

Transnational Secondment: Beware of Undeclared Work and Social Dumping!

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The words are on everyone's ears these days: "undeclared work", "social dumping", "relocation", "transnational secondment", to name a few. There is a wealth of news on the subject, with major changes occurring in French and European legislation. And all of these words have a very real effect on the daily work done by human resource managers, particularly those who manage groups of impatriates. How can one make sense of all the changes?

First of all, HR managers must be aware of the fact that French authorities are particularly attentive to making sure foreign workers come to France to work in strict respect of the French Labour Code, so that national workers are not disadvantaged in any way. The authorities keep a very close eye on foreign workers who come to France from countries where social legislation is more flexible.

1. The French Labour Code provides a strict framework for secondment

The concern is such that last summer the French government had the parliament vote a law adding a full title to the Labour Code dedicated to the "transnational secondment of workers". Article 89 of act no. 2005-882 dated 2 August 2005 does indeed add four new articles to the French Labour Code: articles L 341-1, -2, -3, and -4. These articles provide a legal definition of secondment: "A seconded employee as meant by this chapter is any employee of a legally and regularly established employer exercising its activity outside of France and who, working regularly for that employer, is asked by that employer to carry out his or her work for a limited period of time on French soil" (article L 341-2).

As a result, several conditions must be met before a foreign worker can receive the status of "seconded worker":

- The subordinate relationship to the foreign employer must continue: the foreign worker must be paid by the foreign firm and receive instructions exclusively from the foreign firm.
- The foreign worker cannot have been hired just for his or her secondment in France (must be "working regularly for...").
- The firm must be "regularly" established in the foreign country (if it has just relocated, its workers cannot have secondment status if they come to work in France).

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The new article L. 341-1 specifically defines four cases in which a foreign worker can receive secondment status:

1. In the framework of the provision of services: a foreign company has the right to second its foreign workers in France as part of a contract concluded with a customer in France.
2. A foreign firm can second its employees to its subsidiaries or to its parent company in France—secondment is, in effect, possible “between establishments of a same company or between companies of a same group”.
3. A temporary work agency can “second” its temporary workers—this is very new in French legislation.
4. A foreign firm can post its employees in France “to carry out an operation for its own benefit, without the necessity of a contract existing between the foreign firm and a consignee”. This is also very new.

The new article L. 341-3 specifies that most of the provisions of the French Labour Code apply to foreign workers seconded in France. Provisions regarding the following areas apply:

- individual and collective freedoms in the work relation, exercising the right to strike;
- working hours, time off in lieu, public holidays, yearly paid leave, leave for family events, maternity leave, paternity leave, liability to leave and bad weather funds;
- minimum wage and salary payment, including increases for overtime;
- the conditions under which one is made available and the guarantees due to the workers by temporary work agencies;
- regulations regarding security, health, hygiene at work and medical supervision;
- discrimination and professional equality between women and men, maternity protection, minimum age limitations, employment of children, working hours and night work for young workers;
- illegal work.

This article greatly reduces the possibility of social dumping.

Lastly, the new article L. 341-4 specifies the conditions under which a foreign worker cannot have secondment status and therefore must be hired under a local French contract: if a company’s economic activity is solely turned towards France, if it regularly uses premises in France (and therefore not for specific, time-limited assignments) or if it regularly canvasses for customers in France. That is, if it relocates to a country with more flexible social legislation but continues to have its main economic activity focusing on France. In this case, the firm has to hire its foreign workers in France under a French work contract and apply the full French Labour Code. ***This greatly reduces the advantages one expects to get from relocation.***

2. The Bolkestein directive abandons the “country of origin principle”

These amendments to French law could have had no effect on European Union nationals had the Bolkestein directive been adopted as it had first been drafted. The initial draft set down as a basic principle the country of origin, in order to open up services within the European Union. This first draft foresaw that a foreign firm providing services would only be subject to the legislation of its country of origin. A European-based foreign firm providing services to a French firm would not have to apply the French Labour Code for its foreign workers.

However, on 16 February 2006, the European Parliament adopted an amended version of the Bolkestein directive, which abandons the country of origin principle and excludes labour laws from the directive's scope. The resulting version adopted by the European Parliament obliges foreign-based firms providing services in France to respect the French Labour Code. As a result, the French Labour Code's new articles L 341-1 and following, which we just discussed, do apply to European Union nationals.

N.B.: The European Commission and the Council of Ministers have yet to ratify the version as amended by the European Parliament, which will only take place in a few months.

3. Beware of undeclared, or “dissimulated” work

The new French Labour Code articles define the conditions under which a foreign worker cannot benefit from secondment status. If the worker nevertheless gets secondment status, when he does not have the right to it, the situation could be considered undeclared work and, if the firm is caught, penalties are heavy.

Undeclared work is strictly defined by French legislation and penalties are increasingly heavy. Undeclared work is defined by article L. 324-10 of the Labour Code, which stipulates that undeclared, or “dissimulated” work corresponds to:

- not having filed a DUE (*declaration unique d'embauche*—one-time employment declaration)
- not providing a pay slip
- not declaring all the hours actually worked
- not having a SIRET-SIREN registration number or a certificate of registration or incorporation (*extrait K-bis*) or the equivalent in the foreign country of origin
- not paying social dues or taxes

A foreign firm can only file a DUE if the foreign worker has a work permit. And if the work permit does not correspond to the actual work done, the work is considered “undeclared”.

Here are examples of “undeclared work”: a foreign worker has “secondment status” when he should be a “salaried employee”; a student has a temporary work permit but works as a company manager, or works 35 hours a week when the permit is only valid for 20 hours a week; an “intern” does actual productive work for a firm; etc. Conclusion? Having a work permit is not enough; that permit has to correspond to the actual work done.

In addition, all foreign firms must make sure to fulfil the following obligations in order not to be considered as practicing “dissimilated” work:

- exist as a legal entity in the firm’s country of origin
- pay requisite social dues: either in its country of origin when a bilateral treaty exists with France, or in France when no such treaty exists
- provide its employees, even when they are foreigners, with pay slips as soon as the service provision lasts longer than one month. (If the service provision lasts less than a month, pay slips are not compulsory.)

With regard to French legislation, it is the firm’s responsibility to ensure that it does not practice undeclared work, but also to ensure that its partners and customers do not do so either. Any firm (A) working with another firm must ensure that its partner (B) does not practice undeclared work, or else firm (A) will be considered an accomplice in (B)’s undeclared work.

The Labour Code therefore requires all firms (A) to have their partners (B) provide them with a number of documents proving that they do not use undeclared work. Until recently, these documents had to be provided only when the contract binding (A) and (B) was signed. But Ministry of Labour decree no. 2005-1334 of 27 October 2005 amends articles R. 324-2 and R. 324-4 of the Labour Code and obliges firm (A) to get these documents from firm (B) when the contract is signed ***and every six months thereafter*** until the end of the contract.

If firm (A) does not procure these documents when the contract is signed and every six months until the end of the contract, the consequences could be drastic (article L. 324-14 of the Labour Code):

When a contract regards an obligation of a sum at least equal to 3,000 euros in view of work done, a provision of services or a commercial activity, **any person who does not verify**, when signing a contract and every six months thereafter until the end of the contract, that the contracting partner fulfils its obligations with regard to article L. 324-10, ... **will be held jointly responsible with the person who has committed the offence of undeclared work**:

1° **For the payment of compulsory taxes, duties and dues**, as well as penalties and increases owed to the Treasury or to the social welfare organizations;

2° Where applicable, for reimbursing the sums corresponding to public aid received;



3° **For paying remuneration, compensation and charges due** as a result of employing salaried employees who were not the object of one of the formalities foreseen by articles L. 143-3 and L. 320.

“The sums whose payment is due in application of the preceding paragraphs are determined pro rata based on the work carried out, the services provided, the goods sold and the remuneration practiced in the profession.”

N.B.: Élan has two more detailed information sheets available on the following subjects:

- “Undeclared Work”
- “Secondment, the Bolkestein Directive and Social Dumping”

The information sheets provide the full text of the laws, as well as a precise list of the documents that contracting partners must provide as proof that no undeclared work is taking place.

Don't hesitate to contact us if you want to know more!

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