

## LABOUR LAW

### NEWS - CORONAVIRUS N°4

#### Short time working - termination by mutual agreement - dismissal

9 APRIL 2020

This newsletter sets out developments in France relating to short time working, termination of employment by mutual agreement, redundancy procedures during the Covid-19 crisis period and addresses some questions which are still unanswered on these same subjects.

#### 1. Partial activity (or « short time working »)

In summary, here is what should be borne in mind about short time working and its implementation during a public health emergency:

- As from the implementation of short time working in the company, the employer has a **period of 30 days** to request the agreement of the Administration. The employer specifies in its request the start date and the estimated end date of the need for short time work. The Administration's acceptance has retroactive effect from the date of commencement of the short time working as referred to by the employer in its request.
- The Administration has pointed out that the request must state **the detailed circumstances and economic situation giving rise to the request**: a mere mention of Covid-19 cannot suffice. The request must specify the impact of the pandemic on the business of the company and its employees.
- The request can be formulated for a maximum period of **12 months** and for **1607 hours per year and per employee**.
- **The opinion of the CSE** can be sent to the Administration within **2 months** following the request for authorization of short time work.
- The Administration has **48 hours** to respond to the request. Its silence is deemed tacit acceptance.
- The allowance covers **70% of the employee's previous gross remuneration** (used as a basis for calculating the holiday pay), up to a limit of **4.5 SMIC**, with a minimum of **€8.03 per hour**, regardless of the size of the company's workforce.

- The allowance is subject to CSG/CRDS charges (rate of 6.7%) after deduction for professional expenses (1.75%) and is exempt from social security contributions.
- **Employees with a working time counted by hours or days are eligible** for short time work in the event of a company closure, but also in the event of a **reduction** in the collective working hours usually practiced in the establishment.
- Short time work may **be imposed on protected employees** if it concerns all employees of the company, establishment, department or workshop to which the protected employee(s) is/are assigned or attached.
- The **pay slip** of the employee placed on short time work must indicate **the number of hours off work compensated for the short time work allowance, the rate applied for the calculation of the allowance and the amount of the corresponding compensation paid to the employee**. Employers have until **March 26, 2021** to comply with this obligation. In the meantime, they may submit the document provided for in Article R. 5122-17 of the Labour Code.
- In the event of **fraud** in relation to short time work (claiming compensation from the State for hours during which employees worked or were on paid leave or days off in lieu of overtime pay), the penalties incurred are :
  - Reimbursement of aid received ;
  - Prohibition to benefit from public aid for 5 years;
  - Criminal penalty for concealed labour (fine of 225,000 euros for the legal entity in particular).

Regarding pending items or texts awaiting publication :

- **The complementary short time working allowance** that the employer may decide to pay in excess of 70% of the employee's gross remuneration is subject to the same preferential CSG/CRDS rate (6.7%). **The Government has announced that this top up by the employer will not be subject to social**

**security contributions.** This information is also available on the social security authority website. However, the text establishing this exemption has not been adopted or published yet.

- **Foreign companies with no establishment in France** that employ at least one employee carrying out his or her activity on the national territory may benefit from the short time work scheme if they are covered by the French social security and unemployment insurance system. **However, to date, the website <https://activitepartielle.emploi.gouv.fr/> does not allow a foreign postcode to be indicated. If the site is to be updated, it is not yet effective.** Requests for short time work by foreign companies with no establishment in France cannot therefore be registered yet.

## 2. Termination of employment by mutual agreement

Following Executive Order n°2020-306 of March 25, 2020, which suspends specific time limits applicable to the decisions of State administrations, **some Labour Administrations have suspended the approval process for termination of employment contracts by mutual agreement.**

In particular, the labour administration of the Ile de France region has informed us that for the time being:

- the withdrawal periods not expired by 12 March 2020 would start again "from zero" from 24 June 2020 (estimated date of the end of the public health emergency + one month);
- that no application for approval sent from 12 March to 24 June 2020 would be subject to approval. A new application will have to be made from 24 June 2020.

Other Labour Administrations (the Provence-Alpes-Côte d'Azur region, for example) do not apply the said Executive Order. The position of the Directorate General of Labour ("DGT") is therefore expected to put an end to the following issues that arise:

- Does the Executive Order have an impact on the withdrawal period left to the parties in addition to the approval period?
- If the Executive Order applies, how to manage the situation of employees whose employment contract should have been terminated between 12 March and 24 June 2020 (salary, performance of duties, etc.)?
- Will applications for approval which have been sent via « TéléRC » since 12 March 2020 and which have been acknowledged by the Labour Administration (even though no approbation is supposed to be given) be considered as having been accepted if the Administration is silent within the 15-day period?

The Directorate General of Labour is expected to come to a decision on this issue within a week.

## 3. Dismissal procedures

After announcing a "ban" on redundancies during the Covid 19 crisis, the Government has reversed its position and invites employers to favour other alternatives (short time work, remote working, etc).

However, what about dismissal procedures initiated before 12 March 2020, but for which the preliminary interview had to be held after this date? Or disciplinary procedures?

At this stage, no clarification has been provided by the Labour Administration.

Caution is called for and we recommend the following:

- To postpone the preliminary meeting prior to a contemplated dismissal to a date after the end of the lockdown in France. Indeed, to date, case law requires face to face meetings. It does not authorize telephone interviews (French Supreme Court, 14 November 1991, No. 90-44.195) and has never ruled on the question of preliminary meetings by videoconference.
- Eventually, a preliminary meeting could be held by videoconference subject to obtaining the employee's written consent, which has already been admitted by the Rennes Court of Appeal (11 May 2016 - No. 14/08483). In this case, the employee may still be assisted by an employee advisor who may also connect to the videoconference. The device used must allow the identification of each of the participants.

Regarding sanctions or dismissal on disciplinary grounds, the 2-month limitation period available to the employer to initiate the procedure is not yet suspended in view of the Covid 19 crisis. It is therefore recommended that the employee be called for a preliminary meeting (*see options above*) within the 2-month period to interrupt the limitation period.

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Reinhart Marville Torre's Employment Law teams are fully mobilized to accompany you on these points and answer your questions.

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