Employment Law

• **FINANCE BILL FOR THE FRENCH SOCIAL SECURITY SYSTEM FOR 2013:** main provisions of the Bill concerning companies (bill scheduled to be passed at the end of November 2012).

> **Termination of employment by mutual agreement: termination benefits to be subject to corporate contribution (i.e. "forfait social"): "):** in France, termination benefits for termination of employment by mutual agreement are currently exempted from social security contributions with respect to the portion not exceeding two annual cap amounts fixed by the French social security authorities (€ 72,744 in 2012 and € 74,064 in 2013). The French government has decided to review this favorable treatment. Thus, the Bill provides **that, as from 2013, the portion of the termination benefits not exceeding the two annual social security cap amounts will be subject to a 20% corporate contribution**. The portion of the benefits exceeding this threshold will continue to be subject to social security contributions, as it is currently the case.

> **Strengthened measures against illegal employment:** the French government has decided to implement various measures to **reduce evasion from social security contributions**. In this respect, the Bill provides for the following measures:

• Social security contributions reassessments **increased by 25%** in the event of illegal employment. This increase is to be applicable whether the offence is reported **by the URSSAF inspection authorities or by any other duly empowered agent**, as listed under Article L. 8271-1-2 of the French Labor Code, including **labor inspection officers, judicial police officers, and officers from the tax or customs authorities.**

• **Additional obligations for contractors towards their subcontractors**. In the event of breach of its duty of care, **the contracting party will be required to fully or partially reimburse the exemptions from social security payments and contributions from which it benefited during the period of reported illegal employment,** without there being any requirement to establish its complicity with the subcontractor having resorted to illegal employment.

• Extension of the definition of evasion from social security contributions to include **repeated practices in breach of social security law, reassessments being increased by 10%** if the inspection authority reports an obvious lack of compliance due to the non implementation of observations notified in the scope of a previous inspection (whether or not the observations gave rise to a reassessment).

> **Extended basis of calculation of payroll tax:** integration of all **fringe benefits attached to wages (incentives, profit-sharing, and welfare insurance).** In addition**, a fourth wage bracket taxed at 20% is to be created for salaries exceeding € 150,000.** This measure is to be applicable to wages paid as from January 1, 2013.

> **Work-related accidents/illness:** the Bill provides for a certain number of measures destined to improve coverage of work-related accidents and illness:

•**Employer negligence (i.e. "faute inexcusable"):** the Bill states that **"recognition of employer negligence by way of a** res judicata **court decision implies an obligation for the employer to pay the amounts due by it in this respect".** This measure will be applicable **"whatever the circumstances under which the employer was notified by the social security authorities during the initial application procedure for qualification as work-related accident or illness".**

•**An increase of 0.05% of employer contributions in 2013 with respect to Work-related Accidents and Illness**

• WORKING TIME AND EMPLOYEE HEALTH AND SAFETY PROTECTION MEASURES

> **Executive employee contracts – the validity of working time based on a set number of days worked again subject to challenge:** the French Cour de Cassation (Supreme Court) sets an increasingly strict framework.
After having reconfirmed the validity of working time based on a set number of days worked in its decision dated June 29, 2011, the Cour de Cassation issued a decision on September 26, 2012, again taken in the scope of European charters and directives, invalidating a contract based on a set number of days worked on the grounds that the collective agreements allowing the use of such contracts (Collective Bargaining Agreement for Wholesale Traders and company collective agreement) **did not adequately protect the health and safety of the employee.** The Court indeed considered that the said agreements did not guarantee a reasonable workload for the employee or an appropriate spread of the workload throughout the employee's working time. In the case in point, **the Court considered that it was not sufficient to hold an annual interview with the employee's supervisor, completed by a quarterly review** by the management of the information provided by the supervisor concerning the extent of the employee's workload. The Court thus sets requirements for **a regular and more extensive monitoring of the workload of employees employed under contracts based on a set number of days worked,** whereas companies generally seek to be flexible in monitoring the work of these employees, whose activity is by nature difficult to monitor in practice. Most collective agreements currently in force probably do not meet the conditions laid down by the Court to be valid. **Companies must therefore now (i) ensure that the collective agreements they use are valid with regard to the new requirements laid down by the Cour de Cassation and/or sign new agreements, and (ii) rapidly review and/or implement internal measures to monitor the extent of the workload of the employees concerned.**

As a reminder (see our newsletter for May 2012), contracts based on a set number of days worked that are found to be invalid are subject to the penalty of payment of overtime for the last 5 years and the potential award of damages for illegal employment.

> **Maximum legal working time and mandatory rest periods – the burden of proof lies exclusively with the employer:** in a decision dated October 17, 2012, the Cour de Cassation extends employers obligations, requiring them to ensure and be able to prove that the required maximum legal working time and mandatory rest periods are complied with by their employees (in particular, minimum rest period of 11 hours per day and 24 hours per week, rest breaks following 6 hours' work, maximum weekly working time of 48 hours). Both this decision and the decision dated September 26, 2012 must prompt companies **to regularly monitor employees' working time and rest periods, to avoid a penalty.**

• EMPLOYEE REPRESENTATIVE BODIES: Clarifications concerning the negotiation of a pre-election agreement and the responsibility of organizing negotiations concerning the recognition of a group of companies.

> Articles L. 2314-3 and L. 2324-4-1 of the Labor Code lay down the conditions for the validity of a pre-election agreement concluded between the employer and the trade unions concerned, for the purpose of organizing the election of employee representatives, via a double majority vote, i.e. its signature 1) by the **majority of the trade unions having participated in its negotiation,** 2) **including** the trade unions having obtained a majority vote during the previous union elections or, if the results are not available, a majority vote of the union representatives in the company. **In a decision dated September 26, 2012**, the Cour de Cassation provides two important clarifications in this respect:
- it stipulates, on one hand, that trade unions **that are invited to and participate in the negotiation of the pre-election agreement, even if they subsequently decide to withdraw from the negotiation before the signing of the agreement, must be considered as having participated in the negotiation;**
- it decides, on the other hand, that **when a pre-election agreement is not concluded via a double majority vote as aforementioned, the fact of referring the matter to the administrative authorities** (Direccte), for the purpose of determining the establishments involved and fixing the distribution of voters or seats within each college, **suspends the election process** until the latter's decision and **results in the extension of the ongoing terms of the representatives until the results of the first round of the election.**

> According to Mr. Jean-Marie Combrexelle, Director-General of the Labor Authorities (Letter n°12.0967 dated July 25, 2012 issued by the Labor Authorities), **the leading company of a group of companies has no obligation to enter into negotiations concerning the recognition of a group**, even if a trade union expressly requests it to do so, provided that the trade unions are able to obtain this recognition via judicial means

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