



NEWSLETTER

1. FINANCE BILL FOR 2019: ABUSE OF RIGHTS (« ABUS DE DROIT »)

☞ Law n 2018-1317 adopted on December 28th, 2018

The 2019 Finance Bill makes two major changes to the concept of abuse of rights.

➤ **Extension of abuse of rights' concept:**

- Previously, the abuse of rights procedure concerned "fictitious legal situations" and transactions carried out for tax "exclusively" purposes;
- Henceforth, this procedure is extended to transactions with a "mainly" tax purpose;
- The main purpose of these acts is to evade or mitigate tax charges and have been implemented against the objectives pursued by the legislator, the administration may exclude these acts by considering them unenforceable;
- The expansion concerns tax adjustments notified as from January 1st, 2021 relating to acts carried out as from January 1st, 2020.

➤ **Reversal of the burden of proof in case of URSSAF reassessment for abuse of rights:**

- Since January 1st, 2019 in case of a court challenge of rectification of the contribution notified by the URSSAF, after consulting the Abuse of Rights Committee, the burden of proof of the validity of their rectification lies with the URSSAF.

2. REDUCTION OF EMPLOYEE SOCIAL SECURITY CONTRIBUTIONS ON OVERTIME AND COMPLEMENTARY HOURS

☞ *Order n 2019-40 January 24th, 2019, JO January 25th*

The law related to economic and social emergency measures of December 24th, 2018 reduced employee social security contributions on overtime, complementary hours and additional days worked under a lump-sum agreement in days.

Set by decree, reduction's rate is equal to the sum of the rates of each of the legal and contractual old-age insurance contributions due for each employee and should not exceed 11.31%.

3. NEW RULES FOR THE PUBLICATION AND ENFORCEABILITY OF CIRCULARS AND INSTRUCTIONS

☞ *Order n 2018-1047 November 28th, 2018, JO November 30th*

Since January 1st, 2019 in accordance with the "PACTE" law of August 10th, 2018 new rules governed the publication and enforceability of circulars and instructions depending on the authority that issued the act.

➤ **Publication rules:**

Quarterly publication in official newsletters	Instructions, circulars, notes and ministerial replies from the central state administrations
Publication in a compendium of departmental administrative acts	Instructions and circulars issued by the administrative authorities of the State operating in a department
Quarterly publication in an official newsletter or public register	Instructions and circulars from local authorities, public institutions, other persons governed by public law and persons governed by private law responsible for the management of a public service
Publication on the website « www.circulaires.gouv.fr »	Circulars and instructions issued by ministers to government departments and institutions

➤ **Consequences of not publishing:**

- Lack of enforceability and application of instructions and circulars;
- Repeal of the act in the event of not-publishing it within 4 months of signature;
- For acts drawn up before January 1st, 2019 in the absence of publication before May 1st, 2019 they shall be regarded as repealed.

➤ **Opposability rules :**

- Opposability of an interpretation, even if erroneous, of a circular or instruction, as long as it has not been modified;
- These acts should be taken by the central and decentralized administrations of the State, include an interpretation of positive law or a description of administrative procedures and be published on the government websites dedicated for this purpose.

4. THE CALCULATION OF THE CONTRIBUTIONS DUE TO WORKS COUNCIL: SHOULD BE TAKEN INTO ACCOUNT THE SEVERANCE PAY SUBJECT TO SOCIAL SECURITY CONTRIBUTIONS

▣ *French Supreme Court, December 19th, 2018, n 17-22.583 and n 17-23.558*

For memory, the wage bill base is used to calculate the contributions paid by the employer for the two works council budgets relating to the functioning of the works council and the social and cultural activities of the works council.

All remuneration subject to social security contributions in accordance with Article L.242-1 of the Social Security Code are included in the wage bill (*French Supreme Court, February 7th, 2018, n 16-24.231*).

Therefore, the French Supreme Court, considers that only severance pay subject to social security contributions have to be reinstated in the calculation base (i.e. those exceeding 2 "Social Security Ceiling").

However, this case law cannot be applied to the budgets of the "CSE", since the Labour Code expressly excludes the severance pay from the gross wage bill and therefore from the basis for calculating budgets (Articles L. 2315-61 and L. 2312-83 of the Labour Code).

5. MERGER-ABSORPTION: TRANSFER OF GOODS AND RIGHTS OF THE CE ABSORBS

▣ *French Supreme Court, January 16th, 2019, n 17-26.993*

The Labour Code provides for the assignment of works council assets in the event of the permanent cessation of the company's activity (Article R. 2323-39). However, no provision governs the case of transfer of works council assets in the event of a merger-absorption.

Until now, the French Supreme Court had only ruled on the allocation of the assets of establishment works council in case of the establishment's closure and the continuation of the company's activity. The Supreme Court excluded the application of Article R. 2323-9 of the Labour Code and specified that the assets of the works council should be allocated to the committees of the group companies to which the employees were transferred (*French Supreme Court, January 23rd, 1996, n 93-16.799*).

To our knowledge, the French Supreme Court ruled for the first time on the transfer of works council assets in case of a merger-absorption of a company. By excluding the application of Article R. 2323-39 of the Labour Code, the Court ruled that the works council, of the absorbed company, may decide to devolve its assets to the works council of the acquiring company to which the employees have been transferred. Therefore, the works council becomes the holder of its rights and claim and the action for the payment of a reminder of employer subsidies is also transferred.

6. DRAFT "PACTE" LAW: A DESIRE TO RAISE SOCIAL THRESHOLDS

On January 29th, 2019 the Senators voted an amendment to raise social thresholds provided by the Labour Code (notably from 50 to 100 employees).

This decision would have an impact on the implementation of several mandatory measures, in particular regarding job protection plan, mandatory profit-sharing agreements and voluntary profit-sharing, and the prevention of occupational risks ("pénibilité").

During the second reading of the bill, the National Assembly will have to decide on the fate of this amendment.

To be continued...

7. BREXIT: STATUS OF UK EMPLOYEES IN FRANCE IN THE EVENT OF A NO-DEAL

📄 Order n 2019-76 February 6th, 2019

In case of a Brexit without agreement, the Enabling Act of January 19th, 2019 empowered the French Government to take the measures by order to prepare for the UK's withdrawal from the European Union.

On February 6th, 2019 an order has been signed containing the legislative measures required to regulate the situation of UK employees and UK companies regarding the right of entry and residence, social rights and social benefits and the conditions for exercising a professional activity.

This order provides in particular for an adaptation period for British nationals living in France on the date of the UK's withdrawal from the European Union, who will have, from that date, a maximum period of one year to obtain a residence permit.

However, these provisions may be suspended by decree if the Government finds no equivalent provisions adopted by the UK for French nationals residing there.



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