COVID-19: RETURN TO WORK AND PARTIAL ACTIVITY

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Labor, Employment, and Workplace Safety Alert

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While the end of the health emergency period in France has been set for 10 July 2020, employers are facing practical issues on the return of employees to work and the adaptation of employment measures made available to employers during the lockdown.

Among these rules, partial activity has enabled more than 810,000 companies to benefit from financial support estimated at €4.2 billion (figures as at 22 April 2020) and to safeguard employment during the crisis.

Today, the rules on partial activity have been adapted to ensure a gradual return to activity.

INDIVIDUALIZATION OF PARTIAL ACTIVITY

As part of the gradual return to activity, and in order to adapt to the needs of each company, the French government has allowed companies to “individualize” partial activity.

In principle, partial activity is a collective measure and must concern an entire establishment or a “part of an establishment” corresponding to a production unit, a workshop, or a department.

An ordinance dated 22 April 2020 provides that a company may:

- place some of its employees under “partial activity” (e.g., within the same function, one employee may work at 100 percent as usual while another employee is under partial activity); and
- distribute worked and non-worked hours differently among employees (e.g., within the same department, one employee works 50 percent, another 80 percent, and another 30 percent).

Individualized partial activity is permitted where it is necessary to “maintain or restore activity.” The individualization must be provided for by a collective agreement or by the employer's unilateral decision. Where the individualization is by unilateral decision, the employer must obtain approval from the company's Social and Economic Committee (CSE) or the Business Council (in French, “Conseil d'entreprise”).

The collective agreement or unilateral decision must include the following:

- the skills identified as necessary to maintain or resume the activity of the company, establishment, department, or workshop;
- the objective criteria, related to the positions, functions, or professional qualifications and skills, justifying the designation of employees maintained or placed in individualized partial activity or subject to a different distribution of hours worked and not worked; and

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- the procedures for informing employees about the application of the collective agreement or the employer's unilateral decision throughout its duration, etc.

The agreements or the unilateral decisions taken in application of the above will have effect until a date that is to be determined by decree and no later than 31 December 2020.

WHAT ABOUT THE EMPLOYEES PROTECTED IN THE EVENT OF INDIVIDUALIZATION OF PARTIAL WORK?

As a reminder, as per the ordinance dated 27 March 2020, it is not necessary to obtain the consent of a protected employee before putting him or her on partial activity as long as the partial activity concerns all employees of the company, establishment, department, or workshop to which the protected employee belongs (see our newsletter of 20 April 2020).

If, on the other hand, all employees are not placed on partial activity, the protected employee is entitled to refuse his or her placement under partial activity.

Therefore, a protected employee is entitled to refuse the individualization of partial activity if this measure does not concern all the employees of the company, establishment, department, or workshop to which the protected employee belongs.

FROM SPECIAL WORK STOPPAGE TO PARTIAL ACTIVITY (LAW NO. 2020-473, DATED 25 APRIL 2020)

As per Article 20 of the law dated 25 April 2020, employees under the following work stoppages are placed on partial activity as from 1 May 2020:

- the employee is a vulnerable person presenting a risk of developing a serious form of infection with COVID-19, according to criteria defined by decree;
- the employee shares his or her home with a vulnerable person; or
- the employee is parent of a child under the age of 16 or of a disabled person who is subject to a measure of isolation, eviction, or home maintenance.

In practice, the employer must submit an application for partial activity on the following government website.

The above is applicable for the following periods, depending on the situation:

- for vulnerable employees and those living with a vulnerable person, the end-date will be set by decree (no later than 31 December 2020); and
- for employees who are parents of a child under the age of 16 or of a disabled person, the partial activity applies for the entire duration of the isolation, eviction, or home maintenance.

Note that the Ministry of Labor's Q&A on partial activity updated on 3 June 2020 states that parents looking after a child under the age of 16 may only maintain or activate partial activity upon presentation of a certificate from the school stating that the establishment cannot take care of the child.

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As of 22 June 2020, nursery, elementary, and secondary schools have reopened. Therefore, in principle, parents who refuse to send their children to school should no longer be able to benefit from partial activity.

PARTIAL ACTIVITY: EVOLUTION OF PARTIAL ACTIVITY ON 1 JUNE 2020 (FRENCH MINISTRY OF LABOR, 25 MAY 2020 PRESS RELEASE)

Since 1 June 2020, the conditions of partial activity allowance have been revised.

In a press release dated 25 May 2020, the French Ministry of Labor stated that:

- the allowance paid to the employee will remain unchanged, amounting to 70 percent of the employee's hourly gross remuneration (i.e., approx. 84 percent of the employee's hourly net remuneration);
- companies will be reimbursed by 60 percent of the gross salary, instead of 70 percent; and
- sectors subject to specific legislative or regulatory restrictions due to the health crisis will continue to benefit from 100 percent coverage.

These measures will be implemented by ordinance and decree.

NEW MEASURES SUSTAINING PARTIAL ACTIVITY AFTER THE END OF THE LOCKDOWN

The law dated 17 June 2020, provides specific measures, including specificities on partial activity. Some decrees should be published shortly for the implementation of this law.

In particular, the law provides that the following measures will be created/implemented:

- a specific mechanism for partial activity, called “reduced activity to maintain employment,” to allow companies facing a lasting reduction of activity to reduce working hours in return for commitments to maintain employment;
- mechanisms to monetize days off to complete the remuneration of employees placed on partial activity; and
- the possibility for companies with less than 11 employees, without trade union delegates or CSE, to set up a profit-sharing agreement (“accord d'intéressement”) based on the employer's unilateral decision.

Partial activity has been adapted to help French business activity during the COVID-19 crisis. The government is now trying to adapt this measure to the economic situation and try to circumscribe the effects of the crisis. The future will tell us whether the measures implemented were strong enough to avoid mass redundancies.

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