Questions and Answers Regarding Collective Redundancies in France

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Philippe Despres
Of Counsel / Paris
33.1.55.27.11.56
philippe.despres@skadden.com

Nicolas Etcheparre
Associate / Paris
33.1.55.27.11.46
nicolas.etcheparre@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

68, rue du Faubourg Saint-Honoré
75008 Paris, France
33.1.55.27.11.00

As part of its response to the COVID-19 pandemic, the French government implemented a very generous furlough system designed to protect companies and avoid redundancies, *i.e.*, terminations of employees for economic reasons. The system allows companies to be reimbursed for almost 100% of the wages paid to their employees. In return, companies are prohibited from effectuating redundancies.

However, with the upcoming end of the furlough programs, many companies now face the need to restructure their workforces and adjust to the new business environment. It is therefore anticipated that many companies will implement collective redundancies in the coming months.

Implementing collective redundancies in France can be a long and burdensome process, given the complexities and nuances of French statutory and case law, as well as the various stakeholders' different, and sometimes conflicting, interests. With this in mind, we have summarized below 10 questions most frequently asked by clients when considering collective redundancies in France.

What is a "dismissal based on economic grounds"?

A dismissal based on economic grounds is one of two ways employers can terminate employees in France. Employment also may be terminated based on reasons related to the individual employee, such as poor performance or misconduct.

Valid economic grounds to dismiss one or more employees is defined by law as a reason not related to the employee but rather to his or her job, which results in either (i) the termination or transformation of employment or (ii) a modification of an essential element of the employment contract that the employees declines to accept, **motivated by:**

a. economic difficulties, which can be illustrated by, for instance, significant changes in at least one financial element, such as a decrease in orders or turnover, operating losses, or a deterioration in cash flow or gross operating surplus;

b. a reorganization of the company that is necessary to safeguard its competitiveness;

c. technological adaptations, whereby new technology could impact employment, even if the company currently does not face any economic difficulties and its competitiveness is not threatened; or

d. the closure of the company.

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Dismissals based on economic grounds are considered "collective redundancies" when more than one employee is made redundant over a period of 30 days. Additional rules apply when collective redundancies impact at least 10 employees over a period of 30 days.

When a company belongs to a group of companies, the economic grounds are assessed at the level of the group of companies and therefore include the results/performance of all French entities/branches engaged in the same business.

What documents do I need to prepare for a collective redundancy?

Regardless of the size of the redundancy, employers must prepare a written document that describes the economic rationale demonstrating that the conditions for a collective redundancy are met (*e.g.*, the company must restructure in order to safeguard its competitiveness). The economic rationale must rely on accurate and thorough information, as employees challenging the validity of their dismissal can do so on the basis of the rationale presented.

In addition, for companies with at least 50 employees and 10 or more impacted positions, employers must prepare a redundancy plan (*plan social*) that contains measures designed to reduce the impact of the planned redundancies on employment through redeployment to similar positions within the group in France and measures taken to ensure that employees whose redundancy cannot be avoided are offered assistance in their search for a new job. Such assistance may include, for example, outplacement, training or financial subsidies.

Additional obligations exist, such as searching for a buyer, when the company is considering a full closure of a site and (i) has at least 1,000 employees in France, (ii) belongs to a group that has at least 1,000 employees in France, or (iii) belongs to a group that has at least 1,000 employees in the EU and two different legal entities with at least 150 employees in two different member states.

What is the role of the works council?

The works council must be informed and consulted on for both contemplated reorganizations and collective redundancies. The topics covered must include the number of job positions impacted, the criteria retained for the selection of the employees to be made redundant, the measures provided by the redundancy plan to limit the impact of the contemplated redundancies and the consequences of the contemplated redundancies on the remaining employees (such as changes to contracts, changes in working conditions, and consequences for health and safety).

The works council is not bound by a general duty of confidentiality, and the project itself (including the number of job cuts) is not confidential. Only specific information identified as confidential by the employer, such as nonpublished results, the company's strategy or an internal business plan, must be kept confidential by the works council.

The consultation with the works council must take place prior to the implementation of the redundancies.

The works council can be assisted by experts during the consultation process (usually a chartered accountant and an expert in working conditions/health and safety), whose fees are paid by the company. The experts appointed by the works council have extensive prerogatives to access documents they deem useful for their responsibilities. The experts are bound by law by a duty of confidentiality with respect to any information identified as confidential by the employer.

What is the role of the trade unions?

The role of the trade unions is different from that of the works council. Indeed, while the works council has mainly a consulting role (*i.e.*, this is the body with whom all major projects must be discussed prior to any decision), the trade unions have a negotiation role (*i.e.*, this is the body with whom all collective bargaining agreements are negotiated). This is why most companies have both a works council and trade union representative (*délégués syndicaux*).

The trade unions are not necessarily involved in the process of a collective redundancy, but employers are strongly encouraged to negotiate the contents of the redundancy plan and sign a collective bargaining agreement with the employees appointed by the trade unions as union representatives.

When the redundancy plan is negotiated with the trade unions' representatives, the negotiation takes place in parallel to the consultation of the works council regarding the restructuring and the redundancies.

What is the role of the local labor administration?

A collective redundancy is an inherently administrative process, meaning that companies must obtain the approval of the local labor administration to be able to proceed with the restructuring.

The powers granted to the local labor administration in its control of the process will vary, depending on whether the redundancy plan was adopted through a collective bargaining agreement signed with the trade unions or drawn up unilaterally by the employer.

If the redundancy plan is adopted through a collective bargaining agreement with the trade unions, the administration will only verify that the works council has been properly informed and consulted, that the collective bargaining agreement is valid (*e.g.*, the signatories had the power to sign the agreement) and that the agreement does not contain any illegal provisions (*e.g.*, provisions that discriminate unfairly based on age).

If the redundancy plan is drawn up unilaterally, the administration will also verify that every measure contained in the redundancy plan is appropriate in terms of both duration and budget. If the administration considers the measures contained in the redundancy plan to be insufficient, it can refuse to approve the plan, thereby making redundancies impossible. The labor administration may also challenge the criteria utilized by the company to select the employees to be terminated.

This makes negotiating the redundancy plan through collective bargaining particularly useful, given that, by law, it considerably limits the powers of the administration to prevent the company from implementing the contemplated collective redundancies.

In addition, the labor administration can issue injunctions during the consultation of the works council process requiring employers to provide to the works council or the expert it appointed additional information or documents pertaining to the restructuring.

How long does it take to implement a collective redundancy?

Implementing a collective redundancy requires careful planning, starting with the preparation of the documentation required for the consultation process (*i.e.*, the economic rationale and a draft redundancy plan), which usually takes between one and two months to produce.

Once the documentation is drawn up and the works council process has been initiated, the duration of the consultation process is defined by law and depends on the number of redundancies contemplated, as follows:

- two months if less than 100 redundancies are contemplated;
- three months if between 100 and 249 redundancies are contemplated; and
- four months if at least 250 redundancies are contemplated.

Following the end of the consultation process, the redundancy plan must be filed with the labor administration for approval. The administration has 15 days to validate the redundancy plan if it was adopted through a collective bargaining agreement or 21 days if the it was drawn up unilaterally by the employer.

Once the redundancy plan is approved, the company can start implementing the restructuring, but it can take up to 12 months for impacted employees to actually leave the company's headcount.

How much does implementation of a collective redundancy cost?

Costs will depend on a number of variables, in particular the seniority and salary of the impacted employees and the applicable collective bargaining agreements. However, costs can be broken down into two main categories:

- non-negotiable mandatory costs, of which the amount is set by law or the applicable collective bargaining agreement, and which includes the employees' notice period (usually two to three months), paid holidays, and termination indemnity defined by law or by the applicable collective bargaining agreement;
- negotiable costs, of which the amount will depend on the contents of the redundancy plan, and which includes costs such as a supplementary termination indemnity or the payment of an outsourcing company.

On average, a redundancy plan customarily costs, excluding litigation, between 18 and 24 months of salary per employee.

Can I choose which employees are made redundant?

Employers are free to select the positions to be eliminated but not the employees, and the selection of the employees to be made redundant must be made by following a specific process based on objective criteria. Therefore, employers cannot "pick and choose" employees for redundancy and must follow a two-step, legally defined selection process that must be set forth in the redundancy plan.

The first step consists of breaking down all the employees of the company into "job pools" (or "job categories"). A job pool is supposed to include all employees who have similar skills or backgrounds and who could basically take over each other's job with no or minimum training, even though their current position

and job title may be different. This part of the process is highly scrutinized by the labor administration when the redundancy plan is drawn up unilaterally, given that the size of the job pool may allow the employer to select the employees to be made redundant more easily (the smaller the job pool, the easier it is to target specific employees).

The second step consists of defining the criteria that will be applied within a job pool where positions are suppressed in order to identify the employees to be made redundant. For this step, French law requires the following criteria to be used to identify the employees to be made redundant:

- family responsibilities, especially those of single parents;
- length of service within the establishment or company;
- the situation of employees whose social characteristics make their professional reintegration particularly difficult, especially that of disabled and elderly employees;
- professional qualities assessed by category;
- any other nondiscriminatory, objective criteria provided by the redundancy plan.

Under this selection process, employees with family responsibilities, long length of service, disabilities and the best professional qualities will be chosen last to be made redundant. The purpose of this process is to protect employees who will be more severely impacted by termination than others.

Can I be prevented from making certain employees redundant?

The employer cannot be prevented from implementing the contemplated redundancies unless the redundancy plan is rejected by the labor administration. However, certain employees benefit from a protection against dismissal, which can be lifted only by the labor administration following a specific process.

This protection applies to a variety of employees, most commonly employee representatives, such as members of the works council or union representatives. Their dismissal follows a specific process that requires (i) a specific consultation of the works council, (ii) individual meetings with the relevant employees and (iii) the labor administration's prior approval. Overall, this process can take up to three months.

What litigation risks might I face?

There are three different avenues through which collective redundancies can be challenged in France, which represent three different risks: (i) noncompliance with the legally defined process (*e.g.*, noncompliance with the selection process), (ii) lack of valid economic grounds or (iii) insufficient measures taken by the redundancy plan aiming to limit the impact of the redundancies.

In the case of noncompliance with the legally defined process, employees can file a claim before the labor court seeking either an order for the employer to comply with the breached provision or for damages.

In the case of lack of valid economic grounds, employees can file a claim before the labor court, and the labor court may rule that the dismissal was performed without cause, giving the employees the right to obtain damages. The amount of such damages will depend on the number of years of service within the company and is capped by French law. The maximum amount an employee can obtain is 20 months of salary, for employees with more than 29 years of service. Except in very limited circumstances, employees cannot claim reinstatement.

Both employees and trade unions can challenge the contents of the redundancy plan before the administrative courts, arguing that its provisions do not sufficiently limit the impact of the redundancies, regardless of the fact that the labor administration approved the redundancy plan. If successful, the redundancies are null and void, and employees made redundant under the invalid redundancy plan can then ask to be reinstated to their previous positions within the company with all their benefits (except when such reinstatement is impossible, *e.g.*, in the event of the closure of an entire site) or ask for an uncapped amount of damages.

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Skadden's labor and employment practice in Paris advises clients on a wide range of strategic employment and labor matters to assist with the intricacies of French labor law and to better manage the related risks. We frequently advise on matters related to restructuring operations conducted in France (often related to site closures and redundancy plans), including collective negotiations, works council consultations and employment-related litigation. Our extensive experience in this field allows us to provide commercial and pragmatic advice and offer creative, business-minded solutions to our clients.