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Is the loan of employees really secure since the adoption of the Cherpion law on July 28, 2011?

The loan of employees is an increasingly used human resources management tool that is perfectly suited to the natural trend towards a more flexible and mobile labor market. The provisions introduced by the so-called Cherpion Law were "*aimed at securing the loan of employees*"[1]: while these provisions should be given credit for putting an end to far-reaching court decisions around the concept of "non-profit purpose" and establishing a – burdensome – legal framework regulating the loan of employees, it is unfortunately difficult to assert today that the newly introduced system offers more flexibility and security to companies.

Under a loan of employee, a company agrees to lend an employee for a fixed-term period to a so-called "user" company that has a temporary need for labor. To avoid the risk of being considered as an illegal supply of employees (*prêt illicite de main d'œuvre*) or subcontracting of labor (*marchandage*) that would expose the companies to heavy criminal sanctions[2], the loan of employee must necessarily be for non-profit purpose… and this is precisely where the difficulty lies and where there remains legal uncertainty because of an inconsistent case-law: what does "for non-profit purpose" exactly mean?

Article 40 of the Cherpion Law of July 28, 2011 (L. n°2011-893, JO 29 juill.) amended Articles L. 8241-1 and L. 8241-2 of the French Labor Code in a way not only to (i) specify the elements likely to characterize the "non-profit" nature of a loan of employee but also (ii) define the legal framework governing loans of employee.

Regarding the non-profit purpose of the loan and the invoicing issue

These changes in the French Labor Code, suddenly introduced through a legislative rider to a bill on the development of work/study programs and securing career paths, were indisputably initiated in reaction to the so-called John Deere decision of May 18, 2011 (Labor Chamber of the *Cour de Cassation*, May 18, 2011, n°09-69.175).

In this decision, the *Cour de Cassation* (French Supreme Court) blamed the user company for not assuming any of the personnel management costs, except for the strict reimbursement of the wages and associated social-related charges and contributions. The Labor Chamber of the *Cour de Cassation* considered that the user company not only benefited from an increased flexibility in human resources management but also from

contribution/charge savings, which – according to the judge – attested to the profit-making nature of the loan that was consequently constitutive of an illegal supply of employees.

In our June 2011 e-newsletter[3], we raised the concern that, following this court decision, the re-invoicing on a Euro-for-Euro basis would no longer be conceivable, the strict re-invoicing of management costs would likely be insufficient and that it would henceforth be essential to make sure that the loan of employees does not result in any other types of savings.

Article L. 8241-1 of the French Labor Code, as amended by the Cherpion Law, is quite reassuring for companies: "*a loan of employee does not have a profit-making purpose when the lending company only invoices to the user company, during the loan period,* ***the wages paid to the employee, the associated social-related charges and contributions and the professional expenses repaid to the employee in connection with the loan***".

These provisions clearly challenge the John Deere decision issued by the *Cour de Cassation*: **a strict re-invoicing on a Euro-for-Euro basis will henceforth legally secure the loan of employee.**

Yet the following question arises: conversely, is it forbidden to imagine re-invoicing – in addition to the wages, associated social-related contributions and charges and professional expenses – the management costs that are inevitably assumed by the lending companies? In our opinion, Article L. 8241-1 of the French Labor Code, as amended, does not preclude the principle of reimbursing the management costs insofar as such costs are moderate and justified. According to Mrs. Marie-France Mazars, senior Judge of the Labor Chamber of the *Cour de Cassation*, if the company can prove that the management costs have been correctly calculated and directly and exclusively incurred in connection with the loan of employee, the loan should not be seen as pursuing a profit-making purpose.

Yet, a particular attention should be paid to the associated tax consequences: (i) depending on the amount of management costs that are re-invoiced, the loan could be considered as an irregular management act (i.e. the grant of a benefit that is contrary to the company's corporate interests), which would prevent the deductibility of such costs, (ii) the loan could be subject to VAT.

Regarding the applicable formal requirements (Article L. 8241-2 of the French Labor Code)

Conclusion of an employee loan agreement

Since the Cherpion Law, the lending and user companies must enter into an employee loan agreement that must mention at the very least **the duration of the loan, the identity and qualification of the relevant employee(s) as well as the method to be used to calculate the sums** (wages, associated social-related contributions and charges, professional expenses and, as the case may be, management costs – subject to our comments above) **that will be re-invoiced**. In the event several employees are to be loaned, it is possible to

enter into a framework loan agreement but each employee must be clearly identified.

Conclusion of an amendment to the employee's employment agreement…

In addition, **the employee's express consent** is now required and **the conclusion of an amendment signed by the employee** is mandatory, even if there is no substantial modification of the employee's working conditions. Article L. 8241-2 of the French Labor Code even specifies that the employee may not be sanctioned, dismissed or subject of discriminatory measures if he/she refuses to be loaned.

…that must contains specific information

The amendment must specify the duration of the loan: while it is possible to indicate that the loan agreement is entered into for the performance of a particular assignment and not stipulate a specific duration, it is recommended to agree on a foreseeable duration and still necessary to agree on a minimum duration, just like it is required for fixed-term employment agreements. Even if applicable legal provisions do not expressly prohibit it, we strongly advise not to loan employees on a permanent basis (which is often used within groups in order to enable a manager to have an employment agreement[4]) as this type of loan does not seem to match the spirit of the Law.

The amendment must define the work to be performed within the user company, the place of performance of such work as well as the specific features of the job (e.g. exact description of the job title and tasks, integration to such or such department of the user company, any potential dangers associated with the job, etc.). The amendment must also provide for a probationary period[5] if the loan entails a change in one of the main elements of the employee's employment agreement (change in wage, title/tasks, working time duration, etc.).

The Law also stipulates that the amendment must indicate the working hours of the employees. Logically, the working hours shall be those applicable within the user company but an uncertainty remains as to the working time duration that will apply to the employee.

The Law specifies that the employee "*shall continue to benefit from all provisions set forth in the collective bargaining agreements that would have been applicable if the employee had performed his/her work in the lending company*", which means, on the other hand, that the employee should not be entitled to claim for the application of the provisions set forth in the industry-wide collective bargaining agreements or company-level bargaining agreements applicable within the user company, even when such provisions are more beneficial to him/her (e.g. a working time of 35 hours per week plus the payment of overtime hours instead of the so-called *forfait jour*, i.e. calculation of working time based on a fixed number of working days per year, provided for in the collective bargaining agreement applicable within the lending company, just like in the John Deere case). Yet, in his haste, the legislator omitted to delete in Article L. 8142-2 §2 of the French Labor Code the reference to Article L. 1251-21 of said Code that, with respect notably to working time duration, provides for the application of the legal provisions and the provisions of the collective bargaining agreement(s) in force within

the user company! Because of this contradiction, it should be assumed that the provisions that are the most beneficial to the employee should be applied and that the amendment to the employment agreement should in any event stipulate the working time duration that will apply to the employee (and more generally the conditions in which the employee shall perform his/her job). The Law also recalls that the loaned employee can access the services (e.g. company restaurant) and collective transportation means implemented by the user company.

Consultation and information of staff representatives

The lending company must consult the **Works Council** or, if there is no Works Council, the staff representatives "*prior to the implementation of the loan of an employee*" and inform it/them of the signed loan agreement(s). In our opinion, the Law does not in any way impose the obligation to consult the staff representatives bodies ("SRB") before the signature of a loan agreement: the consultation of the SRB does not extend to the content of the loan agreement but focuses merely on the principle of the loan. However, it is required to inform *a posteriori* the SRB of the terms and conditions in which the loan will be implemented by producing, as the case may be, upon request of the SRB, the signed loan agreement(s) (with the possibility to black out certain information considered as strictly confidential).

Further, when the job position in the user company appears on the list of jobs that pose particular risks to the health or safety of employees, as such list is drawn up for employees working under a fixed-term employment agreement, the **Health, Hygiene and Safety Committee** of the lending company must be informed.

At the level of the user company, the Works Council, the Health, Hygiene and Safety Committee, or in the absence of such Council and Committee, the staff representatives must be informed and consulted prior to integrating a loaned employee.

While this SRB information/consultation process can be viewed as reasonable in case of "large-scale" loans of employees, the imposed obligations appear extremely burdensome and totally disconnected from economic realities (employees are often loaned to remedy urgent situations) in case of one-shot loans of a single employee, notably between companies of the same group.

The loan of employees is now strictly regulated by law. Companies must therefore be extremely vigilant and ensure that the loan is properly structured so as not to overlook any of the imposed formal requirements: indeed, there exists within corporate groups *de facto* situations where employees are loaned by one group entity to another (e.g. employee working occasionally for another entity of the group without any change in his/her place of work). When an employee, even though still contractually linked to his/her initial employer – and therefore linked to the latter by a relationship of subordination[6], performs tasks for another entity and finds himself/herself under the authority of a manager belonging to another legal entity, the formal requirements set out above must be complied with. Moreover, in case of intra-group loans of employees, the risk for the two relevant entities to be considered as co-employer must be seriously taken into account.

Regarding the employee's reinstatement to his/her original job position

Pursuant to Article L. 8241-2 of the French Labor Code, the employee, at the end of the loan period, is reinstated to "*his/her position in the lending company without his career evolution or remuneration being affected by the loan period*".

It should be noted that the Law does not provide for the possibility to offer to the employee an "equivalent" position. Is it simply an omission of the legislator? It seems to be so and the Labor Administration is reportedly preparing a circular that should provide additional information in this respect.

Pending the publication of this circular, it is recommended to include in the amendment to the employment agreement a provision providing for the possibility to offer to the employee an "equivalent" position in the event the original position has been modified or suppressed. Yet, if the employee's original position still exists, the company may not offer him/her another position even if such position is "equivalent".

With respect to the reinstatement of employees to their home company, a decision rendered on December 7, 2011[7] by the Labor Chamber of the *Cour de Cassation* is noteworthy. This decision specifically addresses the issue dealt with in Article L. 1231-5 of the French Labor Code concerning the reinstatement of an employee who had been loaned by a French parent company to a foreign subsidiary and who had entered with the latter into a new employment agreement. The Labor Chamber of the *Cour de Cassation* ruled that in case of termination of the employment contract by the subsidiary, the employee must be reinstated in the parent company even if he/she had never effectively worked there before. So, if the employee's initial employment contract remains in full force and effect during the loan, the reinstatement of the employee to his/her home company is indisputably required even if the employee has never effectively worked there.

As pointed out, far from providing loans of employees with more flexibility, adjustability and legal certainty, the Law, quite to the contrary, created new constraints (written consent of the employee, consultation with the SRB, etc.), raised new issues (can management costs be invoiced?) and further muddled existing grey areas (concerning work performance conditions, what rules apply to the loaned employee? etc.). Hence the need to precisely determine at an early stage the terms and conditions of the loan, both in the loan agreement and in the amendment to the employment agreement.

The fact remains that in this time of crisis the loan of employees, if limited in time and properly structured, proves to be a great tool to manage cyclical fluctuations in business activities and a possible alternative to short-time working arrangements or even to redundancies.

[1] Words used by Mrs. Gisèle Printz – *Rapporteur* of the French Senate's Labor Affairs Committee at the origin of these amendments to the French Labor Code – during the debates before the Senate on June 27, 2011.

[2] The illegal supply of employees and subcontracting of labor are punished by two years' imprisonment and a fine of EUR 30,000 (multiplied by 5 for legal entities). The Court may also prohibit the relevant company from subcontracting employees for a period of 2 to 10 years.

[3] Cf. article entitled *Intra-group loans of employees can be considered as an illegal supply of employees or as an illegal subcontracting of labor* published in our June 2011 e-newsletter.

[4] This situation must be distinguished from the case where the manager has signed an employment agreement with the parent company that entrusts to such manager the management of several subsidiaries.

[5] The probationary period must be distinguished from the trial period because in case of termination of the loan agreement – except for gross misconduct – the employment agreement will not be terminated and the employee will be reinstated to his/her original employment position.

[6] The continued existence of this link of subordination is essential to avoid the risk of the loan being reclassified as an illegal supply of labor.

[7] Labor Chamber of the *Cour de Cassation*, December 7, 2011, n°09-67.367