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# Law of May 27, 2008 on Anti-discrimination : direct consequences for companies

Law n°2008-496 of May 27, 2008 transposing into national law various EC provisions to fight discrimination

Law n°2008-496 of May 27, 2008 (the "Law") transposed five European Directives relating to equal treatment: Directive 2000-43 of June 29, 2000, Directive 2000-78 of November 27, 2000, Directive 2002-73 of September 23, 2002, Directive 2004-113 of December 13, 2004 and Directive 2006-54 of July 5, 2006.

The Law's main provisions that may have direct consequences for companies are: the introduction in the French Labor Code ("FLC") of the definitions of direct and indirect discrimination, a new definition of moral and sexual harassment that complements the existing definition set forth in the FLC, the introduction of new discriminatory criteria, and a change in the rules applicable to mandatory posting of non-discrimination provisions.

## 1. New definitions:

### Discrimination:

Before the Law was passed, the FLC referred to direct and indirect discrimination but failed to provide a definition thereof.

Article L.1132-1 of the FLC which sets forth the principle of non-discrimination has been amended to expressly refer to the definitions in Article 1 of such Law:

- "Direct discrimination: situation in which, based on whether or not a person belongs – actually or impliedly – to an ethnic group or race, or based on that person's religion, beliefs, age, handicap, sexual orientation or gender, that person is treated in a less favorable manner than another person who is, has been, or would have been in a comparable situation."
- *"Indirect discrimination : a provision, criteria, or practice that appears neutral but that result, for one*

> *of the biases mentioned above, in a specific disadvantage for persons, as compared to other persons, unless this provision, criteria, or practice can be objectively justified by a legitimate purpose, and means to achieve this purpose are necessary and appropriate*."

Our concern is that the notion of provision, criteria, or practice *"that may result (…) in a specific disadvantage for persons*" will serve as the basis for claims by employees who consider that they were wrongly excluded from a benefit granted by the employer to other employees.

We therefore recommend being extremely vigilant on the conditions according to which benefits are granted to employees, and making sure that excluded employees are not in a position that allows them to claim that they have been victim of discrimination.

The Law states that discrimination also includes instructing others to act or behave in a discriminatory manner. As such, any corporate officer who requests that his/her Human Resources Director or any other employees act in a discriminatory manner would also be found guilty of discrimination.

## Harassment:

Under Article 1 of the Law, the notion of "*discrimination*" also includes "any act related to any of the *items set forth above and any act with a sexual connotation aimed at another that is intended to, or has the effect of, violating the dignity of such other and of creating an intimidating, hostile, degrading, humiliating, or offensive environment.*"

On the other hand, Article L.1152-1 of the FLC defines "*moral harassment*" as "*repeated acts (…)intended to, or that have the effect of, violating a person's rights or dignity, alter his/her physical or mental health, or jeopardizing his/her career prospects." Articles* L.1153-1 of the FLC defines "sexual harassment" as any action intended "*to obtain sexual favors for one's own benefit or for the benefit of another.*"

The Law's definitions are therefore more extensive than those set forth in the FLC, which were considered by the European Commission as insufficient and non-compliant with its Directives.

This legislative development is best understood when reviewed in conjunction with recent developments in case-law. In three judgments rendered on September 24, 2008, the Labor Chamber of the *Cour de Cassation* overruled previous case-law by adopting a similar position as the Criminal Chamber of the *Cour de Cassation* when it rules that it could review the facts of a case, the appreciation of such facts, and the rules of evidence applied by the lowers courts (previously, the *Cour de Cassation* could not review such aspects of a case).

Reviews by the *Cour de Cassation* have increased and become more harmonized, notably pursuant to the provisions of EU Directive of November, 27 2000, as transposed by the Law. We can therefore expect that courts will be stricter in its review of facts and of the rules of evidence in the future.

**Authorized differences in treatment:**

In this respect, the Law broadened the exceptions prescribed in the FLC, which before the Law only permitted discrimination on the legitimate basis of age, disability certified by an occupational physicians, or handicap.

Article L.1133-1 of the FLC now stipulates that differential treatment is authorized "*when it is in response to an essential and determining occupational requirement, provided that the objective is legitimate and the requirement is proportional.*"

Please note that although the scope of authorized differential treatment has widened, the applicable conditions are strictly defined.

## 2. New criteria

The Law adds to the list of discriminatory criteria by adding discrimination based on maternity and based on maternity leave. Even though these two discriminatory criteria are not included in the list of criteria set forth in the FLC, employers will have to comply with them as the new obligations imposed by the Law are cumulative to those already imposed under the FLC.

## 3. Posting Obligations

Employers must now post copies of Articles 225-1 to 225-4 of the French Criminal Code in the workplace. On the other hand, posting copies of Articles L.1142-1 to L.1144-3 of the FLC (relating to Professional equality between women and men) is no longer mandatory.

Our Labor and Employment Department is at your service to provide any clarification and updates in connection with this topic.