Overview of a reduction in force in France in companies with more than 50 employees

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In this article we address some of the usual questions we get asked by our clients with respect to the "*reductions d'effectifs*" (reduction in force (**RIF**)) in France in companies with more than 50 employees. Our answers and comments apply in the context of a reduction in force of more than 10 employees within a 30 days' time period and aim at providing the reader with an overview rather than a detailed roadmap of obligations and constraints.

1. What justification is required to satisfy the legislation on RIF for economic reasons?

Under French labour law, a "*licenciement collectif pour motif économique*" (a collective layoff for economic reasons) must be based on one of the several economic reasons listed by the labour code which require existing or foreseeable economic difficulties.

An economic dismissal must result from either the abolition of the position held by the employee or a change to an essential element of the employment agreement which has been refused by the employee. The abolition or change must be based on (i) economic difficulties encountered by the company (ii) technological changes implemented within the company (iii) reorganization required to ensure the company's competitiveness or (iv) the cessation of activity of the company.

Economic difficulties must result from a significant change to an economic indicator such as a reduction of orders/sales or revenue, operating losses, deterioration of the cash flow or EBITDA, or any other indicator of economic difficulties, identified over a specific time period depending on the company's labour force (one quarter for companies with less than 11 employees, two consecutive quarters for companies with between 11 and 49 employees, three consecutive quarters for companies with between 50 and 299 employees and 4 consecutive quarters for companies with 300 or more employees).

The need to safeguard the company's competitiveness will require the company to establish the difficulties being encountered in its sector of activity. This will involve describing the characteristics of the relevant market, the practices of competitors and their policies and strategies, and the necessity for the company to take steps to avoid jeopardizing the company's viability.

Undertaking costs savings to increase profit or to gain operational agility is not a valid economic ground to justify a collective layoff.

When the company concerned is a member of a corporate group the economic grounds are assessed at the group's level in France or, if the group is carrying various activities, at the level

of the sector of activity of the group in France corresponding to the activity carried out by the French company.

If the company is unable to demonstrate a valid economic ground for the layoffs, its affected employees will be able to challenge their dismissal before the *Conseil de Prud'hommes* (**Labour Tribunal**). If the challenge is successful, the layoffs are deemed to lack "*cause réelle et sérieuse*" (real and serious grounds) entitling those employees to be paid damages on top of the mandatory severance package to which they were entitled upon termination of their employment contract. The amount of damages awarded by the Labour Tribunal increases according to the length of service of the affected employee with the company.

2. Can the employer select which employees will be included in the RIF plan?

The employer does not select the employees that it intends to dismiss for economic reasons.

Once a decision has been made to effect layoffs for economic reasons, the order in which the layoffs will apply must be established, making it possible to determine which employees will be laid off. This order is based on the application of several factors or criteria taking into account, in particular, the employees' dependents and seniority, their particular personal circumstances which may impact their ability to be re-employed such as a physical handicap, or their age, and their qualifications. In determining the order of the layoffs, certain criteria can be ascribed more importance than others provided all of the criteria have been considered.

The criteria must be negotiated with the Unions. If the workforce is not unionized or agreement on the criteria cannot be reached with the Unions, the criteria are submitted to the opinion of the "*Comité social et économique*" (**CSE** or **Works Council**). In any case, such criteria will be submitted to the *Direction Régionale de l'Économie, de l'Emploi, du Travail et des Solidarités* (**Labour Administration**) for approval.

The approved criteria will apply to all of the company's employees who perform similar or identical duties, making it possible to identify all of the affected employees who are in the same employment category. In practical terms, the application of these rules may result in laying off an employee in a specific employment category despite the fact that his or her position is being retained, or in keeping an employee in that same employment category whose position is being eliminated.

Our advice to clients is that it is essential, in advance of and while contemplating consultations with CSE, to prepare an accurate list of the eliminated positions within the company and to then group them by employment category to be in a position to determine the order of the layoffs of the employees within each employment category.

Failure to comply with the criteria for the order of the layoffs constitutes a non-compliance that is deemed to necessarily harm the affected employees and entitles them to be paid damages on top of the mandatory severance package to which they were entitled upon termination of their employment contract. The amount of damages awarded by Labour Tribunals is assessed by taking into consideration the loss demonstrated by the employees.

3. In estimating the cost of a collective layoff for economic reasons, how does the company estimate the cost of the severance packages?

Severance packages will cover at least the minimum mandatory severance payment calculated in reference to the Labour Code or the applicable collective bargaining agreements (**CBA**), if more favorable.

Under the Labour Code, the minimum severance payment is equal to 1/4 of the monthly average salary multiplied by the number of years of service for the 10 first years and then 1/3 of the monthly average salary multiplied by the number of years of service above 10 years.

However, if the severance package provided in the applicable CBA is more favorable than the one provided by Labour Code, it will apply.

In addition, the *plan de sauvegarde de l'emploi* (**PSE** or **RIF Plan**) must provide for various social measures.

The quality of the PSE is assessed by the Labour Administration by reference to the size and the financial capacity of the company and of the group to which it belongs. In addition to the legal financial aspects of the layoff, such as the severance payment (severance package, payments in lieu of notice or vacation), it is necessary to include costs associated with internal and external reemployment activities and more broadly with the accompanying social measures (outplacement, mobility bonus, training, etc.).

4. Are they any statutory time periods to keep in mind?

In case of a PSE, the statutory time period varies according to the number of employees affected by the contemplated layoff.

- Except otherwise agreed in an agreement concluded with Unions or the CSE, the Labour Code allows 2 months if the number of employees is between 10 and 99, 3 months in the case of 100 to 249 employees and 4 months if there are more than 250 employees, to undertake the necessary information and consultation procedure before the CSE.

  If the workforce is not unionized, the CSE is informed and consulted on both the economic grounds justifying the layoff and on the PSE.

- Once the information and consultation of the CSE has been completed, 21 days from the receipt of the complete file is allowed for the approval of the PSE by the Labour Administration.

In addition to these statutory periods, it should be anticipated that:

- About 2 months is needed to prepare the documents relating to the layoff and the PSE for the information and consultation of the CSE; and,

- About 1 month after approval of the PSE by the Labour Administration must lapse before notification of the first layoffs, if the mandatory reemployment efforts have been unsuccessful.

Indeed, efforts to find reemployment opportunities must begin as soon as the RIF is contemplated and continue until the notification of the layoffs to the affected employees and must be carried out in all companies of the group in France; it is a requirement that the search for reemployment positions must extend to all existing, available, and vacant jobs, permanent or temporary within the group.

The employer should also check if the applicable CBA provides for any additional mandatory relocation searches to be undertaken.

In the event of disputes relating to the obligation to reemploy, and in the event of an established violation by the employer, the layoff will be considered as "*sans cause réelle et sérieuse*" (i.e. wrongful) and damages will be awarded to the affected employee on the basis of their length of service within the concerned company.

→ Taking all of the above provisions into account, employers should anticipate a 6 month process from preparation of the information and consultation procedure with the CSE to the date of notification of the first layoffs in a PSE.

5. Do you have any advice in relation to the management of the CSE's consultation?

Our recommendations include:

- In the case of large companies with operations in more than one EU member states:
  - align communication content and disclosure for the different staff representatives who will be involved in order to avoid leakage of information between the countries involved where there are differences in the applicable national legislation with respect to the timing of involvement and level of information;
  - determine if there is a European Works Council which would have overriding powers with respect to the RIF and the timing of the process over each countries' own Works Councils;
- In any case:
  - only involve the CSE when the RIF's reasoning and content for layoffs in France is sufficiently determined to start an efficient information and consultation procedure;
  - start the information and consultation procedure with a complete and detailed information note on the contemplated RIF: grounds, procedure, number of jobs concerned, social measures, etc.; and.
  - negotiate an "*accord de méthode*" (methodology agreement) to more efficiently drive the PSE negotiation with Unions, if any, and the information and consultation process with the CSE.

6. What are the main steps of the procedure to implement a RIF based on economic reasons?

a) Informing and consulting with CSE

The consultation concerns on the one hand the plan to restructure and reduce the workforce (including a description and features of the affected business sector, the economic difficulties experienced by this sector, the need to safeguard competitiveness with in each case all necessary data and figures) and, on the other hand, in the absence of Unions or any agreement with the Unions, the collective layoff plan (the PSE) itself (including the number of jobs eliminated, the affected employment categories, the criteria for the order of the layoffs and an estimated timetable for the layoffs and accompanying social measures).

At an operational level, all the information/data needed to draft the necessary documents for the CSE identifying the reorganization and layoff plans must be collected, analyzed, and organized well ahead of the consultation process.

b) Approval by the Labour Administration

Once negotiated with Unions (if applicable) or, failing that, submitted to the consultation of the CSE, the PSE only has legal force and effect once it is approved by the Labour Administration which must provide notice of its decision within a maximum of 21 days from receipt of the complete PSE file at the end of the procedure of information and consultation of the CSE (reduced to 15 days if the PSE is negotiated with Unions). The absence of a response from the Labour Administration within this time period amounts to approval.

The Labour Administration examines the content of the PSE with respect to (i) the financial means of the company or of the group to which it belongs (ii) the social measures provided and (iii) the compliance with the obligations relating to reemployment. In the event of a refusal from the Labour Administration, the company, if it wishes to pursue its PSE must restart the process and submit a new PSE for approval after making the necessary modifications, which once again requires consultation with the Unions or the CSE (as applicable).

c) Notification of the layoffs

Notification of the layoffs may not be given until after the Labour Administration has provided notice of its decision to approve, or at the expiration of the time period allotted to it to come to its decision. Any layoff of which notice has been given before such date is void.

d) Penalties for failing to comply with the procedure

Failure to properly consult with CSE will result in the Labour Administration's refusal to approve the PSE. With respect to the employees, failure to comply with the requirements to establish a PSE voids the layoffs and offers the opportunity for employees to be reinstated within the company if they ask to be, or failing that, to be paid an indemnity for which the employer is liable, at least equal to six months of salary.

Pros of PSE	Cons of PSE
Mandatory consultation time frame	Valid economic ground as provided by law
Possibility to manage the risk of key people to leave	Prior reemployment research
	Order of criteria reduces the possibility to "choose" the laid off employees
	Approval by the Labour Administration
	Constraint on departures - Negative HR impact

7. Is there an alternative solution for a RIF in absence of valid economic difficulties?

The "*rupture conventionnelle collective*" (collective termination by mutual consent or **RCC**) allows the employer to organize voluntary terminations in order to implement a RIF without having to demonstrate economic difficulties.

An RCC is not covered by the legislation on economic redundancies and so all of the mandatory legal obligations (the existence of an economic reason to terminate the employment contract, the search for reclassification solutions, the criteria for the order of redundancies, etc.) do not apply.

→ The RCC is based on employees volunteering to accept a termination of their employment contract. If the RCC agreement provides for job cuts, it must exclude recourse to dismissal on economic grounds to achieve its aim and the employees must be free to choose either to leave within the framework of the collective termination by mutual consent or to keep their jobs. As a result, the RCC must be completely disassociated from a PSE and is not intended to be implemented simultaneously with, or prior to, a PSE in the context of the same restructuring and RIF project.

The procedure to negotiate and implement a RCC is the following.

a) Conclusion of a RCC agreement

The RCC agreement is mostly negotiated with the Unions' representative within the company or, the CSE (as applicable).

The Labour Code does not provide for a mandatory time period for the RCC's negotiation. In our experience, it is useful to start the negotiation with the conclusion of an "*accord de méthode*" (**Methodology Agreement**), in order to frame the running and content of the negotiation of the RCC agreement before starting negotiations.

The negotiation starts with the employer providing drafts of the Methodology and RCC Agreements to the Unions or the CSE (as applicable).

The RCC Agreement typically provides for:

- the terms and conditions of the negotiation and involvement of the CSE;

- the number of departures and job cuts envisaged and the period during which the relevant employment contract terminations may occur;

- the conditions to be met to benefit from the measure (i.e. the types of activities/jobs the subject of the proposed voluntary departures measures). Usually, the RCC Agreement conditions the voluntary departure of an employee on the latter's presentation of genuine offer of external redeployment or a genuine plan to create or buy a business;

- the terms and conditions for the submission and examination of applications from employees;

- the procedures for (i) the conclusion of an individual termination agreement between the employer and the employee whose application for voluntary departure has been accepted and (ii) the exercise of the parties' right of withdrawal: the RCC Agreement must provide for the possibility for the parties to withdraw from the Agreement within a period set by the RCC Agreement;

- the method of calculation of the payment to be paid to employees whose application for a voluntary departure has been accepted (which cannot be less than legal minimum severance payment of as provided for in Labour Code or, if more favorable, in the CBA). Additional payment and enhanced social measures will need to be attractive enough to generate sufficient valid applications from employees to reach the target numbers of job cuts;

- the criteria for choosing between applicants when there are too many volunteers; and

- the measures to facilitate the external reemployment of employees to equivalent jobs, such as training, actions that foster the creation of new business activities or the taking over of existing business activities by the employees, etc.

Even if it's not expressly required by the Labour Code, the Ministry of Labour has specified that a commitment on the part of the employer to maintain employment (i.e. by prohibiting economic redundancies in order to achieve the of job cuts) must be expressly mentioned in the RCC Agreement.

It should be noted that, if a key employee submits an application which complies with the RCC Agreement it will not be possible to refuse it. To reduce this risk, a specific retention program or communication should be provided for key employees.

b) Procedure with the Labour Administration

Once signed, the RCC Agreement is submitted for the Labour Administration's approval within15 days from receipt of the complete file. The absence of response within this time period amounts to approval. Once the Labour Administration has provided notice of its decision to validate the agreement, the RCC can be implemented.

c) Termination of the employment agreement

Once the employer accepts an employee's application for a voluntary termination in the framework of the RCC Agreement the employment agreement is terminated by mutual consent. However, not all volunteering employees are certain to leave the company as the employer can only accept applications in accordance with the criteria provided for in the RCC Agreement including that the employee concerned has a genuine offer of external redeployment or a genuine plan to create or buy a business.

If the employee's application is accepted by the employer an individual termination agreement is signed and the employment contract is deemed to have been terminated by mutual consent.

Pros of RCC	**Cons of RCC**
No need of valid economic ground	Risk of application for departure from key people
Reduce legal exposure	Approval by the Labour Administration
Mutual consent termination - No constraint departure	Social measures need to be attractive to reach the target number of RIF
No mandatory redeployment researches	Longer time frame than a PSE depending on the number of RIF

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