

## French Employment Law Update – April 2022

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



**Annual organization of working time in days (so-called “forfait-jours” mechanism):** The *forfait-jours* mechanism does not mean an employee is totally free to determine their working hours. In a recent case, the Court of Cassation ruled that a veterinarian employee on *forfait-jours* who persisted in coming to work as they wished instead of adhering to the schedules their employer imposed was committing gross misconduct. The employer was able to enforce the employee’s half days or full days of work that aligned with appointments the clinic had booked with customers. (Cass. Soc. February 2, 2022, no. 20-15.744)

**Freedom of expression:** The dismissal of an employee for professional inadequacy is null and void if the employee did not abuse their freedom of expression. In this case, the employee, who was the managing director of a company, expressed their disagreement, without using offensive language, with the method chosen by the company’s management for the absorption of the company by the parent company. The employee's dismissal was linked, in part, to their comments. According to the Court of Cassation, since the employee did not abuse their freedom of expression, the dismissal must be considered null and void. (Cass. soc., February 16, 2022, no. 19-17.871)

**Religious freedom:** The Court of Cassation has noted that the disciplinary transfer of an employee who initially refused a transfer because of their religious beliefs is not discriminatory, providing that the transfer was justified by professional requirement due to (i) the employee's activity (in this case, a team manager in the cleaning sector, was assigned to work at a certain site because of a mobility clause), and (ii) the nature of the measure that made it possible to ensure the continuation of the employment relationship by assigning the employee to another cleaning site. (Cass. Soc., January 19, 2022, no. 20-14.014)

**Variable compensation:** In this case, the Court of Cassation ruled that an employee who had received an annual bonus based on their targets and later left the company in November, could only claim the bonus in proportion to the time they had been with the company during that year and not the total amount of the bonus corresponding to the entire year. (Cass. soc., February 9, 2022, no. 20-12.611)

**Employee's prejudice:** In two recent decisions, the Court of Cassation has extended its case law regarding certain failures of an employer that “necessarily” cause a loss to an employee. If an employee exceeds the maximum working time, this causes a loss to the employee and gives rise to a right to compensation (Cass. soc., January 26, 2022, no. 20-21.636). Similarly, the infringement of the employee's right to image gives rise to a right to compensation (Cass. soc., January 19, 2022, no. 20-12.420).

**Moral harassment:** The Court of Cassation has noted that to prove an employer has intentionally committed moral harassment, it is necessary to

demonstrate that the employer was aware that their behavior was negatively affecting their employee's working conditions. (Cass. crim., February 22, 2022, no. 21-82.266)

**Termination of an employment contract by a judge (*résiliation judiciaire*):** The signing of a null and void *forfait-jours* mechanism is not in itself serious enough to prevent the continuation of an employment contract. The Court of Cassation confirmed the decision of a court of appeal that dismissed an employee's request for *résiliation judiciaire*, after declaring the *forfait-jours* mechanism null and void, on the grounds that the employee had not invoked the consequences of the required working time on the continuation of the working relationship. (Cass. soc., March 2, 2022, no. 20-11.092)

**Agreed termination and non-compete clauses:** An employment contract or applicable collective bargaining agreement may grant an employer the right to unilaterally waive the performance of a non-compete clause. The Court of Cassation has recently recalled that an employer who intends to exercise their right to waive the non-compete clause must do so at the latest on the termination date stated on the agreed termination form, notwithstanding any contrary provisions. (Cass. soc., January 26, 2022, no. 20-15.755)

**Fixed-term employment contract:** If one party fails to sign a fixed-term employment contract, the contract is not deemed to be in writing. Consequently, the employment contract may be reclassified as an open-ended contract. (**Cass. soc., March 2, 2022, no. 20-17.454**)

## Legislative developments

**Partial activity:** In its Q&A, which was updated on March 14, 2022, the Ministry of Labor specified the modalities of partial activity and long-term partial activity for companies impacted by the conflict in Ukraine. Trade unions will soon be consulted on the adaptation of long-term partial activity. The consultation will focus in particular on the possibility of extending the system for up to 12 additional months and concluding an agreement or establishing a unilateral document by December 31, 2022 (instead of June 30, 2022).

**Single risk assessment document:** Decree no. 2022-395 of March 18, 2022, issued in application of the so-called "Health" law of August 2, 2021, specifies the methods for keeping, updating, and making available the single occupational risk assessment document (DUERP). Employers must keep the DUERP for at least 40 years from the date of its creation. From July 1, 2023, the document will have to be published on a digital portal. In the meantime, employers must keep a paper or electronic copy of the document. The decree also extends the availability of the document to former workers and to occupational health services.

**Teleworking monitoring:** The French Data Protection Authority (CNIL) has indicated that the monitoring of teleworkers is one of three priority areas for its 2022 Monitoring Plan.

**Whistleblowers:** On February 16, 2022, the Senate definitively adopted a bill to improve the protection of whistleblowers. Whistleblowers are no longer required to report claims solely using internal channels. They can now choose to report claims externally to a competent authority, a human rights defender, the courts, or a European body. The protection of whistleblowers against retaliation is also strengthened, and this protection is extended to "facilitators" who have helped the whistleblower. The Law was published on March 22, 2022 (**Law no. 2022-4401 of March 21, 2022**).

**Agreed termination:** Requests to the Labour Authorities, so-called "DREETS" (French Regional Directorates for the Economy, Employment, Labour and Solidarity), for approval of agreed termination must be made through the TéléRC teleservice from April 1, 2022. By way of exception, if a party indicates that they are unable to use the teleservice, they may submit the request in paper form. Regarding protected employees, the specific procedure for requesting authorization from the Labour Inspection remains applicable.

**Inflation allowance:** According to a Q&A by the Urssaf (the administrative body responsible for social security funds) dated March 3, 2022, inflation allowances for February will be exempt from social security contributions even if they are paid after February 28, 2022.

## COVID-19 update

**Wearing a mask:** As of March 14, 2022, it is no longer compulsory to wear a mask in enclosed areas, including in the workplace. Social distancing rules have also been abolished. (Decree no. 2022-352 of March 12, 2022)

**Health protocol:** As of March 14, 2022, the National Health protocol is no longer applicable. It has been replaced with a guide entitled Benchmark of measures to prevent the risks of COVID-19 contamination, which was issued on March 15, 2022. The guide covers prevention measures such as hygiene and ventilation rules in the workplace.

**Vaccination pass:** As of March 14, 2022, the need for a vaccination pass in public places (e.g., restaurants, bars, nightclubs, cinemas, theaters, and stadiums) has been suspended. Employees working in these places are no longer required to show their employers a vaccination pass. The health pass is still compulsory for access to the following establishments, except in emergencies or when the person concerned wishes to have a COVID-19 test:

- Health services and facilities
- Armed forces health facilities
- Certain social medical services and establishments, such as establishments and services for the disabled and the elderly

Employees, public servants, volunteers, and other persons working in these places and not subject to the vaccination obligation (article 12 of law no. 2021-1040 of August 5, 2021) are still required to present a vaccination pass when their activity takes place in public spaces. The only exceptions are activities involving deliveries and emergency interventions.

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