

## Newsletter – October 2022

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This month, several decisions caught our attention. They concern the motivations of dismissals for economic reasons (1), the implementation of the value sharing bonus (“PPV”) (2), as well as details on the collection and processing of whistleblowers’ reports (3).

**1. Dismissal for economic reasons: in the event of a dispute over the validity of the economic reason, it is up to the judge to take into consideration all the elements submitted by the employer.**

In the decision overturned by the *Court of cassation* on September 21, 2022<sup>1</sup>, the Court of appeal considered that the employer did not provide proof of the economic difficulties alleged as he was unable to demonstrate the existence of a drop in turnover or orders during the reference period preceding the dismissal.

However, according to the *Court of cassation*, in consideration of all the elements submitted by the employer, it was up to the judges to establish whether the economic difficulties invoked by the employer were *real and serious*, either by demonstrating the decrease in turnover *or* any other indicators such as operating losses or a deterioration of the cash flow.

This solution is in line with article L 1233-3 1° of the French Labor Code, according to which economic difficulties can be characterized either "*by the significant evolution of at least one economic indicator*" such as the decline in turnover "*or by any other element likely to justify these difficulties*".

This decision widens the scope of appreciation of the judge and brings more flexibility to the employers on the construction of the economic grounds that may be invoked to justify a dismissal for economic reasons.

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<sup>1</sup> Cass. Soc, 21 septembre 2022, n°20-18.511 FS-B

## 2. Value sharing bonus (“PPV”): a directive clarifies the modalities of its implementation.

The value sharing bonus (“PPV”), introduced on August 16, 2022<sup>2</sup>, is an optional bonus that remains open to companies of all sizes. It may be paid to certain employees by a decision of the employer or a company agreement. A new ministerial directive providing details on its implementation was issued last October 10, 2022. It provides with details on:

❖ The consultation of staff representatives (“CSE”):

According to the law introduced on August 16, 2022:

- In the case of a unilateral decision of the employer, before proceeding to the bonus payment, the employer must consult the staff representatives (“CSE”);
- In the case of a company with less than eleven employees with no CSE, employers will have to inform all employees « *by all means* » of their decision to implement a bonus.

The new directive specifies that staff representatives (“CSE”) must be consulted further to the ordinary rules governing the staff representatives’ consultations.

❖ Applicable exoneration regime:

August 16, 2022 law provides with two scenarios regarding exoneration:

- If the bonus is **paid between July 1, 2022, and December 31, 2023**, to employees who received a remuneration of less than three minimum wages (“SMIC”) over the last 12 months, the exoneration will apply to all social security contributions, but also income tax, generalized social contribution (CSG), contribution for the repayment of the social debt (CRDS) and the social security flat rate.
- If the bonus is paid **from July 1, 2022 onwards**, to employees whose remuneration exceeds three minimum wages **or from July 1, 2024 onwards** to all employees regardless of their remuneration level, the exoneration will apply to social security contributions only.

The new directive gives us more information on how the minimum wage (SMIC) is calculated. It must be calculated over the last 12 months. If variations appear, it will be necessary to multiply by three the weighted average of the different values of the SMIC applicable during that period.

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<sup>2</sup> Law n° 2022-1158 of August 16, 2022

### **3. Whistleblowers: new decree specifying the procedure for the collection and processing of whistleblowers' reports.**

The decree n°2022-1284 relating to the procedures for the collection and processing of whistleblowers' reports introduced on March 21, 2022<sup>3</sup> aiming at improving the protection of whistleblowers, came into force on October 4, 2022.

This decree gives us more information on two important points:

- Firstly, on the deadlines applicable in the internal alert reporting procedure. Indeed, article 4 of the decree informs us that the acknowledgement of receipt must be issued within 7 (seven) working days and that the alert must be processed within a maximum period of 3 (three) months following receipt.
- Secondly, on the procedure for the collection and processing of alerts by external authorities, Article 7 specifies that the channel for receiving alerts may be managed externally by a third party when provided for in the procedure. The third party must be:
  - o An individual;
  - o or a private or public entity with or without legal personality.

The third party must apply the provisions of article 4 (by written notice, by oral, by telephone, recording, videoconference, etc.) and article 6 (respect for integrity and confidentiality of the alert) of the decree.

However, the decree is silent on certain points, especially regarding how companies belonging to a Group may process alerts jointly or regarding the conditions for communicating alerts from one company to another to ensure their processing.

It is the actual implementation of the reporting procedure that will provide answers to these outstanding questions.

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<sup>3</sup> Law n° 2022-401 of March, 21, 2022