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The 7th Macron Ordinance on the posting of employees in France should be published in the coming weeks: Greater simplicity but tighter sanctions for non-compliance

While the European Ministers of Labor and Social Affairs reached on October 23, 2017 an agreement on the revision of the 1996 Posting of Workers Directive, in particular at the instigation of the Macron Government, France is reviewing its own legislation on the subject. On December 20, 2017, the Government indeed announced a series of measures concerning the posting of foreign employees in France, a practice known as "transnational" posting of workers.

A 7th "Macron Ordinance" is expected to be published in the first quarter of 2018. Greater simplicity but tighter sanctions for non-compliance: This should be the spirit of this new Ordinance. As a matter of fact, the Government seems to primarily seek to track down companies that do not comply with their obligations – for example concerning the remuneration of posted employees – and that, as a result, fuel a social dumping mechanism.

Companies having their registered office outside France may temporarily post their employees in France. In that case, they must comply with mandatory formalities (**III.**) and apply to the posted employees some provisions of the French Labor Code (**II.**).

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But before posting an employee in France, the foreign employer must ensure that the contemplated action is encompassed within the legal framework governing the posting of workers (**I.**).

I. The Legal framework governing the transnational posting of workers

Article L.1261 of the French Labor Code stipulates that "*an employer duly established and carrying out its activities outside France may post workers temporarily on the French territory, provided that there is an employment contract between this employer and the employee and that their employment relationship continues throughout the duration of the posting.*"

As a result, the posting is subject to some prerequisite conditions:

a- The employer must be established outside France. However, the concept of establishment implies that two requirements must be met:

+To be duly established, i.e. to comply with the laws and regulations applicable in the relevant country.

+To carry out a significant, stable and continue business activity.

b- The posting of foreign employees in France must be temporary. As such, once the assignment is over, the posted employees must resume their functions within the posting company. The French Labor Code does not fix a maximum duration for the posting period. However, it is worth noting that the agreement on the revision of the Posting of Workers Directive reached by the European Ministers of Labor and Social Affairs on October 23, 2017 foresees to limit the duration of the posting period to a maximum of 12 months.

c- There must always be an employment contract between the employer and the posted employee and such contract must be maintained throughout the duration of the posting, whatever the context in which the posting arrangement is made.

d- Yet, the employment relationship must exist prior to the posting. This means that an employee may not be recruited by a foreign company for the sole purpose of being posted in France.

Then, Article L.1262-1 of the French Labor Code sets forth three situations in which posting can take place:

"*1. on behalf of the employer and under its direction, under a contract concluded between the employer and a hosting entity established or operating in France; or*

2. between establishments belonging to the same company or between companies that belong to the same group; or

3. on behalf of the employer without the employer having a contract with the hosting entity".

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Apart from these three situations admitted by the French legislation, posting will not be recognized.

II. Rights and rules applicable to workers posted on the French territory

It is important to note that, whatever the law governing the employment contract, employees posted on the French territory are subject to **the legal provisions, regulatory provisions and provisions of the collective bargaining agreement applicable to French employees employed by companies established in France that operate in the same business sector, as regards the following areas listed by Article L. 1262-4 of the French Labor Code**:

- Individual and collective freedoms in the employment relationship;
- Discrimination and professional gender equality;
- Protection of maternity, maternity and paternity leaves and new child adjustment leaves, family-related leaves;
- Conditions governing the provision of personnel staff and guarantees that must be given to employees by companies engaged in temporary employment activities;
- Exercise of the right to strike;
- Working time, compensatory leaves, public holidays, annual paid vacation, working time and night work for young workers;
- Conditions for contributing to leave and bad-weather funds;
- Minimum wage and payment of wages, including extra pay for overtime hours, as well as wage accessories set forth by law or by the applicable collective bargaining agreement;
- Rules relating to health and safety in the workplace, minimum employment age and employment of children;
- Illegal work.

This block of areas constitutes the “core” of French labor and employment law and automatically applies to foreign employers that wish to post employees on the French territory.

In practice, this means that the foreign employer must ensure (i) that French rules on working time duration (schedule, maximum daily working time) are complied with, and (ii) that the remuneration paid to the posted employees is at least equal to the minimum wage provided for under the applicable collective bargaining agreement for the type of employment position held by said employees or, in the absence of any such provision, to the minimum wage set forth by law.

III. Formalities that must be carried out by the employer prior to the posting

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(i) Formalities to be carried out with the Labor Inspectorate

Prior to the posting, the foreign employer must file a declaration of posting with the local branch of the *Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi* (Regional Directorate for Companies, Competition, Consumption, Labor and Employment, known under the acronym "DIRECCTE") of the place where the services will be provided (or, if the services are provided in several places, with the local branch of the DIRECCTE of the place where the services will be initially provided).

The foreign employer must also appoint a representative in France to liaise with inspection/control officers (labor inspector, URSSAF[1] controller, police and gendarmerie services, tax authorities, etc.) and retain the documents that must be kept available for the Labor Inspectorate.

This pre-posting declaration must be filed online via the so-called "SIPSI" teleservice: http://www.sipsi.travail.gouv.fr.

It should be noted, however, that the 7th Macron Ordinance expected to be published in the first quarter of 2018 will simplify the administrative formalities for some types of services, including artistic and journalistic services, trainings sessions or colloquiums. Two ideas are being considered: the establishment of a list of activities exempted from the obligation to file a pre-posting declaration, and the determination of a period of service under which the pre-posting declaration will not be required.

The forthcoming 7th Macron Ordinance should also notably encourage the conclusion of bilateral agreements on posted workers. This would enable employees located on the other side of the French border to obtain a single declaration for 12 months without having to file a new pre-posting declaration for each assignment.

Failure by the employer to file a pre-posting declaration is currently punishable by an administrative fine – imposed by the DIRECCTE – in the amount of 2,000 euros maximum per posted employee (4,000 euros in case of repeated offenses) (Article L.1264-3 of the French Labor Code).

As per the terms of forthcoming 7th Macron Ordinance, **a new sanction taking the form of a lump-sum penalty (the amount should be specified by a subsequent Decree) could be imposed as from January 2019 on non-compliant companies** – for example, companies that do no file a pre-posting declaration or that do not respect the "core" rights (cf. II above). If the penalty is not paid, the DIRECCTE will be entitled to order a suspension of activity. This sanction would come in addition to the administrative fine and the suspension measure that already exists, but we do not know at this stage how this will be coordinated.

While it was initially planned to impose as from January 1, 2018 a stamp duty in the amount of 40 euros on any and all companies based abroad and posting employees in France, this duty did not finally come into effect and a repealing Decree should be published very shortly.

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(ii) Formalities related to social security

Pursuant to social security EU Regulations, employees of an employer established in a EU Member State who are posted to another EU Members remain, subject to certain conditions and for a certain period of time only, affiliated under the legislation of the Member State where they habitually work.

In practice, this means that an employee who habitually works in another EU country but who is temporarily posted in France remains affiliated to the social security scheme of the country where he/she habitually works and will not be subject to the French social security legislation.

As such, no social security contribution shall be due in France.

These rules also apply to the countries which are members of the European Economic Area (Island, Lichtenstein, Norway) and the Swiss confederation.

This "equivalence" regime only applies in case of a "posting" within the meaning of EU Regulations on social security, i.e. the assignment must not last more than 24 months (subject to limited exceptions). If the employee is to remain posted for more than 24 months, he/she is in principle subject to the expatriation regime and must in principle subscribe to the French social security scheme.

Similarly, posted employees who are nationals of a country that has entered into a bilateral social security agreement with France shall remain covered by the social security scheme of their country of origin, as per the terms and for the duration set forth in the bilateral agreement.

(iii) Labor law related formalities

The terms and conditions governing the performance of the work that will be performed in France must mandatorily be set out in an amendment to the posted worker's employment contract.

If the posting arrangement is made between two different legal entities, it will also be necessary to conclude an employee loan agreement. This agreement must specify (i) the duration of the loan, (ii) the qualification of the relevant employee and (iii) the method used to determine the salaries, social-related charges and professional expenses that will be charged by the lending company to the using company (Article L. 8241-2 of the French Labor Code).

[1] URSSAF (*Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales*) is the body responsible for collecting social related contributions.

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