

▶ Employment law

• **Second amending finance law dated July 31, 2012: Reduction as from September 1, 2012 of the threshold amount of compensation for termination eligible for exemption from social security contributions**

Since September 1, 2012, the payment of compensation (in particular for dismissal and forced retirement) that exceeds a threshold amount, all types of compensation included (mandatory compensation for dismissal or compensation for forced retirement **and** settlement indemnity), of **10 times the maximum annual amount fixed by the French Social Security Authorities (i.e. € 363,720 for 2012)** is subject to social security, CSG and CRDS contributions for the entire amount paid, as from the first Euro. Previously, the threshold amount was fixed at 30 times the maximum annual amount fixed by the Social Security Authorities (i.e. € 1,091,160 for 2012).

• **Mandatory safety requirements: Reminder of the measures to be taken by companies**

> **Individual record of work-related risks:** Since February 1, 2012, employers are required to establish a record of each employee subject to exposure to one or more of the factors of work-related risk provided for under the French Labor Code.

This record, which must be regularly updated when there is a change of exposure potentially having an impact on the employee's health, must contain the following information: usual circumstances of exposure to risk, assessed based on the official guidelines for evaluating risks; exceptional circumstances having increased the exposure to risk; details of the exceptional circumstances concerned; period during which the exposure occurred; preventive, organizational, collective or individual measures taken to eliminate or reduce the risk factors during said period; employee's entitlement to request the rectification of the information contained in the record.

Failure to establish or update this record is punished by a fine of € 1,500, multiplied by the number of employees concerned. The penalty is higher in the event of a second offense.

The record is confidential and may only be communicated to a limited number of people (employee, assigns in the event of death, and health & safety officers).

> **Safety Officer:** Since June 1, 2012, companies are required, in the scope of their policy to prevent work-related risks, to secure the assistance of one or more employees who are qualified or experienced with regard to health and safety matters.

The designated employees may benefit, at their request, from training courses equivalent to those available to members of the Health & Safety Committee.

Failing any appropriately skilled employee in the company, the latter may, subject to consulting the Health & Safety Committee or the staff representatives, seek the assistance of external advisors such as are listed under the French Labor Code. In the latter case, an agreement must be entered into with the external advisor concerned.

> **Breathalyzer:** Since July 1, 2012, companies are required, as is the case for private individuals, to equip their company vehicles with single-use breathalyzers. Employees using company vehicles are required to present these breathalyzers if they are stopped by the police. Any absence of breathalyzers is punished by a fine of €11, this penalty being enforceable as from November 1, 2012.

It is advisable to circulate a memorandum concerning this point and to have each employee sign a sheet to acknowledge receipt of the latter.

> **Notices concerning bullying and harassment:** Following a decision by the French constitutional council (Conseil Constitutionnel) dated May 4, 2012 to abrogate the law under which harassment was qualified as an offence, the latter was redefined under a new law dated August 6, 2012. The new legislation requires companies to display notices concerning the new definition **in the workplace and on the premises or at the entry of the premises where the recruitment takes place. In addition, the article of the French penal code that defines bullying is now required to be displayed in the workplace.** (Article L.1152-4 and L.1153-5 of the Labor Code).

- **Bullying: Harsher penalties for employers and for whistleblowers making false claims**

- > **Introduction of a double penalty for non-compliant employers:** The French Supreme Court (Cour de Cassation) confirmed the sentence pronounced against an employer **to pay compensation for breach of its obligation to ensure the prevention of bullying**, in addition to the payment of damages to compensate the act of bullying itself, if and when there are separate obligations the breach of which results in separate offences giving entitlement to various specific compensations (Cass. Soc. June 6, 2012).

- > **False claims made in bad faith concerning acts of bullying constitute an act of gross misconduct:** The French Supreme Court, in two decisions dated June 6, 2012, validated the dismissals for gross misconduct of employees having reported acts of bullying that were in fact inexistent, the Court considering that the claims were made in bad faith with the intention of harming other employees in the company. In this context, the protection provided for by the Labor Code for employees reporting acts of bullying does not apply and the penalty for the employee can include dismissal for gross misconduct (Cass. Soc. June 6, 2012).

- **Bonus month of salary (so called “thirteenth month”): Requirement to review employment contracts providing for a bonus month of salary**

The French Supreme Court sentenced a company to pay to an employee a bonus month of salary provided for under a collective agreement, whereas the employee had already been paid a bonus month of salary, since the employment contract expressly provided for the payment of the salary in thirteen installments, on the grounds that the purposes of the two benefits were not the same. The Supreme Court thus considered that the thirteenth month provided for in the employment contract constituted a rule for the payment of the annual salary in thirteen installments, whereas the bonus month of salary provided for under the collective agreement was a wage item with specific conditions for entitlement and payment (Cass. Soc. June 13, 2012).

- **Paid vacation: Requirement to ensure employees effectively take their paid vacation**

An employer was sentenced to pay compensation for preventing the taking of paid vacation.

The French Supreme Court again ruled that employers must take the necessary measures to ensure that employees have the possibility of **effectively exercising their right to vacation** and, where applicable, be in a position to justify that they have taken all the required steps to that effect. **The payment of a paid vacation indemnity does not, according to the Court, replace the effective taking of paid vacation**, notwithstanding the employee’s failure to bring evidence of the inability to take his/her vacation due to the employer (Cass. Soc. June 13, 2012).

- **Employee monitoring: Definition continuously streamlined by the French Supreme Court**

- > **The mere monitoring via “human” means of an employee by a supervisor or a department internal to the company in charge of doing so does not, in itself, constitute an illicit means of gathering proof, even in the absence of any prior information or consultation of the Works Council** (Cass. Soc. July 4, 2012). The same would not apply to monitoring carried out by a monitoring services provider external to the company in charge of monitoring the employees without their being aware of it.

- > After confirming in a decision dated May 10, 2012 that the employer may freely access computer files created by employees using the computer put at their disposal in the scope of their employment, insofar as such files are not clearly and unequivocally identified as being personal, the French Supreme Court recently ruled, in a decision dated July 4, 2012, that the fact that **an employee names the hard disk on his/her professional computer “D:/Personal Data” does not mean that all the information and files it contains are personal**. The names of the files on the hard disk of the computer are the only thing that counts. The employer was therefore authorized to consult the files on the hard disk not marked as “personal” or “private”, without the employee being present, and to dismiss the latter after discovering pornographic files or false certificates on the hard disk. The French Supreme Court, in a decision dated July 11, 2012, also brought its case law concerning the consultation by the employer of employees’ paper correspondence into line with that applicable to electronic mail: **paper correspondence sent or received by employees from or at their workplace are presumed to be of a professional nature, the employer being fully entitled to open it without the employee being present, if and when it is not identified as being personal or confidential**.

• **Management techniques: Employee evaluation procedures severely punished in court**

In two Superior Court decisions (SC Lyon dated September 4, 2012 and SC Paris dated March 6, 2012) **employee evaluation procedures were declared illegal.**

> In a decision dated September 4, 2012, the Superior Court of Lyon prohibited an employer in the banking industry from using a method of organization based on **benchmarking** that consisted in making agencies and their staff compete, on the grounds that the employer had thus severely jeopardized its employees' health and, therefore, breached its safety obligation, which is a performance obligation, and sentenced the employer to pay € 10,000 in damages to a trade union. In the case concerned, the Court considered **that the measures taken by the employer for the prevention of psycho-social risks** (monitoring of psycho-social risks, action plan for promoting "quality of work", and toll free number) **were far from being sufficient** and were not intended to eliminate the risk but to intervene subsequently.

> In a decision dated March 6, 2012, the Superior Court of Paris also judged as illegal, and therefore prohibited, a new evaluation procedure for executives eligible to a variable individual compensation plan that a pharmaceutical group contemplated to introduce within all the group's companies on the grounds that two of the **behavioral skills expected of the employees concerned were not defined and detailed enough** to be able to carry out the evaluation objectively.