

EMPLOYMENT LAW OVERVIEW **FRANCE** 2019-2020

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I. GENERAL OVERVIEW

1. INTRODUCTION

In France, employment law affords employees a good level of protection. Nevertheless, this legal environment is constantly changing as a result of government reforms and case law evolution. Recent trends relate in particular to: (1) union representation and collective bargaining agreements; (2) working time; (3) mutual termination agreements; (4) senior management compensation; and (5) termination packages in listed companies. In France, choosing the wrong option may result in costly individual or collective litigation.

2. KEY POINTS

- All non-EU citizens need a work permit to work.
- Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any provision to the contrary in their employment contract.
- Usually, employees work 35 hours per week. Only hours worked at the request of the employee's superior will be regarded as overtime.
- Indefinite-term contracts: There must be real and serious grounds for dismissal (two types of valid grounds: personal grounds and economic grounds).
- Severance payments are only awarded if the employee has the minimum length of service and the relevant CBA provisions.

3. LEGAL FRAMEWORK

Employment law in France is based primarily on the following sources, set out in order of priority:

- The Constitution.
- European legal instruments: Consisting of EU law (including Treaty provisions, EU regulations and Directives and the case law of the European Court of Justice) and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- The Labour Code: Made up of laws, regulations and decrees, the Labour Code determines nearly every aspect of French employment law.
- Case law: The provisions of the Labour Code are interpreted through decisions of the employment law section of French the Supreme Court ("Cour de cassation").
- Collective Bargaining Agreements ("CBAs") ("Conventions collectives"): Collective Bargaining Agreements are written agreements, entered into between one or more employee representative trade unions and one or more employer representative organisations. They govern individual and collective employment relationships, working conditions and employee benefits in a given industry (e.g., the chemical, banking and pharmaceutical industries). Collective bargaining agreements can be binding on all employers whose line of business is covered by the agreement.
- Collective company agreements ("Accords d'entreprise"): These agreements, which apply to specific companies, are signed by the employer and, in principle, trade union representatives present in the company.
- Atypical agreements: At company level, agreements may be entered into with the staff delegates or the Works Council rather than with trade union representatives and, in such a case, they are defined as atypical agreements. They do not come under the category of collective company agreements. They are considered binding by the case law as a "unilateral commitment" ("engagement unilateral") of the employer.
- Common practices ("usages"): These are the general, fixed and constant practices of the employer. They concern, in particular, benefits

granted to employees and some details regarding the operation of staff representative bodies. The Company may revoke those common practices at any time, subject to notifying the staff representatives and each individual employee concerned, along with respecting a reasonable notice period (normally three months) between the notification of the employees and the revocation of the common practice.

4. NEW DEVELOPMENTS

Recently, the French government has profoundly modified employment law in France, through the adoption of a major overhaul of key provisions of the French Labour Code.

The key aspects relate to the simplification of the staff representative structures and significant efforts to secure dismissals. There are plenty of other measures of importance, as detailed below.

This reform accelerates the trends already initiated under President Hollande through three major labour laws respectively entered into in June 2013, August 2015 and August 2016.

CHANGES TO NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS

By way of background, it should be noted that in France, employers must comply with the labour code, but also with the applicable sectorial collective bargaining agreement (CBA), if any. A sectorial CBA is a collective bargaining agreement entered by Unions representing employees on the one hand and Unions representing employees on the national level in a defined business sector. Once extended by the Labour ministry, it becomes mandatory for any company whose activity falls within the scope defined by the agreement. On the other hand, a company may always enter into company collective bargaining agreements with Unions being present in said company.

The Macron reform provides for some important changes in this area.

IMPROVED CAPACITY TO BREAK WITH SECTORIAL CBA'S

Until recently, it was not possible to derogate to sectorial CBA's with a company-wide agreement, unless it was more favourable for the employees.

This has progressively changed, starting in 2008 as far as working time is concerned, then in 2016, and most recently with the Macron labour law reform that has created three different categories or "blocks":

"Block 1" matters: the sectorial collective agreement prevails over company agreements on a list of 11 topics. For example, minimum wage provided for by the CBA cannot be derogated by a company agreement.

"Block 2" matters: the sectorial agreement prevails over former company agreements if the sectorial CBA provides for it. This concerns 4 topics. For example, policies regarding the insertion of handicapped individuals into the workforce.

All other subjects not included in the previous two blocks constitute "Block 3": Company agreement prevails over the sectorial CBA.

NEW MAJORITY RULES FOR ENTERING INTO A COMPANY COLLECTIVE BARGAINING AGREEMENT

Under French law, company agreements are entered into by the employer and the Union delegates (being employed in the company) having been appointed by Unions based on the results of the votes in the first round of the last elections of the works council (only unions are able to present candidates over this first round).

The principle of the majority collective agreement applies to all company agreements as of May 1, 2018: to be valid, the agreement must then be signed by one or more trade unions that received 50% of the votes cast.

However, if the signatory representative trade union organisations only have 30 to 50% of the votes, it is possible to then use a new backup plan: revert to a company referendum meaning that all the employees' opinions in relation to the agreement may be sought in order to render the agreement enforceable.

INCREASED CAPACITY TO ENTER INTO A COLLECTIVE BARGAINING COMPANY AGREEMENTS IN SMALL COMPANIES OR WITHOUT TRADE UNIONS

In France, some matters require a collective agreement, such as the recourse to specific working

time arrangements. Small businesses without unions were struggling to enter into an agreement where needed. The Macron reform has therefore facilitated the ability to enter into an agreement, by enabling to sign, if no union would appoint an employee, with an elected staff member or even with the workforce directly, under a certain conditions.

SECURISATION OF COMPANIES' CBA

Since case law can be quite unpredictable and because changes are commonplace, the Government wished to protect employers against consequences of a ruling invalidating an agreement or some of its provision, which would then trigger consequences for the future, but also for the past, as it is admitted that civil case law has a retroactive effect. The law now states that if it appears that the retroactive effect of that annulment will have manifestly excessive consequences, there is the possibility for a judge to decide that the cancellation of all or part of an agreement will only bear an effect for the future or to modulate the effects of his decision in time.

FREQUENCY AND CONTENT OF MANDATORY NEGOTIATIONS

Companies where unions are present are required to conduct negotiations on some items listed by the Labour code, under a certain frequency. The most important one is the annual negotiation on wages, working time and profit sharing.

It is now possible to set out by company agreement, the topics of mandatory negotiation in the company and the content of each theme. However, some issues, set out by law, must be negotiated at least once every 4 years.

Topics that can also be set out by agreement:

- the frequency of compulsory negotiations (up to 4 years),
- the calendar and meeting places,
- information provided by the employer (or employers' organisations) and the date of delivery,
- the procedures for monitoring the commitments entered into by the parties.

Such a company agreement is concluded for a maximum duration of 4 years and can set the periodicity of its renegotiation.

Staff Representation: the CSE (The Social and Economic Committee)

The Macron Reform has significantly simplified staff representation in companies. Up to now, there have been three types of staff representative bodies, all of which are chaired by the employer:

- in companies with 11-49 staff: staff delegates (délégués du personnel),
- in companies with 50 and above: staff delegates, a works council, and a health and safety committee.

The staff delegates were in charge of relaying claims regarding the day-to-day working life of the company staff, while the works council is mainly in charge of economic matters, and the health and safety committee deals with health and security matters.

One of the main points in the Macron reforms is the merging of the current three staff representative bodies into one. The Works Council, Staff Delegates, and Health and Safety Committee are now combined into the Social and Economic Committee: the CSE. Note that it will also be possible, subject to the existence of a collective agreement, instead of a CSE, to implement a Conseil d'entreprise. This body would basically have the same prerogatives as the CSE but would, in addition, be able to enter into and revise collective agreements, instead of trade Union delegates that would no longer exist.

TIMEFRAME FOR THE CSE TO BE IMPLEMENTED

The minimum threshold for mandatory implementation is when the company employs at least 11 employees for 12 consecutive months. In principle, the CSE is set up at the end of the current mandate of the elected staff representatives, or at the renewal of one of these bodies. In any case, the very latest for the implementation of the CSE is 31 December 2019.

The body has the same configuration, regardless of the size of the company. It must include a health, safety and working conditions commission in companies and separate establishments that have at least 300 employees.

The number of seats to the CSE vary in proportion to the staff headcount. It ranges from 1 representative for companies with 11 employees to

35 representatives for companies with over 10,000 employees.

CSE'S RESPONSIBILITIES

CSE's responsibilities in companies with fewer than 50 employees

There has been a carry-over of most assignments formerly entrusted to the Staff Delegates:

- they can therefore present individual claims relating to wages, the application of the labour code, etc.
- they will have a role in the promotion of health, safety and working conditions in the company, investigation of accidents at work or occupational illnesses.
- they can refer to the labour inspectorate all complaints and observations relating to the application of legal provisions.

CSE'S RESPONSIBILITIES IN COMPANIES WITH 50 OR MORE EMPLOYEES

There has been a carry-over of the powers previously assigned to the Staff Delegates explained above as well as those previously assigned to the Works Council:

- The CSE remains informed and consulted on matters concerning the organisation, management and general operation of the company.
- The CSE remains informed and consulted periodically on:
 - the strategic orientations of the company
 - the economic and financial situation of the company
 - the social policy of the company, working conditions and employment
- Finally, the CSE has prerogatives that were formally those of the Health and Safety Committee (CHSCT).

CHANGES TO RULES REGARDING DISMISSALS

General Rules

In the past, some employers have been sentenced to pay damages, because they failed to comply with certain formal legal requirements regarding the way the dismissal letter should be motivated.

The Macron labour law reform has simplified the

requirements regarding the letter, although the procedural requirement involving a pre-dismissal meeting remains unchanged.

To help employers in the process, the Government issued a template form that may be used for dismissal.

Also, a specific procedure has been set up, that allows the employee to ask for more precision on the grounds for his dismissal explained in the dismissal letter.

The employee now has 15 days to make the request for further explanation.

If the dismissal letter is ruled as insufficiently motivated, this will trigger the payment of damages for unfair dismissal (see below).

STATUTORY SEVERANCE

Under French law, dismissal triggers the payment of a statutory severance or, if more advantageous, the severance provided for by the applicable sectorial CBA, if any. The Macron reform increased the statutory severance and makes it mandatory for employees whose length of service is of 8 months (instead of one year).

The formula is now the following:

- 1/4 of a month's salary per full years of service up until 10 years,
- 1/3 of a month's salary per full years of service (as of) above 10 years.

The reform does not change the fact that a dismissal for gross or serious misconduct (*faute grave ou lourde*) does not trigger the payment of any severance.

STATUTE OF LIMITATIONS TO CHALLENGE A DISMISSAL

Over the past decade, Parliament has periodically reduced the statute of limitations.

Just as for economic dismissals, the statute of limitation to challenge a dismissal based on personal grounds is now one year.

The reform contains specific provisions to deal with ongoing time limitations for dismissals notified before September 24, 2017.

This time limitation does not apply to disputes in relation to the contract's execution nor to situations triggering a nullity (violation of protection of pregnant women, discrimination, etc.).

Please note that the 3-years statute of limitations still applies for claims in relation to wages and overtime, in particular.

INDEMNIFICATION

French regulation was criticised by employers because of the uncertainty as to their potential financial exposure once they have dismissed an employee.

Indeed, Labour Courts could be quite severe and the amount of damages granted could vary depending on the jurisdiction ruling the case.

Any employee working in a company employing at least 11 employees and having 2 years of service could obtain indemnification of 6 months' salary in case his dismissal was ruled unfair, which could happen quite often. On the other hand, there was no cap.

The Macron reform now imposes a binding grading scale to the Labour Court based on the employee's seniority accrued within the company. For example, 2 years of seniority will entitle the employee to damages between 3 and 3.5 months of salary (in companies with at least eleven employees). 10 years of seniority will entitle the employee to damages between 3 and 10 months of salary (again, in companies with at least eleven employees). This grading scale does not apply in case the dismissal is ruled null and void. Neither does it cover particular prejudices, nor does it apply to claims in relation to the execution of the employment contract.

ECONOMIC DISMISSAL

Since 2013, the French Government and Parliament aimed at making the economic dismissal procedure easier or at least a bit less severe towards large groups and companies.

The Macron reform deals with:

- The perimeter within which the economic rationale shall be assessed.

Before the reform, the economic rationale was assessed at the level of the business sector of the

Group to which the French company belongs to worldwide, and not only in France or in the E.U. This would then trigger damages to be paid for "unfair dismissal" even in case the French subsidiary was experiencing losses for many years, because the "business sector" of the Group itself was quite profitable worldwide.

This economic rationale is defined as either "economic difficulties" or the "need to safeguard the competitiveness" or "technological changes" or, finally, the total and definitive shut down of a French legal entity. The law did not change this, nor the fact that the Group's situation still needs to be taken into account; it also maintained the reference to the "business sector" of said Group.

However, it is now possible to only focus on the Group's economic situation in France alone. Indeed, Section L.1233-3 of the labour code provides that: "Economical issues, technological transformation or the necessity to safeguard competitiveness, are assessed at the company level if it does not belong to a Group and, otherwise, it must be assessed under the scope of the other companies of the Group, operating in the same business sector, and established on the national territory".

This section then provides for some definitions of the Group depending on where the "dominant" company (parent company, basically) is located.

Finally, the law now indicates that the "business sector is characterised, in particular, by the type of products, goods, or services, the targeted customers, the distribution networks and methods, all relating to the same market". This enumeration seems to confer a significant importance to the "market" criteria, but it might be subject to a different interpretation from the courts.

- The internal redeployment duty: the reform puts an end to the duty to search for internal positions within the company's Group abroad.

This fundamental requirement is now limited to France alone, still within the Group's perimeter. The reform also eases the process for proposing redeployment opportunities.

The employer may now start by delivering a list of available positions within the Group in France only. The employee has 15 days to show interest.

AGREEMENTS ORGANISING COLLECTIVE TERMINATIONS BY WAY OF AGREEMENT

Since 2008, entering into a mutual termination agreement with an individual employee is possible. This agreement has to be submitted to the labour administration's approval, which can be implicit.

This scheme has proven to be very popular and not conflictual.

On the other hand, since 2013, the mass layoffs proceedings (at least 10 job eliminations in companies of 50 employees or more) had been placed under the labour administration's control, and negotiation of the redundancy package with unions were strongly encouraged. This reform proved to have a positive outcome as the proceedings became less conflictual, and their duration and outcome more predictable.

Although those "forced departures" plans have become less conflictual, it remains a trauma for the workforce, and a significant source of financial exposure for the company. Also, this process, even in case an agreement is being reached with unions, still involves quite a long consultation process with the Works Council and the Health and Safety Committee.

Conscious that entering into forced departure plans might not always be the best way to deal with a need to reduce the size of the workforce, when voluntary departures appear to be possible, the Macron Government imagined a new scheme called "mutually agreed termination", placed under the labour administration's control, and subject to an agreement being reached with Unions representing the majority of the workforce.

Entering into this agreement does not require a consultation of the elected staff representatives, but they must be informed.

It may be implemented only to organise voluntary departures, meaning that an employee who would belong to a targeted job category must not have his job eliminated or substantially altered if he is not a candidate to this collective departure, that is proposed by the employer.

TELEWORK

The Macron reform brings telework provisions into the 21st century, with the possibility of its implementation by collective agreement or, failing

that, by a charter drawn up by the employer after a possible consultation with the CSE in some cases. In the absence of a charter or collective agreement on telework, it is possible to set up telework via an agreement between the employer and employee, formalised by any means.

II. PRE-EMPLOYMENT CONSIDERATIONS

1. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

It is not necessary to establish a local French entity in order to hire an employee. However, the foreign entity and the employee will have to be registered with the French social security office of Strasbourg, which is uniquely competent for such matters.

2. LIMITATIONS ON BACKGROUND CHECKS

Background checks in France are limited to the strictly necessary verifications of a candidate's qualifications, experiences, and references. Criminal background checks are limited to certain professions that entail security responsibilities or that involve working with children or sensitive information or materials. Credit background checks do not exist in France.

3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The employer can only collect information about candidates, which facilitates the assessment of their professional skills with regard to the position that is offered. These professional skills must be directly required for the position.

This right to collect information should be balanced with the respect of the candidate's privacy.

The employers should run candidate selection tools (i.e. "recruitment methods or techniques of job applicants") before the Works Council, for information.

Finally, all information collected on the professional background of a candidate from former colleagues, employees, clients, suppliers, etc. is legal as long as it is not unbeknownst to the candidate.

TOOLS USED TO CONDUCT BACKGROUND CHECKS

Employers may make use of all information from the Internet, irrespective of whether it was posted on social or work-oriented networks. In France, the private employer is generally prohibited from reviewing any previous convictions, as well as the candidate's financial position.

If applicable, the employer can – only by setting forth a legitimate interest – ask for extract n°3 of the criminal record, which lists the heaviest penalties and can only be applied for by the candidate himself, save exceptions in the fields of banking and healthcare.

INTERVIEWS WITH POTENTIAL CANDIDATES

The employer has the right to ask questions pertaining to the candidate's professional background (previous positions, former employer, grounds for previous termination, if he is held by a non-compete clause, etc.) and to request for the production of documents such as work certificates (but not pay slips), diplomas, driver's license (if appropriate), etc.

It is an obligation to check that the employee holds a specific enabling when required (i.e. administrative agreement or professional card).

However, the employer may not ask questions pertaining to his private life, such as sexual orientations, religion, trade unions activities, health issues, financial issues, etc. Social security enquiries about the applicant are generally prohibited, except if the applicant is not yet registered.

The candidate should answer in good faith to the questions having a direct and necessary link with the employment at stake. When the employer discovers an employee has lied on his background, the employer will be able to dismiss the employee only if he demonstrates that the employee did not have the required competences for the job or that the diploma was essential to perform his duties.

Pre-employment skill testing

Pre-employment testing constitutes a pertinent method to assess the professional qualification of the candidate and his ability to perform the proposed duties.

However, it is important that the candidate is not tested in real conditions of employment, as this would be considered as a trial period and thus an employment relationship.

Moreover, drug and alcohol screening of employees is allowed pursuant to the employer's disciplinary powers, but only under certain conditions (for example, that the screening is provided by the internal rules of the company).

STORING DATA

The employer may store the data collected on the candidates only the time necessary for the hiring process, unless the storing is authorised by the CNIL. However, the storing cannot exceed two years from the last contact with the person.

The CNIL recommends that the storage of candidate or employee data is possible after prior clarification regarding the affected candidate or employee, who can request at any time that the data be erased.

Employers additionally have the option of setting up biometric ID systems on their employees if the CNIL, the French data protection watchdog, approves of their introduction, after prior consultation of the workers delegates.

LEGAL SANCTIONS

If the employer violates the above-referenced legal provisions or employee rights, the employee can claim damages or sanctions under criminal law.

An employer could face up to three years of imprisonment and a fine of up to EUR 46,000 in the event of discrimination with regard to an employee's membership of a trade union.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

Employment contracts are generally not required to be written, but certain forms of employment contract should be in writing (notably fixed-term contracts, part-time contracts and temporary employment contracts). The employer should provide the employee with a written statement of the essential terms governing the employment relationship. Oral fixed-term contracts are unequivocally deemed to be indefinite-term contracts and oral part-time contracts are deemed full-time contracts.

Indefinite-term contracts should contain the following information:

- identification of the parties;
- the employee's job title or a description of their duties;
- working time;
- the employee's compensation;
- the place of work;
- the employment start date;
- the length of the probationary period;
- the holiday entitlement;
- the applicable CBA.

Fixed-term contracts should contain the same information as indefinite-term contracts and, in addition, fixed-term contracts should specify:

- the reason why the company is using a fixed-term contract;
- the date on which the contract is to end, or its minimum duration if an exact termination date has not been fixed; and
- the name and job description of the absent employee, if the reason for using a fixed-term contract is to replace a temporarily absent employee.

In addition to the general requirements for employment contracts listed above, part-time contracts should state the following:

- that the contract is for part-time work;
- the employee's working hours;
- any conditions relating to possible changes in working hours; and
- the amount of overtime permitted according to statute or the relevant cba.

Further, since the law of June 2013 on the security of employment, part-time contracts must be of a minimum duration of 24 hours per week unless an exception applies (for example branch agreements, at the request of the employee in order to address a personal situation or to undertake various work activities, students under 26, certain employers and intermediary associations). Moreover, part-time working hours have been rendered more flexible, as remuneration may now be modified with major modifications (hours exceeding 10% of the contractual hours) to be approved by a branch agreement, and with the possibility of temporarily increasing the contractual working time of a part-time worker, again with approval through a branch agreement. Finally, where 1/3 of the company's workforce is employed part-time, companies now have the obligation to negotiate part-time working arrangements.

2. FIXED-TERM/OPEN-ENDED CONTRACTS

The indefinite-term contract is the typical form of employment relationship. As a rule, the validity of an indefinite-term contract is not subject to conditions regarding the content and form of the agreement. In that respect, French case law has held that a pay slip may be sufficient to formalise an indefinite-term contract.

A fixed-term employment contract is an employment contract entered into for a defined duration, set in advance by the parties. This kind of employment contract is very specific, notably as neither party may terminate it prior to its end, except in the event of an amicable separation, serious misconduct (“faute grave”), force majeure or if the employee finds alternative employment under an indefinite-term contract.

In contrast with indefinite-term contracts, the conclusion of a fixed-term contract is subject to conditions of content and form. However, employees working under fixed-term contracts have the same individual statutory rights as those working under indefinite-term contracts.

3. TRIAL PERIOD

Rather than entering into the contract immediately, parties to the employment contract may agree to provide for a probationary period, which can only be renewed once and under condition, during which either party may terminate the employment contract without any formality. If both parties are satisfied at the end of the probationary period, the employment contract becomes definitive. The probationary period is governed by statute. The legislature has introduced a maximum length for the probationary period and a minimum notice period, which varies according to the categories of employees concerned. The trial period that may be mentioned in fixed-term contracts is fixed by the Labour Code according to the duration of the contract.

4. NOTICE PERIOD

Except for specific exceptions (e.g. dismissals for serious or gross misconduct), the parties should observe and cannot waive the required notice periods before an indefinite-term contract is terminated. The length of the notice period is generally determined by the national CBA. Employees who are dismissed or made redundant are entitled to payment in lieu of notice if they are not required to perform their notice period.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Employers and employees are free to negotiate the terms and conditions of their employment relationship. However, employees have various minimum rights under the law, regardless of any contrary language in their employment agreement. These minimum working conditions are set forth in the French Labour Code and the applicable Collective Agreement, among other sources.

2. SALARY

As of 1 January 2016, the minimum gross monthly wage is EUR 1,498.47 (about USD 1, 753) for a 35-hour workweek. All employees who are employed under an ordinary employment contract (either indefinite or fixed-term) are entitled to the minimum wage. CBAs also frequently provide greater minimum wages (which vary in function of job categories).

3. MAXIMUM WORKING WEEK

Usually, employees work 35 hours a week. However, employers can agree on a longer workweek with their employees. In that case, any work over 35 hours a week is payable as overtime (although there is no entitlement to additional days off).

In any event, employees should not work more than:

- an average of 44 hours a week during any 12 consecutive weeks;
- 48 hours during any given week;
- 10 hours a day.

It is possible to negotiate a more flexible working schedule for all employees with trade unions at company level. A law dated 20 August 2008 reforming working time (“Loi portant renouveau de la démocratie sociale et réforme du temps de travail”) (“Working Time Law”) provides for working time to be reorganised at company level (subject to applicable CBAs). Working time can notably be reorganised on a multiple-week basis, i.e. the employee works an average 35 hours over 4 (or more) weeks, while his working time is different each week.

However, statutory restrictions on working time should be met and the employees duly informed of the working schedule.

Special rules apply to autonomous executives (that is to say executives of a certain level who freely organise their working time). For example, the “forfait-jours” agreement (lump sum remuneration for a working time in days agreement) which is a mechanism that allows the working time of an employee to be calculated by the number of days worked per year instead of the usual number of hours worked per week or month. “Forfait jours” agreement is only possible for certain employees and provided certain conditions, notably where it has been authorised by means of a specific collective agreement (“accord collectif”). The French Supreme Court has recently invalidated some “forfait jours” agreements that failed to ensure the employee’s health and security, and new collective bargaining agreement provisions were negotiated in several sectors.

4. OVERTIME

Only hours worked in excess of the statutory weekly working hours at the request of the employee’s superior will be regarded as overtime. However, the

employer has the duty to ensure that employees do not exceed the daily and weekly limits.

Those who work overtime are entitled to compensatory payment involving a surcharge (which is generally 25% for the first 8 hours put in during the week, then 50%), and which cannot be less than 10%, of the employee's standard pay. Each overtime hour may either be paid or compensated with compensatory rest, i.e. every hour of overtime worked gives rise to either 1 hour of pay or 1 hour of rest, plus the relevant surcharge.

All overtime hours performed are computed within the yearly overtime limit ("contingent").

According to French law, the employer is free to require each employee to work overtime up to an annual limit agreed in the applicable collective agreement or, in the absence of a collective agreement, up to a legal limit of 220 hours per year per employee.

Provided the employer does not require the employee to work beyond the legal limits, the employee has no right to refuse to work overtime. Over this threshold, the employee is entitled to "mandatory rest" in addition to financial compensation.

The employer can only request the employee to work in excess of the legally recognised overtime level if he has consulted the Works Council or, in the absence of a Works Council, staff representatives.

The employee's total working hours in a given month should be recorded in writing on his/her pay slip, with overtime clearly indicated on a separate line. Failure to do so constitutes a criminal offense.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The employer's safety obligation is not limited to the prevention of occupational accidents and diseases. It is much broader and covers all risks

to which the employee may be exposed at work, including psychosocial risks. This is an obligation of result.

Professional risk prevention measures should be sought, employees should receive information and training about these risks, and the employer should be compliant with certain specific rules in the arrangement and use of premises to ensure the health and safety of the employee. For example, premises should be clean and clear of clutter, facilities and technical and safety devices maintained and checked regularly, the employees should have protection against smoking and loud noises, sufficient light, etc.

The employer should assess potential risks in a document called a single document occupational risk assessment (DUERP), including: 1) the choice of manufacturing processes, work equipment, the chemical substances or preparations; 2) the development or redevelopment of workplaces or facilities; 3) defining workstations; and 4) the impact of inequalities between women and men.

Mandatory for any business, this document includes: i) an inventory of the risks identified in each of the business units of work; ii) the classification of these risks; and iii) proposals for actions to be implemented.

The DUERP should be updated once a year minimum.

The Labour Inspector will check that safety rules in the company are adhered to. Where an employer is negligent, the powers of the Labour Inspector are the following:

- draft minutes and give notice to the employer for violations,
- seize in summary procedure the referral judge in case of a serious risk to the physical integrity of a worker,
- prescribe all necessary measures, including, in case of grave and imminent danger, the temporary cessation of work on certain projects.

The liability of an employer who fails to abide by safety requirements includes:

- civilly liability in case of accident or illness of the employee,

- criminal liability (fines and, in some cases, jail sentences).

B. COMPLAINT PROCEDURES

The new Sapin II law expands extra-territorial reach for French prosecutors. The law applies fully to corruption by French companies overseas and foreign companies who have a presence in France.

C. PROTECTION FROM RETALIATION

It should also be noted that the Sapin II law expressly provides for the possibility for employees to appeal to the Labour Court, by way of summary judgment, in the event of termination of the employment contract following the notification of an alert within the meaning set out by the law.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

The principle of non-discrimination is a core aspect of French Labour law. The sources of discrimination law are diverse. The first is constituted of European law that has largely determined the French law of discrimination. The second comes from the French constitution. The principle of non-discrimination has constitutional value, by virtue of the Preamble to the Constitution of 1946 that prohibits discrimination with regard to criteria of sex, race, belief and trade union activity, and of the current Constitution dated 1958 that contains a provision according to which “the nation ensures equality before the law of all citizens, whatever their ethnic origin, race or religion” (article 2 of the French Constitution).

The French Labour Code contains several provisions on discrimination, especially a provision that lists all grounds of prohibited discrimination (article L.1132-1 and following).

2. EXTENT OF PROTECTION

According to the French Labour Code, it is forbidden to punish or dismiss employees, or exclude potential employees from the recruitment process (for a job, a training position or an internship), or endure direct or indirect discriminatory measures with respect to remuneration, incentive schemes, share distribution, training or redeployment programs, posting, qualification, classification, career development, mobility or contract renewal, on the basis of their: origin, gender, sexual orientation, morals, age, marital status, religious beliefs, nationality, ethnic or racial origin, political opinions,

trade union activities, physical appearance, name, medical condition, disability.

The burden of proof is lighter for the employee who alleges discrimination: the employee must invoke facts likely to demonstrate discrimination, while the employer has to demonstrate that the difference observed is justified by objective non-discriminatory elements.

Discrimination is a criminal offence punishable by (i) a maximum of three years’ imprisonment and a fine of EUR 45,000 for the employer’s legal representative (in most cases, the chief executive, depending on the type of company), (ii) a fine of up to EUR 225,000 for the employer (as a company).

3. PROTECTIONS AGAINST HARASSMENT

In France, harassment is prohibited in national law and takes the form of both sexual and moral harassment.

Moral harassment is defined as repeated conduct which is designed to or which leads to a deterioration of the employee’s conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects.

Sexual harassment as repeated statements or acts or pressure that is repeated or not of a sexual nature that violate a person’s dignity because of their humiliating or degrading content or because they generate an intimidating, hostile or offensive environment, as well as pressure with the perceived or real aim of obtaining sexual favours for a person’s own benefit or the benefit of a third party.

Sexual and moral harassment are both punished by two years of imprisonment and a fine of EUR 30,000 (by three years of imprisonment and a fine of EUR 45,000 where sexual harassment is committed by a hierarchical superior).

In France, where harassment is perpetrated by an employee, both the employer and the employee are liable.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under the current legislation, private companies and public offices with a work force of more than 20 employees must hire 6 % of disabled workers. Employers are provided with three options to meet this target: (i) Hiring disabled workers as employees, (ii) subcontracting workers from the sheltered sector, (iii) paying a contribution fee to AGEFIPH which is an organisation dedicated to furthering professional inclusion of the disabled in the private sector.

5. REMEDIES

Employers can initiate a non-judicial in-house inquiry if a victim of harassment brings to their attention, or if they suspect, an incidence of discrimination, as they must guarantee a working environment free of such practices.

The right of alert of the employees' representatives in case of violations of human rights and freedoms in the workplace entitles the representative to file an emergency petition for injunctive relief before the Labour court and applies to cases of discrimination.

Since 2004, a special body has been created, that has an essential role in the fight against discrimination: The Defender of Rights. Any discrimination case, direct or indirect, prohibited by statute law or by an international convention to which France is a party, can be brought before the Defender of Rights. Its main task is to ensure the efficacy of the legal mechanisms prohibiting discrimination.

Legal actions may also be brought before the Labour Court ("Conseil de Prud'hommes") directly by employees who allege discrimination.

6. OTHER REQUIREMENTS

French labour law does not recognise quotas, and the principle of non-discrimination bars employers from practicing affirmative action or instituting measures destined to favour diversity in the workplace.

VI. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

No specific French employment law provisions currently address issues raised by employees' social media use. Employers can set out the general conditions of use and restrict access to the Internet in the workplace, but they have to be cautious, as all employees have a right to privacy, even at the workplace during working time (article L. 1121-1 of the French Labour Code). For example, the employer may access the employees' professional emails under very restrictive conditions.

Besides, employees benefit from the freedom of speech principle, within the company and outside of it, which can only be restricted for legitimate grounds.

Article L.2323-47 provides that the company's Works Council, if any, must be informed and consulted prior to the implementation of any means aimed at monitoring or controlling the employees' activities.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employers may limit the use of social networks by requiring that employees do not disclose confidential information or trade secrets by implementing an obligation of confidentiality or codes of conduct.

Concerning denigration, the issue regarding whether comments made on Facebook are public or private was considered by the French Supreme Court (Cass. civ. 1, 10 April 2013). From this case law, a comment on a social media may be considered private or public depending on the privacy settings of the relevant account. The more accessible a comment is, the more likely it will be deemed public and punishable, as the case may be.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

The employer must ensure that the employee to be hired is authorised to work in France:

- where the employee is already in France, the employer will have to check that the employee has a valid residence permit allowing him to work in France, and keep a copy thereof;
- where the employee is not yet established in France, the employer should undergo a three-step process “of introducing a foreign worker in France”:
 - obtain from the French unemployment agency (“Pôle Emploi”) a document certifying that there are no workers available to fill jobs in the country,
 - file to the labour authorities (i.e. the Territorial Unit of Direccte) an application package,
 - inform the French Immigration Office (the Ofii) of the entry in France of an immigrant and pay the Ofii a fee.

An employer must ensure the validity of the work permit of the foreign employee he wants to hire is valid, by submitting a declaration of employment (by email or post mail) to the Prefecture of the place of employment, at least 2 working days before the hire. Nationals of most countries of the European Union have the right to work freely in France without a specific work permit. The only document required for their job is an identity card or passport to prove their nationality.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

In the case of an indefinite-term employment contract, there should be real and serious grounds for dismissal. There are two types of valid grounds: personal grounds and economic grounds.

PERSONAL GROUNDS

Personal grounds can include:

- poor performance or unsatisfactory professional skills;
- inability to perform the assigned tasks;
- misconduct within the company; and
- an employee's repeated absence or absence over a long period of time (which is not related to a work-related accident or illness) which, in certain circumstances, can also constitute valid grounds for dismissal.

ECONOMIC GROUNDS

The Labour Code allows two main economic grounds for dismissal:

- economic difficulties facing the relevant business sector at a group level in France; and
- technological changes.

As the above list is merely indicative, case law allows other economic grounds for dismissal, namely where it is necessary to safeguard the competitiveness of the relevant business sector at group level and in the case of cessation of business activity.

The company must implement measures to prevent the dismissal of the employee. Therefore, before or during the process, the company is required to implement various preventive measures, support and reclassification of the employee.

2. COLLECTIVE DISMISSALS

COMMON RULES

The common rules that apply to collective dismissal procedures are:

- order of dismissals,
- redeployment efforts,
- informing the labour authorities.

The redeployment efforts should be carried out throughout the group in France. The employer should offer individual and precise offers to the targeted employees.

In case of failure to comply with these rules, the dismissal may be considered unfair by the Labour Courts.

PROCEDURE

The procedure will vary in function of the number of employees made redundant over a period of 30 days.

Less than 10 redundancies over 30 days

In collective redundancies involving companies of less than 50 employees, the company should consult the workers' representatives (i.e. workers delegates for companies of less than 50 employees and Works Council in companies of 50 or more) on the redundancy project. In practice, an economic note will be handed in to the workers' representatives presenting the reasons for the redundancies and the measures to be taken.

The employees will be individually convened to a pre-dismissal meeting where the project will be described and the economic motives detailed. The employer will also have to present information on a redeployment scheme (i.e. "Contrat de Sécurisation Professionnelle" (CSP) or redeployment leave, depending on the size of the company).

The employer will have to inform the Labour Authorities in writing of certain details of the redundancies, within 8 days of the sending of the dismissal letters.

At least 10 redundancies over 30 days

Here again, the procedure will vary in function of the size of the company.

In companies employing 50 employees or more

A new system of collective redundancies applies as a result of the law of 14 June 2013 on the security of employment (“loi de la sécurisation de l’emploi”). As such, in companies of more than 50 employees dismissing at least 10 employees, the employer should undertake the following steps:

I. ESTABLISH A “JOB PRESERVATION PLAN” (“PSE”)

The PSE should provide concrete, accurate and detailed measures and, notably, any alternative to redundancy such as the reduction of working time, redeployment opportunities or training.

The employer may then formalise the PSE by:

- entering into an agreement with the relevant unions; or
- where this is not possible, make a unilateral decision.

In both cases, the plan must be approved by the Labour Administration.

II. CONSULT THE WORKERS REPRESENTATIVES AND PROVIDE INFORMATION

The employer should meet with the Works Council to announce the proposed plan and inform it in writing of the reasons for the restructuring project and of the number and the category of workers to be made redundant.

The consultation procedure is now limited to:

- 2 months where the number of redundancies is less than 100 employees;
- 3 months if the number of redundancies is between 100 and 250 employees; and
- 4 months if the number of redundancies is above 250 employees.

III. SEEK THE APPROVAL OF THE LABOUR ADMINISTRATION

The agreement or unilateral decision on the PSE should be approved by the Labour Administration.

Time limits are imposed on the approval of the Labour Administration:

- 15 days where an agreement has been reached; and
- 21 days where a unilateral decision was made.

In the absence of any response, approval by the Labour Administration is deemed to be given.

IV. NOTIFY AFFECTED EMPLOYEES

Once the PSE has been authorised, the employer should make every effort to find employees facing redundancy another position within the same company or group, worldwide. If the internal redeployment is not possible, the employer should give each of the affected employees notice of his/her dismissal and indicate in each letter the reason for the redundancy.

It is important to note that there is a specific procedure for the dismissal of “protected employees”, including staff representatives, trade union representatives, candidates to professional elections, and former staff representatives. Regardless of the type of procedure under way (for personal or economic grounds), the employer should, in most cases, inform and consult the Works Council (where one exists) and request the prior authorisation of the Labour Inspector for the proposed dismissal.

Companies employing less than 50 employees

The employer should consult the workers delegates on the project after having provided an economic note detailing in particular the economic motive, as well as the measures to be implemented to prevent or limit the number of redundancies and to facilitate the redeployment of employees made redundant.

Workers representatives hold at least two meetings separated by a period that cannot exceed 14 days.

As the case may be, the employees should be informed of their right to benefit from the CSP at the end of the second meeting with the workers representatives.

3. INDIVIDUAL DISMISSALS

Once an employer believes that there is a valid ground for dismissal, it should send a letter giving the employee five working days' notice of a meeting. This letter should set out the time and place of the meeting and the employee's right to be accompanied by a fellow employee or a third party.

During the meeting, the employer should state why it intends to dismiss the employee and take note of the employee's explanations if the dismissal is based on the employee's performance or misconduct.

The employer must notify the employee of its decision and, if appropriate, specify the grounds for dismissal in a letter delivered by registered post.

The employee may request additional information on their dismissal within 15 days. The employee may dispute the grounds for dismissal before a Labour Court.

If the contemplated dismissals are based on economic grounds, the employer should elect which employees to make redundant by considering:

- the number of the employees' dependants (especially for single parents);
- the employees' length of service;
- potential difficulties that the employees may face in finding new employment (such as age or disability); and
- the employees' professional skills.

The employer should also make every effort to find employees facing redundancy another position within the same company or group, worldwide. It should also ensure that employees can adapt to the changes in their job position by way of training programs. Non-compliance with these rules may render the redundancy unfair. The employer should inform the Labour Administration of its decision to make the employee redundant within 8 days of the formal notice of dismissal.

A. IS SEVERANCE PAY REQUIRED?

The employee made redundant will receive a dismissal indemnity calculated based on the employee's years of service, as well as any accrued and untaken paid vacation.

4. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

The legislator imposes that a separation agreement, other than a dismissal or resignation, should be done through a specific procedure called the "rupture conventionnelle" (mutually agreed termination), which is subject to specific regulations and conditions.

Hence, the "rupture conventionnelle" is the only method to terminate an employment contract by mutual agreement.

The employee who signs a conventional break with his employer receives a termination indemnity, which cannot be less than the dismissal indemnity the employee is entitled to had he been dismissed.

A specific homologation or approval procedure applies to the "rupture conventionnelle". Once signed, the employee as well as the employer has a right of withdrawal of 15 calendar days, after which either party will send the form to the Labour inspector for homologation or authorisation. The Labour Inspector will have 15 business days from the reception of the form to homologate or authorise. In the absence of response, the form is deemed homologated or authorised.

This method of separation will allow the employee to be entitled to unemployment benefits (if they meet general allocation conditions).

B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

A specific governmental form called a Cerfa should be filled out, either by hand or online. The form requests basic information on the parties, and will require the following provisions:

- date of the meetings between employer and employee and whether they were assisted during these meetings,
- termination indemnity amount (which cannot be less than the dismissal indemnity that the employee would have received in case of dismissal),
- date of signature of the form,
- date of projected end of the work contract (which cannot be earlier than the day following the authorisation by the labour inspector).

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

The age of the employee may affect the amount of the specific termination indemnity, as certain collective bargaining agreements provide for specific additional indemnities depending on the employee's age.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Additional provisions may be considered and indicated directly on the form, such as waiving of non-compete clauses.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

When seeking remedies, the employee may request before the Labour Courts:

- the nullity of the dismissal (only possible where a text provides for a nullity, such as harassment

or discrimination): as appropriate, reinstatement within the company or compensation of unfair dismissal;

- damages for unfair dismissal (e.g. insufficient economic grounds or insufficient redeployment efforts in a redundancy, or gross misconduct not demonstrated): these damages are now set out in a binding grid containing minimum and maximum amounts, based on the employee's length of service.
- damages for irregularity of the dismissal (i.e. the dismissal procedure was not correctly followed): damages equal to a 1-month salary maximum in the event that the dismissal is considered as grounded.
- damages for any additional demonstrated prejudice.

Please note that when entering into a "rupture conventionnelle", the remedies are limited. The employee may only challenge the mutually agreed termination in Court within a year of the homologation or authorisation and only on the grounds that he did not consent to signing the agreement.

6. WHISTLEBLOWER LAWS

The new "Sapin II Law" fully named the "Law on Transparency, the Fight against Corruption, and for the Modernisation of Economic Life" puts in place new rules for whistleblowing in France.

The Sapin II expands extra-territorial reach for French prosecutors. The law applies fully to corruption by French companies overseas and foreign companies who have a presence in France.

It creates new obligations for companies to take an active role in preventing corruption. Companies with over 500 employees and/or an annual turnover in excess of EUR 100m must put in place a framework to allow for accountability.

The law puts in place eight mandatory measures for a corruption prevention program. So far, these include a code of conduct to be integrated into the internal regulations of the company; an internal whistleblowing mechanism; ongoing risk assessments; due diligence regarding clients, suppliers and intermediaries; internal and external

controls; training; a roster of disciplinary sanctions; and an internal audit of the program.

The law creates a new national anti-corruption agency called Agence Française Anticorruption (AFA). The law requires all companies with more than 50 employees to establish a whistleblower mechanism and provide protection against retaliation guaranteeing confidentiality. The system is different from its UK and US counterparts and only applies to disinterested parties. Whistleblowers receive immunity from criminal prosecution. Whistleblowers must first use the internal whistleblowing channels before blowing the whistle to the public authorities and the press.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

Post-termination restrictive covenants are fairly common in French employment contracts, especially for senior employees or those with access to confidential information, senior responsibilities or contact with the clientele. In principle, restrictive covenants must be justified by the nature of the duties to be performed and proportionate to the aim that is pursued.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

A non-compete clause prohibits an employee from competing with his former employer after the termination of his contract. Under French employment law, the validity conditions of a non-compete clause were defined by case law. The clause must:

- be essential to preserve the legitimate interests of the company;
- be of limited duration;
- be geographically limited;
- take into account the specific features of the employee's position;
- provide a financial compensation for the employee after the termination of the contract.

By reference to case law and CBAs, 30% to 50% of gross monthly remuneration is likely to be reasonable compensation for such restrictions. The compensation should be paid regardless of the grounds for termination (i.e. even in cases of dismissal).

B. NON-SOLICITATION OF CUSTOMERS

According to the article 1134 of the French Civil Code, an employee owes a duty of loyalty to his employer until the expiry of his employment contract and during any suspension of it.

After the termination of his contract, the employee recovers his freedom to work but is still subject to a prohibition of unfair competition with his former employer. For example, case law disapproves of customer poaching through denigration.

The French Supreme court has ruled that this is a distinct obligation from the non-compete clause and must be financially compensated as well.

C. NON-SOLICITATION OF EMPLOYEES

A clause of non-solicitation of employees usually prohibits employers from recruiting a competitor's or supplier's employees.

It could also refer to the interdiction for an employee to recruit his former colleagues after the termination of his employment contract.

Although a non-solicitation clause concluded between two companies is distinguished from the non-compete clause between the company and its employee, it nevertheless results in a limitation of the employee's freedom to work, much as a non-compete clause.

The French Supreme Court concluded that this restriction to a fundamental freedom had to be compensated based on the harm incurred (Cass. soc. 2 March 2011, n° 09-40.547).

3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

Under French law, restrictive covenants can be enforced in different ways depending on the situation:

- if the employee breaches the restrictive covenant, the former employer can issue a claim before the Labour court in order to obtain an injunction to stop the employee carrying out the activity. The former employer may also claim for damages for the loss sustained according to Article 1184 of the Civil Code. Instead of claiming for damages, the employer may request the application of a penalty clause, if one is contained in the employment contract.
- if the employer breaches the restrictive covenant or if the clause is void, the employee may claim for damages if he has observed the provisions of the clause.
- if an employer knowingly hires an employee subject to a non-compete clause, the former employer has grounds for claiming for damages against it.

4. USE AND LIMITATIONS OF GARDEN LEAVE

The notion of “Garden leave” as such does not exist under French law. Upon termination of employment, the employer may release the employee from working during all or part of the notice period and pay him an indemnity in lieu of notice, or alternatively require the employee to work until the end of the notice period.

If the employee expressly requests to be released from his obligation to work during the notice period, and if the employer agrees to it, then the employer is not required to pay the employee and the employment contract may be terminated upon the employee effectively leaving the company.

The French Supreme Court ruled that the employee, who is not subject to a non-compete clause and who is on Garden leave, may work with a competing company during his notice period (Cass. Soc., 6 May 2015, n° 14-11.001).

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

SCOPE OF THE AUTOMATIC TRANSFER

In France, an employee cannot object to a transfer of undertaking as the transfer is operated automatically. A refusal could constitute grounds for dismissal for disciplinary reasons. The automatic transfer concerns any kind of employment contract (fixed-term contracts, trial period contracts, suspended contracts for illness, etc.). Employees who enjoy a protected status (e.g. employee representatives) will also see their contract automatically transferred, with their representative role intact; however, when the transfer concerns only part of a business (a partial activity transfer), their transfer should be authorised by the Labour Inspector.

The contracts will be transferred in their totality (seniority, remuneration, position, non-competition, etc.), as well as unilateral commitments and practices, such as payment of a 13th month premium. The applicable collective bargaining agreement will continue to apply for a maximum period of 15 months, in the event that the company to which the employee is transferred applies a different collective bargaining agreement.

EMPLOYEES' BENEFITS AND PENSION RIGHTS

Employees will continue to benefit from any existing profit sharing agreement unless the change in legal status of the employer makes the implementation impossible for the transferee. In that event, open negotiations should be conducted in good faith to reach a profit sharing agreement, with an obligation to reach an agreement (articles L.3313-4 and L.3323-8 of the French Labour Code).

Regarding pension rights, the transfer will have no impact on the social security system. However, the transfer of undertaking could require a harmonisation of the complementary system (managed by AGIRC/ARRCO pension funds). The rules of harmonisation depend on how the undertaking is transferred (merger, sale, etc.).

INFORMATION PROCEDURE

To date, there is no legal requirement in France to inform each employee before the transfer, but there is a legal requirement to inform and consult the Works Council. However, in practice, employees commonly receive a brief letter advising of the change of employer, in an attempt to achieve a seamless transition and to build unity with the new entity. It is noteworthy that certain bargaining agreements may require informing transferred employees. Hence, except where this is a requirement under a collective bargaining agreement, there is no legal sanction if the transferred employees are not informed.

* The relevant EU Directive requires employers to notify the employees of the transfer prior to their transfer when there are no workers' representatives. However, this has not been transposed into French law. Hence, no legal sanction exists if this is not done (Cass. Soc. 18 November 2009, n° 08 43397 and 08-43398). In July 2013, the French Government discussed, but did not pass, a bill requiring that the employee be informed of his transfer.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The Hamon Law dated 31 July 2014 provided that, where a small company is to be sold, the employer

selling his business should inform the workforce so as to allow employees to make a purchase offer.

A decree dated 28 December 2015, taken in application of the Macron Law dated 6 August 2015, eased these provisions in particular regarding the sanction in case of failure to respect the law. Now the employer who fails to respect this information obligation risks a fine of up to 2% of the amount of the sale. The successor has the obligation to maintain the transferred employees work contract and working relationship (i.e. company agreements, company benefits, etc.). Any modification will entail the agreement of the employee or a negotiation with the employee's representatives, as the case may be.



XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The French trade union movement is one of the weakest in Europe in terms of headcount. Only 8% of employees are members of a trade union.

Since a Law dated 20 August 2008, all the trade unions (at the company, at the branch and at the national levels) have to demonstrate their representativeness by complying with new criteria. In particular a minimum percentage of votes at the last professional elections (10% at the company's level, 8% at the branch and national levels).

Currently, the representative trade unions at national and interbranch level are the CGT, CFDT, CGT-FO, CFTC and the CFE-CGC (i.e. the trade union dedicated to managers and executives).

The largest employers' federations in France are the MEDEF ("Movement of the French Companies"), which totals more than 750,000 member firms and the CGPME ("French small and medium sized employers' organisation"), which represents the interests of 1,675,000 SMEs, registered in France.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

According to Article L. 2131-1 of the French Labour Code, the exclusive purpose of a trade union is to protect the professional interests of its members.

The most important prerogative of trade unions is the role they have in negotiating and concluding collective agreements with the employers' organisations. It used to be a monopoly, but the Macron reform introduced other ways to negotiate collective agreements.

This exclusive right explains the paradox of the French industrial relations system: a low unionisation rate around 8% and a very high rate of collective bargaining coverage, close to 98% of employees due to the extension's mechanism of collective agreements and compulsory negotiations.

3. TYPES OF REPRESENTATION

French employment law provides that, in companies with at least 50 employees, trade unions, which are representative within the company, may appoint union representatives ("délégués syndicaux") among the employees of the company in order to represent them before the head of the company or establishment.

A trade union may also be represented, within a company, by a union section ("section syndicale"), which gathers the members of the same trade union and represents its material and moral interests at a company level. In particular, the union section is entitled to collect, on the company's premises, the financial contributions made by the employees to the union and distribute its publications and leaflets on the company's premises at the beginning or end of working hours.

A. NUMBER OF REPRESENTATIVES

The number of union representatives a trade union can appoint within the same company is based on the number of company's employees.

Article R.2143-2 of French the Labour Code provides that the number of union representatives a trade union can appoint varies from 1, for a company with a number of employees between 50 and 999, to 5, for a company with at least 9,999 employees.

A collective agreement regularly concluded between the representative trade unions in the company and the employer can modify these terms and conditions.

B. APPOINTMENT OF REPRESENTATIVES

In order to be appointed as union representative, an employee must be at least 18 years old, must be employed by the company for, in principle, at least one year, and must be in full possession of his civil rights.

Article L.2143-3 of the Labour Code requires the union representative to be appointed among the candidates in the last professional elections who obtained a minimum of 10% of the votes at the first round.

The trade union must notify the employer of the appointment, by registered letter with return receipt requested or hand-delivered letter against a signed release. A copy of the letter must also be sent by the trade union to the Labour Inspector, and the appointment must be posted on the trade union notice boards.

The employer cannot interfere in the designation of a union representative, but may challenge it before the First Degree Civil Court ("Tribunal d'Instance"), within a maximum period of 15 days following the date of reception of the appointment letter sent by the trade union.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The union representative represents its trade union vis-à-vis the employer, and may present claims to the employer in view of improving the employees' working conditions (e.g., salary increases, additional days of vacation, time-off, etc.).

To perform their duties, union representatives are authorised to circulate freely within the company's premises. They also benefit from paid time-off to perform their mission as employee representatives (10 hours per month in companies employing from 50 to 150 employees, 15 hours in companies employing from 151 to 499 employees, and 20 hours in companies employing more than 500 employees), which are granted in addition to the union section's time-off hours and which can be exceeded in exceptional circumstances (such as a strike).

The most important prerogative of trade union representatives is the monopoly they have in negotiating and concluding in-house collective agreements with the employer. In principle, an in-house collective agreement cannot be validly concluded without being signed by union representatives (Article L. 2232-16 of the French Labour Code), even where the majority of the company's employees favour such an agreement.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

In principle, managers and executives have the opportunity to join the trade union of their choice.

However, the CFE-CGC (The French Confederation of Management and the General Confederation of Executives), which is one of the five major French trade union confederations, gathers 140,000 members and organises unions specifically for professional employees in management or executive positions.

If need be, the CFE-CGC is considered as representative only for executive employees and managers. Consequently, the CFE-CGC is entitled to negotiate a collective agreement that covers all categories of staff but cannot sign it on its own.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The significant labour and employment law reform ushered in by the Macron government has completely overhauled the system of employee representative bodies. Below is the current, surviving situation that will entirely cease to exist by January 1, 2020 at the latest. The worker's delegates, works council, and Health and Safety Committee will be replaced by and merged into the CSE.

Currently, other types of employee representative bodies in France include:

WORKERS' DELEGATES

In any company employing at least 11 employees, representatives' elections should be organised. The number of delegates to elect will vary according to the company's headcount (their number vary from 1 or more) and they are elected for 4 years.

The delegates' responsibilities include individually representing the employees and their complaints to the employer.

In that respect, the workers delegates have specific means, notably:

- hours of delegation and travel (10 hours a month if the company has less than 50 employees, 15 hours a month if the company has at least 50 employees), which are considered and paid as working time;
- specific office and posting board;
- meetings with the employer (at least one a month), where questions and answers are recorded in a special register, available to all employees and the labour inspection.

WORKS COUNCIL

The members of the Works Council are elected in companies of at least 50 employees. These

representatives are elected for 4 years, along with the staff representatives. The number of representatives here again depends on the company's headcount (their number varies from 3 to 15).

The Works Council ensures the collective voice of employees. It allows the inclusion of their interests in decisions concerning life in the company (management and economic and financial developments, work organisation, training, production techniques).

It examines formula or on request of the employer, any proposal likely to improve:

- working conditions, employment and vocational training for employees,
- living conditions in the company,
- and the conditions under which they benefit from group benefits additional social protection.

The Works Council is mandatorily consulted on certain issues, and the following three main themes must be addressed at least once a year:

- strategic orientation of the company,
- financial and economic situation of the company,
- social policy of the company, working and employment conditions.

The Works Council is consulted or informed promptly of any plans for:

- organisation and running of the business (business organisation, introduction of new technologies, restructuring and downsizing, changes in economic or legal organisation of the company, takeover bid)
- working conditions (for any specific problem arising from work organisation, technology, conditions of employment, the organisation of working time, skills and forms of remuneration)
- a safeguard procedure, receivership or liquidation.

The Works Council also has a right to alert of economic and social matters within the company.

The Works Council also provides, controls or participates in the management of all social and cultural activities, which are established at the business to employees, their families and trainees. These social and cultural activities may include

activities aimed at improving the conditions of well-being, activities related to leisure and sports, professional or educational institutions of order attached to the company, a health service established to work in the company, etc.

HEALTH AND SAFETY COMMITTEE

In companies of at least 50 employees, a health and safety committee (CHSCT) must be implemented. It is composed of appointed employer and employee representatives. The number varies according to the company's headcount (which varies from 3 to 9). To accomplish their mission, these officials receive delegation hours in function of the company's headcount (between 2 and 20 hours a month).

The CHSCT contributes to the prevention and protection of the health and safety of employees in the company, participates in the improvement of their working conditions and ensures the employer's compliance with legal obligations. The employer should consult and inform the CHSCT on a number of topics. It is consulted in the following situations:

- before major transformation of workstations from the change of tooling, a change in the product or the work organisation,
- before changing speeds and productivity conditions,
- on any major project of introduction and during the introduction of new technologies and their impact on the health and safety of employees,
- on the adaptation plan established in case of implementation of significant and rapid technological change,
- on measures taken to facilitate the development, delivery or maintenance work of injured workers, disabled people and disabled workers
- on the documents relating to its mission, including the company's internal regulations.

The employer at least once a year informs the CHSCT:

- with a written report taking stock of the general situation of health, safety and working conditions in the company. the report presents the activities carried out during the past year,
- through an annual program of prevention of occupational risks and improve working conditions.

The employer must also make available to the CHSCT:

- the single document of occupational risk assessment (DUERP),
- reports and results of occupational medical studies on the business.

The CHSCT may call upon a registered expert, which fees are borne by the employer, in the following situations:

- when a serious risk, proven or not by an accident at work, occupational or professional nature disease is found in the company,
- in case of major project modifying the conditions of health and safety or working conditions.

The employer may oppose to having an expert appointed, in certain circumstances.

CSE

With the Macron reform, by January 1, 2020, all companies with at least 11 employees will have to put in place a CSE. The Macron Reform has significantly simplified staff representation in companies by merging the former three staff representative bodies into one. The Works Council, Staff Delegates, and Health and Safety Committee are now combined into the Social and Economic Committee: the CSE. Note that it will also be possible, subject to the existence of a collective agreement, instead of a CSE, to implement a Conseil d'entreprise. This body would basically have the same prerogatives as the CSE but would, in addition, be able to enter into and revise collective agreements, instead of trade Union delegates that would no longer exist.

TIMEFRAME

The minimum threshold for mandatory implementation is when the company employs at least 11 employees for 12 consecutive months.

In principle, the CSE is set up at the end of the current mandate of the elected staff representatives, or at the renewal of one of these bodies.

In any case, the very latest for the implementation of the CSE is 31 December 2019.

The body has the same configuration, regardless of the size of the company. It must include a health, safety and working conditions commission in companies and separate establishments that have at least 300 employees.

The number of seats to the CSE vary in proportion to the staff headcount. It ranges from 1 representative for companies with 11 employees to 35 representatives for companies with over 10,000 employees.

CSE'S RESPONSIBILITIES

CSE's responsibilities in companies with fewer than 50 employees

There has been a carry-over of most assignments formerly entrusted to the Staff Delegates:

- They can therefore present individual claims relating to wages, the application of the Labour Code, etc.
- They will have a role in the promotion of health, safety and working conditions in the company, investigation of accidents at work or occupational illnesses.
- They can refer all complaints and observations relating to the application of legal provisions to the labour inspectorate.

CSE's responsibilities in companies with 50 or more employees

There has been a carry-over of the powers previously assigned to the Staff Delegates explained above as well as those previously assigned to the Works Council:

- The CSE remains informed and consulted on matters concerning the organisation, management and general operation of the company.

The CSE remains informed and consulted periodically on:

- the strategic orientations of the company,
- the economic and financial situation of the company,
- the social policy of the company, working conditions and employment.

Finally, the CSE has prerogatives that were formally those of the Health and Safety Committee (CHSCT).

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

French social protection is organised in four levels:

i. Social Security, which provides the basic risk covers “illness / maternity / disability / death”, “occupational accidents / occupational diseases”, “elderly” and “family.” It is composed of various schemes involving the insured according to their professional activities, the main ones:

- the general scheme: it includes workers, students, recipients of certain benefits, and residents;
- special schemes: they cover employees who are not in the general scheme (e.g. civil servants, SNCF and EDF-GDF agents...);
- the schemes for non-agricultural employees: they separately cover the artisans, merchants or manufacturers and liberal professions to the pension insurance, the “sickness” risk is subject to joint management;
- the agricultural scheme: it ensures the welfare of farmers and farm employees. This social security system does not depend on the Ministry of Social Affairs but on the Ministry of Agriculture.

ii. Complementary plans which provide additional coverage to the risks covered by Social Security. Some are mandatory (supplementary pension for private sector employees) and others optional (mutual health organisations, insurance companies, pension funds).

iii. UNEDIC (National Employment Union Industry and Commerce), which administers the unemployment insurance program.

iv. State welfare, which provides support to the poorest.

REQUIRED CONTRIBUTIONS

Social Security is mainly financed through:

- Social Security contributions:
- the contribution is based on the basic salary paid (mainly indemnities, premiums, and monetary

advantages, as well as tips, and under certain conditions benefits in-kind;

- the rate fixed by decree, with a portion paid by the employer and the other portion by the employee (“gross salary” is the total wages with deduction of employer contributions; “net salary” is the gross salary reduced employee contributions);
- the employer pays all due contributions to the administrative body;
- the average employer contribution can account for as much as 45% of the gross salary of the employee, whereas the employee contribution may only count for as much as 20%.
- A specific tax called CSG (“Generalized Social Contribution”)
- Various other taxes collected by the Social Security (e.g. “forfait social” tax; gross VAT on tobacco, pharmaceuticals, alcohol, health products; tax on company cars, tax on land motor vehicles; tax on salaries; etc.).

2. HEALTHCARE AND INSURANCES

The French law provides for a basic minimum indemnity and protection of employees. Quite often, collective bargaining agreements provide for additional protection or allowances.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

HOLIDAYS

Employees are entitled to a minimum of five weeks’ paid holiday a year. In addition, there are approximately ten public holidays every year. The law and CBAs grant additional paid leave for employees who have reached a specific length of service and for family related events. Autonomous executives also benefit from additional days off.

ANNUAL LEAVE

Every employee is entitled to paid vacations by his employer, regardless of his age, seniority or type of contract (indefinite-term or fixed-term). The duration of paid vacations varies according to the acquired rights (legally 2.5 days of paid vacation per month, unless more favourable collective bargaining agreement provisions apply). The vacation dates are subject to the agreement of the employer.

B. MATERNITY / PATERNITY LEAVE

The pregnant employee benefits from a maternity leave during the period, which is around the expected date of childbirth (there is a prenatal leave and postnatal leave). Its duration is variable, depending on the number of unborn children or already at charge (from 16 to 46 weeks). The Social Security Daily Allowance varies in function of the salary (from EUR 9.39 to EUR 86).

C. SICKNESS LEAVE

Where the employee is out of work for sickness, subject to compliance with certain formalities (notably for the employee to submit, within 48 hours, the sick slip to the Social Security office and the employer) and satisfies the requirements, the employee is entitled to receive a daily allowance during his leave, after a three-day waiting period. This allowance will be directly paid to the employer in case of subrogation. The daily allowance paid for sick leave is 50% of the basic daily wage (on average, the Social Security Daily Indemnity is of EUR 43.40). After 30 days of sick leave, the daily allowance is increased to 66.66% of the basic daily wage, if the employee has at least three children. After 3 months, the daily allowance will be re-evaluated.

D. DISABILITY LEAVE

If an employee is recognised as 'invalid' (work capacity and gain is reduced by at least 2/3 as a result of an accident or a non-occupational disease) the employee can obtain the payment of a pension disability to compensate for lost wages, by filling a demand before the CPAM (French Health Insurance).

If the accident or illness is work-related, the employee may receive, under certain conditions, a permanent disability pension.

The employee should be affiliated to the Social Security for at least 12 months on the 1st day of the month during which occurred the interruption of work followed by disability, or the recognition of disability status resulting from bodily premature wear.

In addition to the qualifying affiliation period, the employee should either have contributed on a salary at least equal to 2,030 times the minimum wage schedule during the 12 calendar months preceding the work interruption, or have worked at least 600 hours during the 12 months preceding the interruption of work or recognition of disability status.

Invalids are classified into 3 categories, depending on their level of disability, by the medical officer of the primary health insurance fund (CPAM):

- 1st category: invalids capable of remunerated employment,
- 2nd category: invalids absolutely unable to perform any occupation,
- 3rd category: invalid who is absolutely unable to exercise a profession, and compelled to resort to the assistance of another person to perform ordinary activities of life.

The amount of the disability pension received will depend on the category the person is in, as the determining of a category is not definitive and may evolve.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

The French retirement pension system of employees is structured into three components; the first two, the Basic retirement pension and the Complementary retirement pension are mandatory, hence, contributions are imposed on employees and employers, while the third, Additional pension (when implemented by the employee, it is primarily of savings products such as life insurance, the popular retirement savings plan (PERP) or "Madelin contracts" for non-salaried workers) is optional.

BASIC RETIREMENT PENSION

The characteristic of the basic diets is that they are extremely fragmented. They number thirty-six structured around the professional status of their contributors (private sector, agriculture, civil servants, independent...) or a particular occupational category (SNCF, RATP, Ministers of Religion ...). For employees of the private sector, the fund is the National Elderly Insurance Fund (CNAV) and the largest pension fund.

COMPLEMENTARY RETIREMENT PENSION

- for employees and managers covered for their basic pension of national pensions' fund (CNAV) or MSA (MSA), the complementary pension is managed by two entities:
- for executives, it is the General Association of Supplementary Pension Institutions of Executives (AGIRC);

For all employees, it is the Association of supplementary pension schemes (ARRCO). Both associations formed an economic interest group: GIE AGIRC-ARRCO. An agreement signed in October 2015 provides for the creation in 2019 of a unified complementary regime.

ADDITIONAL PENSION

Based on the principle of capitalisation by the employee, who saves for retirement, the additional pension is fairly marginal in terms of membership. It can be implemented by a company or individually. When implemented by the employee, it is primarily of savings products such as life insurance, the popular retirement savings plan (PERP) or "Madelin contracts" for non-salaried workers.

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