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Is the right to disconnect about to become an effective right for employees in France?

In today's digital and "all-connected" world where 71% of French executive employees read work emails in the evening or on holiday[1], the "right to disconnect" has been officially introduced in the French Labor Code following its legislative recognition in the so-called "Work Law" of August 8, 2016.

Effective as from January 1, 2017, the mandatory annual negotiations on gender equality in the workplace and quality of life at work must also address "*the conditions in which the employee can fully exercise his /her right to disconnect and the implementation by the company of mechanisms to regulate the use of digital tools*".

While the legislator's laudable initiative to prompt employers to put in place regulation systems in order to protect the employees' personal life and preserve their health is welcome, it is also perfectly understandable that companies working internationally and /or in an ultra-competitive environment that requires the highest level of responsiveness express concerns regarding the necessity to continue to rely on the reactivity of their autonomous

executive employees.

Should we be pleased or concerned about the emergence of the right to disconnect? What are the boundaries of this right? Is it a realistic right or a right that is totally "disconnected" from business realities?

The right to disconnect is quite logically part of a current trend associated with a change in mentality and the evolution of French labor and employment law, as it is closely linked to the respect for personal and family life and to the protection of the health and safety of employees.

Quality of life at work is a very topical issue at the moment. New information and communication technologies have substantially affected working conditions. For some people, such technologies constitute a major contribution to the working life as they translate into further flexibility and responsiveness; for others, they reflect an unwelcome phenomenon of "hyper-connectivity" that generates psychosocial risks.

With the introduction of digital tools in business life, the boundary between the working sphere and the private sphere is shrinking.

As a result, new forms of work organization have emerged, such as teleworking that was first introduced by the national inter-industry agreement of July 19, 2005, then incorporated into the French Labor Code through the Law of March 22, 2012, and that has been increasingly used over the past few years.

While employees are given more freedom in the organization of their work schedule, it has become apparent that this greater freedom can create an absence of limits and, therefore, an excessive encroachment into the private sphere.

Hence the legislator's will – quite laudable in itself – to put in place regulation mechanisms. But how far should this go? How to accommodate respect for private life and the business requirements of being responsive or even acting instantaneously in a global and ultra-competitive economy? How to preserve the health of employees without being "disconnected" from business realities?

All of these issues will have to be addressed by social partners (i.e. employers' organizations and trade unions) during the negotiations on the right to disconnect.

Indeed, effective as from January 1, 2017, the mandatory annual negotiations on gender equality in the workplace and quality of life at work must also address "*the conditions in which the employee can fully exercise his /her right to disconnect and the implementation by the company of mechanisms to regulate the*

use of digital tools".

The right to disconnect prior to January 1, 2017

The first signs of the right to disconnect emerged in a decision issued by Labor Chamber of the *Cour de Cassation* (French Supreme Court) on October 2, 2001[1]: "*The employee is under no obligation either to accept working at home or to bring there his files and working tools*". This decision was subsequently confirmed by a decision handed down on February 2014 by the *Cour de Cassation* that ruled as follows: "*The fact that* [the employee] *was not reachable on his cell phone outside working hours cannot be considered as a misconduct*"[2].

The right to disconnect made the news again in 2014 – including at the international level – when the companies of the so-called Syntec industry (i.e. engineering and consulting firms, and technology companies) signed on April 1, 2004 an amendment to the Syntec collective bargaining agreement that imposed on employees subject to an annual *forfait jours* working time arrangement (i.e. an arrangement according to which working time is counted on the basis of a fixed number of working days per year) the "*obligation to disconnect from remote working devices*" in order to ensure "*the employees' compliance with the statutory minimum rest periods*".

The same wording has been very recently used in a June 30, 2016 amendment to the collective bargaining agreement applicable to the wholesale industry. This amendment, the application of which has not yet been extended by decree, pertains to annual *forfait jours* working time arrangements and includes a provision that introduces the obligation to disconnect for employees subject to annual *forait jours* working time arrangements.

Still concerning annual *forfait jours* working time arrangements, we already discussed in our October 2016 e-newsletter the provisions set forth in new Article L. 3121-64 of the French Labor Code, effective since August 10, 2016, according to which collective agreements that provide for the implementation of *forfait jours* working time arrangements must henceforth specify the terms and conditions in which the employee can exercise his/her right to disconnect. If the collective agreement does not include provisions in this respect, such terms and conditions must be defined in the individual *forfait jours* working time arrangement and notified to the concerned employee by any means.

As such, the right to disconnect of employees subject to annual *forfait jours* working time arrangements has already been incorporated into the French Labor Code as early as in August 2016.

The new provisions applicable as from January 1, 2017

With the introduction of the obligation to negotiate annually on the right to disconnect issue, effective as from January 1, 2017, the Work Law enshrines this right and tries to make it an effective right enjoyable by all employees, without any distinction.

Article L.2242-8 of the French Labor Code, in its version applicable as from January 1, 2017, stipulates as follows:

"The annual negotiations on gender equality in the workplace and quality of life at work must also address:

1° The relationship between the employee's personal life and professional life;

(…)

7° The terms and conditions in which the employee can fully exercise his/her right to disconnect and the implementation by the company of mechanisms to regulate the use of digital tools, to ensure compliance with the rest periods and vacation time and respect for personal and family life.

If no agreement is reached, the employer must draw up a charter, after seeking the opinion of the works council or, in the absence of a works council, of the staff representatives. This charter must set forth the terms and conditions in which employees can exercise their right to disconnect, and provide for the implementation of training and awareness programs on the reasonable use of digital tools for the employees and management staff."

The binding effect of the new provisions

It should first be recalled that companies that must conduct mandatory annual negotiations are only those that have one or several trade union sections with a trade union representative, i.e. companies with at least 50 employees.

Failure to comply with this obligation to negotiate is punishable by a one-year term of prison and a 3,750 euros fine[3].

However, while the new provisions impose the obligation to negotiate on the right to disconnect, they do not, as per the principle of contractual freedom, impose the obligation to reach an agreement.

As such, companies can try to find a common ground but, if negotiations are not successful, they may not be

sanctioned just because no agreement is put in place.

Yet, Article L.2242-8 of the French Labor Code stipulates that in the absence of agreement on the right to disconnect, the employer must draw up a charter that will set forth the terms and conditions in which employees can exercise their right to disconnect, and provide for the implementation of actions to educate and raise the awareness of employees regarding a reasonable use of digital tools.

It seems that the obligation to draw up such a charter will also apply to companies with less than 50 employees. However, the new provisions do not provide for any sanction/penalty for companies that do not draw up this charter.

In France, a charter has no legal value or legal force strictly speaking, unless it provides for sanctions against employees, in which case, it can be considered as an appendix to the company's internal rules and regulations.

What is to be feared or expected from the development of the right to disconnect?

Since the new provisions do not provide for any sanction/penalty if no agreement is reached or if the company does not draw up a charter, one may wonder about the effectiveness of this right to disconnect.

At this stage, the introduction of the right to disconnect among the issues to be negotiated annually is mostly symbolic.

Yet, the impact that this legislative change will have both on internal corporate practices and forthcoming court decisions should not be overlooked.

Indeed, it is likely that a new type of claim will be brought before labor courts in disputes concerning overtime back pays and the employer's failure to comply with its obligation to ensure the safety of the employees, i.e. a separate claim for damages for failure to comply with the right to disconnect.

As such, the right to disconnect will *de facto* generate – even in the absence of a negotiated collective agreement – additional obligations for employers. The latter must put in place systems to *regulate* the tools made available to employee (such as a "pop-up"-styled automatic alert sent after a certain time in the evening and that indicates to the employee that it is time to disconnect) in order to avoid the risk of being blamed for an infringement of the employees' right to disconnect.

This interference of the right/duty to disconnect may indirectly undermine the autonomy of so-called "autonomous" executive employees who may, until now and for example for family reasons, decide to leave the office earlier and then reconnect later in the evening.

While respect for personal life is of course essential and critical, it really remains regrettable that in France

“self-regulation” by employees who are supposed to be “autonomous”’ does not exist or is inadequately implemented (even by employees with a high level of responsibility) and that it is always necessary to impose new constraints on businesses in order to protect employees, even sometimes against their own will…

[1] Labor Chamber of the *Cour de Cassation*, October 2, 2001 n°99-42.727

[2] Labor Chamber of the *Cour de Cassation*, February 17, 2004 n°01-45.889

[3] Article L.2243-2 of the French Labor Code