What are the main changes made to the Labour Code by Macron's orders?

SUMMARY

On 31 August, the French government unveiled five draft orders to reform the Labour Code.

These draft orders, after approval from the Council of State, have been definitively adopted by the Council of Ministers on 22 September, before being published in the Official Journal - and thus coming into force - on 23 September (except for the provisions that require regulatory measures).

For its part, the Constitutional Council had already validated the compliance of the enabling law with the Constitution on 7 September 2017.

However, the Constitutional Council has raised the possibility of a subsequent constitutional review of the orders, either in the form of a referral to the Council on the legislation ratifying them, or as part of a priority preliminary ruling on constitutionality (PPRC) concerning the ratified provisions of the orders.

This note sets out the main changes contained in the orders and which concern:

1. Collective bargaining in companies
2. Staff representation
3. Termination of employment contracts
4. Occupational health
5. Use of specific forms of work

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1. Collective bargaining in companies

The provisions detailed below came into force on the publication date of the implementing decrees and not later than 1 January 2018.

1.1 The relationship between branch, company and establishment agreements

The relationship between these various forms of agreement is currently identified by distinguishing **thee blocks of themes**.

1) For themes related to:

- Minimum wages (not bonuses);
- Classifications;
- Sharing matching funds;
- Supplementary collective guarantees;
- Certain measures related to working time regarding equivalence, night work, the minimum weekly working time of part-time employees, the increased rate of overtime and the temporary increase in working time specified in the contracts of part-time employees;
- Certain provisions related to fixed-term contracts, temporary work and the use of permanent 'construction' contracts;
- Certain provisions on professional equality;
- The conditions and renewal periods of trial periods;
- The conventional transfer of employment contracts when article L1224-1 of the Labour Code does not apply.

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- The branch agreement prevails over the company agreement signed before or after, unless the latter provides at least equivalent guarantees.

This concept of 'at least equivalent guarantees' has still to be defined.

2) For themes concerning:

- Prevention of the effects of exposure to occupational risk factors;
- The employability and continued employment of disabled workers;
- The workforce size from which union representatives may be appointed, the number of union representatives and the value of their trade union career;
- Premiums for dangerous or unhealthy work.

- When the branch agreement so provides, the subsequent company agreement cannot contains any different stipulations unless it provides at least equivalent guarantees. This concept of 'at least equivalent guarantees' has still to be defined.

3) For all other themes:

- Previous or subsequent company or establishment agreements prevail over branch agreements, on the specification that, in the absence of any company or establishment agreement, the branch agreement will apply. This will be the 'reserved area' of the company or establishment agreement.

Note: The clauses of branch conventions and agreements concluded before the orders in those areas where the company or establishment agreement prevails and prohibits this agreement from derogating from their stipulations became null and void since the publication of the order.

1.2. Mandatory collective bargaining

The provisions of the Labour Code relating both to mandatory branch bargaining and to mandatory company bargaining have been completely rewritten.

Concerning companies, the chapter on mandatory bargaining now comprises three sections:

- Section 1 defines the public policy measures: a prohibition on unilateral measures during bargaining and an obligation to draw up a record of disagreement;
- Section 2, the field of collective bargaining, provides that the collective agreement can determine the themes of the mandatory bargaining, the frequency (up to four years) and the content of each theme, the timing and location of meetings, the information to be provided to the negotiators and the date of delivery and the arrangements for monitoring the commitments entered into by the parties. Group, company and establishment bargaining have thus been affected. The principle is therefore for the terms of collective bargaining to be determined by the collective bargaining itself.

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- Section 3 determines the supplementary provisions to be applicable in the absence of the above agreement: a priori, and subject to further review, the provisions currently governing mandatory annual and triennial bargaining essentially continue to apply.

1.3. Majority/non-majority agreements

The order introduces two new concepts:

- The option for employers of requesting an employee consultation to be organised, in the event of a non-majority agreement having been signed by trade union organisations having received over 30% of the votes cast in favour of representative organisations in the first round of the professional elections and none of these trade union organisations having asked for such a consultation to be held within one month of signing the agreement. Therefore, the orders open up this route to employers;
- The generalisation of the 'majority' agreements provided for by the El Khomri Act will be brought forward to 1 May 2018, instead of 1 January 2019 as originally planned.

1.4. A new competitiveness agreement

The order provides for the harmonisation of the conditions of appeal and the content of the following agreements: continued employment, job preservation and internal mobility agreements.

Therefore, it involves establishing a single type of agreement with relaxed conditions which could, according to this order, 'arrange working time, its organisation and distribution arrangements; adjust the remuneration [and] determine the conditions of professional or geographical mobility within the company in order to meet the needs related to the functioning of the company or in order to maintain or increase employment'.

The provisions of the agreement automatically replace any conflicting and incompatible clauses of the employment contract, including in terms of remuneration, working hours and professional and geographical mobility.

In addition, the order specifies the procedures for terminating the employment contracts of employees who refuse to see these provisions applied. Therefore, in this case, employees have one month in which to inform their employers that they refuse to amend their employment contract. If the employer decides to dismiss the employee, 'this dismissal is not a dismissal on economic grounds and is based on real and serious cause'. The employee cannot benefit, in this case, from the Professional Security Contract (PSC) but from a 100-hour contribution to their personal training account.

1.5. Collective bargaining in the absence of a union representative

The order seeks to simplify collective bargaining in companies which do not have a union representative:

- In companies with fewer than 11 employees, or companies employing between 11 and 20 employees without a representative on the Social and Economic Committee: the employer can offer the employees a draft agreement covering all the themes open to collective bargaining. To be valid, this agreement must be ratified by a two-thirds majority of the staff.

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- Agreements can be concluded and revised in companies employing between 11 and fewer than 50 employees without a union representative:
    - By one or more employees mandated by one or more representative trade unions in the branch or otherwise, at national and industry level.

Note: In the case of an agreement with non-mandated employees, their validity will be subject to approval by the employees by a majority of the votes cast.

- *OR*

- By one or more members of the staff delegation of the Social and Economic Committee, in which case the validity of these agreements will be subject to their signing by the member or members of the Social and Economic Committee representing the majority of the votes cast in the last professional elections. In practice, the interest will therefore be to bargain directly with the member who obtained the most votes in the last professional elections in order not to be exposed to blocking by the other members of the SEC.

- In companies with at least 50 employees without a union representative, the bargaining provisions remain broadly unchanged.

1.6. Contesting collective agreements

The conditions and deadlines for contesting collective agreements have been modified, with the purpose of securing these agreements.

Henceforth, conventions or agreements meeting the validity conditions are presumed to be negotiated and concluded in accordance with the law. It is therefore up to the person challenging the validity of the agreement to prove the contrary.

The deadline for contesting agreements has then been reduced. Before the orders came into force, the applicable rule was the five-year limitation period. With the orders, the action for the annulment of all or part of a convention or agreement must be initiated, on pain of nullity, before the expiry of a two-month period from its notification to the non-signatory unions or, in the case of employees, of its publication.

Finally, judges are given a new option regarding the matter. Indeed, if it becomes apparent – in the event of judicial cancellation of all or part of a convention or agreement – that the retroactive effect of this cancellation is likely to have 'manifestly excessive consequences', the judge can decide that the cancellation will take effect only in the future. Now, the judge has the option of modifying the effects of his decision over time, without prejudice to any litigation already initiated on the date of his decision.

1.7. Provisions specific to very small businesses

The order on strengthening collective bargaining introduces a condition to extend branch agreements or professional agreements to companies with fewer than 50 employees.

Indeed, in this case, such conventions or agreements can be extended only if they contained specific provisions for these companies or justified the reasons why they did not contain such provisions.

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2. Staff representation

2.1. The merging of Staff Representative Institutions

2.1.1. Social and Economic Committee

In companies with at least 11 employees, a new institution called the Social and Economic Committee (SEC) has been set up.

In companies with between 11 and 49 employees, this SEC replaces the staff representatives.

In companies with at least 50 employees, it exercises the powers currently assigned to the three information and consultation bodies (DP, WC and HSE) and benefits from legal personality.

This committee is set up, as the case may be, at the level of the company, an SEU or at intercompany level.

Moreover, in companies made up of two or more separate establishments, a central company SEC and establishment SECs are created.

The terms of office of SEC members is four years, although an agreement could provide for a shorter period, within a limit of two years. SEC representatives cannot complete more than three consecutive terms, except in companies with fewer than 50 employees.

The order specifies that the minimum number of hours of delegation per SEC member is 10 hours in companies with fewer than 50 employees and 16 hours in others.

The number of SEC representatives and their time credit will be defined subsequently by decree. This regulation should also specify the conditions for sharing time credits.

The order provides that an operating subsidy will be paid by the company to finance the SEC, which depends on the size of the company:

- Fewer than 50 employees: no subsidy provided
- Between 50 and 2,000 employees: 0.20% of the gross payroll
- More than 2,000 employees: 0.22% of the gross payroll

In addition, funding for social and cultural activities is added to the subsidy.

In addition, expert fees will be partially borne by the SEC, up to 20% of its operating budget. This will apply to all cases involving the use of experts, with the exception of SEC consultations on the company's economic and financial situation and employment policy (in the event of severe economic dismissal or in case of serious risk to health, safety and working conditions) for which the employer will cover all the expert fees.

The order's provisions came into force on the publication date of the implementing decrees and not later than 1 January 2018.

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However, in companies that already have elected staff representatives, the SEC could be set up at the end of the current mandate of these elected representatives and at the latest by 31 December 2019, regardless of whether or not the mandate of these elected representatives has come to an end. However, the order provides for different hypothesis in which different rules apply:

● First hypothesis: the company concluded a pre-electoral agreement before September 23, 2017 (date of publication of the order). In this case, the Staff Representative Institutions are renewed (or constituted for companies without SRI) in accordance with the rules in force before the publication of the order. The SEC must be set up on the January 1, 2020, or on an earlier date determined by collective agreement or by decision of the employer after consultation of the WC or, failing that, the DP or, where applicable, the DUP.

● Second hypothesis: mandates expire between 23 September and 31 December 2017: they are extended
- Either until the end of the year, and the SEC will replace the existing SRI at the end of the professional elections
- Or by one year at the latest or by collective agreement, or by decision of the employer after consultation of the appropriate SRI. The one-year deadline seems to begin at the expiry of the mandates.

● Third hypothesis: the mandates expire between January 1 and January 31, 2018. These mandates can be reduced or extended but not more than one year, either by collective agreement or by decision of the employer after consultation of the appropriate SRI.

● Fourth hypothesis: the companies including separate establishments which mandates of the different SRI do not coincide. As for the third hypothesis, the duration of these mandates can be, for one of the establishments or for the whole company, extended or reduced in the same conditions as described above, so that their term coincide with the date of the setting up of the SEC and, where appropriate, of the establishment SEC and of the central company SEC.

2.1.2. Works Council

The order makes it possible to set up a Works Council by a majority or extended-term company or branch agreement for an indefinite period, instead of the SEC.

This Works Council exercises all the powers of the SEC but is also empowered to negotiate, conclude and revise company or establishment agreements, excluding agreements subject to specific rules of validity (job protection plans or professional elections, for example). Thus, despite its competence in the field of collective bargaining, it nevertheless coexists with the union representatives, who remain.

The agreement establishing the Works Council shall set out the list of themes for which the employer's decisions could not be taken without the Council's approval. Professional equality and training are necessarily concerned.

According to the order, the validity of a company or establishment agreement concluded by the Works Council is subjected to its signing by a majority of the elected members of the council or by a majority of the votes cast during the professional elections. It seems that an agreement can be validated according to two alternative arrangements:

- If it is signed by a majority of the members of the Council;

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- If it is signed by one or several members of the Council representing the majority of the votes cast in the last professional elections.

Implementing decrees will determine this Council's methods of operation.

2.1.3. The Health, Safety and Working Conditions Commission

In companies with at least 300 employees, a commission dedicated to 'health, safety and working conditions' (HSWCC) will have to be set up to compensate for the disappearance of the HSE.

To this commission – set up within the SEC – is delegated 'all or parts' of the SEC's responsibilities. It is chaired by the employer and includes at least three members of the SEC; the employer can appoint experts and technicians with advisory opinions.

The establishment of this commission is compulsory in separate companies and establishments with at least 300 employees, as well as in establishments with at least one Seveso-classified nuclear installation or certain mineral deposits. In companies or establishments with fewer than 300 employees, the HSWCC can be set up by collective agreement or by agreement between the employer and the SEC, or imposed by the labour inspector when it appeared necessary to do so.

3. Termination of employment contracts

3.1. The rules of procedure and grounds for dismissals

The order provides that employers may use standard templates for dismissal notifications. These templates, which will also recall the rights and obligations of each party, will be determined by decree of the Council of State.

These templates exist for dismissals for both personal and economic reasons.

The grounds set out in the dismissal letter could, after notification of the dismissal 'be specified or supplemented, either directly by the employer or at the employee's request, under conditions set by decree'. It is only after this step that the dismissal letter would if necessary set the limits of the dispute.

But if employees do not make such a request and then dispute the legitimacy of their dismissal for insufficient reasons, this irregularity do not have the effect of rendering the dismissal without real and serious cause; but it gives entitlement to compensation for procedural irregularities amounting to a maximum of one month's salary.

Moreover, in the event of irregularity of form or non-respect of the dismissal procedure by the employer (preliminary interview, deadlines, attendance by a person of its choice), the employee can only claim maximum compensation equal to one month's salary.

Finally, in the event of failure by the employer to comply with the deadline for sending employees their fixed-term or temporary contracts, the penalty is limited to maximum compensation equal to one month's salary, and thus can no longer comprise reclassification of the contract to a permanent contract as was currently the case.

3.2. Statutory compensation for dismissal

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Statutory compensation for dismissal is granted to employees with at least eight months' service, instead of one year as before the order. This measure applies to dismissals notified as of the publication of the order (September 23, 2017).

Note: A decree issued at the same time as the orders also increases the amount of the statutory compensation for dismissal. A 25% increase in the current amount of compensation has been adopted, but only for the first ten years

3.3. The deadline for contesting termination of the employment contract

Although before the order, in the majority of cases, the deadline for employees to contest a dismissal was 24 months, the order harmonises and reduces this period to 12 months from the termination of the employment contract (except for specific disputes, in particular in the event of dismissal with job protection plans, or shorter deadlines).

These provisions apply to the requirements in force from the date of promulgation of the order.

3.4. The cap on compensation in the event of dismissal without real and serious cause or a null and void dismissal

3.4.1. In the event of dismissal without real and serious cause

While a scale already existed as an indication, the order introduces a mandatory scale of damages to be awarded by judges in the event of dismissal without real and serious cause. The scale provides for a minimum and maximum number of months of salary as compensation based on the employee's length of service in the company.

Length of service of the employee in the company (in full years)	Minimum compensation (in months of gross salary)	Maximum compensation (in months of gross salary)
0	Not applicable	1
1	1	2
2	3	3
3	3	4
4	3	5
5	3	6
6	3	7
7	3	8
8	3	8
9	3	9
10	3	10
11	3	10.5
12	3	11
13	3	11.5
14	3	12
15	3	13
16	3	13.5
17	3	14
18	3	14.5

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19	3	15
20	3	15.5
21	3	16
22	3	16.5
23	3	17
24	3	17.5
25	3	18
26	3	18.5
27	3	19
28	3	19.5
29	3	20
30 and above	3	20

The order on securing labour relations has set up a derogation scheme for companies with fewer than 11 employees.

For these companies, the minimum compensation is half a month's gross salary for employees with one year of service and the maximum compensation amounts to two and a half months' gross salary for employees with 10 years of service.

In all cases, the judge is able to deduct the compensation for dismissal paid to the employee from the amount awarded under the scale.

In addition, the scale also applies in the event of an act or decision of legal termination when the employer is at fault.

These mandatory amounts are not applicable in the event of a null and void dismissal or a dismissal in violation of a fundamental freedom.

3.4.2. In the event of a null and void dismissal

The compensation is set by the judge at a minimum of six months' gross salary, without prejudice to the severance payment received by the person concerned.

As a reminder, null and void dismissals are those related to the violation of a fundamental freedom, acts constituting psychological or sexual harassment, discriminatory dismissal, the violation of specific protections linked to the exercise of a mandate, maternity or a refusal to reintegrate employees deemed to be unfit.

These new arrangements for indemnifying unfair or null and void dismissals apply to terminations notified after the publication of the order.

3.4.3. Changes to certain indemnities

Some specific indemnities stipulated by the Labour Code are amended in a way less favourable to employees.

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- In the event of a violation of the re-employment priority during an economic dismissal: at least one month's salary (compared to two months before the order);
- Nullity of the economic dismissal due to the absence or insufficiency of a job protection plan or the failure to validate or approve such a plan: at least six months' salary (compared to 12 before the order);
- In the event of a failure to reintegrate employees who are victims of occupational accidents or diseases or failure to comply with the redeployment obligation when such employees are physically unfit: at least six months' salary (compared to 12 before the order).

3.5. Dismissal on economic grounds

3.5.1. Scope of assessment of economic difficulties

Before the orders, according to established case law, the notions of the economic difficulties and reorganisation of the company required to safeguard its competitiveness were assessed in terms of the business sector of the group to which it belongs, thus taking account of companies located abroad.

The order restricts a company's geographical scope of assessment of economic difficulties to the French national territory when it belongs to an international group. Indeed, in this case, economic difficulties, technological changes or the need to safeguard the company's competitiveness are assessed 'in terms of the business sector common to its own and that of the companies of the group to which it belongs, established in the French national territory, except in cases of fraud'.

The order also specifies the definition of a business sector, drawing on the case law of the Court of Cassation. Thus, a business sector is 'particularly characterised by the nature of the products, goods or services delivered, the target customer base and the distribution networks and methods related to the same market'.

No measures have been taken to increase the thresholds (in terms of workforce size and number of dismissals) from which the employer has to establish and implement a job protection plan.

3.5.2. Redeployment obligation

The implementing rules for the prior redeployment obligation will be specified by decree.

However, the order provides for the repeal of article L1233-4-1 of the Labour Code. The latter specifies the possibility and the conditions for employees to receive redeployment offers outside the French national territory when the company in which they are employed has establishments abroad.

3.5.3. Criteria for order of dismissal

According to the order, the scope of application of the criteria for order of dismissal is now set at the employment areas defined by the INSEE (French National Institute for Statistical and Economic Studies) and not the company as a whole, in the event of an economic dismissal of fewer than 10 employees in the same 30-day period, i.e. without a job protection plan.

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3.5.4. Consultation of staff representatives

The order adapts the provisions of the Labour Code related to the procedures for consulting staff representatives on collective dismissals on economic grounds. Thus, the texts refer to the Social and Economic Committee. The Social and Economic Committee is informed, if appropriate, of the consequences of the order in terms of health, safety or working conditions.

3.6. Supervision of voluntary departures

The order stipulates the option of implementing a voluntary departure plan, which was previously absent from the Labour Code. The order states that a 'voluntary departure plan may lay down the terms governing the conditions for the termination of the employment contract between the employer and the employee by mutual agreement'.

The order states that a collective agreement may 'determine the content of a voluntary departure plan that excludes any dismissal in order to achieve the objectives assigned to it in terms of job losses'. It also details the measures that the voluntary departure plan may contain: 'the maximum number of departures envisaged, the associated job losses and the duration of implementing the plan; the conditions that employees must meet in order to benefit from it; the criteria for deciding between potential candidates for departure; the methods for calculating the severance payment guaranteed to employees, the candidature procedures when employees depart, the measures to facilitate external redeployment of employees and arrangements for monitoring the effective implementation of the voluntary departure plan.'

This agreement, set by a majority collective agreement, will be submitted to the administrative authority for validation.

Once the agreement has been validated, the employer's acceptance of the voluntary departure of an employee will lead to the termination of the employment contract by mutual agreement between the parties (subject to authorisation by the Labour Inspectorate for protected employees).

Furthermore, the social security and tax regime of the compensation paid to an employee who accepted such an amicable termination, the amount of which should be fixed by said agreement without being able to be less than that of the statutory compensation for dismissal, is aligned with the arrangements applicable to compensation awarded under a job protection plan.

Finally, the person concerned is entitled to unemployment insurance.

The order codifies thus certain rules of the legal regime for voluntary departure plans, which up to now have been defined by case law alone.

4. Occupational health

4.1. Scope of the redeployment search in the event of physical unfitness

The scope of the redeployment search necessary in the event of an employee's physical unfitness is reduced and henceforth limited to the French national territory.

The measure is applicable on or before 1 January 2018.

4.2. Appeals against an occupational physician's opinion

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According to the order, appeals against an occupational physician's opinion (notably opinions on physical fitness or unfitness) still come under the jurisdiction of the Labour Tribunal acting in summary proceedings.

However, the Labour Tribunal is no longer responsible for appointing an expert physician to the Court of Appeal. However, it has the option of submitting an instructional measure to the occupational physician inspector.

The order specifies that a physician mandated by the employer for a counter-medical examination can be notified of the medical evidence justifying the occupational physician's opinion. The costs of the procedure, normally borne by the losing party, will be fixed by a ministerial order.

The entry into force of this system is scheduled for the publication date of an implementing decree and not later than 1 January 2018.

4.3. Hardship prevention

The order provides that the staff hardship prevention account becomes the 'professional prevention account'.

As of 1 January 2018, it will be managed by the occupational accidents/diseases branch of the national health insurance fund, as would its financing. Hardship contributions will consequently be abolished on that date.

In addition, as of 1 January 2019, the obligation for companies with at least 50 employees to start negotiations on a hardship prevention plan or, failing that, to establish an action plan will also apply when their claims in respect of occupational accidents and diseases would be greater than a threshold determined by decree and not only if a minimum number of employees were exposed to risk factors beyond the regulatory thresholds.

5. Use of specific forms of work

5.1. Telecommuting

Telecommuting can be set up in companies by collective agreement or, failing that, within the framework of a charter drawn up by employers after consulting the Social and Economic Committee. In addition, occasional telecommuting can be set up simply by agreement between employers and employees, without any special conditions of form.

Any employee occupying a position eligible for a telecommuting organisation method can asks his or her employer to benefit from it, and in the event of refusal by the employer, the response must be justified.

5.2. Temporary or fixed-term contracts

The total duration of the fixed-term or assignment contract, the maximum number of possible renewals, the waiting period applicable in the event of a succession of contracts for the same position and the cases in which this waiting period would not apply can be set by a branch convention or agreement. If there are no conventional stipulations on these points, the legal provisions apply.

NEWSLETTER

Labour Law

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5.3. Permanent construction or operational contracts

In addition to the sectors in which their use was common on 1 January 2017, permanent construction contracts can be used in companies covered by a branch agreement setting out the reasons for using them. This agreement shall contain a certain number of criteria, such as the size of the companies and the eligible activities, as well as the consideration for employees in terms of remuneration and compensation for dismissal.

5.4. Not-for-profit labour loans

The order provides that labour loans made between, on the one hand, a group or company with at least 5,000 employees and, on the other hand, a young company under eight years old or a company of up to 250 employees are not-for-profit even if the amount invoiced by the lending company to the user company is less than the salaries, social security contributions and professional expenses related to the jobs of the employees provided. In addition, this labour loan can not exceed two years.

Our dedicated Labour Law team

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