ANDRH JANUARY 2023

M2 IHRM
C.BEATA
C.CONDOURET
C.FERREIRA
A.REINE

ACKNOWLEDGEMENT

We wanted to express our sincere gratitude to the FIDAL firm and especially to Me Mathilde ANIZON, to Me Delphine STELLA-BERNAD and to Me Yann GADY for their captivating presentation on the 2022/2023 social updates.
Your expertise and knowledge on the subject were very helpful in understanding the latest developments in this field.
Thank you also to the ANDRH for allowing us to attend this meeting.

SUMMARY

I. CASE LAW NEWS

- Conformity of the Macron Scale: Cass. Soc. 11/05/2022, n°21-14.490 and 21-15.247.
- Impossibility of reaching full-time by an additional hours amendment to a part-time employment contract: Cass. Soc. 21/09/2022, n°20-10.701.
- Possible qualification of travel time for itinerant workers as actual working time: Cass. Soc. 23/11/2022, n°20-21.924.
- The absence of a requirement to inform the employee of their right to specify the dismissal letter: Cass. Soc. 06/29/2022, n°20-22.220.
- Possibility for an employer to interrupt a conservatory suspension of an employee: Cass. Soc. 18/05/2022, n°20-18.717.
- Tolerance for quick initiation of termination procedure for serious misconduct in case of absence: Cass. Soc. 09/03/2022, n°20-20.872.
- Absence of obligation to consult the CSE in the event of an exemption from reclassification: Cass. Soc. 08/06/2022, n°20-22.500 et Cass. Soc. 16/11/2022, n°21-17.255.

II. LEGISLATIVE AND REGULATORY NEWS

- A. Labour Market Law
- B. The 2023 Budget Law
- C. Social Security Financing Act
- D. Protect the Purchasing Power
- E. Occupational Health Law
- F. The Whistleblower protection law

CASE LAW NEWS

Reminder:
Case law is a **source of law**, representing legal principles derived from **decisions** made by **courts** and **tribunals** in relation to a legal issue.

- **Conformity of the Macron Scale: Cass. Soc. 11/05/2022, n°21-14.490 and 21-15.247.**

The Court of Cassation has stated that the scale for compensating employees who are dismissed without a valid reason is not in violation of Article 10 of No. 158 International Labour Organization Convention. Therefore, French judges cannot, even on a case-by-case basis, exclude the application of the scale about this international convention.

- **Impossibility of reaching full-time by an additional hours amendment to a part-time employment contract: Cass. Soc. 21/09/2022, n°20-10.701.**

The Court of Cassation clarified for the first time that the conclusion of an amendment for additional hours to a part-time employment contract cannot have the effect of bringing the agreed-upon work duration to the level of the legal work duration or the duration set by convention.

- **Possible qualification of travel time for itinerant workers as actual working time: Cass. Soc. 23/11/2022, n°20-21.924.**

The Court of Cassation has ruled that the travel time from home to the first client and from the last client to the home, of a traveling employee, can be considered effective working time. This ruling constitutes a change of previous case law.

- **The absence of a requirement to inform the employee of their right to specify the dismissal letter: Cass. Soc. 06/29/2022, n°20-22.220.**

The Court of Cassation specifies that there is no requirement for the employer to inform the employee of their right to request clarification of the reasons for the dismissal letter.

CASE LAW NEWS

- **Possibility for an employer to interrupt a conservatory suspension of an employee: Cass. Soc. 18/05/2022, n°20-18.717.**

The Court of Cassation considers that the employer's decision to abandon a precautionary suspension, by requesting the employee to return to work, does not result in reclassifying this measure as a disciplinary suspension, and does not prevent the employer from issuing a termination notice, the procedure for which was initiated at the same time as the precautionary suspension.

- **Tolerance for quick initiation of termination procedure for serious misconduct in case of absence: Cass. Soc. 09/03/2022, n°20-20.872.**

The Court of Cassation considers that serious misconduct is of such importance that it makes it impossible for the employee to remain in the company. Thus, the dismissal procedure must be implemented quickly. The Court of Cassation sets the principle of a short deadline, however, this principle does not apply if the employee is absent from the company.

- **Absence of obligation to consult the CSE in the event of an exemption from reclassification: Cass. Soc. 08/06/2022, n°20-22.500 et Cass. Soc. 16/11/2022, n°21-17.255.**

The Court of Cassation has recently confirmed that in the presence of the aforementioned explicit mention in the statement of the occupational physician, the employer is not required to seek a reclassification, and also has no obligation to consult the CSE.

LABOR MARKET LAW

LAW 2022-1598
21ST OF DECEMBER 2022

REMINDER:
A law in France **comes into force** the **day after** its publication in the **Official Journal**.

• Article 1) The presumption of resignation in case of abandonment of post

Purpose of this article : prevent the receipt of unemployment benefits when an employee abandons his or her job. This limits the use of this practice of voluntary abandonment of post by employees. It is necessary to have a voluntary abandonment of the job by the employee and his non resumption of work even though he has been put on notice by his employer to justify his absence and to resume his job within a fixed period of time (the period of time cannot be less than the minimum period of time fixed by decree).
It is for employees on permanent contracts. However it makes us wonder : What about protected employees?

Case of application :

- Abandonment must be voluntary, this is an essential notion: no constraint, not a wrongful behavior of the employer otherwise the resignation is not presumed
- Not applicable for resignations for health or safety reasons, for violent customers, if the tools provided and used are not compliant, if there is a risk of physical violence

Clarification in the senators' report:

Does not apply to justified or legitimate absences such as :

- Exercise of the right of withdrawal in case of imminent danger
- Right to strike
- Health condition to consult a doctor
- No return to work after a work stoppage

The application decree is still missing.

• Article 2) The decision of a single CDD to replace several absent employees

Relaunch of a previously conducted experiment:

- Reversal of the rules of common law: for replacement CDDs, normally it is 1 contract per person replaced and per reason for absence, here, as an experiment and by derogation to this rule: In the 11 sectors defined by a decree (*health care, medical and social services, personal services, large-scale distribution....*) , we will have "multi-replacement" fixed-term contracts.

That is to say : one contract to replace several employees.

Objectives :

- To make sure that fixed-term contracts are longer
- Less precarious for people
- To reduce management costs
- Less work for HR (less contracts to be made, less account balance)
- To reduce the volume of contracts and therefore reduce the risks of litigation.

This applies to **fixed-term contracts** and also to **temporary work**, and is planned for **2 years**.

The application decree is still missing.

- **Article 3) The unemployment insurance**

Normally, rules for coverage by Pôle Emploi such as the duration of the conditions and the amount of benefits are defined jointly. When the different parties do not agree, it is the government that takes over and sets the applicable rules by decree.
Here, in this article, as an exception to the usual rule, the rules for taking charge of the unemployment insurance **will be set by decree**.
Thus, we are facing an implementation of a temporary derogation to the partial determination of the rules of the unemployment insurance. It has been validated by the Constitutional Council.
Purpose :

- Possibility by decree to fix the rules of the unemployment insurance
- The rules of unemployment insurance must be a function of the economic situation, as soon as we are close to full employment, we consider that the rules of the unemployment center must be less protective

The conditions can have an impact on both the conditions for entitlement to Pôle emploi and, above all, the duration of coverage by Pôle emploi.
These two elements, condition and duration, depend on the economic situation.
In view of our economic situation, the future decree would say that the maximum duration of Pôle emploi is 18 months.

- Elimination of unemployment insurance in case of refusal of a permanent contract by an employee on a fixed-term contract or on a mission/temporary contract (job must be similar)
- When the person refuses the permanent contract, the employer must warn Pôle emploi when he/she refuses 2 times in the previous 12 months, he/she will no longer be taken in charge by Pôle emploi.

Be careful, there are exceptions:
-e.g., the person must not have had a permanent contract in the previous 12 months
-e.g., if the job offer does not correspond to the project that I have defined with Pôle Emploi

For the concerned sectors: Bonus/Malus device of the unemployment contribution in relation to a separation rate, one separates more collaborators than the average of the sector

- In a certain number of listed sectors, if one is more than the average of the companies of the sector of the people at the employment center one has a malus: the contribution of unemployment insurance increases
- If one is virtuous one has a bonus and less important contribution

It has a vocation to be extended.

The application decree is still missing.

- **Article 4) *The elections of the CSE***

Under the decision of the Constitutional Council of November 2021 : the article that excluded from the electorate a certain employee has been considerate as non consistent with the Constitution.
Purpose :

- From now on, all employees are electors in the selection of the CSE and this whatever his function.
- Something completely new because it means that even the Managing Director, the number 1 of the company and representative of the company, is also an elector.

Practical consequences:

- Think about modifying the pre-electoral agreement protocol, since the employer's representatives, the directors, the executives can now vote and therefore it must be modified.
- In the practices of the electoral list, it is necessary to reinject in the college manager and supervisor, all the managers whatever their functions.
- The employer's representatives are excluded from the eligibility. However, although they are voters, the general manager and the executives cannot run for or be elected to the CSE. The cards are then redistributed, because any employee is a voter whatever his function.
- This has very important consequences on the election results.

THE 2023 BUDGET LAW

LAW NO. 2022-1726 OF DECEMBER 30, 2022, ON THE BUDGET FOR 2023

- **The remaining cost for employees using their CPF.**

The 2023 budget law, published in the official journal on December 30, 2022, establishes a remaining cost for employees who wish to use their Personal Training Account (in French CPF) to fund training, a skills assessment, or validation of prior experience (in French VAE). The details of this remaining cost must be specified by a forthcoming decree.

Article 212 of this law specifies that this participation "may be proportional to the cost of the training, within a limit, or fixed at a flat rate". Exemptions will be granted to job seekers and employees whose training project is co-constructed with the employer. The formations chosen by the account holder must be related to a solid professional project, to acquire new skills, or participate in a career change.

- **Other measures in labor law.**

  - The limit of exemption for the employer's portion of meal vouchers is raised to 6.50€ for vouchers issued on or after January 1, 2023. To be exempt from contributions and income tax, the value of the meal voucher must be between 10.83 and 13€.

  - The management and collection of the tax for hiring a foreign worker are transferred from the Ofii (The French Office of Immigration and Integration) to the DGFiP (The General Direction of Public Finances) as of January 1, 2023.

SOCIAL SECURITY FINANCING ACT

LAW NO.2022-1616 OF DECEMBER 23, 2022, ON THE FINANCING OF SOCIAL SECURITY FOR 2023

PRIOR CLARIFICATIONS

Two key measures relating to daily allowances of the bill were censored by the Constitutional Council (decision of 20/12/2022).

- **Issuance of sick leave by teleconsultation.** The 2023 Social Security Funding Bill provided for a limitation on the compensation for work stoppages prescribed by teleconsultation, starting June 1, 2023, to put an end to certain abuses recently identified by the government.

- **Subrogation relating to daily maternity, paternity, and adoption allowances.** The law also provided that the employer must guarantee its employee, from the first payroll cycle, the payment of an amount at least equal to the number of daily indemnities for maternity leave and paternity and child care leave, and that the employer may be subrogated to the employee in the payment of these daily indemnities. The Constitutional Council believes that this measure constitutes a "legislative cavalier" and has no place in law on social security financing.

KEY MEASURES

- **Illegal work provisions.** The 2023 Social Security Funding Law has just confirmed the government's intention to strengthen sanctions and controls on undeclared work.

- **URSSAF control procedure**. The law contains two measures regarding URSSAF control:
  - 1. The permanence of the experimentation aimed at limiting the duration of controls to 3 months in companies with less than 20 employees (Article L. 243-13 of the Social Security Code).
  - 2. The possibility for URSSAF to use documents and information obtained during the control of another company in the group (Article L. 243-7-4 of the Social Security Code).

- **Unilateral correction of the DSN (Nominative Social Declaration) by URSSAF.** The law fills in and clarifies the legal framework of the DSN correction mechanism. It provides that as of January 1, 2023, when the declarant does not correct their DSN, the correction will be carried out by the social security organizations to which the declaration was submitted.

- **Extension of the Covid exceptional leave scheme.** The law extends the compensation for employees on Covid leave without waiting days until a date set by a forthcoming decree, and at the latest until December 31, 2023. It does not apply to child care as the scheme for employees who have to take care of their Covid-positive child and cannot work remotely has ended.

- **Adjustment of the flat-rate deduction of employer contributions for overtime.** The 2023 Social Security Funding Law brings some changes to the flat-rate deduction of employers' contributions for overtime in companies with 20 to fewer than 250 employees.

- **Postponement of the transfer of AGIRC ARRCO recovery to URSSAF.** Initially planned for 2022 and then postponed to 2023, the transfer of AGIRC-ARRCO contributions to URSSAF has been definitively postponed to January 1, 2024.

PROTECT THE PURCHASING POWER

LAW OF AUGUST 16TH, 2022, ON EMERGENCY MEASURES TO PROTECT PURCHASING POWER. N°2022-1158 AND AMENDING FINANCE LAW FOR 2022, AUGUST 16TH, 2022, N°2022-1157

THE VALUE SHARING PREMIUM (PPV) (UNTIL 31/12/2023)

Formerly known as the Macron bonus, this premium can be paid by the employer voluntarily for all employees with a working contract (fixed-term contract, permanent contract, apprenticeship agreement, temporary employment contract) when:

- the payment is made
- the company agreement is done
- the decision is made by the employer

The premium is paid once a year or can be divided and paid once every quarter.
The employer can decide to give it to employees that are earning less than a certain amount per month/per year, however, the employer cannot give it only to employees earning more than a certain amount.

The criteria to decide the amount of the premium are:

- the employees' remuneration
- their level of classification
- the actual working time during the year or laid down in the employment contract
- the seniority of the employees, which is a new criterion from the initial Macron bonus. However, an employer cannot leave out employees if they have less than X months, but the amount given to each must be calculated prorated to the seniority. And there cannot be disproportionate gaps between the amounts given.

This premium cannot supplant a remuneration element like a pay increase provided for by a wage agreement.
The maximum amount is €3,000 per year per employee, and it can go up to €6,000 if the company has a profit-sharing agreement or an gainsharing agreement.
With those conditions, the premium shall be exempt from income tax, salary contributions, and social contributions.

TRANSPORTATION EXPENSES

The transportation allowance can now be given to all employees in 2022 and 2023, whether they live in a city served by public transportation or not, and whether their working time allows them to use public transportation or not. This premium is also known as the fuel premium.

It authorized the cumulation of the transportation allowance and the Sustainable Mobility package, with an exemption ceiling of €700 in 2022 and 2023 (€900 for French overseas regions and departments), including €400 (€600 for French overseas regions and departments) for the transportation allowance.

It authorized the cumulation of the transportation allowance and the mandatory public transportation and bike renting allowance in 2022 and 2023.

It raised the exemption ceiling of the cumulation of the Sustainable Mobility package and the mandatory public transportation and bike renting allowance from €600 per year to €800 per year.

OCCUPATIONAL HEALTH LAW

LAW N° 2021-1018, AUGUST 2ND OF 2021 TO REINFORCE OCCUPATIONAL HEALTH PREVENTION, WITH A FOCUS ON MEDICAL EXAMINATION

REINSTATEMENT VISIT

The reinstatement visit concerns:

- Employees coming back after a minimum of 60 days of work absence due to non-professional sickness or accident.
- Employees coming back after a minimum of 30 days of work absence due to a professional accident.
- Employees coming back after a work absence due to professional sickness.
- Employees coming back after maternity leave.

Creation of the liaison meeting: when an employee has been absent from work for at least 30 days, both the employer and the employee can ask for a liaison meeting to keep the link between the employer and the employee during the work stoppage. The employer can inform the employee of the different prevention actions on professional exclusion, pre-reinstatement visits, and the measures for adjustment or transformation of the workstation and the organization of working time.

The employer must inform the employee of the pre-reinstatement visit, which can take place if the employee has a work absence of at least 30 days. However, this visit is not mandatory, and we don't know yet what the legal repercussions can be if the employer fails his obligation to inform the employee.

MEDICAL EXAMINATION POST-EXPOSURE

The end-of-career medical examination for workers with a safety-sensitive position is now taking place at the end of the mission leading to professional exposure to chemicals and other dangerous substances, instead of waiting for the retirement of employees.

MID-CAREER MEDICAL EXAMINATION

This new medical examination from the Law of August 2nd, 2021, starting from March 31st, 2022, must take place during the calendar year when the employee is turning 45. It can be done with another occupational medical examination that takes place no more than 2 years before the employee is turning 45.
Its objective is to increase awareness of the challenges of aging at work and risk prevention and evaluate risks of professional exclusion. It also allows occupational doctors to evaluate employees' capacities depending on a career path, age, and health.

THE WHISTLEBLOWER PROTECTION LAW

ART.6 OF THE LAW N°2016-1691 OF 9 DECEMBER 2016

- **The whistleblower protection law :**

The 6th and last point discussed on the legal news concerns the protection of whistleblowers. Indeed, in 2016, the Sapin II law requires that several measures be put in place within companies employing at least 500 employees and with a turnover of more than €100 million. Over time, this law has evolved until this latest update on 21 March 2022, aimed at better-protecting whistleblowers.
But what is a whistleblower?
According to art.6 of the law n°2016-1691 of 9 December 2016 on transparency, a whistleblower is a natural person who reports or discloses, without direct financial compensation and in good faith, information relating to a crime, an offense threatening the general interest of the company.

Here, the decree simplifies the procedures for whistleblowing and aims to protect whistleblowers. To do this:

- The internal regulations must be amended so that this new measure is visible to all employees. This update must not be overlooked and must be included in the company's compulsory postings.
- Changes to non-discrimination:
  - The list of grounds for discrimination has been modified. From now on, when an alert is launched, it is forbidden to take into account the quality of the whistleblower, the facilitator, or the person in contact with the whistleblower. The aim here is for everyone to be treated and heard in the same way, regardless of their position in the company.

In addition, the decree specifies the internal reporting procedures:

1. **For companies with less than 50 employees**:
   - if no procedure and treatment of alert reporting have been put in place, you should first think about it to better guide employees in this action, which is not always obvious. If this is not your priority, the whistleblower will now have to refer to their line manager (direct or indirect), their employer, or a referent designated by the latter.
2. **For companies with more than 50 employees**:
   - the employer must put in place an internal procedure for collecting and processing reports.

It would be relevant to consider which legal means would be the most appropriate to meet the employer's needs: memo, collective agreement, etc.
- Do not forget to consult the social committee beforehand
- Finally, once the new procedure has been put in place, it should be clearly and prominently displayed so that all employees have quick and easy access to this information.