

The Brief

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Employment Law Practice Group

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1. Purchasing power: Commutation to cash of rest days and rights acquired relating to a time savings account

Within the scope of increasing purchasing power, employees now have the possibility of waiving all or part of their entire or half RTT day (replacement compensatory rest pursuant to the 35-hour work week), thus giving rise to the increase of their remuneration. Said increase must be equivalent to at least the increase rate applicable to the first hour of overtime performed within the company.

In the case of employees whose working time is calculated in days per year, the commutation to cash of RTT days will apply only in companies where no agreement was concluded regarding the possibility for the employer to "purchase" its employees' RTT days. In order to benefit from this commutation to cash, the employees have to make an individual written request to their employer with whom they will have to negotiate the increase of remuneration, which cannot be less than 10%.

Commutation to cash depends on when such RTT days were acquired: (i) when RTT days are acquired before December 31, 2007, the purchase of these days, which are paid at the latest on September 30, 2008, will be exempt from social contributions, save CGS and CRDS contributions, if the employee makes such request at the latest on July 31, 2008. (ii) When RTT days are acquired between January 1, 2008, and December 31, 2009, the purchase of these days will be exempt from tax and will give rise to a reduction of the employees' social contributions relating to overtime pursuant to the conditions set out by the TEPA law.

Compensatory rest can also be commuted to cash. From January 1, 2008 until December 31, 2009, with the employer's approval, employees may commute into money all or part of their acquired replacement compensatory rest into an equivalent increase of remuneration. Such increase of remuneration will benefit from the favorable tax and social security regime set out by the TEPA law.

Rest days allotted to a time savings account can also be commuted to cash. Such provision will apply only in companies where such possibility was not provided for by the agreement relating to the time savings account.

Employees can ask their employer to buy their rest days that have been accrued in their time savings account.

Employees may make such request for the rest days that will be allotted to a time savings account on December 31, 2009. However, employees will not be allowed to ask for the commutation to cash of days acquired for their annual paid vacation. For the tax and social regimes, see (i) and (ii) above.

2. TEPA law: Labor, employment and purchasing power in France

The Law for the promotion of labor, employment and purchasing power (*Loi en faveur du travail, de l'emploi et du pouvoir d'achat*) of August 21, 2007, known as the "TEPA law", which entered into force on October 1, 2007, institutes a tax exemption regime for employees as well as an exemption regime regarding the employer and employee shares of social security contributions on overtime.

The 35-hour work week remains the legal working time. Under conditions set forth by the French Labor Code and the applicable bargaining agreement, if any, the employee may be required to perform overtime over and above that legal duration, thus giving rise to additional pay.

Before the passing of the TEPA law, the payment of such overtime hours was entirely subject to employer and employee social security contributions, as well as to income tax.

Now that the TEPA law has been adopted, the employee benefits from (i) a reduction of the employee's share of social security contributions on overtime pay, within the limit of 21.5% of the total amount of social security contributions (excluding pension, unemployment and CSG/CRDS contributions), and from (ii) an income tax exemption regarding the entire overtime pay, subject to compliance with the legal or collective bargaining agreement rates on overtime pay.

As for employers, with regard to the payment of every hour of overtime, they are entitled to a lump-sum deduction on the employer's share of social security contributions, whose amount varies according to the company's headcount (1.50 euros per hour of overtime for companies with fewer than 20 employees, and 0.50 euros for other companies).

For companies with fewer than 20 employees, the TEPA law does however increase the overtime pay rate for the first four hours of overtime, which goes from 10% to 25%, unless otherwise provided for by a collective agreement.



3. New social security treatment on stock options and restricted stock units

The French social security financing law for 2008 has provided for two additional contributions on stock options and restricted stock units (RSUs).

The first contribution is to be borne by the employer. According to the employer's choice, its funding base equals:

- for stock options, either the value of the stock options as it appears in the company's consolidated accounts or 25% of the fair market value of the underlying shares on the date the stock options were granted;
- for RSUs, either the value of the RSUs as it appears in the company's consolidated accounts or the fair market value of the underlying shares on the date the RSUs were granted.

The contribution rate is 10%. It must be paid in the month following the stock option grant.

The second contribution is to be borne by the beneficiary. Its funding base equals the acquisition gain, i.e.:

- for stock options, the difference between the value of the shares on the date the stock options are exercised and the exercise price;
- for RSUs, the fair market value of the shares on the vesting date of the RSUs.

The contribution rate is 2.5%. It must be paid in the month following the sale of the shares, whether they were acquired through stock options or RSUs.

These new rules apply to all grants carried out as from October 16, 2007.

4. Information / consultation on employee performance evaluation system

In a decision of November 28, 2007, based on Article L.236-2 paragraph 1 of the French Labor Code, the employment division of the French Supreme Court (*Cour de Cassation*) imposes on the employer the information and consultation of the Health, Safety and Working Conditions Committee (*Comité d'hygiène, de sécurité et des conditions de travail* - hereinafter the "CHSCT") prior to the implementation of an annual employee performance evaluation system.

Article L.236-2 paragraph 1 of the French Labor Code provides that "*the Health, Safety and Working Conditions Committee's purpose is to contribute to the protection of the "physical and mental" health and safety of the establishment's employees (...)*".

The French Supreme Court judges that in this case, the employees' annual performance evaluation must allow for utmost coherence between salary and the achievement of annual objectives, and that it could have an impact on the employees' behavior, career development and salary. Lastly, it considers that conditions and stakes during the annual performance evaluation interview could manifestly generate psychological pressure with consequences on working conditions.

Consequently, the company must inform and consult its CHSCT when there is a possibility that the conditions of the annual employee performance evaluation interview may have an impact on the employees' behavior and stress, as well as repercussions on working conditions.

In such a case, the CHSCT must be informed and consulted prior to the implementation of the annual employee performance evaluation system. For lack of this information and consultation process, the CHSCT can solicit before the District Court (*Tribunal de Grande Instance*) to have the implementation of the annual employee performance evaluation interview system suspended until it is duly informed and consulted thereon.

Pursuant to Article L.432-2-1 of the French Labor Code, the Works Council must also be informed and consulted, while each employee must be informed beforehand on the implementation of said system, according to Article L.121-7 of the French Labor Code. This French Supreme Court decision confirms the current upward trend as to the importance of the CHSCT's role and competence in French companies.

5. Termination of the employment contract during the trial period

In a decision dated November 22, 2007, the employment division of the French Supreme Court (*Cour de cassation*) delimited downwards the employer's prerogative to terminate an employee's employment contract during the trial period.

Under French law, the employment contract can be terminated during the trial period irrespective of the provisions relating to the compliance with a notice period, a specific procedure, a real and serious cause of dismissal or the payment of severance pay.

Traditionally, French Labor Courts refuse to control the reasons that lead to the early termination of an employment contract, considering that the decision remains that of the employer. However, some exceptions to this principle have been admitted in cases where termination during the trial period proves abusive and, especially, contrary to its purpose, that is, the assessment of the employee's professional competence. Such exceptions include cases where the trial period was used to fulfill temporary needs in personnel or where the employer had already planned, from the moment the contract was entered into, a motive to terminate it during said trial period.

In the case that led to the aforementioned French Supreme Court decision, the employee was hired as a *chargé d'affaires* under an indefinite-term employment contract, but the employer terminated it before the end of the trial period. The employee brought his case before the Labor Courts, considering that the termination of his contract was unfair owing to the fact that the position he had been hired for had been eliminated.

The French Supreme Court reasserted the traditional purpose of the trial period, but also held that, as a consequence, the termination of the trial period for a reason not related to the employee, but rather to the elimination of the job in question, was abusive. This decision clearly refers to dismissal on economic grounds. Hence, when the trial period is terminated because the position is eliminated, this job elimination must therefore be justified. Moreover, the courts will exercise the same control as in situations of dismissal on economic grounds. Furthermore, in the event where the contract's termination for economic reasons proves to be possible during the trial period, we can wonder whether the employer is required to respect the specific procedure of dismissal on economic grounds.

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