

TIME TO ADAPT

COVID-19

23 July 2020

Reorganizing your business: alternatives to redundancy plans

In the face of the current and unprecedented health/economic crisis, the legislative arsenal implemented since 22 September 2017 offers serious options to companies that are in financial difficulty and that wish to restructure their workforce without implementing a collective redundancy plan. Among the new options, the partial activity scheme, Collective Mutual Termination and the Collective performance bargaining agreement are tools that merit consideration.

The partial activity scheme

The partial activity scheme (also known as “short-time work”) is a temporary state-funded tool aiming at preventing redundancies when companies face exceptional circumstances (e.g. decline in activity linked to the Covid-19 epidemic, administrative closure of an establishment etc.) which force them either to reduce their staff working time or temporarily shut down the business.

Under this scheme, employees are entitled to a compensatory allowance paid by the employer which is equal to at least 70% of their hourly gross remuneration (i.e. approximately 84% of the net remuneration) for each unworked hour they would have normally performed if they had not been subject to short-time work. In return, the French state provides the concerned Companies with a partial compensatory allowance equal to:

- **70%** of employees’ gross hourly wages for each partial activity hour between **1 March 2020 and 31 May 2020** (capped at 4.5 times the hourly rate of the minimum wage);
- **60%** of employees’ gross hourly wages for each partial activity hour between **1 June 2020 and 30 September 2020** (capped at 4.5 times the hourly rate of the minimum wage).

Under recent legislation, the compensatory allowance allocated to Companies belonging to economic sectors that have been particularly affected by the Covid-19 crisis (e.g. tourism industry etc.) will remain equal to 70% of the employee hourly gross remuneration. In other words, partial activity within these companies will continue to be fully publicly funded until at least 30 September 2020.

With regards to the implementation procedure for the partial activity scheme, French labour authorities (so-called “DIRECCTE”) may authorize the implementation of short-time work as from the first hour of work reduced below the legal working-time (i.e. 35 hours per week) provided that the reduction/closing of the business activity is both temporary and collective (e.g. concerns all the employees within a business unit etc.).

The long term partial activity scheme

Law n°2020-734 dated 17 June 2020 provides for a specific long-term partial activity scheme (so-called “*activité réduite pour le maintien de l’emploi*” or “ARME”) which is available to businesses going through lasting economic difficulties but whose sustainability is not at risk.

In contrast with the above described partial activity scheme, the “ARME” presents important differences, including:

- The requirement that there be a collective bargaining agreement providing for the implementation of the “ARME”;
- The need to follow a specific approval procedure with the DIRECCTE;
- The possibility to submit an “ARME” request during a limited period of time (i.e. only until 30 June 2022);
- The employer’s obligation to undertake specific commitments aiming at avoiding redundancies.

A soon-to-be issued decree will set out in detail the mandatory content of “ARME” collective bargaining agreements.

Collective performance bargaining agreement

The Macron ordinances issued in September 2017 have unified the different pre-existing employment collective bargaining agreements aiming at safeguarding jobs into one specific tool: the Collective performance bargaining agreement (hereafter « CPBA »).

The CPBA may be entered into by companies for the purpose of either avoiding redundancies or increasing employment. Considered a prevention tool, the objective of this agreement is to allow companies to adapt quickly and flexibly to market requirements. Therefore, that a company face actual economic difficulties is not a prior condition to the implementation of a CPBA.

On either a permanent basis or for a fixed term, the CPBA allows the Company to:

- Amend the working time organization/duration;
- Amend employees' remuneration (although the Company must pay the minimum wage set out in the industry-wide collective bargaining agreement);
- Determine the conditions for occupational/geographical mobility.

Once the CPBA has been entered into, the employer must inform its employees of both the existence and the content of the agreement. Upon reception of the notification, the employee has one month to either accept or refuse the application of the CPBA.

The refusal by an employee to accept the CPBA constitutes *per se* actual and serious basis for a dismissal, so therefore this situation must be differentiated from economic layoffs. In other words, regardless of the number of employees that would be dismissed for refusing the CPBA, the Company would not have to implement a collective redundancy/social plan.

The Collective termination based on mutual agreement

The collective termination based on mutual agreement (hereafter "CTMA") is a system that allows companies to collectively negotiate, with the union delegates, a determined number of employment terminations which would only be carried-out with the relevant employees' consent. As a result, the CTMA is a less confrontational and more participative way of reorganising a workforce.

In contrast with collective redundancy plans, the CTMA provides some significant perks, including that:

- It does not require an economic rationale (i.e. a CTMA may be set-up even though the Company is not in financial difficulties);
- Usual dismissal formalities do not apply (e.g. absence of a notice period, no prior interview/summoning of the employee etc.);
- Concerned employees cannot *a posteriori* challenge the termination of their employment contract, unless they prove that their prior consent was vitiated (e.g. pressure from the employer etc.);
- Concerned employees' employment contracts terminate on a selected date;
- Employers may refuse an application provided that the company is in a position to prove that the candidate/employee is essential to the business (e.g. specific know-how hard to find in the employment market etc.).

In relation to the implementation procedure, the DIRECCTE's prior approval of the CTMA collective bargaining agreement is mandatory. More specifically, the DIRECCTE is in charge of both verifying the content of the CTMA and ensuring that the works council has been duly informed in this respect.

In addition, a CTMA collective bargaining agreement must in particular provide for:

- The method for calculating the termination allowance (i.e. at least equal to the severance pay to which the redundant employee would have been entitled);
- The criteria that must be met by the employee so as to be able to apply to the CTMA (e.g. length of service etc.);
- Accompanying measures for employees post-termination of their employment contracts (e.g. training programs; supporting funds for new businesses etc.).

In any case, it is important to bear in mind that although a CTMA does not require an economic rationale, this system cannot be combined with a collective redundancy plan. For instance, in order to implement economic layoffs following a recent CTMA, the employer will have to prove that a significant change in the economic situation of the Company has occurred in the meantime.

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