Legislation

Publication of the law on the simplification of legal measures in the Official Journal


This law contains several provisions on social matters, relating in particular to:

- **Reform of working hours**: the law has inserted an article L. 3122-6 into the Labor Code, specifying that the distribution of working hours over a period greater than a week up to a maximum of a year laid down in a collective bargaining agreement does not constitute a modification of the relevant employment contract.

- **Extending the right to paid leave**: up to now, in order to be entitled to paid leave, an employee had to be able to demonstrate that he or she had completed ten days of actual time worked for the same employer. The law has abolished this condition of ten days of actual time worked.

- **The notification of disciplinary sanctions**: for certain disciplinary sanctions, the employer must convene the employee to a prior meeting. The Labor Code stated that the sanction could be applied at the earliest one full day after the date set for the interview. From now on, the law provides that the sanction may apply at the earliest two working days after the date set for the interview.

- **Remote working**: the law has inserted three articles concerning remote working into the Labor Code. In particular, it defines the concept of remote working and the employer's obligations in respect of its employees working remotely.

- **Incapacity following an illness or a non-occupational accident**: the law now provides that in a case of dismissal, the notice period will not be worked out and the employment contract is broken on the date of notification of dismissal. However, the notice period will be taken into account in calculating severance pay. The failure to work out one's notice will not give rise to any payment in lieu of notice.

Approval of the national cross-sectoral agreement of 13 January 2012 on short-time work and the national cross-sectoral agreement (NCA) of 6 February 2012 on long-term short-time working arrangements

A decree of 4 May 2012 approved the national cross-sectoral agreement (NCA) of 13 January 2012 on short-time work (Decree of 4 May 2012, OJ 8 May 2012).

Thus, the NCA has been made obligatory for all employers and employees included in its territorial and sectoral scope of application.

To recap, the NCA of 13 January 2012 contains provisions concerning:

- the base for calculating hourly remuneration paid by the company;
- short-time work periods taken into account in calculating the length of paid leave;
- how short-time work will affect the distribution of mandatory and optional profit-sharing.

A second decree dated 4 May 2012 approved the national cross-sectoral agreement (NCA) of 6 February 2012 concerning long-term short-time work (Decree of 4 May 2012, OJ 10 May 2012).

Thus, the NCA has been made obligatory for all employers and employees included in its territorial and sectoral scope of application.

Under the terms of the NCA of 6 February 2012, the social partners asked Unédic to conclude an amendment to the agreement signed with the State concerning the financing of long-term short-time work. This amendment should provide in particular for the sum of Unédic's contribution to the financing of long-term short-time work to be set at 2.90 euros from the first hour onwards.
Publication by the DGEFP of a detailed circular on short-time work

A detailed circular was published on 4 May 2012 by the DGEFP [General Delegation for Employment and Training] on all of the recent amendments to the instrument on short-time work (DGEFP Circular 2012/08 of 4 May 2012 NOR: ETSD1222939C).

In fact, no less than three executive orders have recently amended certain provisions in the Labor Code on short-time work and long-term short-time working arrangements.

• The decree of 7 February 2012 was aimed at extending the possibilities for training, skills assessments or recognition of prior experience in the context of long-term short-time working agreements. It also increases the hourly payment to the employee on short-time paid to him or her during these training periods to 100% of the employee’s net salary (Decree No. 2012-183 of 7 February 2012, NOR: ETSD1202684).

• The decree of 28 February 2012 increased the hourly sum of the specific short-time workers’ benefit for which the State must pay to 4.84 euros for companies with 1 to 250 employees and 4.33 euros for companies with over 250 employees.

Moreover, this decree temporarily reduced the minimal duration of agreements giving rise to an entitlement to benefit from long-term short-time working arrangements, lowering the duration from three to two months up to 30 September 2012.

Finally, this decree extended the scope of prior consultation with staff representatives concerning training that may be undertaken during long-term short-time work (Decree No. 2012-275 of 28 February 2012, NOR: ETSD1205857D).

• The decree of 9 March 2012 abolished the request for compensation which the employer had to request from the Prefect prior to moving employees onto short-time work. From now on, employers will send their requests for specific allowances after switching to short-time work. The prior opinion of the staff representatives will be transmitted by the employer to the Prefect without delay. In the case of an unfavourable opinion, the employer will have to attach the information presented to them, setting out the grounds for the reduction or temporary suspension of work.

The decree also specifies that employees whose work time is set at an all-inclusive number of hours or days over the year may benefit from the specific short-time workers’ benefit in the case of a temporary closure of all or part of the establishment (Decree No. 2012-341 of 9 March 2012, NOR: ETSD1205432D).

Case law

Can the absence of economic grounds lead to the invalidity of layoff proceedings for economic reasons initiated by an employer?

The company Viveo France submitted a restructuring project entailing the loss of 64 jobs and a social plan to its works council. After considering the expert report, the works council brought the case to the High Court in expedited proceedings in order that it might rule that no economic cause justified the initiation of layoff proceedings and to have these invalidated.

The Paris Court of Appeal considered that the works council was entitled to request invalidation of the proceedings and all its subsequent effects, since the lack of economic grounds made the consultation of the works council redundant and rendered the entire subsequent proceedings ineffective.

The Court of Appeal justified its position on the basis that a consultation on a project claiming the existence of an economic reason whereas in fact there was none could not constitute a consultation as intended by the legislators, who would have had to be ignorant of the most basic logic if they intended that layoff proceeding should be invalidated if there was no redeployment plan and yet would not be invalidated if the actual basis of this plan and the trigger for the whole process were non-existent.

The French Supreme Court criticised the position taken by the judges on the merits.

First of all, in a statement of principle which has attracted a lot of attention it stated that “pursuant to [article L.1235-10 of the Labor Code], only the absence or inadequacy of a social plan submitted to the staff
representatives leads to the invalidity of the layoff proceedings for economic reasons”. In the present case, it concluded from this that the layoff proceedings could not be invalidated by reference to economic grounds for said layoff, since the validity of the plan was independent of the cause of the layoffs (Supreme Court, Social Affairs Division, 3 May 2012, No. 11-20741).

Can the reply by a former employee to a letter from the employer asking him whether she wished to avail of her priority right to reemployment be considered a request by the employee to avail of this priority right?

An employee hired as an assembly-line worker was laid off for economic reasons. Some months later, she received a letter indicating that she could express her desire to avail of her priority right to reemployment, as the company needed temporary staff in light of additional work. The employee replied in the affirmative to the proposal made to her. Subsequently, the company took on two other former employees in posts of assembly-line workers which were not offered to her. She then took her case to the labour court requesting damages for a breach of her priority right to reemployment.

The Amiens Court of Appeal upheld the employee’s applications. The company appealed the decision. It claimed that a desire to avail of the priority right to reemployment might possibly be implied from a reply to a request by the employer but that in this case the scope of the reply was necessarily determined by the terms of the question put to her by the employer. In this case, the employer believed that it had clearly restricted its question to the provision of temporary employment and that the employee’s reply could not therefore be equivalent to a request for a priority right to reemployment on a more general basis.

The Supreme Court rejected the company’s appeal. It indicated firstly that “the request to take up the priority right to reemployment may be presented either spontaneously or in reply to an invitation by the employer, provided that it is explicit”. It then approved the view of the Court of Appeal whereby the employee had applied to take up the priority right to reemployment after pointing out, firstly, that in a letter to the employee the employer had invited her to express her desire to avail of her priority right to reemployment, and proposed several posts to her and secondly that the employee had replied in the affirmative and opted for one of the posts offered (Supreme Court, Social Affairs Division, 3 May 2012, No. 11-20741).

Is an employer entitled to freely access files which an employee has stored in a folder entitled “My documents”?

An employee was dismissed for serious fault for having misused his personal computer by recording photographs of a pornographic nature and videos of other employees taken against their will. He applied to the labour court, contesting the lawfulness of his dismissal.

The Nîmes Court of Appeal upheld the employee’s claims on the basis that, according to the bailiff’s records, the incriminated files were on the hard disc of the employee’s computer in a folder entitled “My documents” and that opening them without the presence of the interested party was not justified by any particular risk or event that would justify the violation of his privacy, so that opening them could not justify his dismissal.

The Supreme Court criticised the position taken by the judges on the merits. Firstly, it recalled that “files created by an employee using computer equipment made available to him by his employer for work requirements are presumed to be of a professional nature so that the employer is entitled to open them without the presence of the employee unless the employee has identified them as personal.” (Supreme Court Social Affairs Division, 11 April 2012, No. 11-11037).

May an employer examine the telephone statements of a protected employee [i.e. an employee protected against dismissal]?

A protected employee brought a case before the labour court seeking a court-ordered termination of his employment contract on the basis, in particular, that his employer had not respected his status of protected employee when it consulted the list of his telephone calls made on the mobile phone with which the company had provided him.
The Lyon Court of Appeal dismissed his application on the basis that the company merely examined the telephone statements provided by the operator of the phone, which had been made available to him by the company and that this simple examination did not constitute surveillance of its employees requiring that a particular procedure be respected.

For its part, the Supreme Court stated that “in order to accomplish their legal mission and to preserve the confidentiality pertaining thereto protected employees, whose ranks included board members and directors of social security funds had to be able to access equipment or processes at their place of work which would not allow their telephone calls to be intercepted and their interlocutors to be identified.”

In this case, the Court of Appeal pointed out that an examination by the employer of telephone statements for a phone made available to an employee allowed the latter’s interlocutors to be identified. Therefore, the Supreme Court criticised the position taken by the judges on the merits and referred the parties to another court of appeal. (Supreme Court, Social Affairs Division, 4 April 2012, No. 10-20845).

May the facilities accorded by a collective bargaining agreement allowing trade union sites to make a company’s intranet sites mutually accessible through “links” be reserved solely to those trade unions representing workers at company level?

The trade union “Sud Renault Guyancourt-Aubevoye”, recognised representative at the level of the Guyancourt-Aubevoye establishment was allocated an Intranet site. Management refused to make this site accessible to the employees on the basis that the name of the trade union appearing there, “Syndicat Sud Renault” was not identical to its statutory name and that the trade union had inserted links allowing access to the trade union sites of other establishments on the site in disregard of the provisions of the applicable charters, which reserve the insertion of links solely to the representative trade unions at company level. The trade union “Sud Renault Guyancourt-Aubevoye” applied to the judge to have the employer ordered to make its intranet site accessible.

Its applications were dismissed by the Versailles Court of Appeal and the trade union then brought an appeal before the Supreme Court.

The Supreme Court held that the trade union was correct in claiming that “the facilities provided by a general or more limited collective bargaining agreement allowing trade union sites to be made mutually accessible through links on the company Intranet cannot be reserved to only the representative trade unions at company level without breaching the principle of equality, since posting and disseminating trade union communications within the company are linked [...] to the setting up by trade union organizations of a trade union division, which is not subject to the requirement of being representative.”

However, the Supreme Court upheld the Court of Appeal in dismissing the trade union’s claims, on the basis that the latter, had a “name other than that specified in its articles of association and which was such as to mislead employees regarding its scope of application and the extent of how representative it was.” (Supreme Court, Social Affairs Division, 23 May 2012, No. 11-14930).

Can the victim of an occupational accident or illness due to inexcusable fault on the employer’s part claim specific compensation for sexual impairment and temporary incapacity?

The employee of a temporary employment company was the victim of an accident in the course of carrying out work for one of his employer’s clients. Responsibility for the accident was assumed, under occupational legislation, by the primary health insurance fund and the employee was granted an annuity. Since the accident has been recognised as due to inexcusable fault on the part of the employer, the employee is seeking compensation for various counts of damage.

The Limoges Court of Appeal granted the employee a sum on the basis of his sexual impairment and another as compensation for his temporary incapacity.

The primary health insurance fund, the temporary employment company and the client company appealed to the Supreme Court. They maintained, in particular, that the sexual impairment formed an integral part of the count of “loss of enjoyment of life” and that the employee could not claim two separate counts of compensation.
The Supreme Court dismissed the appeal. It stated that “the provisions of article L. 452-3 of the Social Security Code, as interpreted by the Constitutional Court in its ruling No. 2010-8 QPC of 18 June 2010 did not constitute an obstacle for a victim of an occupational accident or illness, in the case of inexcusable fault on the employer’s part and regardless of an increase in the annuity paid to him or her, to applying to the social security court to have the employer ordered to compensate not only the counts of damage listed in the abovementioned legal text but also any damage not covered by Title IV of the Social Security Code.”

The Supreme Court held that the sexual impairment and temporary incapacity were not among the counts of damage covered by Title IV of the Social Security Code and that compensation for them was lawful (Supreme Court, Second Civil division, 4 April 2012, No. 11-14311 and 11-14594).

In a judgement delivered the same day, the Supreme Court specified that in the case of an occupational accident, medical, surgical, pharmaceutical and ancillary expenses, transport expenses and in general the expenses deriving from functional re-adaptation, occupational rehabilitation and the redeployment of the victim come under the counts of damage expressly covered by Title IV of the Social Security Code, for which the victim cannot seek compensation from the employer (Supreme Court, Second Civil division, 4 April 2012, No. 11-18014).

Nor may the victim claim compensation on the basis of his or her permanent incapacity (Supreme Court, Second Civil division, 4 April 2012, No. 11-15393).

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