January 2016

FLASH INFO

1. Redesigning of the French Labour Code

In view of the forthcoming reform of the Labour Code scheduled for March 2016, three reports requested by the Government have been published. These reports should be followed by Manuel Valls and Myriam El Khomri: Badinter, Combrexelles and Cesaro report.

On January 25, 2016, the Government announced the parts that will compose the reform of the Labour Code. The New Labor Code should be structured around three distinct levels:

- The first level: the social order which no agreement can derogate, such as the minimum wage or the legal working hours.
- The second level: the open area to the negotiation and articulation between the branch and the company.
- The third level: constituted by the provisions applicable in the absence of corporate or branch agreement.

Manuel Valls announced that the reform will take place in several stages and several parts:

- The first part will focus on the revision of the rules on working time. According to government announcements, a company agreement might derogate from a collective branch agreement to determine the rate of overtime payment.
- The second part is expected to give more strength to the majority agreement in order to prevail over the employment contract (on the model of job retention agreements "*accord de maintien de l'emploi*"), with the ability to call a referendum of employees in the event of opposition of a syndicate.
- The third part should allow securing the flat-rate pay agreement covering days worked, in VSE/ SME ("*PME/TPE*") without having to go through a collective agreement.
- Finally, the new bill is expected to propose a ceiling on redundancy payments without actual and serious basis. This provision already in the Macron law was repealed by the French Constitutional Court on the grounds that the criterion linked to the size of the business is contrary to the constitutional principle of equality before the law.

The evolution of these reforms will be addressed in our next newsletters.

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2. The obligation to inform employees of SMEs in case of transfer of the project is up to date of the Macron law.

The decree of December 28, 2015 provides practical information for information of employees, information that has been restricted solely in case of sale of the company. The decree specifies that the date of the first presentation of the registered letter with acknowledgment of receipt is worth information of employees (instead of the date of receipt by the employee).

The Decree of 4 January 2016 specifies the content of the three-year information of employees. This can take the form of a meeting at which all employees must have been summoned.

Decree dated of December 28, 2015 No. 2015-1811 and decree dated of January 4, 2016 No. 2016-2.

3. New details of the employees detachment in France

Following the provisions of the Macron Law on the posting of workers, two decrees specify the practical means of control by the Labour Inspectorate under the worker detachment in France by a company based abroad.

Starting January 21, 2016, the criminal penalties in case of irregularities of the posting declaration or non-presentation of documents relating to the detachment apply only to temporary employment agencies.

Decree dated of December 3, 2015 No. 2015-1579 and decree dated of January 19, 2016 No. 2016-27.

4. The order of the wage portage has been framed

The decree of 30 December 2015 concerning the wage portage clarifies the financial guarantee of portage companies. The decree allow to:

- Clarify the content and terms of the statement made to the administrative authority;
- Set the amount of the financial guarantee of wage portage companies to :
    - 8% of the mass payroll for the period from January 1st to December 31, 2016;
    - 9% for the period from 1st January to 31 December 2017;
    - 10% effective 1st January 2018.

Decree dated of December 30, 2015 No. 2015-1886

5. Publication of regulatory texts relating to the simplification of the arduousness account "*compte pénibilité*"

Two decrees were issued to ensure the implementation of the device of prevention of arduousness at work:

- the decrees draw conclusions of the removal of the arduousness sheet and its replacement by a declaration via the annual declaration of social data (DADS) or registered social statement (DSN);
- they also adapt the reporting procedures of the exposure factors to the implementation of the DSN (which will eventually be extended to all companies in July 2017 under the Social Security Financing Act of 2016);
- they make explicit the consideration of modalities of professional standards branch in assessing employee exposure to factors of arduousness;
- they postpone to 1st July 2016 the entry into force of the 6 new risk factors (instead of 1st January 2016).

Decree dated of December 30, 2015 No. 2015-1885 and No. 2015-1888

6. Co-employment and responsibility for redundancy

French Supreme Court, Employment Section, dated December 10, 2015 No. 14-19.316

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New case law illustration for co-employment, the Supreme Court reiterated its restrictive position on the matter.

To demonstrate the co-employment situation, the employee must prove either that there is a confusion of interests, activities, and direction between the two companies concerned; or the employee has worked under the supervision of the parent company, i.e., there is a subordination link between him or her and the parent company.

In this case, for the court is not sufficient to recognize a situation of co-employment:
- the fact that the leaders of the subsidiary are from the same group;
- that they are in close collaboration with the parent company;
- that the parent company has taken decisions to reorganize the subsidiary;
- that the parent company has given up its financial support to avoid bankruptcy;
- that the parent company was involved in the reclassification of employees searches within the group.

7. No application for approval before the end of the withdrawal period:

French Supreme Court, Employment Section, dated January 14, 2016 No. 14-26.220

For the first time, the French Supreme Court states that an application for approval can't occur before the end of the withdrawal period and that the French Labor Court can't approve an amicable termination of employment contract "*rupture conventionnelle*".

In this case, the request for approval was sent before the withdrawal period provided for in article L.1237-13 of the French Labour Code (15 days).

Accordingly, due to the default of approval, the amicable termination of employment contract is not valid, and the employment contract should continue. If the employment relationship is broken, this break should be regarded as a redundancy without actual and serious basis.

8. A reorganization project due to decreased activity does not justify a demand for expertise by the Committee on Hygiene, Safety and Working Conditions (CHSCT)

French Supreme Court, Employment Section, dated October 14, 2015 No. 14-17.224

According to the article L.4614-12 of the French Labour Code, the CHSCT may use an expert in case of major project modifying the conditions of health and safety or working conditions. The concepts of "major project" and "working conditions" have not been defined by law. It is therefore the case law that defined the concepts.

In this case, for the French Supreme Court, the reorganization within a group because of loss of markets and economic difficulties do not necessarily constitute an important project modifying the conditions of health and safety or working conditions. Consequently the deliberation of the CHSCT designating an expert has been canceled.

For information, the number of employees concerned does not determine by itself, the importance of the project. What the judges consider is the importance of the impact on the working conditions of employees regarding schedules, tasks and resources provided to them.

9. Independent contractor status and concealed work: Warning Caution

French Supreme Court, Criminal Section dated December 15, 2015 No. 14-85.638

The existence of an employment contract does not depend on the will of the parties nor the particular qualification, but to factual circumstances in which the activity is exercised by the worker.

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In this case, a telephone prospecting company employed former employees as “auto-entrepreneurs”, while they continue to operate under the same conditions. An investigation by the Labour Inspectorate has led employers to be prosecuted for concealed work.

The Criminal Section of the Supreme Court upheld the decision of the lower courts. For the Court, self-contractors provided benefits to the business in conditions placing them in a legal relationship of subordination with respect the employer.

It was thus demonstrated that the company had circumvented its purpose the self-contractor status to avoid paying payroll taxes. The offense of concealed employment was therefore established.

As a reminder, any infringement of the prohibition of concealed employment is punished with imprisonment of three years and a fine of 45,000 euros (225,000 euros for legal entities).

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