

What are the Labor implications of the so-called PACTE Law?

Law n°2019-486 dated May 22, 2019 on business growth and transformation, known as the “PACTE” Law, transforms the workforce thresholds and amends the rules governing employee savings schemes in many respects.

This article provides an overview of the main provisions of the Law that have implications for the French labor and employment landscape.

1. Workforce thresholds

One of the most direct applications of the PACTE Law with respect to labor and employment stems from Article 11 of said Law that deals with the calculation and crossing of workforce thresholds. Starting from the premise that companies close to the thresholds were reluctant to cross them because of the new obligations that would be imposed on them as a result of the hiring of new employees, the legislator wanted to make applicable legal provisions more flexible in order to limit the threshold effects.

These new rules will come into force on January 1, 2020.

Rationalization of thresholds

The legislator initially sought to “rationalize” the workforce thresholds around three values: 11 employees, 50 employees and 250 employees.

This leads to an increase in some intermediate thresholds.

As such, the obligation to draw up internal rules and regulations will no longer apply to companies with at least 20 employees but to those with at least 50 employees.

Calculating the workforce

The PACTE Law also harmonizes the rules scattered throughout the various Codes for the calculation of the workforce within companies. To calculate the company's workforce, the preferred reference rule is that of the average annual workforce for the year Y-1 laid down by the French Social Security Code. As such, pursuant to Article L. 130-1 of said Code *"the annual number of employees of the employer, including in the case of a legal entity with several establishments, corresponds to the average number of persons employed during each month of the previous calendar year"*. Paragraph 3 of the same Article further specifies that *"the number of employees to be taken into account for the year of creation of the first salaried position under an employment contract in the company corresponds to the number of employees present on the last day of the month in which this first recruitment was made"*.

The provisions of the French Labor Code relating to the number of employees now refer to these calculation methods provided for by the French Social Security Code.

Crossing of thresholds

The major change brought about by PACTE Law in terms of calculating workforce thresholds concerns the procedures for crossing the thresholds set by labor and employment rules and regulations.

Indeed, Article L. 130-1 II of the French Social Security Code stipulates that *"the upward crossing of an employee threshold is taken into account when this threshold has been reached or exceeded for five consecutive calendar years"*.

Previously, in the absence of clarification, the obligations relating to the threshold were incumbent on the employer insofar as this threshold had been crossed during the previous calendar year.

This rule was considered to be a barrier to recruitment, particularly when it came to hiring a fiftieth employee.

The purpose of the above-mentioned new provisions is to neutralize threshold effects, as the crossing must be observed for five consecutive years in order to produce its effects. The downward crossing of the threshold for a single year resets this five-year period to zero.

As an exception, this rule does not apply retroactively to companies that have crossed a threshold before the promulgation of the law and are already subject to the obligations corresponding to the exceeded threshold.

These new threshold crossing rules concern in particular the number of employees taken into account for the obligation to employ disabled workers, the penalty associated with the professional interview, the payment of transport, the obligation in companies with more than 250 employees to appoint a referent in the fight against sexual harassment or sexist actions, the one-time apprenticeship allowance and access to holiday vouchers.

By way of exception, a specific calculation is provided in connection with the obligation to draw up internal rules and regulations in companies with at least 50 employees, the obligation applying *"at the end of a period of twelve months from the date on which the threshold of 50 employees has been reached"*.

An analysis of these changes reveals, however, that the simplification of the rules governing workforce thresholds is still far from being achieved: in 2020, there will still be intermediate workforce thresholds between the 3 preferred thresholds (11, 50 and 250). The reference rule for calculating the number of employees as per the provision of the French Social Security Code will coexist with other calculation methods specific to certain pieces of legislation, the rule for mitigating the crossing of the threshold over 5 years (which also involves risks of circumvention) is not generalized to all workforce thresholds and must coexist with the existing “freezing” rules currently in force.

2. Mandatory and optional profit-sharing schemes, employee savings

In order to encourage the sharing of the fruits of work, the PACTE Law includes provisions on mandatory profit-sharing schemes, employee savings schemes and optional profit-sharing schemes.

Optional profit-sharing

Article L. 3314-2 of the French Labor Code provides that, in order to qualify for certain exemptions provided for in Articles L. 3315-1 and L. 3315-3 of said Code, optional collective profit-sharing must be random and result from a calculation formula based in particular on the company’s performance over the year or over a period of at least three months.

The PACTE law supplements this article by specifying that this calculation formula “***may be supplemented by a multi-year objective based on the company’s earnings or performance***”.

In case of transfer of the company or business, “*when there is a change in the employer’s legal situation*”, which requires the establishment of a new Social and Economic Committee, Article L. 3314-4 of the French Labor Code specifies that the optional profit-sharing agreement remains in effect or may be renewed under the standard terms and conditions for concluding such an agreement. This clarification should not lead in practice to any changes, since the rule according to which the agreement ceases to be effective between the new employer and the company’s employees when this change makes its application impossible is maintained, thereby becoming the exception to the principle.

The cap on the amounts that can be distributed to employees under an optional profit-sharing plan has been raised. For the same beneficiary and for the same financial year, it may not exceed three quarters of the annual social security ceiling, i.e. 30,393 euros in 2019 as opposed to half this sum previously, i.e. 20,262 euros (Article L. 3314-8 of the French Labor Code).

Finally, the collective optional profit-sharing scheme may now provide that if sums could not be paid to an employee under the scheme because the applicable individual cap has been reached, the remainder may be automatically distributed, according to the same procedures as the original distribution, to employees who have received sums below this cap, up to the same cap (Article L. 3314-11 of the French Labor Code).

Mandatory profit-sharing

The first impact of the change in thresholds is that the obligation to set up a profit-sharing scheme applies from the first financial year following a period of five consecutive calendar years during which the threshold of 50 employees has been reached or exceeded.

In addition, the PACTE Law reduces the wage cap for distribution, which is now set at three times the annual social security ceiling, in order to promote a more equitable distribution proportional to the wage.

Employee savings plan

With regard to employee savings, the PACTE Law allows employers to make payments under an employee savings scheme and this even in the absence of any contribution from the employee, provided that these payments are allocated uniformly to all employees and that they are used to *“acquire shares or investment certificates issued by the company itself or by a company within the same scope of consolidation or combination of accounts”*.

Retirement savings

On the issue of employee savings, the PACTE Law eventually harmonizes the various existing supplementary pension plans (PERCO, PERE, PERP, MADELIN) and creates, as from October 1, 2019, a new Retirement Savings Plan (“PER” in French). In particular, it organizes the transferability of rights from one type of plan to another, with a view to creating a “single” retirement plan.

3. Other labor-related measures

Night work

Until now, the 9:00 pm - 7:00 am time-slot has been considered to be the period when night work was performed. From now on, this time-slot is narrowed and goes from midnight to 5:00 am. The possibility of extending night work is, however, subject to the existence of an industry-wide or company-level agreement providing for a compensation for any and all employees working between 9 :00 pm and midnight. The compensation - determined by the above-mentioned agreement - may be a financial one or a rest period.

Corporate purpose of the company

In this respect, the objective of the PACTE Law was to expand Article 1833 of the French Civil Code which defines what is a company *“formed in the common interest of the shareholder”*. Specifically, the following paragraph is added to said Article 1833: *“The company must be managed in furtherance of its corporate interest, while taking into consideration the social and environmental issues arising from its business activities”*. In addition, the PACTE Law also amends Article 1835 of the French Civil Code. It states that a company may, if it so wishes, include a *“fundamental purpose”* (*“raison d’être”* in French) that expresses its project over the long term, in the service of the collective interest.

Employee representation in management bodies



In order to improve employee representation in the management bodies of companies that have been employing more than 1,000 employees in the company itself and in its subsidiaries for two consecutive financial years and whose registered office is located in France (or 5,000 employees and whose registered office is located in France and abroad), the PACTE Law provides that the **number of employee-directors will increase from one to two** wherever the Board of Directors comprises more than eight members, as opposed to twelve under the current legislation. The same rules apply for employee representatives on the Supervisory Board. The training of directors representing employees will be strengthened.

Finally, the PACTE Law provides for the establishment of a direct dialogue - instead of a written opinion and successive written responses - between the Economic and Social Committee and the Board of Directors on the company's strategic orientations (Article 191 of the PACTE Law).

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