

Companies with at least 50 employees: the new obligation to negotiate on senior employment and the financial sanctions that will apply as of January 1, 2010

In France in 2008, the employment rate of employees between 55 and 64 years old was 38.30% whereas the European objective is 50% for 2010. The French government has taken several measures to keep senior citizens in their jobs: increasing the rate of the pension bonus of employees who continue to work after having reached the number of quarters necessary to benefit from a retirement at the full rate, the easing of restrictions on cumulating employment with retirement, prohibiting forced retirement of employees under the age of 70 by the sole initiative of the employer, and requiring the consent of the employee for a forced retirement between the ages of 65 and 70.

Along the same lines, Article 87 of the Law on Financing Social Security sets forth an “incentive” for companies to adopt an active management of senior citizens and to better integrate them in human resources management by putting in place agreements and action plans in branches and companies in favor of senior employees. This “incentive” is not inconsequential as companies that do not implement this measure will be sanctioned up to 1% of their total payroll for each month during which they are in breach.

1. The companies targeted by the obligation to negotiate on senior employment:

All companies with at least 50 employees or belonging to a group with at least 50 employees are concerned. The number of employees is appreciated at December 31 of each year on the basis of the average staff size registered on the last day of each month. For a company created during the year, the number of employees is appreciated at its creation date (Decree no. 2009-564 of May 20, 2009). As such, a company with 50 employees registered on December 31, 2009 should comply with this new obligation as early as January 1, 2010.

For companies exceeding one of the two aforementioned thresholds, the Circular DGEFP-DGT-DSS no. 2009-31 of July 9, 2009 requests the French Social Security Administration (URSSAF) to be lenient by enforcing the penalty only after a 3-month period following January 1, at which time such penalty will become due and payable, thereby allowing them the necessary time to negotiate an agreement or implement an action plan resulting thereof.

2. The obligation to negotiate on senior employment:

Companies must negotiate a company agreement on senior employment with their union delegates. Otherwise, they must put in place an action plan after receipt of the opinion thereof of the works council (or the personnel delegates, if no works council exists). The company agreement or action plan cannot have a term exceeding 3 years and must be filed with the French labor administration as well as the clerk of the labor court.

Companies with less than 300 employees are released from the obligation to negotiate a company agreement if they are a party to a branch agreement that has been given the force of law and complies with the conditions set forth in Article L. 138-25 of the French Social Security Code.

3. The minimum terms and conditions of the collective agreement or action plan:

The agreement or plan must contain the following:

- An objective of the number or percentage of senior employees, who are 55 or older, who will keep their jobs, or of senior employees, who are 50 or older, who will be recruited;
- At least 3 areas of action selected from the six set forth in Article R.138-26 of the French Social Security Code:
 - Recruiting senior employees in the company,
 - Anticipating the evolution of professional careers,
 - Improving the working conditions and preventing hardship situations,
 - Developing skills and qualifications and providing access to training,
 - Planning retirement and the transition between working and retiring,
 - Transmitting knowledge and skills and developing a tutorial system.

Each of these areas must have objectives, in precise figures (either in terms of volume or percentage), whose achievement will be based on defined indicators. The agreement must also set forth the terms and conditions on how each objective will be implemented and reached. The action plan, on the other hand, must set forth the terms and conditions on the annual communication of these indicators and results to the works council (or otherwise, the personnel delegates).

Companies may use their own actions to complete those listed above. In this case, they will not be obligated to set forth objectives in precise figures. Instead, they will need an agreement or action plan that specifies the general provisions on career management, which fall within the scope of early management of senior employment, and may therefore also concern employees who are less than 50 years old, even all the personnel.

4. The financial sanction

The company that is not covered by an agreement or action plan on January 1, 2010, must pay a penalty equal to 1% of the total payroll for each company during which no such agreement or plan is applicable to it.

As soon as the company carries out the formalities on filing its agreement or action plan, it is deemed to have met its obligation.

The URSSAF collects the 1% penalty and allocates it to financing the old-age section of French Social Security. To avoid this heavy penalty, which will apply once the URSSAF audits the company, it may send its agreement or action plan to the prefect of the region to assure him that it is complying with the measure. The prefect of the region will have 3 months in which to verify the document. Absence of any response within this timeframe shall be deemed a favorable opinion that may be enforceable against the URSSAF.

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