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Gender Equality in the Workplace: How Far Will France Go?

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Gender Equality in the Workplace: How Far Will France Go?

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The almost 50-year old core principle of French employment law, equal pay for equal work, may sound like a broken record especially with regards to gender equality. Much has been done on paper to ensure that women performing the same job as their male counterparts are also getting the same salary. However, effective gender equality is yet to be achieved. The fact that President Macron created a special secretary of state exclusively dedicated to the promotion of gender equality and the fight against discrimination¹ is very instructive as to how insufficient in practice the improvements made by companies over the past decades have been.

Employment law and gender equality are necessarily intertwined as the major differences in treatment between women and men are usually witnessed in the workplace: hiring discrimination, slower professional evolution, lower compensation, and weak presence in the management bodies.

Some laws have been passed over the last decades to erase remuneration gaps or to enhance female representation among staff representatives. But these legal provisions enacted in favour of women are often not applied by French companies. Is it because women themselves tend not to believe that they should receive the same treatment as men? Is it because they are not claiming their rights because of the fear of repercussions? Without falling into too deeper sociological considerations, it is worth noting that even quite recently, women were still earning on average 24 percent less than men for the same job².

¹ In the past, such ministry was more generic as it was dedicated to the promotion of women's rights at large.

² Key figures – 2018 edition: "Towards real gender equality" – published by the Secretary of State for gender equality

This is certainly the reason why the French government has made of gender equality one of its central priorities and some daring measures have recently been presented to that effect.

This article presents an overview of some French legal provisions that seek to promote gender equality in the work place along with the latest reforms to reach and ensure "real and effective gender equality" as announced by the Ministry of Labour.

Overview of French Employment Law Provisions

Remuneration and Benefits in Kind: Cornerstone of the Fight for Gender Equality

Pursuant to article L. 3221-2 and seq. of the French labor code, any difference of treatment based on gender is strictly forbidden. Tasks requiring similar professional skills materialized by a certification, a degree or a professional experience, responsibilities, mental or physical loads are considered equal work.

By way of example, a difference of salary between a male and a female accountant can be rightfully justified if there is a different qualification along with requirements that include less length of service and fewer responsibilities³.

Conversely, the "equal pay for equal work" principle does not only apply to women. French Supreme Court has held on multiple occasions that maternity allowances or additional paid time off should not only benefit female employees⁴.

Employees who have been discriminated against due to their gender can be reinstated and/or be awarded damages in court in addition to back payment of the difference of remuneration they should have received. The employer can also be held liable to pay a fine of EUR 3,750 and/or be sentenced to a one-year imprisonment (albeit theoretical). The judge can also issue a specific order forcing the employer to provide supporting evidence of the potential lack of discrimination raised against the company.

Collective Negotiation: The Promoted Way to Reach Gender Equality

Since September 24, 2017⁵, companies can adapt the legally required topics and frequency of mandatory collective negotiations by way of company-wide collective agreements.

However, in the absence of such an agreement, companies with at least 50 employees are legally required to negotiate at least once every four years on gender equality. In the absence of any such agreement, the employer must set up an action plan on the goals and corrective measures to implement every year in order to achieve gender equality in the workplace.

³ French Supreme Court, Employment law division, January 19th, 2012, n°10-20.127

⁴ French Supreme Court, Employment law division, February 27th, 1991, n°90-42.239; French Supreme Court, Employment law division, April 9th, 1996, n°94-43.279

⁵ Entering into force of the "Macron" Legislative orders

Failure to comply with these requirements can lead to the company being fined in an amount up to 1 percent of all remunerations paid during the period that the company did not have an adaptation agreement or an action plan.

Employees' Representation: Gender Equality Can Limit Other Rights

Some legal reforms have proved counterproductive. The rule on equal representation in professional elections is a good example of the adversarial effect some gender equality rules or affirmative action can have.

In order for staff representatives to mirror the headcount (and in the hope to reach a more significant female representation) a new law was passed in 2015, whereby the number of female candidates should be proportional to the number of females in the organization. Thus, if a company includes 90% of men, parity imposes at least 10% of female representation.

The French supreme court⁶ went even one step further: in a recent case, the company's headcount (77 percent of women) suggested that the lists of candidates should have exclusively included women. As unions were struggling to recruit female candidates, they decided to present a list with only one male candidate instead. The elections were subsequently invalidated by the French supreme court who seemed to add an additional condition: when several seats are available, the lists of candidates must present an equal number of women and men. If not, the elections must be invalidated.

This ruling certainly had a negative impact as it:

- prevented employees from having staff representatives;
- prevented unions from proving a potential representativeness;
- potentially led to a difficult social climate within the company.

Some similar decisions are nevertheless likely to follow with the implementation of the new Social and economic committee.

New Measures for Effective Workplace Gender Equality

On November 22nd, 2018, the Ministry of Labour and the Secretary of state for gender equality have decided to bring the fight to the next level and thus presented one of their core programs: an index that measures how companies are tackling gender equality issues through various rating criteria.

A governmental decree setting forth the modalities to implement such an index was enacted on January 8th, 2019.

⁶ French Supreme Court, Employment law division, May 9th, 2018, n°17-17.088

The index is made of five weighed indicators.⁷

Indicator	Points	Elements to be taken into account
Salary difference between men and women with comparable ages and positions	0 to 40 Points	<ul style="list-style-type: none"> - Base and variable remuneration, individual and performance bonuses, benefits in kind; - CBA classification or the socio-professional categories (workers, technicians, engineers and executives etc.) - Four age categories: under 30, from 30 to 40, from 40 to 50, over 50.
Opportunity for pay raise	0 to 20 points	<ul style="list-style-type: none"> - The company must have given raises to the same number of men and women with a delta of 2 percent or two persons.
Opportunity for promotion	0 to 15 points	<ul style="list-style-type: none"> - The company must have promoted an equal number of men and women. Could be calculated over a three-year period.
Raises following a maternity leave	0 to 15 points	<ul style="list-style-type: none"> - The company must comply with the legal obligation to top-up the remuneration of employees coming back from maternity leave with all global raises that have been decided during said leave along with the average individual pay raises in the company⁸.
Number of women among the top 10 highest paid employees	0 to 10 points	<ul style="list-style-type: none"> - There must be at least four women in the top 10 highest remunerations in the company

⁷ These indicators could be subject to some adjustments depending on the company's headcount. For instance, in companies with 50 to 250 there would be only 4 indicators out of 5. Instead of the chances to get a raise and a promotion, a weighed indicator of 35 points will measure chances to get a raise for women and men, irrespective of whether said raise is related to a promotion or not.

⁸ According to surveys, such provision is almost never applied

In terms of supplying the data necessary to calculate the score, companies are already collecting them for the Social and Economic Database. For determining the score related to year 2018, the timeline has been set as follows:

Headcount of the company	Publication deadline
50 to 250 employees	Until March 1 st , 2020
251 to 1000	Until September 1 st , 2019
Over 1001	March 1 st , 2019

According to the Ministry of Labour, 7,000 inspections will be conducted each year by the Labour Inspection on gender equality.

If the company scores below 75 points out of 100, corrective measures will have to be implemented and failure to implement such measures could then lead to financial penalties that could go as far as 1 percent of the company's payroll. Corrective measures could include:

- According an equal amount of pay raises and promotions to women and men;
- Ensure women and men benefit equally from the company's top remunerations;
- Apply the legislation with regards to women returning from maternity leave.

On top of financial penalties, the fact that companies will have to publish their results on their website should have a positive effect as a bad score could necessarily deter people from working for a company where gender equality is not respected.

About Mayer Brown

Mayer Brown is a global legal services provider advising clients across the Americas, Asia, Europe and the Middle East.