23 July 2014

STEHLIN & ASSOCIÉS

HR & EMPLOYMENT LAW E-ALERT

1. Part-time work

- **Part-time work: Minimum of 24 weekly hours**

Since 1st July 2014, after being delayed for 6 months, the minimum working time shall be set on a basis of 24 hours per week (or an equivalent working time duration of a monthly basis – i.e. 104 hours per month) except in case of an extended branch agreement that provides part-time workers with certain guarantees.

This minimum working time shall applied for all new part-time employment contracts entered into as from 1st July 2014 and for all current part-time employment contracts as from 1st January 2016.

Besides, a number of exceptions will be available and working time below 24 hours per week will be tolerated:

- for students younger than 26 years old who pursue their studies,
- for the employees of intermediary associations, temporary agency workers,
- 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 (i.e. implementation of regular hours, option for the employee to hold several concurrent positions).

2. Professional training

- **The professional training plan for 2015 shall be established in the light of new rules resulting from the law no 2014-288 of 5 March 2014 on occupational training, employment and social democracy**

In particular the professional training reform concerns the following points:

- Reduction in the amount of the employer's mandatory contribution dedicated to the professional training plan: All companies will have to pay a single contribution as per the training costs to their OPCA (i.e. - the "*Organisme Paritaires Collecteurs Agréés*" which is the French social partners' bodies collecting and regulating funds for training). The amount of this training costs contribution is equal to 1% of the remunerations in companies with less than 10 employees, and to 0.55% of the remunerations in companies with at least 10 employees.

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- End of the administration control and accountability of the professional training programs on the mandatory contribution.

- Change to certain professional training programs scheme:

  - Program for skill development: Prior to the commencement of the training program, the employer's obligations and commitments with respect to this program shall be defined pursuant to the provisions of the French Labour Code, even if the training program takes place during the employee's working hours. This concerns the conditions under which the employee has priority rights to access to available functions corresponding to skills newly acquired and to the appropriate classification (based on the new job performed), as well as the way in which the efforts made by the employee shall be taken into account. These commitments require that the employee has been assiduous and has successfully completed the planned training program.

  - Professionalization periods: these shall include qualification training programs or training programs that enable to acquire the "base of knowledge and skills" or a certification training program which is registered in the professional certifications. A "tutor" must be appointed. A number of conditions regarding these obligations shall be set forth in a forthcoming decree.

  - Validation of learning from acquired skills and experience (i.e. "*VAE*"): the new law includes several provisions that clarify and amend this professional training program, in particular with respect to the rules for calculating the minimum period of 3-years of activity which is required to apply for a "*VAE*".

  - Training program for employees who are absent from work due to sick leave: this program is fully recognized as a training program.

  - Training program for volunteers: repealing of the provisions regarding the financing of this training expenses by the insurance training fund.

  - **Individual Right to Training ("*DIF*"): As from 1 January 2015, the current Individual Right to Training ("*DIF*") will be replaced by the Personal Training Account (i.e. - "*Compte Personnel de Formation*" or "*CPF*"). The hours accrued under the Individual Right to Training ("*DIF*") and not used as of 31 December 2014, will be transferred to the Personal Training Account ("*CPF*") until 1st January 2014.**

  - Professional training plan duration: In principle, the professional training plan shall be established each year. However, a company-wide agreement may set up for duration of 3 years in accordance with the law.

- Information and consultation of the Works Council: the meeting dates for the information and the consultation of the Works Council on the professional training plan (before 1st October and before 31 December) may now be set up by a company-wide agreement. Or, in the absence of such agreement, a Decree shall fixe the time-frames within which the Works Council must be consulted. **Besides, the 50% increase of the employer mandatory contribution with respect to training development in the absence of the consultation of the Work Council is now abolished.**

- **Training: According to a decision of the French Supreme Court dated 18 June 2014 (no 13-14916), the obligation to ensure the continued ability of employees to carry out their jobs fell within the initiative of the employer**

It follows that the employee's right to compensation for breach by the employer of the obligation to ensure the continued ability of employees shall not be subject to any prior request for training made by the employees. Thus, the lack of initiative from the employee shall not release the employer of his obligation to ensure the

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adaptation of workers to theirs jobs, and to ensure their ability to hold a job. As such, if the employer refrains from any initiative regarding training of employees, it is exposed to significant risks, especially with regard to the seniority of the employee concerned within the company.

3. Working time – Annual day packages (i.e. "forfait-jours")

- **Annual day packages: The collective agreement concluded in the SYNTEC branch is extended**

The decree of extension was published in the Official Journal of July 4, 2014. The amendment signed on 1 April 2014 which completes the National Agreement of 22 June 1999 related to working time and the Agreement of 19 February 2013 related to health and psychosocial risks in the workplace is now applicable. This amendment takes into account the case law related to the validity of the Annual day packages in the SYNTEC branch and introduces a "right to disconnect" for employees subject to an annual day packages.

- **Annual day packages: According to a decision of the French Supreme Court of 11 June (n°11-20.985), it is not part of the employee's responsibility to ensure that his workload remains reasonable**

Invalidity of an individual day package convention concluded on the basis of treaty provisions which require the employee to verify that his workload remains reasonable and organize work under the daily and weekly limits.

- **Annual day packages: According to a decision of the Court of Appeal of Aix-en-Provence of 17 April 2014 (n°12/10.349), the company agreement which fixed the modalities of the annual day packages is not enforceable against the employee if the employee has not been informed of any provisions provide by the company agreement concerning the annual day packages**

In this file, a new legal approach was used to invalidate the annual day packages agreement signed by the employee. In this case, the employee was hired after the negotiation of the company agreement which fixed the modalities of the annual day packages. Considering the fact that she has never been informed individually of the existence or the content of this company agreement, she argued that it was not enforceable to her.

The Court of Appeal decided that "a company agreement which fixed the terms of implementation and control of the working time is enforceable against each employee only if each employee has been informed individually of the provisions provide by the company agreement related to the annual day packages".

4. Fixed-term employment contract

- **Premium for insecurity of employment (« *Prime de précarité* »):** According to the Constitutional Council, the premium for insecurity of employment is not due when a young person works during his holidays

The premium for insecurity of employment due at the end of the fixed-term employment contract is not due for:

- the employment contract is concluded with a young worker during his school holidays ;
- the seasonal employment contract ("*contrat saisonnier*").

The Constitutional Council considered that these rules are complying with the Constitution because they are justified by the particularity of these 2 situations (Decisions n° 2014-401 and 402 QPC of 13 June 2014).

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5. Employment contract

- **Modification of the employment contract : the acceptance of the employee is still required**

Two recent judgments of the French Supreme Court give the impression that employers could impose the modification of the employment contract without the acceptance of the employee. However, in our view, it is important to analyze the elements of context to understand the decision of the High Court (French Supreme Court, 12 June 2014, n° 13-11448 and n° 12-29063).

In these 2 files, the employees have requested the termination of their employment contract before the French Labour Court and that the employer was solely responsible for the termination of their employment contract because they argue that the employer amended their wages without their agreement/consent.

In these 2 situations, the Supreme Court judged that the modifications of their contract of employment did not affect the continuation of the employment relationship because the modifications were not unfavorable to the employee. Consequently, the Supreme Court did not pronounce the termination of the 2 employment contracts.

In our view, the acceptance of the employee is still required in case of modification of his employment contract. If the employer does not respect this rule, the employee could request for the termination of his employment contract before the French Labour Court if the modification is important and affect the continuation of the employment relationship.

6. Professional Elections Organized within the Company

- **The "double-majority rule" is required for the pre-electoral agreements**

Please note that under French Labour Law, the validity of pre-electoral agreements is subject to specific majority requirements.

Pursuant to the Law n°2014-288 dated March 5, 2014, the "double-majority rule" applies as principle, unless otherwise provided by Law. Thus the Law clarifies the scope of the pre-electoral items subject to this "double majority rule". Articles L.2314-3-1 (Staff Delegates) and L.2324-4-1 (Works Council) of the French Labour Code are modified accordingly.

The Law dated March 5, 2014 also clarifies the "unanimity rule", when expressly required by Law. Pursuant to the new provisions of the French Labour Code, the "unanimity rule" requires the unanimity of all trade unions which are regarded as "representative" within the Company. As a consequence, a trade union which would be i) representative within the sector of industry concerned and/or at the inter-professional level, and ii) present within the Company, without satisfying the conditions set forth by Law for being regarded as "representative" within the Company, can no longer prevent the conclusion of the pre-electoral agreement.

The "unanimity rule" concerns:

- The number and structure of electoral colleges for the election of Staff Delegates *(Article L.2314-10 of the French Labour Code)* and of the Works Council's members *(Article L.2324-12 of the French Labour Code)*;

- The organization of the vote outside working time hours for the election of Staff Delegates *(Article L.2314-22of the French Labour Code)* and of the Works Council's members *(Article L. 2324-20 of the French Labour Code)*.

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7. Maternity Leave

- **Maternity leave immediately followed by the taking of paid holidays: the specific protection against dismissal is postponed**

Under French Labour Law, pregnant women and women on maternity leave (or adoption leave) benefit from specific protection against dismissal. This protection also applies during a four-week period as from the end of the maternity leave (or adoption leave).

In its decision dated April 30, 2014, the French Supreme Court softens its position by admitting, for the very first time, the possibility to postpone the four-week period of legal protection against dismissal in the event that the mother takes days of paid holidays at the end of her maternity leave. Indeed, the French Supreme Court specified that *"the four-week period of protection as from the end of the maternity leave is suspended by the taking of paid holidays, its starting point being postponed to the date when the employee returns to work"*.

As this decision only provides for the postponement of the period of protection, not its extension, the specific protection against dismissal does not apply during paid holidays. Thus, from a theoretical standpoint, the employee can be dismissed during her paid holidays.

8. Professional Expenses

- **Reimbursement of professional fees related to new technologies: only the reimbursement of expenses at real cost is allowed**

Several methods exist in order to provide for the employee's professional fees, mainly: the reimbursement of professional expenses at real cost (upon presentation of supporting documents) and the granting of a lump-sum aiming at covering these expenses. As far as new technologies of information and communication are concerned (mobile phone, laptop, software, access to a fax machine, Internet connection, etc.), the employer has no choice but to reimburse the employee's professional expenses at real cost, upon presentation of supporting documents. The practical difficulties related to the presentation of supporting documents by the employee and the collection of these documents by the employer cannot legitimate the granting of a lump-sum to cover the costs borne by the employee with respect to the professional use of new technologies (French Supreme Court, 2nd Civ. Chamber, May 28, 2014, n°13-18.212).

9. Works Council

- **Economic and professional powers of the Works Council : mandatory consultation on the Company's strategic directions**

In a decision dated April 7, 2014, the High Court of Justice (*"TGI"*) of Créteil ruled that the mandatory consultation on the Company's strategic directions must be disconnected from the setting up of the new single data base for economic and employment information (*"base des données économiques et sociales"* or *"BDES"*).

- **Powers and financial resources of the Works Council: calculation of the mandatory financial participation of the employer to social and cultural activities**

In a decision dated May 20, 2014 (n°12-29.142), the French Supreme Court ruled that the total annual payroll taken into account for the calculation of the financial participation of the employer to social and cultural activities must be understood as *"the total annual wages recorded under account number 641, "with the exception of the sums which correspond to the remuneration of corporate officers, to the reimbursement of professional expenses, and to the sums due in respect of the termination of the employment contract, other than the legal and conventional severance pay, retirement indemnity, and compensation in lieu of notice"*.

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10. Supplementary social protection

- **11 July 2014 : Entry into force of the Decree n°2014-786 dated 8 July 2014 on the collective and mandatory nature of supplemental guarantees**

This new text is part of the reform regarding coverage obligation in respect of health expenses. It should be recalled that pursuant to the law n° 2013-504 of 14 June 2013 on securing employment all companies must implement, no later than 1st January 2016, mandatory supplemental coverage providing reimbursement of expenses incurred due to illness, maternity or an accident to the benefit of their employees, either through a branch agreement, a company level agreement or, in the absence of such agreement, a unilateral decision of the employer.

These new provisions amend the decree n°2012-25 of 9 January 2012 on the collective and mandatory nature of supplemental guarantees that lists the requirements to be met in order to benefit from an exemption from employer social related contribution (articles R 242-1-1 to R . 242-1-6 of the French social security code).

This new decree provides additional details on the concepts of "objective category of employees" and "collective nature" of supplemental insurance scheme implemented within companies – i.e. 2 essential criteria allowing companies to benefit from tax deductibility and exemption from employer social related contribution to finance supplemental retirement, death and disability benefits.

Companies must now satisfy the requirements set forth in this decree in order to benefit from the exemption from employer social contributions as per the assessment of their "objective category of employees" of supplemental insurance and the situations for waiver of affiliation.

The issue of coordination between this new decree and the prior French administrative circulars related to the conditions in which sums paid by employers to finance supplemental retirement, death and disability benefits are subject to social security contributions does not become any clearer (Circular DSS/SD5B n°2013-344 of 25 September 2013 and Circular ACOSS n°2014-02 of 4 February 2014).

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