

## French Employment Law Update – July 2021

Welcome to our quarterly newsletter, with a summary of the latest news and developments in French employment law.

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# Case law updates



**Macron scale of compensation due for unfair dismissal:** The application of the so-called Macron scale that provides for caps and floors of compensation due in the event of unfair dismissal set forth by [Article L. 1235-3 of the French Labour Code](#) was set aside by the Paris Court of Appeal in a decision rendered on 16 March 2021 (Court of Appeal of Paris, 16 March 2021, n° 19/08721). The Judges considered in the present case that the Macron scale did not ensure “a relevant and appropriate compensation of the loss suffered by the employee”. The Paris Court of Appeal followed in the footsteps of several other courts of first instance which, while admitting the conformity *in abstracto* of the Macron scale with Convention n° 158 of the International Labour Organization (ILO) have arrogated to themselves the right to set it aside should it not allow *in concreto* for adequate compensation of the loss suffered by the employee in case of unfair dismissal. The position of the French Supreme Court on this new rebellion of the courts of first instance against the Macron scale is awaited with interest, as it had concluded in the context of a specific opinion procedure<sup>1</sup> that the Macron scale was in conformity with the Convention n° 158 of the ILO ([Cass. soc., AP. 17 July 2019 n° 15013](#)).

**“Forfait jours” mechanism<sup>2</sup>:** The French Supreme Court recently reiterated that failure of the employer company to comply with its legal and conventional obligations in relation to the “forfait-jours” mechanism, the individual “forfait-jours” agreement is unenforceable, the employee being free to make overtime claims ([Cass. soc., 17 February 2021, n° 19-15.215](#)). Keeping in mind that on their side, the employer company could request the reimbursement of the additional rest days the employee had benefited from in counterpart of the “forfait-jours” mechanism ([Cass. soc., 6 January 2021, n° 17-28.234](#)). In the present case, the employer company was unable to demonstrate that it had organized between 2005 and 2009 the annual meeting provided for by the collective agreement that implemented the “forfait-jours” mechanism to discuss the workload, the organization of work within the company, the relationship between the employee's professional activity, their personal life and their compensation.

**Discrimination:** The French Supreme Court reminded that in the absence of a “neutrality clause” in the company's internal regulations (“*règlement intérieur*”)<sup>3</sup> prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, since this general and undifferentiated clause only applies to employees who are in contact with clients, the employer company cannot forbid the wearing of the Islamic headscarf ([Cass. soc., 14 April 2021, n° 19-24.079](#)). In the absence of such a neutrality clause, the dismissal of an employee who refused to remove their Islamic headscarf constitutes a discrimination based on the employee's religious beliefs and their dismissal must be held null and void.

**Redeployment obligation:** When contemplating a redundancy, the employer company has the obligation to search for available redeployment solutions in France within the group of companies it belongs to among the companies whose organization, activities or place of business ensure the permutation of all or part of the staff. In its decision rendered on 17 March, 2021 ([Cass. soc., 17 March 2021, n° 19-11.114](#)), the French Supreme Court specifies that, when liaising with the other companies of the group, the employer company has no obligation to mention the profile of the employees whose redundancy is contemplated (age, education, experience, qualification or seniority) in the letters circulated to the other companies in the course of the redeployment

**Dismissal held null and void<sup>4</sup>:** When the dismissal is held null and void, the employee may request their reinstatement in their previous job position, or failing that, in an equivalent job position. As reminded by the French Supreme Court in its decision rendered on 10 February 2021 ([Cass. soc., 10 February 2021, n° 19-20.397](#)) the employer company has no other choice than to reinstate the employee who made such request unless it is able to demonstrate that the reinstatement is materially impossible. In this decision, the French Supreme Court considers that the fact the employee found a new job since their dismissal does not constitute a material impossibility.

# Legislative developments

**Official database of the social security:** Implemented on 8 March 2021 pursuant to [the social security financing law for 2018](#), the Official database of the social security ("*Bulletin Officiel de la Sécurité Sociale*" or "BOSS") available on the website <https://boss.gouv.fr/portail/accueil.html> has been enforceable against the Administration and contributors since 1 April 2021 following the publication of two orders of [30 March 2021](#) and [31 March 2021](#). The "BOSS" is a documentary database that presents a consolidated version of the Administration's doctrine on social security contributions. At this stage, the "BOSS" only covers certain topics (general basis of calculation of the social security contributions, reduction and exemptions of social security contributions, benefits in kind, professional expenses, termination indemnities). It should soon cover other issues such as supplementary social protection.

**Teleworking organization:** The National interprofessional agreement for a successful implementation of the teleworking organization dated 26 November 2020 was extended by [an order of 2 April 2021](#). Its provisions are mandatory for (1) all employer companies that are not covered by a collective agreement signed at the company's level and addressing this topic and (2) belonging to a professional sector represented by one of the signatory employer organizations (i.e. MEDEF, CPME, U2P).

**Exceptional financial aid for employers of apprentices<sup>5</sup>:** The [amending finance law of 30 July 2020](#) introduced, subject to meeting certain conditions, an exceptional financial aid for companies, regardless of their workforce, for the hiring of apprenticeship and professionalization contracts in the amount to EUR. 5,000 euros for a minor and EUR. 8,000 for an adult. Initially granted for employment contracts concluded between 1 July 2020 and 28 February 2021, it was extended for contracts concluded between 1 March and 31 December 2021 (Decrees [n° 2021-224 of 26 February 2021](#) and [n° 2021-363 of 31 March 2021](#)). [Decree n° 2021-510 of 28 April 2021](#) harmonized the conditions to be met in order to benefit from this aid for companies with at least 250 employees.

**Paternity leave:** The [social security financing law for 2021 of 14 December 2020](#) has modified the rules applicable to paternity leave. For births up to 30 June 2021, paternity leave is 11 calendar days (18 days for multiple births) and must be taken within four months of the child's birth. For births occurring from 1 July 2021, this leave increases to 25 calendar days (32 days for multiple births), it being specified that four days must be taken by the employee at the end of the three-day birth leave<sup>6</sup>. [Decree n° 2021-574 of 10 May 2021](#) provides additional details on the new paternity leave regime: (1) the paternity leave must be taken, in principle, within the six months following the child's birth; (2) the balance of the paternity leave (21 or 28 days in the event of multiple births) may be taken in two periods, each of which must be at least five days long; (3) the employee must inform the employer of the expected date of the child's birth at least one month in advance; and (4) the employee must inform the employer of each date of departure on paternity leave and its duration at least one month in advance.

**Partial activity<sup>7</sup>:** [An order of 10 May 2021](#) sets the maximum number of hours of partial activity per employee entitling the employer to an allowance for the year 2021 at 1,607 hours. In addition, decrees dated n° [2021-671](#) and n° [2021-674](#) of 28 May 2021 set the rules relating to the amounts of compensation paid to employees placed in partial activity and of allowances received by employer companies as of 1 June 2021.

**Exceptional purchasing power bonus:** The draft amending finance law for 2021 adopted by the Council of Ministers on 2 June 2021 provides for the renewal of the exceptional purchasing power bonus (also known as the "Macron bonus") for 2021. This bonus, which is optional for the employer company, may be implemented either through a collective agreement signed at the company's level, an agreement approved by the employees or through unilateral decision. This bonus must be paid between 1 June 2021 and 31 March 2022. As for the 2019 and 2020 bonuses, the amount of the bonus may be adjusted according to several criteria (remuneration, classification, length of employee presence). The bonus will be exempt from social security contributions and from income tax up to a maximum of EUR. 1,000 (increased to EUR. 2,000 should the company be covered by an "*accord d'intéressement*"<sup>8,9</sup>), provided that the beneficiary employee receives a gross annual remuneration of less than three SMIC (i.e. for 2021, EUR. 55,694.88 per year). The draft bill is now under discussion in Parliament.



# Other news

**Trade union representativeness:** As every four years, the audience of the trade unions was assessed last [May by the French Ministry](#) of Labour at national and interprofessional level as well as at the level of the professional branches. This is an essential criterion for determining the representativeness of these organizations and thus their empowerment to sign collective agreements. At the national and interprofessional level, five organizations have been recognized as representative (CFDT, CGT, FO, CFE-CGC and CFTC), the same as four years ago. The final results should be reflected in an order to be published early July.

# COVID-19 update

**National protocol:** [The national protocol to ensure the health and safety of employees in the workplace in the context of the COVID-19 pandemic](#) established by the French Ministry of Labour has been modified once again. Since 9 June 2021, the teleworking organization on a full-time basis is no longer the rule of principle. Although working from home and meetings by audio or video conference are still preferred, the Administration recommends that each employer company in compliance with the social dialogue rules determines a minimum number of days per week worked from home. In addition, according to this protocol, shared conviviality between employees are no longer suspended. They can be organized in strict compliance with the barrier gestures.

**State of health emergency:** [The law n° 2021-689 of 31 May 2021](#) and decrees [n° 2021-699 of 1 June 2021](#), [n° 2021-724 of 7 June 2021](#) and [n° 2021-782 of 18 June 2021](#) relating to the sanitary crisis exit strategy specify the legal framework of the end of the lockdown and implement the "health pass" until 30 September 2021, which will allow people to access events, festivals, large-scale fairs provided that they have been vaccinated, are able to show a negative PCR test or have recovered from COVID-19. The law of 31 May 2021 also extends until 30 September 2021 instead of 30 June 2021 the possibility of imposing the taking of paid vacations subject to a collective agreement, increasing on the way the maximum number of paid vacations that can be imposed (from six to eight).

**Vaccination:** Since 31 May 2021, vaccination against COVID-19 is open to all people in France over 18 years old. An experiment has also been conducted since 25 May 2021 with occupational health services offering the Moderna vaccine to the employees of some selected large companies (so far, only the Astra Zeneca vaccine dedicated to individuals aged 55 or older has been made available in France).

**Medical exams performed by the occupational medicine:** Considering the pandemic situation, [the decree n° 2021-729 of 8 June 2021](#) temporarily postpones once again the deadlines for the performance of certain medical exams by occupational health services. Those due by 2 August 2021 may be carried out in the twelve months following this date. In addition, this decree extends the possibility for occupational health service nurses to be delegated the task of carrying out resumption and pre-suspension medical exams until 1 August 2021<sup>10</sup>.

1. When receiving a request made by courts of first instance in the context of a "*procédure d'avis*" (opinion procedure), the French Supreme Court only expresses its general opinion on the compliance of French law with international conventions.
2. French law provides a "*forfait jours*" mechanism, which is a type of organization of employee working time based on a fixed number of working days per year (usually 218 days) with no reference to any working hour and which may be implemented in certain circumstances. As a counterpart of this mechanism, the employee benefits from additional rest days.
3. The internal policies ("*règlement intérieur*") are a mandatory document in companies employing at least 50 full-time employees. This document addresses limited topics such as discipline, hygiene and safety and moral/sexual harassment.
4. Under French law, some dismissals can be held null and void e.g., if the dismissal results from a prohibited discrimination, a moral/sexual harassment, etc. In case of dismissal held null and void, the employee benefits from an option of being either reinstated or allocated with compensation for null and void dismissal.
5. In France, there are two main apprenticeship contracts where an employee alternates work and training periods i.e. the "*contrat d'apprentissage*" designed to enable young people aged between 16 and 30 years to follow a general education curriculum, both theoretical and practical, in order to acquire a professional qualification based on a diploma or a professional credential and the "*contrat de professionnalisation*" whose goal is to provide access to employment through the acquisition of a professional qualification recognized by the French state and/or a professional sector.
6. In France, in addition to the paternity leave, there is a birth leave equal to at least three business days.
7. Partial activity ("*activité partielle*") is the French furlough mechanism.
8. An "*accord d'intéressement*" is an optional profit-sharing plan.
9. The maximum ceiling of EUR. 2,000 is also applicable if the company is covered by a collective agreement signed at the company's or branch's levels (or if negotiations have been initiated on this subject) which identifies employees who have contributed directly to the continuity of the economic activity and to the maintenance of social cohesion, and whose activity was carried out in 2020 and 2021 mainly on site during the periods of the state of sanitary emergency.
10. Under French law, a resumption medical exam may have to be organized after sick leave.

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