Flichy Grangé AVOCATS

Covid-19: French labor law insight

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1.1. Are lay-offs/redundancies allowed?

- As of now, **no specific prohibition of lay-offs or redundancies** (either individual or collective)
  - Law adopted on March 23, 2020 authorizes the government to take every necessary measure to limit the number of redundancies. The government has not detailed these measures yet.
- However, in the meantime, clear position taken by the government to **try to avoid such dismissals through the implementation of remote work and short-time work** (see next slides).
- Please note that the implementation of dismissals might in itself be made difficult:
  - The Labor Administration in Paris already indicated that it would delay its approval delays for social plans
  - Collective redundancies require the prior information and consultation of the CSE which might be impossible to take place and might consequently be postponed
  - The individual dismissals' procedure can also be disturbed (e.g., the holding of the preliminary meeting with the employee might not be feasible, the notification of the dismissal by registered letter with acknowledgment of receipt might not be possible, etc.)

1. How can the employers cope with a decline in activity?

1.2. Government schemes of assistance: short-time work (1/3)

- Companies can request to benefit from the short-time work ("*activité partielle*") scheme in the event of a reduction or elimination of the activity caused by **exceptional circumstances** (including a reduction of the activity linked to the epidemic).
- In practice, short-time work can be implemented either through:
  - The temporary closure of the company site or part of the company site, OR
  - The reduction of working hours below the legal working time (35 hours) within the company site or part of the company site.
- According to a new decree adopted on March 25, during the Covid-19 epidemic, the administrative authorization for implementing short-time work can be granted for a **maximum duration of twelve months** (only six months in "normal" times).

1. How can the employers cope with a decline in activity?

1.2. Government schemes of assistance: short-time work (2/3)

- **<u>Consequences for employees</u>**:
  - In principle**, all the employees having an employment contract with the company** are eligible. Specific provisions used to exist for employees whose working hours are fixed in hours (*forfait heures*) or days (*forfait jours*) over the year but have been eliminated for the Covid-19 crisis.
  - The employees' work contract is suspended (and not terminated). These employees suffer a loss of salary due to the partial activity. They therefore receive a **compensatory indemnity at least equal to 70% of their previous gross remuneration**, limited to 1 000 hours.
    - Please note that the collective bargaining agreement applicable to the company might provide for higher percentages of compensation. This point has to be verified on a case-by-case basis.
- **<u>Consequences for employers</u>**:
  - The employer receives a short-time work allowance financed by the State and the Unedic. In the context of the Covid-19 crisis, the **State has undertaken to fully take charge of the compensatory indemnity paid to employees who are in partial activity**. This allowance is therefore equal to:
    - 70% of the employee's gross hourly wage limited to 4.5 times the hourly rate of the minimum wage (€45.675 on January 1, 2020);
    - This hourly rate cannot be below 8.03 €

1. How can the employers cope with a decline in activity?

1.2. Government schemes of assistance: short-time work (3/3)

- **Implementation process**
  - In principle, the Labor Code requires a prior consultation of the CSE. However, given the emergency context, prior consultation might not be feasible.
    - The new decree provides that the consultation procedure can take place after the request for short-time work is made by the employer, and the CSE's opinion is sent to the Labor administration within two months from the request.
    - The CSE will nevertheless have to be informed of the potential authorization given by the administration.
  - The employer has to obtain an administrative authorization to implement short-time work .
    - The request has to be made on a website (https://activitepartielle.emploi.gouv.fr)
    - The new decree indicates that companies are allowed to proceed to such a request up to 30 days after having, in the facts, opted for short-time work .

1. How can the employers cope with a decline in activity?

1.2. Government schemes of assistance: FNE-Formation

- In the event of prolonged lack of activity, or even total cessation of activity, companies can request to benefit from the **FNE-Formation** in lieu of partial activity in order to invest in the skills of employees.
  - Formalized through an agreement between the State and the company, the formation is aimed at implementing training actions in order to facilitate the continuity of employees' activity facing transformations resulting from economic and technological changes, and to promote their adaptation to new jobs.
- Eligible formations:
  - Those leading to the acquisition of certain qualifications;
  - Those enabling workers to have their experience validated.
- If the State is the sole public financer, **it may grant aid of up to 50% of the eligible costs**, or up to 70% in the case of an increase. In return, the company undertakes to keep the trained employees employed for a period at least equal to the duration of the agreement plus six months.

2. Information and consultation of the CSE

2. Information and consultation of the CSE

2.1. Need to inform and consult on Covid-19 decisions?

- As a general rule, the **Social and Economic Committee** has to be informed and consulted on matters relating to the organization, the management and the general operation of the company.
- Regarding the Covid-19 crisis, the CSE will have to be informed and consulted on 3 main topics:
  - **significant changes in the organization of work** (e.g. massive recourse to remote work);
  - **the implementation of short-time work**;
  - **derogations from the applicable rules on working hours and rest periods**.
- As already discussed, regarding short-time work, it seems that the consultation could only be conducted after the decision to implement it has been made.

  For other required consultations, the principle of prior consultation should be complied with. However, the Ministry of Labor has indicated in its Q&A that there was a **possibility for the employer to take provisional measures** before being able to effectively consult its CSE when **emergency** justifies such provisional measures.

2. Information and consultation of the CSE

2.2. Holding of virtual meetings

- **The French Labor Code provides for the ability to resort to video-conferencing for 3 meetings maximum by civil year** (article L. 2315-4).
  - This number can be increased by an agreement between the employer and the elected members of the CSE (the existence of such provisions should be verified).
  - The Code also requires that the technology used guarantee the identification of the CSE's members, their effective participation, but also the confidentiality of their potential votes.
- In its published Q&A, **the Ministry of Labor encourages the companies to resort to video-conferencing** in order to avoid unnecessary physical contacts.
- A law adopted on March 23, 2020 **authorizes the government to adopt new regulations** (by way of *ordonnances*) especially **amending the rules for informing and consulting employee representative bodies**, in particular the Social and Economic Committee, to enable them to deliver the requisite opinions within the time limits set by the law.
  - The government must take implementing measures within 3 months but will, without doubt, act rapidly.

2. Information and consultation of the CSE

2.3. What happens if the CSE refuses to meet?

- In general, **the employer can organize CSE extraordinary meetings** when it deems those meetings necessary, without having to wait for the next periodical meeting.
  - The law does not provide for the possibility for the CSE to refuse to meet.
- In any case, when calling for such an extraordinary meeting, the employer should comply with the general rules:
  - The meeting's agenda should be agreed both by the employer and the CSE's secretary;
  - The employer must convoke all the members of the CSE (both titular and substitute);
  - The employer must comply with the convocation delays except in the event of exceptional circumstances – always in compliance with the applicable (either legal or conventional) provisions.
- **There should be no reason for the CSE members to refuse to meet**, especially if the meeting is designed to implement measures facilitating the safeguarding of the company and its workforce during (and after) the crisis.
  - In any case, such an « empty-chair » policy would be useless given that, if the employer has regularly convoked the CSE, the CSE is deemed to have been consulted if its members are absent.

2. Information and consultation of the CSE

2.4. Possibility of subsequent annulation of decisions?

- As a general rule, a decision taken by the employer can be contested if:
  - The CSE has not been previously consulted;
  - The CSE has not been regularly consulted (no regular convocation, insufficient information…).
- In the event of a decision taken by the employer without consulting the CSE:
  - The principle is that of the **suspension of the decision** and not its annulation;
  - The annulation of the decision is only provided for in very specific cases, such as when a positive opinion from the CSE is required (e.g., individualized working hours) or in other particular situations (e.g., authorization of dismissal of a protected employee, adoption of bylaws, or the opening of a collective proceeding);
  - The CSE may also claim for **damages** designed to repair the prejudice allegedly sustained.
- However, as previously explained, the Ministry of Labor has indicated in its Q&A that **employers have the possibility to take provisional measures** before being able to effectively consult their CSE when **emergency** justifies such provisional measures.
  - In any case, try to postpone the decision-taking when this is feasible if no meeting can be organized, either in person or through new technologies devices.

3. Working from home

3. Working from home

- Since a press release of the Ministry of Labor of March 15, 2020, **remote work has become the <u>mandatory rule</u> for all positions that allow it**.

- While the implementation of remote working usually requires the employee's consent, the Labor Code provides that, in the event of exceptional circumstances, and **<u>especially an epidemic threat</u>**, the implementation of remote work may be considered as **<u>an adaptation of the employee's job</u>** made necessary to allow the continuity of the company's activity and to guarantee the employees' protection.
  - In the context of the Covid-19 epidemic, remote work can therefore be **<u>imposed</u>** on the employee and **no specific formality** is required (i.e., a simple email is sufficient).

3. Working from home

3.1 Are there any issues around working from home?

- Massive recourse to remote work constitutes a **significant change in the organization of work** which requires prior information and consultation of the CSE.
  - However, given the current context, consultation of the CSE might be difficult to implement.
  - As explained above, videoconferencing should be favored in order for such a consultation to take place.
- The employee might not be **equipped with the adequate facilities** and have the necessary tools for working from home. In that regard, the employer should provide the employee with the required equipment (computer, printer, etc.) or grant an allowance to the employee to buy such equipment.
- It should also be recalled that:
  - The employee working remotely must benefit from **equal treatment** with the employees working on the company's premises
  - An **accident** occurring during the exercise of the remote worker's professional activity is presumed to be an industrial accident

3. Working from home

3.2 How is working time monitored?

- When remote working is implemented through the usual ways (collective / individual agreement or a company charter), the implementation instrument must, *inter alia*, provide for:
  - the **modalities of control of the working time or regulation of the workload**; AND
  - the determination of the time slots during which the employer can usually contact the employee working remotely.
- In the context of the implementation of remote work without an agreement or a charter, although the legal text does not expressly provide for it, it seems to us necessary for the employer to quickly specify this information to the employee.
- The **employee's working time must be controlled** and the employer must ensure **compliance with the maximum working hours**:
  - if remote working has already been implemented in the company: the existing time monitoring devices must be used;
  - if remote working has not already been implemented in the company: the best way is to set in place an auto-declarative system whereby the employees will have to record their working hours.

4. Work stoppage for childcare

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- First of all, the employees who need to take care of their children at home must inform their employer and discuss with him or her any remote working arrangement that could be put in place.
- If remote work is not possible and the employee does not have a childcare solution for his/her children **under the age of 16**, he/she can request a **compensated work stoppage**:
  - without any waiting period;
  - and valid throughout the duration of the closure of the childcare facility.
- **The employer cannot oppose to this stoppage**. It must also complete an online declaration on the Ameli.fr website or on the website declare.ameli.fr.
- Please note that **only one parent** can benefit from such compensated work stoppage.
- All employees (including home workers, seasonal employees, intermittent employees and temporary employees) also benefit from the **legal additional allowance** without any waiting period and without any condition of seniority.

5. Can employees be asked to take their leaves and the employer change their leave dates without notice?

5. Can employees be asked to take their leaves or modify them?

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- **Regarding paid holidays**: if a collective agreement provides for it, the employer can either **impose** or **modify** the leave dates for up to 6 days (i.e., a week of holidays) and a 1-day notice period (instead of 1 months in "normal times").
- **Regarding RTT, days-off (including for *forfait jours*), and time saving accounts**: if it is justified by the **interest of the company** with regards to **economic difficulties** faced due to the Covid-19 crisis, the employer can impose or unilaterally modify the dates of these days off, within the limit of 10 days. The employer must comply with a 1-day notice period.

→ Although not specified by the decree, it appears necessary for the employer to consult the CSE prior to implementing any of these specific provisions and imposing or modifying leave or days-off dates.

- **For companies facing increased activity** (i.e. those belonging to sectors of activity that are particularly necessary for the Nation's safety and the continuity of economic and social life):
  - Working time can be raised to 12 hours daily or 60 hours weekly;
  - Daily rest time can be diminished to 9 hours and weekly rest can be granted in rotation (instead of being attributed on Sundays).

This document presents information which is general in nature.

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