COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

France

EMPLOYMENT & LABOUR LAW

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This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in France.

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FRANCE
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1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

- Measures aiming at protecting the employees within the company

The Covid-19 pandemic requires the employer to take measures to protect the health of employees as part of its safety obligation. The employer must adapt its organization and prevent contamination risks.

In this regard, the single risk assessment document (*Document Unique d'Evaluation des risques*) must be updated; this document assesses the risks for the health and safety of employees resulting from the lay-out or re-lay-out of workplaces or facilities and in the definition of workstations. Following this assessment, the employer implements preventive actions as well as work and production methods that guarantee a better level of health and safety protection for workers. Employee representative bodies must be involved in the single risk assessment document updating process.

The French government also published several texts aimed at protecting employees and guiding employers in the satisfaction of their safety obligation.

Thus, the Ministry of Labour published a national protocol to ensure the health and safety of employees at their companies in the context of the Covid-19 epidemic. It strongly advocates teleworking when possible, requires that masks be worn in some workplaces (enclosed collective areas, vehicles, etc.). It also sets a procedure for the regular cleaning / disinfection of surfaces, objects and contact points, restates the social distancing rules, those related to Covid-19 screening at the company and how to manage the case of symptomatic people.

The Ministry of Labour also posted several online "Q&A" relating to telework, vaccination by occupational health services or preventive measures in the workplace against Covid-19 and masks. Job information sheets and practical guides according to activity sectors and occupations are also available to steer companies.

- Measures to avoid redundancies.

– Partial activity (ordinary rules)

Partial activity is a measure that allows companies faced with temporary difficulties of various origins (economic, technical, health, following a disaster ...) to avoid notifying redundancies by notably having the State cover all or part of the cost of compensation paid to employees. This scheme allows the employer to go beyond legal and contractual obligations in terms of working hours. During periods of partial activity, the employment contract is suspended but not terminated.

The methods to implement partial activity were significantly adjusted in the context of the Covid-19 pandemic. Partial activity may concern all or part of a company's employees.

In practice, the employer must send its request for partial activity to the *Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi* (DIRECCTE) within 30 days of the beginning of partial activity. It must notably specify the reason justifying the use of partial activity ("exceptional circumstances" related to the Covid-19 pandemic) and the number of concerned employees. In companies with at least 50 employees, the request must be accompanied by the opinion issued by the Social and Economic Committee (*CSE*) on this subject and communicated within maximum two months of its submission to the DIRECCTE. The absence of a decision to authorize the use of partial activity within fifteen days constitutes implicit acceptance of the request.

Within the framework of partial activity, the employer pays its employees a partial activity allowance and receives a partial activity indemnity from the State.

- The rate of the partial activity allowance, which is currently set at 70% of the employee's previous gross remuneration, is to

be reduced to 60% as from April 1, 2021, except for companies open to the public, the activity of which is interrupted in full or in part following health promotion measures, for which the 70% rate will be maintained until June 30, 2021.
- The rate of the partial activity indemnity is set at 60% but will decrease, in principle, to 36% on April 1, 2021. However, this rate is adapted and modulated according to the activity sectors and characteristics of the companies, taking into account the economic impact they suffer due to the health crisis. Thus the partial activity indemnity will actually only decrease from 70% to 60%, as of April 1, 2021 for some activity sectors.

– Long-term partial activity

Long-term partial activity (*APLD*) is an alternative to partial activity under common law. It enables companies to face a lasting drop in their activity by benefiting from a system equivalent to partial activity. It covers longer periods of reduced activity than the common law system (24 months, consecutive or not, over a reference period of 36 months).

The *APLD* is a true alternative to collective redundancies, as the Administration asks the employer to reimburse the sums received for each employee subject to the *APLD* scheme and whose contract is terminated, during the period the scheme is applied, for an economic reason. The administrative authority may also interrupt payments of the indemnity when it observes that the subscribed undertakings are not complied with.

This scheme is implemented pursuant to a company, site or group agreement or by an extended branch agreement which defines, in particular, its duration of application, the activities and employees concerned, the reductions in working hours that may give rise to compensation and the undertakings specifically subscribed in consideration thereof, in particular to maintain employment. When the scheme is implemented pursuant to a branch agreement, the company draws up a document that complies with its stipulations and sets the specific employment undertakings. The company or branch agreement may exclude from its application scope either one or several sites or one or several categories of employees, who may then be made redundant, if necessary, within the framework of a job safeguarding plan. If the APLD scheme is implemented by collective agreement, it must be validated by the administration (reduced control), whereas if it is implemented by way of a unilateral document, it must be approved by the administration (stronger control).

The hourly rate of the indemnity paid to the employer is equal to 60% of the gross hourly wage. The employee receives an allowance, paid by their employer, equal to 70% of their gross salary.

An employer benefiting from the specific partial activity scheme for some of its employees may, at the same time, benefit for other employees from the ordinary partial activity scheme.

2. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

a. Unilateral termination of an open-ended contract must be justified by “real and serious grounds”. In the absence of such grounds, the employee is entitled to damages for unfair termination in case of litigation (please refer to question 21 regarding the potential amount of damages the employer may be ordered to pay in case of unfair dismissal).

This requirement applies to all types of dismissal, e.g. based on:

- disciplinary reasons (the misconduct must be serious enough);
- professional incompetence (the incompetence must be stated objectively and over a sufficient period of time);
- physical unfitness (the company must follow the unfitness procedure and attempt to redeploy the employee within the company or the group in France);
- economic grounds (the job elimination must rely on, for example, economic difficulties which are assessed at the level of the group or of the sector of activity of the group to which the company belongs, but only on the French territory, and the employer must also do his/her utmost to redeploy the employee).

From a formal perspective, in order to help companies to secure the dismissal procedures they may enforce, the “Macron laws” (ordonnances Macron) dated September 22, 2017 and corresponding decrees have published various templates of dismissal letters that employers can use.

Moreover, the Macron laws provide that, following the notification of termination, the employer has 15 days to provide further details to the concerned employee on the grounds of dismissal, while the employee also has 15 days to ask the employer for additional explanations.

The potential pitfalls surrounding dismissal have triggered the implementation and the success of a mutually agreed termination called "*rupture conventionnelle*", which requires the employee's agreement and validation by the labour administration but eliminates the necessity to provide justification.

Trial periods also offer a timeframe (of one to four months, potentially renewable depending on applicable terms) where unilateral termination may occur without justification.

b. Fixed-term contracts may only be unilaterally terminated by the employer on grounds of gross misconduct or physical unfitness. In the absence of such justification, the employer is bound to pay the salaries owed until the end of contract.

3. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

- Rules common to redundancies

Redundancies must comply with additional requirements including the necessity to chose the potentially dismissed employees via application of selection criteria which in essence tend to protect the most fragile individuals.

Besides, employers must carry out consultation procedures whose content is determined by the number of layoffs and the size of the company. The timeframe typically ranges from one to four months. An interesting feature is that consultation deadlines (ranging from one to four months, depending on the number of dismissed employees) give employers better planning capacities.

- Additional rules specific to the redundancies of more than 10 employees over a period of less than 30 days in companies with at least 50 employees

In addition to the above-mentioned rules, if a company of 50+ employees contemplates laying off 10+ employees, it must set up a redundancy plan (negotiated with unions and/or discussed with the Works Council) containing inplacement and outplacement measures and have this plan approved by the Labour Authorities. This administrative process tends to secure the redundancy plans, as the latter will only be implemented once the Labour Authorities have issued their authorization.

4. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

Whenever a sale of assets entailing a transfer of undertaking occurs (TUPE transfer), the seller may not, except under a very limited derogation, carry out redundancies prior to the transfer. Failure to respect this prohibition causes dismissals to be null and void. Redundancies, if any, must be carried out once the transfer has taken place.

5. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

In the event of dismissal, the notice period varies according to the employee's length of service at the company. The law specifies this period of time. For example:

- for employees with less than 6 months of seniority, the law refers to the collective labour agreements or, failing that, to local and business customs;
- for employees with a seniority ranging between six months and two years, the employee is required to comply with a notice period of one month;
- for employees with at least a two years' seniority, the employee is required to comply with a notice period of two months.

However, the above-mentioned notice periods of one and two months are only applicable in the absence of collective agreement provisions, contractual or customary stipulations providing for a more favourable notice period or seniority for the employee.

The French labour code prohibits the parties from contractually setting a shorter notice period or a seniority requirement higher than those provided for by law.

Branch collective agreements can therefore determine the notice periods in the event of dismissal,) depending on the employee's categories and length of service. The notice period would typically amount to one or two months for blue-collar and administrative employees, and three months for employees of managerial status ("*cadres*"). Some CBA's provide for shorter or longer notice periods.

Concerning the trial period, the notice depends upon the length of service and amounts to a maximum of one month.

Finally, in certain circumstances, no notice period applies, especially in case of dismissal for gross misconduct, or for physical unfitness not caused by an accident at work or an occupational disease.

6. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

The employer may decide to put the dismissed employee on garden leave, with maintained pay and benefits in kind (e.g., company car), until the end of the notice period

7. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Yes, please refer to question 5.

8. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

In any event, the grounds of dismissal must be precisely set out in the notification letter. As mentioned in question 1, the grounds of dismissal must be contained in the dismissal letter, but additional details can be provided within 15 days following the notification.

In addition, except in the event of a large layoff procedure, dismissal must be preceded by the invitation of the employee to a preliminary meeting, where he may be assisted by staff representatives for example. A minimum of five business days must elapse between the invitation and the meeting, and at least two business days must elapse between invitation and notification of dismissal.

Depending on the grounds for dismissal, further requirements may have to be complied with, e.g.:

- dismissals on grounds of physical unfitness require prior consultation of staff delegates, medical examination and redeployment searches in order to find an alternative to dismissal.
- disciplinary dismissals must comply with specific requirements, among which the necessity to start the procedure no later than two months after the facts were committed or discovered, and the dismissal must be notified no later than one month after the preliminary meeting;
- Economic redundancies must be preceded by various steps (please refer to question 2).

9. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

Failure to set out the dismissal grounds has the same effect as an absence of “real and serious cause” and entitles the employee to damages for unfair dismissal. The same applies to non-compliance with the timeframes applicable to disciplinary procedures. Other violations of the procedure (e.g. non-compliance with the required five business days’ timeframe between invitation and preliminary meetings) result in damages of a maximum of one-month’s salary.

10. How, if at all, are collective agreements relevant to the termination of employment?

Essentially with respect to the definition of notice periods (see question 4) and severance indemnities (see question 15)

11. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

The labour inspector’s authorization is required to terminate the employment of protected employees, e.g., current elected or appointed employee representatives, former representatives (who remain protected over a period of 6 or 12 months depending on the nature of their mandate) and candidates to staff elections. Failure to request said authorization, or annulment of said authorization by a court, results in an obligation to

reinstate the dismissed employee or, if the employee waives reinstatement, payment of damages up until the end of protection within the limit of 30 months.

12. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

A dismissal that, in fact, relies on a discriminatory reason (e.g., origin, gender, family status, union affiliation etc.) or takes place pursuant to acts of harassment, is subject to annulment by the labour court. Such annulment entitles the employee to reinstatement and/or high damages.

13. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

In addition to the risk of annulment of dismissal, the employer is exposed to paying specific civil damages to compensate harassment or discrimination. Besides, discrimination and harassment (of a sexual or moral nature) constitute a criminal offence (up to 3 years imprisonment and a fine of up to €45,000 for discrimination, and up to 2 years imprisonment and a fine of up to €30,000 for harassment).

14. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Pregnant employees, or employees under sick leave following a work accident or occupational disease, benefit from a protection consisting of the employer's prohibition to terminate the contract except for gross misconduct or "impossibility to maintain the contract". Employees on strike may not be dismissed on the basis of facts committed during the strike, except in case of wilful misconduct. The non-respect of this prohibition entitles the employee to reinstatement and/or high damages. For fixed-term contracts, please refer to question 1 above.

15. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Pursuant to a law of 9th December 2016, whistle-blowers enjoy a protection consisting of the prohibition of discriminatory measures (resulting in annulment of said measures if any) and immunity from criminal prosecution whenever whistleblowing is performed in compliance with the law. The legal whistleblowing procedure entails, *inter alia*, a principle of *bona fide* and disinterested reporting, and an obligation to first disclose illegal acts to the employee's supervisor. The scope of facts subject to whistleblowing is extremely broad (including but not limited to, any criminal offence of medium or high range). If the supervisor abstains to take reporting into consideration, the employee is free to report the fact to judicial or administrative authorities, and if these remain inactive for three months, he may report the facts to the press.

16. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

In the event of dismissal, the severance indemnity is defined by the collective bargaining agreement. For all employees having at least eight months of seniority, it amounts to a minimum of 1/4 of a monthly salary per year of service up to 10 years of seniority, and 1/3 of a monthly salary for each year over 10 years.

17. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

A mutually agreed termination ("*rupture conventionnelle*") permits to end the contract while avoiding any legal challenge about the justification of termination (unless the employer fraudulently resorts to said termination to avoid a legally mandatory procedure such as redundancy). Yet such termination does not bar the employee from claiming amounts pertaining not to the termination, but to the employment relationship itself (salary or overtime back pay, damages for harassment, etc.).

As an alternative, the employee and the employer may

enter into a settlement agreement subsequently to dismissal, in which case the employee may validly waive his rights to sue the employer. Said settlement implies the payment of a settlement indemnity.

The termination agreement may include a confidentiality clause pursuant to which the parties will be required to keep its contents confidential. Such a clause will be included as an appendix to the *CERFA* form.

Furthermore, if discretion or confidentiality clauses are stipulated in the employment contract, they will continue to apply after the termination.

18. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Non-compete covenants are enforceable under French law as long as they are justified by the company's legitimate interests, limited in time and space, financially compensated, and do not make it impossible for the employee to find another employment. The covenant may allow the possibility to waive the non-compete covenant upon termination, hence avoiding payment of the compensation.

19. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Confidentiality covenants are admitted under French law. Based on existing case law, the only potential matter for discussion relates to the necessity to limit the duty in time.

20. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

No. Yet settlement agreements often stipulate non-disparagement obligations, or even a commitment to provide positive references.

However, the new employer may check the candidate's references with the former employer. The latter is required to answer loyally to questions asked about the former employee's professional capacities, without exceeding the limits of its duty of discretion.

For example, it is possible for the employer to provide information, even unfavourable information, on the employee's professional skills. They must be directly related to the employee's professional capacities.

21. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The main difficulty consists in assessing the existence of a proper cause for dismissal in a context where statistically, nearly one third of terminations end up in labour courts. Mitigating the judicial risk requires a thorough verification of the file. Here are the questions that one may ask in the event of an intended disciplinary dismissal:

- are we still within the applicable timeframe (no later than two months after discovery of the facts)?
- is there proper evidence of the misconduct (e.g., via a valid affidavit)?
- how can we convince a judge that it is serious enough to justify dismissal (because of the damage suffered, or the risk for the company, etc.)?
- were there any prior sanctions?
- is the employee likely to invoke credible justifications (mismanagement, unclear instructions, etc.)?

An additional step consists in assessing, in the event of an unfavourable court ruling, the level of the risk, leading to the following questions:

- what are the employee's age and length of service?
- is this employee likely to remain unemployed for a long time?
- would the employee be likely to make, upon occasion of a court case, additional claims related to the contractual relationship (e.g., bonus or overtime back pay)?

Depending on the results of this analysis, the company may consider resorting to mutually agreed termination, or to a settlement negotiation following dismissal.

22. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of

employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The Macron laws provide for minimum and maximum damages that the judge may award the employee in case of unfair dismissal, depending on the employee's seniority and the company's headcount.

This minimum and maximum amounts are currently challenged by employees before French labor courts, and some of them have already considered these rules as unenforceable. Only a French Supreme Court decision, that could take place in the following months or years, will confirm or not the validity of such rules.

Note that on top of this amount, employees may be entitled to additional damages in specific circumstances (dismissal in vexatious circumstances, violation of safety at work, etc.) and may also make salary claims (overtime, bonus, etc.).

The minimum and maximum amounts are as follows. These thresholds and caps apply except if nullity of dismissal is incurred (which is the case in the event of very serious violations such as harassment or discrimination for example).

Seniority in the company	Minimum indemnity (in gross monthly salaries)		Maximum indemnity (in gross monthly salaries)	Seniority in the company	Minimum indemnity (in gross monthly salaries)	Maximum indemnity (in gross monthly salaries)
	< 11*	≥ 11*				
0	N/A	N/A	1	16	3	13.5
1	0,5	1	2	17	3	14
2	0,5	3	3,5	18	3	14.5
3	1	3	4	19	3	15
4	1	3	5	20	3	15.5
5	1,5	3	6	21	3	16
6	1,5	3	7	22	3	16.5
7	2	3	8	23	3	17
8	2	3	8	24	3	17.5
9	2,5	3	9	25	3	18
10	2,5	3	10	26	3	18.5
11	3		10.5	27	3	19
12	3		11	28	3	19.5
13	3		11.5	29	3	20
14	3		12	≥30	3	20
15	3		13	–	–	–

* Number of employees in the company

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