

New French Rules Loosen Constraints on Employment Termination

A law of 25 June 2008, and its implementing decrees of 18 July represent a watershed in French rules on terminating employees. The new rules provide a legal framework that allows an employer and an employee to terminate their employment relationship by mutual consent, without the employee losing unemployment benefits and without the need to prove grounds for the termination. This update examines the key provisions of the new law.

France is famous for the rigidity of its labor laws. There is no such thing as employment at will under French law, and the use of fixed-term contracts is strictly regulated, with the result that most contracts are for an indefinite term. Terminating an indefinite-term employment contract is often a nightmare—employees are deterred from leaving voluntarily because they may lose their entitlements to unemployment benefits, and employers are unwilling to dismiss an employee without solid grounds, as they know labor courts are strict in their review of the grounds for dismissals.

These constraints can have adverse consequences, such as employees performing their duties poorly in order to force the employer to dismiss them, or trying to obtain a court decision that there was a constructive dismissal because of a breach of the employment contract by the employer. A straight-forward employer/employee discussion is often rendered impossible by case law that holds that the only real protection for an employer—a binding settlement agreement—can be entered into only if there is a true dispute, and that there cannot be a dispute unless and until a formal termination letter is sent. Thus, the employer has to send a formal letter, and take its risks as to litigation, or adopt questionable practices, such as documents escrowed at the parties' respective lawyers. This often means the employer has to agree to a settlement giving the employee more than what the employee is entitled to by law.

The law of 25 June creates new rules allowing a termination of an indefinite-term contract (as opposed to fixed-term contract) by mutual consent. Terminating an indefinite-term employment contract was already possible, but by being a party to the decision the employee usually lost his or her entitlements to unemployment benefits. This is no longer the case.

Under the new rules, the agreement to a termination by mutual consent must be negotiated during one or more meetings between the employee and the employer. During these meetings, the employee has the right to be assisted, depending on the existence of workers' representatives within the company, either by another employee, or by an advisor chosen from a list published by the labor authorities (if the employee decides to do so, the employer is also entitled to be assisted during the meetings). A strategy needs to be carefully developed if the employee will otherwise be terminated for cause, as the prior negotiations are not confidential and may undercut in practice the grounds for dismissal. Lawyers may not participate in the meetings but they may of course advise the parties during the course of the negotiations.

Once the negotiations are completed, an agreement for the termination of the employment contract is signed, together with a form requesting approval of the termination by the labor authorities. A fifteen-calendar-day waiting period follows, before the request for approval can be sent to the labor authorities; during this period, each party is entitled to withdraw its consent.

The labor authorities then have a fifteen-working-day period to check that the legal rules were respected and in particular that the consent of the employee has not been improperly obtained. No review of the grounds for the dismissal appears possible, which avoids a substantial source of uncertainty and potential litigation.

As a condition for the agreement to be valid, the employee must be paid a specific severance payment, the amount of which may not be less than the minimum severance payment required by law (which is usually low—generally one fifth of a month's gross salary per year of seniority). There is no obligation to provide for a notice period before the end of the contract (as is usually the case in dismissals), and the effective date can be as early as the first day after the actual or deemed approval by the labor authorities.

The specific severance payment benefits from the same favorable tax and social security conditions as other compensation paid by reason of the termination of an employment contract (such as a settlement indemnity): no social contributions and no income taxes are due up to the equivalent of two years of gross salary, subject to a maximum ceiling amount that changes each year (for 2008 the ceiling amount is EUR 199 656).

The labor courts have exclusive jurisdiction over any disputes concerning a consent termination, and claims are subject to a statute of limitations of twelve months from the date of the approval by the labor authorities. The labor court will review the agreement and the approval of the labor authorities; it is expected that the court's review will focus on whether the termination and its consequences were fully understood by the employee. In principle, the court will not review the underlying reasons or grounds for the termination.

This system is available only for the termination of indefinite-term contracts. It may not be used within the context of a mass-lay off, nor as a means to program a progressive reduction in the company's headcount. Even with these limitations, it creates an important new avenue that employers in France should explore when facing employee terminations.

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