



FLASH INFO

Focus on El Khomri law forced by the Government on July 21st, 2016: what is really changing ...?

Government resorted once more to paragraph 3 of Article 49 of the French Constitution to force the implementation of El Khomri law. In the absence of censure motion during the following 24 hours, the proposed law is in force since Thursday 21st July afternoon.

Certain opponents are considering to refer to the French Constitutional Court because they do not want to be responsible for the law “working harder but earning less”.

Subject to the precisions which will be provided by the implementing decrees of the law, at this stage, the main provisions of El Khomri law are the following:

1. Collective bargaining and referendum :

- "Rebsamen" Law had already authorized the signature of a collective agreement for companies without trade-union delegates either by (i) elected staff representative appointed by an union, or (ii) elected staff representative not appointed by an union (iii) an employee appointed by an union. In the first case, the company agreement could cover any topic, subject to compliance with the applicable rules of articulation of the collective agreements (Article L. 2253-1 and following of the French Labour Code). This collective agreement shall also be approved by a referendum of employees (majority of the votes). However, in the two other cases, the negotiations could cover only measures whose implementation was subject by law to a collective agreement (for example the working time organization) and should have been approved by a national commission (in the case of an elected staff representative not mandated by an union) or by referendum (in the case of an employee appointed by an union).

- The "El Khomri" law (Article 10) now imposes **the primacy of company agreements** signed by representative trade-union members having obtained the majority of the votes in the first round of the last professional elections. Otherwise, it provides the possibility for representative trade union organizations that obtained 30% of the vote in the first round of the elections to sign a collective agreement and / or to request that the concluded company agreement shall be subject to employees for approval by **referendum**. Apart from some issues that shall absolutely remain in the scope of the collective bargaining agreement (the strenuousness and equality male / female, etc. (Article 13)), the company agreement can now cover any topic, as for example, the working time duration. Unless stipulated, the duration of the company agreement is 5 years.

2. Working time and working time based on annual number of days :

- It is already possible to shield to the provisions of a collective bargaining agreement, in a unfavorable way, regarding working time, in the following assumptions:
 - If the provisions of the collective bargaining agreement are not mandatory and such agreement did not enter into force before the Act May 4, 2004;
 - If the law provided for, as it was the case in relation to the annual quota of overtime hours.
- El Khomri" Law allows as from now to a company agreement to shield to the provisions of a collective bargaining agreement regarding working time:
 - In this respect, for example, a company agreement may provide for the payment of overtime hours **at the rate of at least 10%** (Article2). This possibility was already in force according to article L. 3121-22 of the French Employment Code, unless otherwise provided by the applicable collective bargaining agreement and according to the rules governing the application of simultaneous agreements (Article L. 2253-1 et al. of the French Employment Code).
 - The legal weekly working time remains 35 hours, being specified that it is possible to convert working time **on an annual basis, for a maximum of 3 years** (Article2). If need be, the overtime time hours are assessed at the end of the reference period defined as such.
 - The agreement in respect of **working time determined on an annual number of days** are secured (Article 2): the implementation of this working time organization is made conditional on the signing of a company agreement, establishment agreement or, in the lack of such agreements, a collective bargaining agreement, which must provide for the provisions allowing to ensure the protection of the employee's security and health (tracking tool, monitoring scheme). Nevertheless, if the agreement in respect of working time on an annual number of days basis complies with a common standards defined by the French Employment Code, this working time organization would be deemed as licit, independently of the collective bargaining agreement provisions.

3. New rules governing the consequences of the denunciation of the company agreements

- El KHOMRI Act provides for that in case of termination of a company agreement, and in the lack of a substitution company agreement signed within the time (15 months), the employees concerned would conserve under the company agreement terminated a *"compensation whose amount cannot be less than the compensation paid during the last 12 months, considering an equal working time sets forth according to the employment contract"* (Article 8).
- On the light of the foregoing, it seems that "El Khomri" Law **confines the notion of "individual advantages acquired" to the compensation from now.**

4. Existence of economic difficulties :

- According to "El Khomri" law (Article 30) in order to demonstrate the existence of economic difficulties, declining orders or declining turnover, operating losses or the degradation of the treasury or of the gross operating profit are considered as an economic indicator. It should be noted that this indicator is appreciated (i) over a period which depends on the size of the workforce concerned (ranging from 1 to a maximum of 4 quarters for the companies which employ 300 employees and more) and (ii) in comparison with the results obtained during the same period the previous year.
- It is further clarified that the materiality of the cut, of the transformation in employment or of the modification of an essential element of the employment contract is assessed at company level. However, regarding other economic reasons, including the reorganization necessary for the competitiveness' protection, economic difficulties should continue to be assessed **at internationally group level sector**.

5. Agreement preservation or development of employment:

- Article L. 5125-1 of the French Employment Code already included the possibility of concluding maintenance agreements in employment when the company was facing serious short-term economic difficulties. As part of these "**defensive agreements**" the employer undertook to maintain the employment of each employee involved in return or a pay revision, or an arrangement of working time, organization and the division of labor, or both. The employee who refused to be applied the provisions of the agreement was terminated for economic reasons (without the employer is obliged to adapt or redeployment obligations) and could benefit from the Professional Securing agreement or leave reclassification.
- "El Khomri" Law now provides the possibility of concluding a business agreement for the preservation or development of employment (Article 11) so called "**offensive agreement**". Where applicable, the provisions of this Agreement shall be substituted automatically to contrary and inconsistent contract terms, including on remuneration and working hours, except with regard to the monthly salary of the employee concerned. In companies with no union delegate, this agreement may be made by elected representatives appointed by one or more trade unions representing employees or by one or more authorized employees, in accordance with Articles L. 2232-21 and following of the Employment Code. If the employee concerned refuses to be applied the provisions of the agreement, individual redundancy procedure for economic reasons is implemented, without being entitled to any notice or pay compensation. During the preliminary interview, a support system provided by the job center is proposed.
- It should however wait for the decrees to establish whether, as for the competitiveness of employment agreements, employment development agreements exclude certain categories of employees (whose salary is below 120% of the SMIC for instance).

6. Personal activity account:

- According to "El Khomri" law (Article 21), "the personal activity account's aim is to strengthen the autonomy and the freedom of action of the holder, and to secure his professional process allowing him to use rights registered into and suppressing the obstacles to his mobility. The personal activity account consists of the training personal account, the account concerning the prevention of onerousness resulting from work conditions and the account regarding civic commitment which will be implemented by the related Act. It may be used by persons who are 16 years old, employees or looking for a job, even pensioner.

- Considered as the main measure of El Khomri" law, the personal activity account should make easier employees' life, especially those who move from their jobs several times: it would not be necessary anymore to multiply the process in order to obtain a count of their training rights and onerousness takes they had performed. Provisions in relation to the personal activity account shall enter into force by January 2017.

Given the issues and questions raised by “El Khomri” law, we will keep you posted as soon as the publication of the implementing decrees...



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