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Law on securing employment: the new obligations imposed on businesses in return for increased labor market flexibility and greater legal certainty

Law n°2013-504 of June 14, 2013 on securing employment (the "Law") was published in the Official Journal on June 16.

Our March 2013 and May 2013 e-newsletters addressed two flagship measures of the Law: the new procedural framework governing large-scale collective dismissals and the introduction of so-called job preservation agreements. In addition to these major measures towards greater flexibility called for by employers, the Law provides for a number of other devices that will have significant consequences for businesses. This article briefly discusses some of these new provisions, most of which must still be supplemented by forthcoming implementing Decrees.

1. Taxation of fixed-term employment contracts (Amendment of May 29, 2009 to the unemployment insurance agreement)

During the negotiations of the Inter-professional National Agreement of January 11, 2013 that formed the basis of the Law, the social partners had decided to tax fixed-term employment contracts with a short duration in order to limit the number of such contracts and curb precarious employment.

This taxation shall become effective on July 1, 2013 and shall apply to all pending fixed-term contracts with a short duration, regardless of their date of conclusion.

As from July 1, 2013, the employer's contribution to unemployment insurance, currently fixed at 4%, shall be increased to:

- 7% for fixed-term employment contracts with a duration of one month or less,
- 5.5% for fixed-term employment contracts with a duration exceeding one month and up to and including 3 months,
- 4.5 % for fixed-term employment contract in specific industries to be set forth by Decree, it being specified that this tax increase shall not apply to seasonal contracts.

Similarly, this tax increase shall not apply to fixed-term employment contracts entered into for the replacement of an employee or a business manager.

In order to determine the applicable rate, it is the initial duration of the contract (or its minimum duration if the contract does not include a specific termination date) that will be taken into account, not the actual duration that can include, as the case may be, a renewal period. The initial duration of the contract must, therefore, be carefully chosen. A fixed-term employment contract of 3 months, renewed once for an additional 3-month period, will be taxed while a fixed-term employment contract of 4 months, renewed once for a period of 2 months will not be taxed, and, therefore, will be less costly for the company even though the overall duration of the two aforementioned contracts is the same.

It should be noted that if, at the expiry of the fixed-term contract, the employee is hired under a permanent employment contract, the tax paid by the company will be reimbursed… but the conditions of such reimbursement have not yet been defined.

In return for this tax increase, businesses will be exempted from employer's contribution to unemployment **insurance** during 4 months, reduced to 3 months for companies with at least 50 employees, for the hiring of a young person under the age of 26 years under a permanent employment contract. This exemption will be available UPON REQUEST from the employer, on the first day of the calendar month following the trial period.

2. Changes concerning part-time work

2.1 Mandatory minimum working time (Articles L.3123-14-1 to L.3123-14-5 of the French Labor Code, hereinafter "FLC")

Part-time employment agreements entered into as from January 1, 2014 must provide for a minimum working time of 24 hours per week (or an equivalent working time duration on a monthly or yearly basis).

For all part-time employment agreements in effect as of January 1, 2014, and up to January 1, 2016, this minimum working time shall be applied at the request of the relevant employee(s). The employer may refuse the requested change if it can prove that it is unable to meet such request "*given the company's economic activity*".

Undoubtedly, there will be some difficulties in the operational implementation of this new provision: will the company be required to send to the employee a reasoned reply explaining why it is unable to implement this provision? What will a company have to do if it cannot respond favorably to all the requests received from employees, i.e. grant to all employees a working time below the 24-hour ceiling or grant a working time of 24 hours only to some employees? In this last case, wouldn't the company's decision be challenged on the ground of discrimination or unequal treatment? Will it be necessary to lay down specific selection criteria in this respect?

As from January 1, 2016, all part-time employment agreements must provide for a minimum working time of 24 hours per week.

A number of exemptions will be available:

Working time below 24 hours per week will be tolerated:

- for employees under the age of 26 who pursue their studies;
- upon written and reasoned request from the employee, to enable him/her either to deal with personal constraints or to stack several jobs to reach an overall working time of at least 24 hours per week;
- pursuant to an extended branch agreement that provides part-time workers with certain guarantees;
- for the employees of intermediary associations.

In the two first cases, business must be extremely vigilant on the documentary evidence to be provided by the employees (valid student cards, written request received from the employee).

Such evidence must be carefully kept to avoid any subsequent litigation. A specific attention will also have to be paid to the formalities to be complied with by the employee when drafting his/her request in order (i.e. he/she must justify his/her request by one of the aforementioned two cases provided for by the Law).

Concerning the provisions of collective agreements that deal with this part-time work issue, we believe, based on the decisions and practices applied by French courts in general and by the *Cour de Cassation* (French Supreme Court) in particular, that such collective agreements will be challenged in the future for lack of sufficient guarantees provided therein to part-time workers!

This is exactly what happened with the provisions of collective agreements concerning the so-called *forfait jours* working time arrangements (i.e. arrangements according to which working time is not counted in hours but is based on a fixed number of working days per year).

2.2 Increase pay rate applicable from the first additional working hour (Articles L.3123-17 and L.3123-19 of the FLC)

Currently, part-time employees may work additional hours in excess of the working time duration set forth in their employment contract, within a maximum of 10% of the said contractual duration (this ceiling can be increased to 1/3 of the contractual working time pursuant to a collective agreement).

At present, only additional hours worked in excess of the 10% legal ceiling are remunerated at a premium pay rate. Effective as from January 1, 2014, each additional hour within the 10% legal ceiling will be remunerated at a premium pay rate of 10%.

Additional hours worked in excess of 10% of the contractual working time shall be remunerated at a premium rate of 25%. As from the enactment of the Law, a collective agreement can provide for a lower premium pay rate that must, however, be at least 10%.

3. Partial activity, a new unified device for short-time working (Article L.5122-1 of the FLC)

The various existing schemes of compensation for short-time working are merged. The employee shall receive a single hourly allowance, the amount of which will be fixed by Decree.

Businesses will also receive a single allowance, without any specific formalities being required, insofar as the administrative authorization, whether implied or express, will be sufficient to obtain the partial coverage of the indemnification paid to the employee.

In return for such short-time working allowance, the company may be required to make specific commitments in terms of employment or training. A forthcoming Decree will specify the conditions in which such commitments must be made.

4. New statutes of limitations (Articles L.1471-1 and L.3245-1 of the FLC)

Today, most legal actions concerning employment agreements become time-barred after 5 years.

The Law introduced in the FLC a new Article L.1471-1 according to which *"Any legal actions relating to the performance or breach of the employment contract shall be time-barred at the expiry of a 2-year period as from the day on which the person bringing such action has become aware or should have become aware of the facts on the basis of which such person can exercise his/her right".*

Other situations for which the FLC currently provides for other applicable statutes of limitations (action challenging a contractually negotiated termination, action concerning the invalidity of a dismissal procedure due to the absence of a *plan de sauvegarde de l'emploi* (collective lay-off plan) or to the non-compliance of the *plan de sauvegarde de l'emploi* with applicable legal and regulatory requirements, discrimination or harassment, compensation for injuries caused during work) are not impacted by this provision.

On the other hand, the statute of limitations applicable to claims relating to salaries is reduced from 5 years to 3 years, as per Article L.3245-1 of the FLC.

These changes shall apply to statutes of limitations that have started running as of the date of enactment of the Law, without the total length of the statute of limitations period exceeding the length provided for by the former legislation. If proceedings have been initiated before the enactment of the Law, the legal action shall proceed and be adjudicated pursuant to the former legal provisions.

5. New timeframes applicable to the Works Council consultation process (Articles L.2323-3 and L.2323-4 of the FLC)

The new provisions introduced by the Law will bring about significant changes in the Works Council ("WC") consultation processes initiated within companies insofar as they should put an end to deadlock situations due

to the WC's refusal to issue an opinion – that have become a commonplace today.

Indeed, pursuant to Article L.2323-3 of the FLC, an agreement between the employer and the WC or, in the absence of such agreement, a Decree of the Council of State, must fix a maximum timeframe, considered as "*a sufficient review period*" that may not be less than 15 days.

This is a pre-determined time-line that may not be suspended or extended, even if a claim is brought before the First Instance court, unless the Court decides to extend it because of specific difficulties in accessing the required information.

If, upon expiry of the time-frame, the WC has not rendered an opinion, it shall be deemed as having been duly consulted and as having rendered a negative opinion.

Most of the WC consultation processes initiated within companies are impacted by this new provision.

6. Creation of a Social and Economic Database (Articles L.2323-7-2 and L.2323-7-3 of the FLC)

Companies with more than 300 employees have one year as from the enactment of the Law to create this database.

Companies with less than 300 employees shall be granted an additional year. Although the Law does not explicitly say so, only companies with at least 50 employees are targeted by this new obligation, as the provisions pertaining to the database are included in the chapter of the Law that deals with WCs.

The information to be recorded in this database concern the following topics:

- investments: social investment (employment, training, part-time jobs, internships), tangible and intangible investments and, as the case may be, environmental information;
- equity capital and debts;
- items of remuneration of employees and management;
- social and cultural activities;
- remuneration of financers;
- financial flows received by the company (state aids, tax credits);
- sub-contracting;
- commercial and financial transfers between the various entities of the group, if any.

The specific content of all such topics shall be determined by a Decree of the Council of State.

This database must aggregate data on the current year and the two previous years, include prospects over the next three years and be regularly updated.

It shall be kept permanently available to the members of the WC, or in the absence of a WC, to the staff

representatives, members of the Central Works Council, Health, Safety and Working Conditions Committee and trade-union representatives.

7. The obligation to consult the WC is extended to further issues

The WC must henceforth be consulted on the following topics:

- **Strategic orientations of the company (Article L.2323-7-1 of the FLC)**

The WC must be consulted once a year on the company's strategic orientations and on the impact such orientations will have on business activities, employment, evolution of jobs and expertise, work organization, subcontracting, interim employees, temporary contracts and internships.

Since the information contained in the Social and Economic Database is supposed to serve as a basis for the preparation of the consultation process, it can be inferred that such consultation on the strategic orientations of the company will only become mandatory after the database has been implemented.

- **Use of the so-called Competitiveness and Employment Tax Credit (Articles L.2323-26-1 to L.2323-26-3 of the FLC)**

The consultation process must be completed before July 1 of each year. **In companies with less than 50 employees (i.e. where a WC is not mandatory), the staff representatives must be consulted**.

8. Creation of a body responsible for coordinating the various Health, Safety and Working Conditions Committees ("HSWCC") (Articles L.4616-1 to L.4616-5 of the FLC)

In order to avoid overlap of expertise, the company with several places of business and several HSWCC will be entitled to implement a temporary coordination body responsible for organizing the use of a single expertise for projects that are common to several places of business.

9. Obligation to search for a buyer (Article L.1233-90 of the FLC)

Businesses subject to provisions governing redeployment leave (companies or groups with at least 1,000 employees and/or subject to the rules governing group WCs or European WCs) that contemplate implementing collective economic dismissals that would result in the shutdown of a place of business, must search for a buyer and inform the WC thereof as soon as the consultation process is initiated.

This provision is applicable to collective economic dismissal procedures that will be launched as from July 1, 2013 (date of dispatch of the notice to attend the first WC meeting).

10. Conciliation before the Labor Court (Article L.1235-1 §1 of the FLC)

The Law aims at encouraging the parties to find an agreement before the conciliation board of the Labor Court.

Under such agreement, the employer must pay to the employee a pre-determined lump sum indemnity that will be based on an indemnification scale to be set forth by a forthcoming Decree.

This indemnification scale, based on the employee's seniority, should be as follows:

- between 0 to 2 years of seniority: 2 months' salary;
- between 2 to 8 years of seniority: 4 months' salary;
- between 8 to 15 years of seniority: 8 months' salary;
- between 15 to 25 years of seniority: 10 months' salary;
- over 25 years of seniority: 14 months' salary.

If an agreement is reached between the parties, it shall be deemed as a settlement agreement.

11. Coverage obligation in respect of health expenses (Article L.911-7 of the French Social Security Code)

Companies must implement before January 1, 2016 a so-called "medical expenses" complementary insurance to the benefit of their employees, either through a branch agreement, a company-level agreement or, in the absence of such agreements, a unilateral decision.

The complementary health insurance must provide for a minimum level of guarantees and for the payment by the employer of part of social-related contributions (at least 50%).

The Law also improves the scheme by which employees who are made unemployed remain covered by their former employer's death and disability insurance:

- by extending such obligation to all business sectors, some of them being currently excluded from the existing scheme (e.g. teaching, liberal professions);
- by increasing the coverage period from 9 to 12 months,
- by providing for such continuous coverage without any counterpart funding being required from the former employee.

These new provisions will become effective on June 1, 2014 for the obligation to implement complementary health insurance, and on June 1, 2015 for the continued coverage scheme (insofar as such continued coverage is already provided for in the company as of said date).

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