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PROFESSIONAL GENDER EQUALITY: GET YOUR INDICATORS, COMPARE AND PUBLISH!

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In 2018, the French Ministry of Labor published the pay gaps between men and women: a 9% differential in wage and 25% at the end of the career. Yet, as per the famous principle “equal pay for equal work”^[1], the employer is required to ensure equality of remuneration between employees of either gender, as long as the concerned employees are placed in identical situations.

While an annual negotiation on professional gender equality is mandatory in companies with more than 50 employees since January 1, 2012^[2], the contemplated scheme has obviously not yet fully come into effect.

Persistent gender inequalities have led the legislator to take action again by introducing for employers the obligation to publish indicators relating to gender pay gaps.

Article authored in collaboration with Ambre Dalbès

The legislator has thus set a new milestone by introducing a so-called “obligation de résultat” (literally “performance obligation”^[3]) with respect to professional gender equality and by strengthening the ways to achieve this. The Law on freedom to choose one’s professional future^[4] imposes on employers the obligation to publish indicators relating to gender pay gaps.

1. Reminder of existing obligations with respect to professional gender equality

Companies with at least 50 employees – regardless of whether they have trade-union representatives – must conduct annual negotiations on professional gender equality (Article L. 2242-1 of the French Labor Code).

If negotiations fail, the employer must unilaterally adopt an annual action plan designed to ensure professional equality between men and women (Article L. 2242-3 of the French Labor Code).

(i) The content of the company-wide collective agreement or, in the absence of such agreement, of the action plan

The company-wide agreement or, in the absence of such agreement, the action plan must include the following:

1° the progress target;

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2° the actions taken to achieve these targets;

3° these targets must be accompanied by quantifiable indicators.

These targets and actions must cover nine areas included in the social and economic database, i.e. hiring, training, professional advancement/promotion, qualification, classification, working conditions, effective remuneration, balance between professional life and personal life (Article L. 2312-36, 2° of the French Labor Code).

However, there is no obligation to set targets and implement actions for each of the aforementioned areas. To escape the financial penalty (see below), the company-wide collective agreement (or, in the absence of such agreement, the action plan) must simply address three of the aforementioned areas. However, applicable legal provisions require that the issue of effective remuneration be included in the areas addressed by the company-wide collective agreement or, in the absence of such agreement, in the action plan (Article R. 2242-2 of the French Labor Code).

As such, companies must, in addition to the effective remuneration issue, address two other areas among those set out above.

(ii) Financial penalty for non-compliance

In the absence of any company-wide collective agreement or action plan on professional gender equality, companies with more than 50 employees are liable to a financial penalty that can amount up to 1 % of the total remunerations, as defined by Article L. 242-1 §1 of the French Social Security Code (i.e. all sums received by the employees in compensation for or in connection with the work performed, including salaries, indemnities, bonuses, benefits in cash or in kind, etc.), paid to employees during the period(s) where the company does not comply with its obligations on professional gender equality (Article L. 2242-8 of the French Labor Code).

2. New obligation imposed on companies: Publication of indicators on pay gaps between men and women

(i) The indicators that must be published

The Law on freedom to choose one's professional future henceforth imposes on companies with at least 50 employees the obligation to publish annually indicators relating to gender pay gaps and the actions implemented to eliminate such gaps (Article L. 1142-8 of the French Labor Code).

Implementing Decree n°2019-15 of January 9, 2019 published in furtherance of the Law on freedom to choose one's professional future specified the terms and the method to define the level of performance to be achieved. Annexes to this Decree detail in a number of tables the indicators and applicable calculation

methods.

For companies with more than 50 and fewer than 250 employees, 4 indicators must be published:

1° the salary gaps between men and women based on the comparison between the average remuneration of women and men of comparable age and equivalent positions;

2° the gap in individual wage increases between men and women;

3° the percentage of women who received a salary increase in the year following their return from maternity leave, provided however that salary increases were granted during their absence;

4° the number of employees of the underrepresented gender among the ten employees who received the highest remunerations.

Companies with more than 250 employees must, in addition to the aforementioned indicators, publish a fifth indicator: the difference between women's and men's promotion rate.

A number of points will be awarded depending on the gaps identified for each indicator. Every company, whatever its size, must score out a minimum of 75 points out of a total of 100 points in order to meet its obligations.

Companies have the obligation to publish on their website the score for each indicator (or if not possible, the score must be made available to employees by any means) and to transmit this information to the Ministry of Labor. The score must also be made available to the Social and Economic Committee^[5] through its inclusion in the social and economic database.

Companies that do not score 75 points will have the obligation to include in the mandatory negotiation on professional gender equality appropriate and relevant remediation measures and, as the case may be, adopt annual or multiannual financial salary catch-up measures. Companies will then be granted three years to comply with this new obligation (Article L. 1142-10 of the French Labor Code).

(ii) Applicable timetable

This new obligation will be implemented gradually based on a timetable that provides for different effective dates depending on the number of staff members within each company. As such, the publications of the indicators on pay gaps between men and women must be effective at the latest on:

- March 1, 2019 for companies with 1,000 employees or more;
- September 1, 2019 for companies with 250 to 1,000 employees;
- March 1, 2020 for companies with 50 to 250 employees.

For the purpose of the calculation of the number of staff members, the

company's headcount is assessed as of the date on which the obligation to publish the indicators becomes effective.

(iii) Penalty for non-compliance

Companies that do not score at least 75 points will be liable for a financial penalty up to 1% of the total remunerations paid to the employees within the meaning of Article payroll within the meaning of Article L. 242-1 §1 of the French Social Security Code (see above) (Article L. 1142-10 of the French Labor Code).

However, an additional year can be granted to companies to ensure compliance.

This financial penalty is the same as that provided for in Article L. 2242-8 of the French Labor Code that sanctions the absence of company-wide agreement or action plan on professional gender equality (Articles L.2242-1 and L.2242-3 of the French Labor Code). An instruction issued on January 25, 2019 by the General Directorate of Labor^[6] specifies that whenever the penalty provided for under Article L. 1142-10 of the French Labor Code is applied, the penalty under Article L.2242-8 of said Code becomes inapplicable. However, the combination of these penalties works the other way around: it is possible to apply the penalty provided for under Article L.2242-8 of the French Labor Code and then the penalty set forth in Article L. 1142-10 of said Code.

In order to ensure effective professional gender equality, controls by labor inspectors will be intensified. Indeed, the French Ministry of Labor indicated that the annual number of controls and inspections by the labor inspectorate will raise from 1,730 to 7,000.

3. Support measures for businesses

The aforementioned Instruction issued by the General Directorate of Labor^[7] foresees a number of measures to help businesses achieve professional gender equality in terms of remuneration.

- The implementation of information, awareness and support initiatives: group sessions, workshops, mailings and meetings within companies will be implemented to recall the obligations imposed on businesses and assist them in the actions to be taken to achieve the targets set forth by law.
- The designation of contact persons by 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"): one or more contact persons will be appointed by the DIRECCTE to assist businesses with 50 to 250 employees for the calculation of the indicators and, as the case may be, for the definition of adequate and relevant remediation measures.

As part of the assistance provided to companies to achieve professional gender

equality in terms of remuneration, the French Ministry of Labor makes available to businesses a spreadsheet that includes all the formulas required to calculate the pay gaps between men and women in companies with more than 250 employees, and to have a global quantified overview of the situation. Given the timetable that has been set, a second spreadsheet will be made available to companies with less than 250 employees.

The General Directorate of Labor should issue in the first quarter of 2019 a second Instruction on all the measures relating to professional gender equality and related financial penalties.

In conclusion, while the obligation to ensure professional gender equality is nothing new, the means to achieve it are expanded and reinforced. Companies no longer have a choice and must expeditiously use the tools made available to them to comply with their obligations in this respect.

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Notes

[1] "Ponsolle" decision, Labor Chamber of the Cour de Cassation, October 29, 1996, no 92-42.291

[2] Cf. article entitled **Gender equality in companies with at least 50 employees: as from January 1, 2012 the company's inaction can be sanctioned**

[3] There exist two types of obligation under French law: "Obligation de résultat" and "obligation de moyens". With an **obligation de résultat**, a party must fulfill a specific obligation or arrive at a specific result. With an **obligation de moyens**, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result

[4] **Law n° 2018-771 of September 5, 2018** on freedom to choose one's professional future – **Articles 104 and 105.**

[5] or the Hygiene, Safety and Working Conditions Committee / Works Council if the Social and Economic Committee has not been implemented yet. The Social and Economic Committee merges and supersedes all employee representative bodies, i.e. the staff delegates, the Works Council and the Hygiene, Safety and Working Conditions Committee.

[6] Instruction DGT/N°2019/03 of January 25, 2019 on new provisions aimed at eliminating pay gaps between men and women

[7] cf. note 6

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