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France is taking the path of flexicurity with the creation of so-called job preservation agreements

Despite the current economic gloom in this month of May 2013 where France officially entered recession, French business managers can at least find some consolation as the Law on securing employment (the "Law") – that recasts France's labor and employment legislation – was definitively adopted on May 14.

The Law enshrines the keystone principle of flexibility that had been forcefully requested by the MEDEF[1] by introducing so-called job preservation agreements. This new type of company-level agreements aims at allowing companies facing serious short-term cyclical economic difficulties, to temporarily adjust the balance between working time, wages and employment.

In our March 2013 e-newsletter, we had announced the forthcoming enactment of the Law and presented an essential part thereof relating to the new procedural framework for large-scale collective dismissals. Yet, as the bill was still in draft form, we wondered whether the legislator would betray the spirit of flexicurity that had guided the social partners who are behind the Law[2]. Adopted on May 14, the Law should enter into force in the coming weeks, unless the Constitutional Council (which has been asked by sixty members of the French Parliament to review the Law) finds that part of its provisions are unconstitutional.

On the whole, French employers and the majority of the other actors of the French employment market welcome the principle of the Law, even if many fear that the practical implementation of the newly adopted rules will nonetheless raise concerns which will cause legal uncertainty. And precisely, securing employment is not possible without a secure labor and employment legal framework!

In any event, Laurence Parisot, the current head of the MEDEF, did not hide her satisfaction. For her, this vote is "*a key event in the economic and social history of our country*" because "*this Law finally introduces flexicurity on the labor market*" and "*offers tools that will immediately allow companies to adjust to changes*". "*Successful outcome of a process led and driven by social partners*", the Law "*shows, despites the endlessly repeated clichés, the capacity of the social partners to reach reform deals*". "*This marks the arrival of a culture of compromise, of a method where reforms are achieved by social partners, after decades of a social antagonism philosophy*".

So, has France finally embraced the culture of compromise in social and industrial relationships, like its neighbor Germany?

One thing is certain: The Law, that is the fruition of the faithful transposition of an inter-professional agreement entered into between social partners and that **gives companies more flexibility** (e.g. by introducing a new framework for the implementation of collective lay-off plans, by regulating and simplifying the information-consultation process of staff representatives, by creating flexibility tools, such as job preservation agreements or the part-time employment scheme, available to companies facing economic difficulties) while **granting new rights to employees** (e.g. by imposing new obligations in the field of employees' information, by providing for a mandatory complementary healthcare insurance for all employees) **entails a major overhaul of the French Labor Code**.

One of the flagship measures of the Law is the creation of a new type of company-level agreements, i.e. the so-called job preservation agreements.

Under the Law, companies "*facing serious short-term cyclical economic difficulties*" will be entitled to "impose" to all employees, **for a maximum period of two years, a temporary decrease of wages (not below 1.2 times the minimum wage) and an adjustment (increase or decrease) of the working time duration, organization and distribution**. Employees will *a priori* be free to accept or refuse such measures but if they refuse they can be dismissed on economic grounds.

The job preservation agreement will detail the time-lines and the conditions in which the employee can accept or refuse the application of such agreement to his/her employment contract. If the job preservation agreement does not include specific provisions, the procedure governing notifications of changes to employment contracts motivated by economic reasons set forth in Article L. 1222-6 of the French Labor Code will apply. Accompanying measures/aids for the redeployment of the employees who refuse the application of the job preservation agreement must be provided for.

As such, the job preservation agreement shall apply to all employees who have accepted it. The clauses of the employment contracts that conflict with the terms of the job preservation agreement will be suspended.

On the other hand, if an employee refuses the application of the job preservation agreement, he/she can be dismissed on economic grounds. One of the original aspects of this new scheme is that the dismissal shall be carried out pursuant to the rules governing **individual dismissals on economic grounds**, irrespective of the

number of employees concerned. This implies in particular that it will not be required to apply criteria for the order of dismissals, as is the case for dismissals carried out following a refusal to accept a change in the employment contract pursuant to Article L. 1222-6 of the French Labor Code, or even to implement a *plan de sauvegarde de l'emploi* (collective lay-off plan) even if more than 9 employees in companies with at least 50 employees refuse the job preservation agreement and are dismissed.

In addition, the other significant feature of this new scheme is that the dismissal shall be "*based on an economic ground*", meaning that the dismissal will necessarily be **for just cause**, as attested to by the job preservation agreement, which will keep the employer harmless from and against any claim by employees seeking to challenge the economic justification of his/her dismissal.

A job preservation agreement can be implemented even in companies where there is no trade union representative or staff representative.

As a matter of principle, to be valid, a job preservation agreement must be signed by one or several representative trade unions having obtained at least 50% of employees' vote cast in the first round of the most recent elections of the members of the Works Council ("WC") or of the so-called Unique Staff Representation ("USR") or, if there is no WC or USR, of staff representatives.

However, in the absence of trade union representatives, the job preservation agreement can be entered into by staff representatives expressly mandated by a representative organization at the branch level or at the national inter-professional level, or in the absence of such staff representatives, by **mandated employees**. The agreement signed by an elected staff representative or mandated employee must be approved by the employees by a majority of the votes cast. As such, all businesses are potentially affected by the new scheme.

The prerequisite for the conclusion a job preservation agreement is the existence of "*serious short-term cyclical economic difficulties*". The Law provides that the difficult economic situation shall be assessed with the representative trade-unions and that the WC will be entitled to appoint a chartered accountant to assist the trade-unions in such assessment: One can already feel that the negotiations on this prerequisite – which, in addition, leaves room for divergent interpretations – will not be smooth and will require time.

The objective of this mechanism that provides for a negotiated adjustment of working time, wages and employment is to preserve jobs while ensuring the survival of companies through the reduction of production costs. These job preservation agreements are designed to offer "*companies whose production costs are too high while demand remains depressed, first to reduce their activities in order to decrease operating costs and compensate for revenue shortfalls, second to meet their cash requirements related to the increase in stocks/inventories*"[3].

Further, these job preservation agreements are supposed to ensure the retention of expertise and know-how in companies, thereby avoiding one of the drawbacks of dismissals that deprive companies of the skills required to revive their business activities if and when the economic situation improves.

While these job preservation agreements indisputably provide companies with valuable flexibility tools and may be viewed by some as a “gift” made to employers, this “gift” definitively has constraining counter-concessions.

First, as the name “job preservation agreement” suggests, the company must commit, during the whole duration of the job preservation agreement, not to terminate, for an economic reason, the employment contract of the employees who have accepted the implementation of such agreement.

The job preservation agreement must also include commitments from the company on the consequences that an improvement of the economic situation would entail for the employees, at the end of the implementation period, including on the allocation of profits derived from the efforts made by the employees.

It should also be noted that the job preservation agreement must specify the conditions in which the salaried managers, corporate officers and shareholders (within the powers and authority conferred upon the corporate supervisory bodies) will, during the whole implementation period, **make efforts commensurate with those required from the employees**. In practice however, it is hard to imagine how such a measure can be implemented, especially for the shareholders (prohibition to distribute dividends during the implementation of the job preservation agreement?).

Lastly, it is specifically stated that the job preservation agreement must include a penalty clause providing for the payment of damages to employees harmed by the employer’s failure to fulfill its commitments. If the matter is brought in court, such non-fulfillment can also lead to the suspension of the job preservation agreement pursuant to a decision of the President of the Summary Division of the First Instance Court.

For companies, the overall picture is far from idyllic and some employers have already expressed their concerns as to the additional costs that may be incurred for the implementation of this new scheme.

Furthermore, other measures contemplated by the Law, such as the obligation to search for a purchaser if a company site is to be shut down, will surely displease businesses and foreign investors.

Pursuant to a bill presented for discussions on April 30, that is viewed as a complement to the aforementioned obligation, the management of companies with at least 1,000 employees that contemplate shutting down a site where at least 50 employee work should have the obligation to search during three months for a purchaser, failing which they would be liable to a financial penalty up to an amount corresponding to **20 minimum wages for each eliminated employment position.** If such a measure was to be adopted, it would undermine all the works achieved by the social partners in view to reducing time-lines and simplifying and securing the procedures governing collective dismissals[4].

In conclusion: France is definitively making its first steps towards flexicurity but the flexibility granted to businesses remains strictly regulated. In short, this is indeed flexicurity *à la française*…

[1] The *Mouvement des entreprises de France* (Movement of the Businesses of France, or MEDEF) is the largest union of employers in France.

[2] The Law on securing employment is indeed the transposition of the national inter-professional agreement for a new social and economic model supporting companies' competitiveness and securing career paths of employees, concluded on January 11, 2013 by the social partners and aimed at creating a "flexicurity" *à la française*.

[3] According to the Impact Study dated March 5, 2013 carried out in connection with the bill on securing employment

[4] Please see our March 2013 e-newsletter for more information in this respect.