Dechert LLP

Macron Law: its major changes

A legal update from Dechert's Employment Practice

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The law for growth, activity and equal opportunities, known as "Macron Law" (hereafter referred as "the Law") has been approved on 6 August, 2015. From the reform of the procedure before employment tribunals to the simplification of the staff representation bodies management, to the softening of the regime of redundancies, this Law softens the legal provisions on a large number of subjects for the benefit of employers.

Click on the link below, related to the section that interests you to access the summary of the provisions.

• Procedures before employment tribunals and indicative baseline for severance pay

➢ Concerning the procedures before employment tribunals

- The conciliation board is renamed the conciliation and orientation board ("COB").
- The COB may hear both parties separately and confidentially.
- If the conciliation has failed, the COB may refer the parties to:
    - o the restricted **judgment board**;
    - o a **professional judge**;
    - o the **classic judgment board.**
- If one of the parties does not appear (personally or represented), and fails to have a legitimate reason, the COB may rule as a restricted judgment board.

- **Concerning severance pay in the case of an unfair termination**

An **indicative baseline** will be implemented later on, in order to facilitate fixing severance pay by the judge. This baseline should particularly take into account the employee's seniority, age and new activity (if any) after the termination of the employee.

The use of this baseline is left to the consideration of the judge. Unless both parties have required its use, the judge will not have to apply it strictly.

- **Softening of the redundancies**

The Law softens the rules related to redundancies in several respects.

- **The selection criteria**

Previously, it was possible to defer to the implementation of the selection criteria at the company level in extremely limited cases. Now, the Law allows retaining a scope of application of those criteria at the level of the employment area. A decree will fix the notion of employment area.

- **The obligation to seek redeployment abroad**

From now on, if the employees want to receive offers for redeployment abroad, they will have to ask for it and specify to their employer if they have any wages or remuneration restrictions.

- **The consequences related to the cancellation of the validation or certification decision of a social plan for insufficient motivation**

When the validation or certification decision is canceled because its motivation is considered insufficient, the labor administration may regularize the situation during the fifteen calendar days following the notification of the judgment of cancellation.

In addition, while before the Law, the employees could request on this basis their reinstatement and/or damages for null and void redundancy because of the cancellation of this labor administration's decision, the redundancies notified on the basis of this decision are no longer null and void.

- **The social plan in companies under legal redress or liquidation of property**

In companies under legal redress or liquidation of property, the validation or certification decision of the social plan by the labor administration may occur after the appreciation of the companies' resources within the company itself and not within the whole group.

- **The retaining agreement with the state unemployment agency** ("*Contrat de sécurisation professionnelle*" hereafter referred as **"CSP"**)

The Law provides that the proposal of a CSP will occur only after the validation or certification decision of the social plan by the labor administration is rendered.

- **Improving the attractiveness of agreements for employment stability**

Set up by the law on the protection of employment dated 14 June 2013, the agreements for employment stability enable the employer to apply temporarily, to employees who accepted it, adjustments on remuneration or working time. In return, the employer commits to maintain the jobs of the concerned employees for the duration of the agreement.

To encourage companies to resort to this measure, the Law increases the duration of those agreements to five years (instead of two years previously) and allows the agreements to provide for the terms and conditions of its suspension.

In addition, if the employee refuses the measures decided in the agreement for employment stability, the employer no longer has the obligation to try to redeploy him/her before proceeding with his/her dismissal.

- **Easing the conditions to resort to Sunday work and night work**

  - **Concerning Sunday work**

The Law has eased the conditions for Sunday work as follows:

- the number of exemptions granted by the mayor (or in Paris, the prefect) for retail business establishments is increased from five to twelve as of 1 January, 2016.

- the retail sale of products and services establishments may resort automatically to Sunday work, by giving rest on a rotational basis for all or some of the workforce if they are located:

  - in a tourist area, defined by the regional prefect;

  - in an international tourist area, defined by the Minister of labor, tourism and trade;

  - in a trading area, characterized by a potentially significant commercial supply and demand, defined by the regional prefect.

These three areas replace the current tourist areas and the perimeters of use and exceptional consumption.

The retail establishments of certain train stations characterized by an exceptional attendance, designated by decree, benefit from the same exemption.

Nevertheless, the eligible companies will have to be covered by a collective bargaining agreement defining the terms and conditions to resort to Sunday work, as well as the compensations and guarantees for employees.

- the exemption to Sunday rest will be granted for a maximum time period of three years, when the rest of all the employees on Sunday is detrimental to the public's interest or compromises the functioning of the establishment.

- the food trade companies may have their employees work until 1 p.m. in exchange for compensatory time-off. When the sale space exceeds 400m², the employees should benefit in addition from a 30% increase in salary.

  - **Concerning night work**

Subject to the conclusion of an industry-wide collective bargaining agreement, a company-wide collective bargaining agreement or an establishment collective bargaining agreement, the establishments located in an international tourist area may postpone the beginning of the night period of work until midnight. When the beginning of the period of night work is fixed after 10 p.m., it ends at 7 a.m.

This agreement will have to contain certain guarantees.

The employees volunteer (by written agreement) for night work. Each hour worked during this time window should be paid at least double and equivalent compensatory time-off must be granted.

- **Reducing the obligations of the employer in the course of a transfer of a company**

Employers' information obligations towards their employees in case of transfer of the company, implemented by Law n°2014-856 of 31 July, 2014 (called "*Loi Hamon*") in companies with fewer than two hundred and fifty employees, is amended.

Such obligation now only applies to the sale of the company, i.e. no longer to any kind of transfer that may notably include internal operations within the group (contribution of assets, partial contributions of assets or intra-group transfers).

In addition, the employer is exempted from this information obligation if it has already performed such obligation with respect to the triennial information obligation relating to the possibility to take-over the company by the employees in the course of the twelve months prior to the sale.

The company may be condemned to a civil fine which amount may not exceed 2% of the sale for not complying with this obligation.

- **Control of the top-hat pension plan and employee shareholding**

  - **Top-hat pension plan**

The guaranteed benefit pension plan ensures employees who benefit from it a predetermined pension level.

Among the different kinds of guaranteed benefit pension plans exists the differential plan (also called "top-hat pension plan") which allows for the company to award to the beneficiaries an overall level of pension, all retirement schemes combined of which the company commits to compensate the difference between the guaranteed overall level of pension and the pensions actually paid by the other pension plans.

The Law provides that the granting of guaranteed benefit pension plans to French *societés anonymes* directors which securities are admitted to trading on a regulated market must be subject to the procedure for related party transactions ("*procédure des conventions réglementées*") and comply with certain limits.

In addition, their benefit is now subject to the performance of the directors, appreciated regarding those of the company.

These provisions will apply to commitments taken by the companies from the publication of the Law and to those taken in favor of directors appointed or renewed after the publication of the Law, from their nomination or renewal.

  - **Distribution of free shares**

The regime of the distribution of free shares ("*attribution gratuite d'actions*") which will be allocated after the publication of the Law is amended as follows:

- the two-year vesting period is reduced to one-year;

- the minimum legal retention period (which lasts two years) no longer exists. The extraordinary general meeting may freely set this retention period. In any case, the cumulative duration of the vesting period and the retention period cannot be less than two years;

- the rate of the employer's specific contribution is reduced from 30% to 20% and needs to be paid the following month of the acquisition date of the shares by the beneficiaries;

- the profits obtained after the acquisition of the shares are no longer subject to the employee's contribution amounting to 10%.

- **Employee savings**

  - **Measures related to incentive plan and profit-sharing**

    i. Negotiation of incentive plan / profit-sharing agreement

Professional branches have to negotiate an incentive plan before 31 December, 2017.

The implementation of profit-sharing is now mandatory for companies with a workforce of at least fifty employees during the last three financial years (and not only the last one as it was the case before). However, the companies reaching the threshold of fifty employees and having already concluded an incentive agreement are exempted from negotiating a profit sharing agreement during a three-year period.

The employees may request the renegotiation of an incentive plan when the existing agreement has been concluded at the majority of 2/3 of the workforce (including when the agreement contains a clause providing for automatic renewal).

The applicable rate of the social security contributions is reduced to 8% for companies with fewer than fifty employees that conclude for the first time an incentive plan or profit sharing agreement or if they have never concluded such an agreement during the last five years before the implementation of the new agreement. This rate will be applicable for six years.

ii. Allocation of the sums paid out under profit sharing agreements and incentive plans

Before the Law, sums paid out under incentive plans were directly provided to employees.

From 1 January, 2016, these sums will be placed in a retaining agreement with the state unemployment agency ("CSP"), when such a plan exists in the company.

Nevertheless, the Law provides a 'right of withdrawal for the employee' for the rights granted under the incentive plan awarded between 1 January and 31 December, 2017. In this regard, the employee may request the exceptional release of his/her incentive assigned to the CSP, in a three-month delay after having been informed of the blocking of his/her assets.

iii. Delays of payment of the incentive and the profit sharing

Now, the single deadline for the payment of the premiums is set at the last day of the fifth month following the end of the financial year. If the deadline is missed, there is a single delay rate equal to 1.33 times the average rate of yields of bonds in private companies.

In such circumstances, the unavailability of the sums blocked in connection with profit sharing and incentive starts at the first day of the sixth month following the year in which the employee's entitlements arose.

➢ **Measures related to the collective retirement savings plan**

The specific contribution of 8.2% applicable on the fraction of the employer's contribution to the group retirement savings plan higher than €2,300 per year is removed.

In addition the employers may contribute through an initial payment and periodic payments, regardless of the payments for the employees.

It will also be possible to implement the collective retirement savings plan with the approval of 2/3 of the workforce of a draft contract proposed by the employer, if there is no union representative or works council.

The equivalent of ten days of untaken vacation may be allocated in the collective retirement savings plan by the employees who do not have a time savings account, compared to five days previously.

As of 1 January, 2016, the free management will be replaced by the guided management, which will become the option by default of the collective retirement savings plan.

Finally, the rate of the social security contributions is reduced to 16% for the payments allocated from the incentive and profit sharing agreements, as well as the employer's contribution, subject to the investment in a fund containing at least 7% of securities intending to finance small and medium-sized companies and intermediate-sized companies.

➢ **Various measures**

The Law provides for a whole range of measures related to employee savings:

- possibility to amend the provisions related to the intercompany savings plan (supply, allocation and employer's contribution), if there is no opposition by the majority of the companies which have subscribed to the plan in a one-month period from the date the information is sent;

- review of the content of the employee savings book, which will be the scheme implemented in the company from now on;

- information on the conditions for reimbursement of account fees in a summary statement: payment by the company or deduction from the assets.

- **Staff representation bodies**

➢ **Breaching the rules on staff representation: the prison sentence is abolished**

The criminal offence attached to breaching the rules on staff representation is now differently punished, depending on the nature of the breach:

- infringement on free appointment of staff representative bodies remains punishable by a one-year imprisonment sentence and an increased fine from €3,750 to €7,500;

- infringement on regular exercise of staff representative functions is no longer punishable by a prison sentence, however it remains, however, punishable by a fine that is similarly increased from €3,750 to €7,500.

➢ **Implementation of the status of Union Defender**

The Law creates the status of Union Defender. The status applies to employees designated by an union organization to support or represent employees before employment tribunals and courts of appeal in labor matters.

The Union Defender is granted time off to perform his duties, up to a maximum of ten hours per month. Such absences are considered effective working time and must, therefore, be paid by the employer. However, the wages paid during the absences, as well as the benefits and corresponding social charges, are then reimbursed by the State.

The Union Defender is also entitled to time off for training up to a maximum of two weeks for each period of four years, and benefits from the protected employee status.

➢ **Consultations of the Health and Safety Committee**

Now, as for the works council, the consultations made compulsory by law or regulation or a collective labor agreement can be registered as a genuine right on the agenda by the employer or the secretary.

Naturally, the principle remains a joint development of the agenda by the employer and the secretary.

➢ **Extended use of the economic and social database**

The employer is now entitled to communicate to members of the works council the information relating to occasional consultations via the economic and social database. Such consultations previously required sending reports and information.

- **Professional elections**

➢ **Extending the jurisdiction of the judicial judge**

The judicial judge can now rule on litigation related to challenging administrative decisions regarding:

- the distribution of staff in the electoral colleges and of the seats between the staff categories for the elections of staff representatives and of the works council;

- the recognition of a separate establishment for staff representatives;

- the exemption to the seniority conditions in order to be elector or eligible to the elections of staff representatives or the works council, given by the labor inspector.

The administrative judge remains competent to rule regarding the terms and conditions of the professional elections.

➢ **The information of the results of the elections**

The minutes with the results of the professional elections must be communicated to the labor inspector and to an organization responsible for gathering the results of the elections.

In addition, the employer now must communicate a copy of those minutes to the unions which have presented voters lists and to those that have participated to the negotiation of the pre-election agreement at the earliest time (and by any means).