ALERT MEMORANDUM

A Major Reform Of French Labor Code To Come Into Force

September 27, 2017

During his presidential campaign, Emmanuel Macron made labor law reform one of his major focuses as part of his first work as President, with the priority being simplification and flexibility, in particular by untightening certain rules governing the labor consequences of business reorganizations.

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After his election in May 2017 and the renewal of the French Parliament a few weeks later, a bill was soon submitted to French Parliament with a view to empower the Government to issue administrative regulations called 'ordinances' to implement this reform. These ordinances, if later approved by Parliament, would have the force of statutory law, while not having to go through the long parliamentary process. In parallel with the bill's discussion before the Parliament, the Government consulted extensively with the unions during July. The statute empowering the Government was voted on August 2nd, 2017 (the "**Statute**"). The Statute was immediately referred to the Constitutional Council (*Conseil constitutionnel*) by opposition members of Parliament. The Constitutional Council dismissed their arguments in a decision issued on September 7th, 2017.

Throughout the summer, the services of the Ministry of Labor worked on the drafts of the ordinances, which were made public on August 31st, 2017. The ordinances, which were signed on September 22, 2017 for a large part deepen reforms initiated under previous governments, but also introduce major changes in labor and employment law.

The main changes that will come into force relate to the termination of employment agreements (**I**); the employees' representation (**II**) and the collective bargaining negotiations (**III**).

I. TERMINATION OF EMPLOYMENT AGREEMENTS

A. Securing the dismissal procedure

The Government introduces new provisions to abolish case-law found to be excessively favorable to employees:

- Until now the employer was bound to indicate the cause for dismissal in the termination letter. Only the reasons for dismissal indicated in the termination letter could be discussed in court and the absence or insufficiency of the motivation given in such letter resulted in the dismissal being automatically unfair and allowed the employee to seek damages in court. The employer will be entitled to detail at a later stage the cause for dismissal mentioned in the dismissal letter. Absent a specific request from the employee, the employer will only be bound to detail such cause during court proceedings, and the insufficiency of motivation will only result in an indemnity not exceeding one month of salary.

- The failure to comply with the specific dismissal procedure provided by the applicable collective bargaining agreement will no longer result in an unfair dismissal but will only result in the payment of an indemnity not exceeding one month of salary.

The statute of limitations to challenge a dismissal is reduced from 2 years to 1 year.

B. Simplifying and securing termination for economic reasons

Significant changes introduced by the new legislation are of particular relevance in the context of dismissals resulting from the reorganization of a French company belonging to an international group:

- For the purpose of assessing the fairness of such dismissals, the economic reason for the dismissal was until now to be assessed at the level of the relevant sector of activity of the entire group worldwide, including the group's companies located outside of France. This rule used to result in serious limitations on the ability of global groups of companies to reorganize their making loss French operations when the rest of the group was profitable. The assessment of the seriousness of the cause supporting the dismissals will now be conducted at the level of the group's companies exclusively located in France.

- The employer will no longer be required to offer employees subject to redundancy proceedings the ability to ask for redeployment positions available in non-French subsidiaries of the group. The scope of such redeployment positions will be limited to the group's companies located in France. The employer will also be able to satisfy this requirement by communicating to the employees a list of available positions instead of having to make burdensome individual offers to each of the employees.

In addition, the new statute regulates voluntary departure plans that have been increasingly used in recent years. One significant benefit of voluntary departure plans is the absence of possible challenge of the termination by the employee as it is based on its individual decision to leave the company. In the absence of a statutory regime for voluntary departure plans, the rules applicable to such plans had to be defined by the courts on a case-by-case basis, with significant legal uncertainties remaining.

Under the new regime, the employer will not be able any more to unilaterally decide the implementation of a voluntary departure plan: only a collective bargaining agreement negotiated with the unions (representing at least 50 % of the votes cast during the last elections of the works council) will allow such a plan to be proposed to the employees. Collective bargaining agreements will also have to be cleared by the labor administration within a 15-day period, failing which the plan will be deemed approved. The new legislation defines the mandatory contents of the voluntary

departure plan which are consistent with what was so far customarily provided by such plans.

C. Capping damages for unfair dismissal

This is the most emblematic change provided by new legislation and, as such, the most disputed by the adversaries of the reform. In connection with a first attempt to introduce a cap on damages for unfair dismissal, which had to be abandoned, the Constitutional Council had cleared the way in 2015 by holding that such a limitation was not per se in breach of constitutional principles. A new attempt at implementing such a cap was again abandoned in 2016 by the former Government after political protests by left-wing members of Parliament and the unions.

This limitation is designed to remove the uncertainty created by the volatility of court decisions in dismissal matters which resulted in many instances in making budgets for dismissal costs very difficult.

The ordinance introduces both a floor and a cap to damages awarded in court to an employee whose dismissal is held unfair, *i.e.*, not grounded on a "real and serious cause". This minimum and maximum vary depending on the seniority of the dismissed employee. The absolute floor is 3 months (whereas it was previously 6 months for employees with more than 2 years of seniority in companies with 11 employees or more). The absolute maximum is 20 months of salary for employees with 29 years of seniority and more.

The cap does not apply when the dismissal is held void by law (as opposed to unfair) or in case of violation of a fundamental right, for instance in case of dismissal in retaliation for resisting to sexual or moral harassment, based on discrimination or in breach of the statutory protection afforded to pregnant women or employees' representatives. In such a case also, the absolute floor remains 6 months of salary.

In order to politically balance the introduction of such a cap on court awarded damages, the Government has decided to increase the statutory severance paid to dismissed employees (this indemnity is due for all dismissals, even if not unfair, in addition to the notice period, except in case of dismissal for gross or willful misconduct):

- The severance will be paid to employees after 8 months of seniority (versus 1 year);
- The severance will be equal to ¼th of one month's salary per year of service for the first 10 years (versus 1/5th – starting from the 11th year, the severance is equal to 1/3rd of one month's salary per year of service).

In many instances, the statutory severance will be more favorable than the severance provided for in the applicable collective bargaining agreement and will therefore supersede that lower severance.

II. EMPLOYEES' REPRESENTATION

A recent 2016 statute allowed companies with less than 300 employees to merge the staff delegates (mandatory in companies with 11 employees or more), the works council and the health and safety committee (both mandatory in companies with 50 employees or more).

The new reform goes further in streamlining the employees' representation, by creating a new "social and economic committee" :

- In companies with 11 to 49 employees, this committee has the same powers as current staff delegates;
- In companies of 50 employees or more, this committee has the same powers as current staff delegates, the works council and the health and safety committee; as a result the simplification of the employees' representation through a single committee will now apply to companies as from those employing 50 employees;
- In companies of 300 employees or more, it will be mandatory to have, in the committee, a specific commission dedicated to health and safety matters.

While this reform does not narrow the powers of the "social and economic committee" as compared to the aggregation of those currently granted to the staff delegates, the works council and the health and safety committee, respectively, it nonetheless aims at reducing the number of meetings with the employees' representatives and the number of employees' representatives themselves. As the

number of members of the "social and economic committee" will be determined by implementing regulations which have not yet been published, it is not possible to say to what extent this result will be achieved.

The transformation of the current employee representation bodies into "social and economic committees" is to be implemented progressively as the members of such bodies are renewed but in no event later than December 31, 2019.

III. COLLECTIVE BARGAINING NEGOTIATIONS

A. Completing the primacy of the company-wide collective bargaining agreement

Created in 2004, promoted a first time in 2008, then in 2016, the reform significantly enlarges the primacy of company-wide collective bargaining agreements over industry-wide agreements in order to promote negotiation at the company-level and have agreements more tailored to companies' needs.

The reform precisely allocates the roles between the company-level negotiation and the industry-level negotiation by providing the list of the areas where the industry-wide negotiation retains primacy (such as employees classification and related minimum wages, benefits, restrictions on fixed-term employment agreements) or has the ability to retain primacy.

In all other areas, the company-wide agreements shall have primacy over the industry-wide agreement, irrespective of the date of entry into force of such industry-wide agreement. For instance, a company-wide agreement will be permitted to reduce or to remove the seniority premium paid to employees pursuant to the applicable industry-wide agreement. In the absence of a company-wide agreement dealing with the matters regulated by the industry-wide agreement, the industry-wide agreement will apply.

In order to allow for this new allocation of roles to develop, the Government has broadened the ability to negotiate in the absence of trade union delegates, by allowing such negotiation to take place with employees' representatives (even in the absence of a specific mandate granted by a union) and, in very small-sized companies, by allowing draft agreements prepared by the employer to be approved by two-thirds of the employees.

In companies with trade union representatives, where the validity of the agreement will be subject to the signature by unions representing at least 50 % of the votes cast during the professional elections, if only unions representing 30 % of such votes have signed the agreement, the employer will be able to submit the agreement to an employee referendum, except if all unions object to it (by contrast, currently only the unions can request such a referendum to be organized). The agreement will come into force if approved by a majority of the employees' votes cast.

To protect the application of the agreements negotiated at company level, claims for nullity of company-wide collective bargaining agreements will be time barred after 2 months (while a 5-year limitation was normally applicable until now).

B. Enlarging the ability for company-wide collective agreements to supersede employment agreements

In recent years, diverse types of collective bargaining agreements have been introduced whose common feature is to supersede the provisions, even where more favorable, of employment agreements. This feature is an exception to the general rule according to which a collective bargaining agreement cannot be less favorable to the employees than is an employment agreement. The various legal regimes applicable to these agreements were quite complex and divergent. The aim of the reform is replace such agreements by a single new type of collective agreement whose scope goes beyond that of its predecessors.

By way of a company-wide collective bargaining agreement concluded for the purpose of (i) "addressing needs related to the operation of the undertaking", which can be construed very broadly; (ii) protecting employment; or (iii) promoting employment it will be possible to:

- Adjust working time duration or working time organization or allocation;
- Adjust compensation (in compliance with the statutory minimum salary and the

minimum salaries according to the employee classification provided in the applicable industry-wide collective bargaining agreement);

- Determine the conditions for professional or geographical mobility within the company.

The provisions of the collective agreement will automatically supersede the provisions of the employment agreements.

The employee can refuse such modification within a month after the employer has notified the existence and content of the collective agreement. In such a case, if the employer decides to dismiss the employee, such dismissal shall not be a redundancy for economic reasons and the dismissal shall be deemed valid. Whatever the number of employees being dismissed, the employer shall not have to implement a social plan.

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