment agreement does not include a mobility clause:

If the employer wishes to change the employee's place of work, it will be necessary to assess whether this change is to be considered as a change in the employee's working conditions or as an amendment to the employee's employment agreement.

It must be recalled that the place of work mentioned in the employment agreement is considered as purely informative, unless it is expressly specified that the employee will be required to work exclusively at the location indicated therein.

According to an established case law, the change in the employee's place of work is considered as a change in the employee's working conditions and therefore can be decided upon by the management if the new place of work is located within the same geographical sector. On the contrary, if the new place of work is not located within the same geographical sector, the change will be considered as an amendment to the employment agreement and therefore requires the employee's formal consent.

The *Cour de Cassation* (French Supreme court) has not yet precisely defined the **notion of geographical sector –** which therefore remains quite vague – even though it specified that "a change in the place of work must be assessed in an objective manner". As such, the location of the two places of work (the former one and the new one) must be taken into consideration in view to determining whether they are located within the same geographical sector, the domicile of the employees and the impact the change in the place of work will have in the employee's personal life are not taken into account.

This "objective" assessment remains however de facto quite subjective and is subject to the judge's sovereign appreciation. In a judgment dated January 25, 2006, the *Cour de Cassatio*n upheld the decision of a Court of Appeals which took into account the distance between the two sites and the public transportation servicing the two areas to finally rule that the change in the place of work did constitute an amendment to the employment agreement, not a simple a change in the employee's working conditions. It is therefore impossible to assert today that the Parisian area forms a single and unique geographical sector: the Versailles Court of Appeals held that, to be considered as a simple change in the working conditions, the transfer of the place of work

should take place within a geographical area more homogeneous than the entire Parisian region.

This notion of geographical sectors is however set aside when the mobility is inherent to the employee's professional duties (construction superintendent, consultant, etc.) and when the change is in fact a temporary assignment or an occasional travel. It has been ruled that a two-month assignment was to be considered as a temporary transfer but it is no easy to determine up to which duration an assignment can be considered as temporary.

The notion of **home working** is now sufficiently clear: the *Cour de Cassation* laid down in 2001 the principle according to which employers may not oblige employees to work at home. This principle was confirmed in the inter-professional agreement on telework dated July 19, 2005, extended by decree of May 30, 2006. This agreement logically imposes that the termination of the teleworking arrangement is subject to the mutual consent of both the employer and employee. In the same vein, the *Cour de Cassation* ruled on May 31, 2006 that the employer was not entitled to terminate the teleworking arrangement even when the employment agreement includes a mobility clause.

2. The employment agreement includes a mobility clause:

The mobility clause authorizes the employer to transfer the employee's place of work to another location an initially defined geographical sector without the employee's consent (said consent was given by the employee at the time the employment agreement was signed).

French case law has however limited the powers of the employer in this respect. In a judgment rendered on June 7, 2006, the *Cour de Cassation* specified that the geographical area where the employee was to be transferred ought to be **precisely defined**. This area may be a region or a larger zone so long as it is geographically limited. As such, the employer may not extend said zone, even if it reserved the rights to do so in the mobility clause, for instance to cover the extension of the territories in which the company deploys its activities. It is therefore impossible to provide that an employee can be transferred to future entities of the company if such entities are not located within the geographical sector defined in the mobility clause.

In addition, employees may only be transferred to a new location at the expiration of a **sufficient notice period**, the duration of which depends on the scope of the change.

Employers must also ensure that the transfer of the employee will not be considered as an abuse of right (for instance if the notice period if insufficient compared to the impact the change in the place of work will have on the employee) or as a breach by the employer of the contractual good faith duty. The following were considered as abusive: the transfer of a seven month pregnant woman and the transfer of a mother of a handicapped child because the proposed employment positions could be occupied by other employees. The *Cour de Cassation* held that "imposing a transfer on employees in an unstable family situation or heath condition violates the contractual good faith duty".

Prior to enforcing a mobility clause, it is highly advisable to analyze the possible impact the change will have

in terms of remuneration. It is indeed impossible to unilaterally deduct the remuneration of an employee, which could be the case in the event of a transfer of a employee benefiting from a variable remuneration (commission on the sales achieved in his/her geographical sector). This is the reason why it is necessary to secure the employee's consent if the transfer will result in a reduction in the contractual remuneration.

Lastly, is must be specified that a transfer may not be imposed on employees benefiting from a special status under applicable French legislation (such as staff representatives). Employers must in this case obtain the employees' express consent.