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Nonstandardized Working Day

By Marina Ryzhkova

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Marina Ryzhkova
Partner, Head of Russian Labor Law / Employment Practice
Salans

Nonstandardized working day: Can there be any term so dear to employers? What is a nonstandardized working day, and why is it so interesting?

Situations in which employees periodically work longer hours than established in their contracts (whether at the request of a supervisor or of their own initiative) are extremely common. One of the most widespread ways that employers deal with this situation is to establish a nonstandardized working day for such employees.

According to a popular misconception (especially among employees), the establishment of a "nonstandardized working day" means that the employer has the right to demand that the employee work "whenever needed," whether 12 hours a day instead of eight, around-the-clock or on weekends. And this "overtime" does not need to be paid: The Labor Code states that just three calendar days of additional annual vacation is sufficient compensation for a nonstandardized working day!

In fact, the situation is not so easy for employers, or so harsh for employees.

The term "nonstandardized working day" as defined in the RF Labor Code is worth citing in full. It refers to "a special work procedure in accordance with which certain employees may at the instruction of the employer where necessary occasionally perform their duties outside of their standard working hours." Therefore, this definition means that: (a) This procedure cannot be applied to everyone, but only to "certain" employees; (b) "overtime" can only be "occasional," not continual (and especially not daily); and (c) the employee can only be asked to work extra time without payment on business days (not on weekends or holidays).

It should be noted that by law a list of positions with a nonstandardized working day should be included in a corporate bylaw of the employer, usually the mandatory Code of Conduct. Less frequently, this list is part of the collective bargaining agreement (which usually means the company has a trade union).

An employer planning to introduce nonstandardized working days for its employees should note that a number of legal issues relating to this procedure are controversial. One of the first issues for employers considering introducing nonstandardized working days is whether they can apply the procedure to all employees?

A literal interpretation of the RF Labor Code implies that the list of positions with a nonstandardized working day can be drawn-up by the employer at its discretion, after which the employer must include the said list in the relevant bylaw. We note that if the company has an employee representative body (usually a trade union), the opinion of this body must be taken into consideration before the list of employees with nonstandardized working days is added to the bylaw.

Many labor law specialists refer by analogy to a rule in public sector employment legislation when determining the list of employees for which a nonstandardized working day may be

established. According to this rule, the list of employees with nonstandardized working days includes employees (a) whose work in the course of the working day cannot be accurately accounted for, (b) who organize their working hours at their own discretion, and (c) persons whose working hours are divided into periods of variable duration due to the nature of the work. In our experience, many state labor inspectors take an unfavorable view of situations where a corporate bylaw expressly states that all employees have a nonstandardized working day. They note that in accordance with the Labor Code, a nonstandardized working day may be established for "certain" employees (namely, employees for whom a standard working day is difficult to determine in view of their duties).

The second problem typically encountered is that the law permits employees with nonstandardized working days to be asked to work extra time only occasionally. However, neither the law nor enforcement practice provides guidance as to what should be considered "occasional." It is only clear that such extra time should not be daily or practically daily: We are aware of numerous cases in which inspected employers have had problems due to employees with nonstandardized working days working extra hours practically every working day.

What conclusion should be drawn from the above? Basically speaking, although the legal provisions regulating nonstandardized working days are incomplete, which may cause certain practical difficulties, for many employers and many categories of employees, this procedure is entirely appropriate.

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