

## Labor & Employment Client Service Group

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### French budgetary deficit means the cost of mutually agreed employment terminations will likely increase in 2013

The draft Social Security Financing Act for 2013 ("the Bill") has been adopted by the French Ministers Council on October 10, 2012.

In substance, the Bill announces four goals, with a view to reducing the budgetary deficit of the French social security system (i.e., welfare as opposed to retirement), safeguarding the future of French health coverage, consolidating welfare protections and "*rendering the social charges and contributions fairer*"<sup>1</sup>.

While these goals are certainly respectable, one may express skepticism with regard to the efficiency and the legitimacy of the proposed measure of the Bill related to the social regime of the allowances paid when mutually agreed employment terminations ("*ruptures conventionnelles*") are entered into.

The applicable substantive French law provides that the specific termination allowance which must be paid when entering into a mutually agreed employment termination and may not be lower than the dismissal indemnity (provided by the law or, if higher, under the applicable collective labor agreement), is subject to the same social regime as the dismissal indemnity. Therefore, the specific termination indemnity is currently exempted from social charges up to €72,744 in 2012.

Furthermore, French law provides a guarantee by submitting the validity of the mutually agreed employment terminations to review by the French labor administrative authorities.

Since the introduction of the law on mutually agreed employment termination in June 2008, the number of such employment terminations has increased considerably.

Is there a problem? One would think not, since mutually agreed terminations, which commence by law at the employee's initiative, entitle the latter to benefit from the public unemployment coverage following their voluntary leave from the company, while preserving their rights to potentially sue the employer. Indeed, the mutually agreed termination agreement, which requires the consent of both employer and employee, is not a settlement agreement ("*transaction*") which would definitively terminate the right to pursue claims. In addition, from a practical standpoint, since even an imperfect agreement is often better than a good lawsuit, the entering into mutually agreed employment terminations (i) permits the employee to leave under more or less pacified conditions and (ii) results in a decrease of the number of litigations before the labor courts.

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<sup>1</sup> Draft Social Security Financing Act for 2013.



The prospective French law, supported by the Bill (which is currently being debated before the French Parliament in October and November 2012), tends in the direction of "*moving the social regime of the specific termination indemnity closer to that of remunerations*"<sup>2</sup>, by submitting the specific termination indemnity for the mutually agreed employment terminations to the "*forfait social*" of 20% for the part of the indemnity which was previously exempted from social charges. The grounds alleged -- without evidence -- to support such reform is that "*the mutually agreed terminations have been used by certain employers to terminate employment agreements (often of older employees) to avoid the French law constraints of dismissals*"<sup>3</sup>. On the other hand, dismissal indemnities will remain exempted from social charges up to €72,744 in 2012 (and presumably €74,064 in 2013).

In regard to the foregoing, the "*forfait social*" is a tax borne by the employer on elements of the remuneration or benefits which, while being subject to certain social contributions (so-called "CSG"), are exempted from social charges (e.g., sums paid out pursuant to profit-sharing plans, company-retirement plans, ...). In this regard, the "*forfait social*" amounted to 2% when created in December 2008, and increased to 20%, subject to certain exceptions, as from August 1<sup>st</sup>, 2012.

Expected tax revenue from the reform: €330 million per year.

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In addition to the dubious grounds put forward for the reform, since there exists a strict monitoring procedure by the French administrative labor authorities in order to validly enter into a mutually agreed employment termination, the reform may in fact have a boomerang effect as employers may soon prefer to advance their mutually agreed termination schedule prior to December 31, 2012, considering that the mutually agreed termination will most likely be more expensive than dismissals as from January 1<sup>st</sup>, 2013.

For more information on this subject, kindly send your questions to your contact at Bryan Cave, or to:

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<sup>2</sup> *Ibidem.*

<sup>3</sup> *Ibidem.*