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GLOBAL WORKPLACE LAW PERSPECTIVES



A COMPARATIVE GUIDE TO

Terminating the Employment Relationship in the U.S. and France

U.S. employers generally have greater freedom than their counterparts in France and other European countries when it comes to terminating employees. The underlying legal doctrine in the private sector for U.S. companies is “employment-at-will,” meaning that either the employer or the employee may terminate their relationship at any time, for almost any reason, as long as the termination does not violate any statutory mandates or voluntary contractual commitments. In France, on the other hand, every employment arrangement is governed by a contract setting forth essential provisions of the relationship, which can

only be terminated for specific reasons. This article explores the practical differences between the two models, as well as other distinctions between the U.S. and French legal systems with respect to terminating employees.

A LOOK AT THE LEGAL FRAMEWORK

While individual employment contracts and collective bargaining agreements are permitted within certain parameters, it is safe to say that the majority of employees in the U.S. work under the “at-will” arrangement. Generally, individuals

employed on an at-will basis may be terminated with or without cause so long as the dismissal is not for an illegal reason, notably discrimination or retaliation on grounds protected by law. The employment contracts of executives and other highly-skilled individuals, however, often incorporate a “just cause termination” clause, which is typically negotiated by the parties on a case-by-case basis. Courts in the U.S. have also found that implied contracts can limit the employer’s ability to terminate an employee without cause.

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arising from specific personal or economic reasons. French case law has clarified the meaning of real and serious cause in the context of terminations for personal reasons as requiring, among other things, that the cause be based on objective facts that can be proven and that are sufficiently serious to justify the termination. Economic-based terminations are discussed in greater detail later in this article.

An employer can also terminate an employee in France for disciplinary reasons stemming from a “faute grave” (serious misconduct) or a “faute lourde” (willful misconduct). Serious misconduct, according to French courts, means the result of “a fact or set of facts for which the employee is responsible which constitute a breach of the employee’s obligations under the employment contract of such significance that it is impossible to retain the employee in the enterprise during the notice period.” Willful misconduct requires the employee to have intent to damage the enterprise of the employer. The procedures an employer must follow in these situations are less stringent than those required for a termination involving real and serious cause.

DISCRIMINATION AND OTHER LIMITATIONS ON TERMINATION

Although the generally-accepted doctrine in the U.S. is employment-at-will, U.S. employers do not have unfettered rights to terminate employees for any reason at all. It is illegal under U.S. federal law to terminate an employee on account of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to terminate an employee because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation

Unlike in the U.S., an employee in France can only be terminated for “real and serious cause,” arising from specific personal or economic reasons.

or lawsuit. Most employers with at least 15 employees are covered by this body of federal law, as are most labor unions and employment agencies.

State and local laws mirroring the federal civil rights statutes are common and often extend their coverage to a larger group of protected characteristics, adding, for instance, protected categories such as marital status, sexual orientation, sexual identity and familial status. State and local laws often apply to employers with workforces of fewer than 15 employees, as well as larger companies.

In addition to the civil rights statutes, employees are protected from dismissal in retaliation for engaging in various “protected activities,” including forming or joining a labor organization for the purposes of collective bargaining with the employer. The courts in many U.S. states also impose “public policy” restrictions, which are intended to prevent an employer from terminating an employee in retaliation for engaging in some conduct that promotes an important interest of the citizens of that state. Finally, courts have also found there to be implied contracts where, in the court’s opinion, a promise of continued employment was made – even if the employer did not think it was making a binding promise – and the employee relied on that promise.

It is similarly illegal in France to dismiss an employee on account of certain protected characteristics, including his or her origin, sex, morals, sexual orientation, age, marital status or pregnancy, health or disability, genetic characteristics, membership or non-membership (real or supposed) in an ethnic group, nationality or race, religious beliefs, physical appearance, as well as political opinions, and union activities or mutual associations. The penalties for terminating an employee for a discriminatory reason in France are more severe than if the employer lacks real and serious cause. A discrimination-based dismissal can also be brought to the criminal court by the employee, a representative union, or a discrimination defense association.



ECONOMIC-BASED TERMINATIONS IN FRANCE

Although French employers can terminate individual employees for economic reasons, they must establish the existence of one of the following situations:

- 1) *a reorganization necessary to safeguard the company's competitiveness ("réorganisation nécessaire à la sauvegarde de la compétitivité");*
- 2) *economic difficulties ("difficultés économiques");*
- 3) *important technological changes ("mutations technologiques"); and*
- 4) *termination of business activity ("cessation d'activité").*

In the first two situations, these economic reasons have to be assessed on the level of not only the individual company, but also the group of employers it may belong to.

In the case of a dismissal for economic reasons, the employer must do its best to find an alternative position for the employee to be terminated, including within its group of companies, if relevant. If the employer does not do so, the court may find that the dismissal was unfair.

French employers must comply with other legal obligations in the course of an economic-based termination. Where several employees belong to the same professional category (all employees with similar training and skills), the employer must consider the following factors before selecting the employee(s) to be terminated:

- *number of dependents;*
- *length of service;*
- *characteristics that make redeployment more difficult (age and disability); and*

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- *professional skills, as long as the relevant criteria are objectively defined and established.*

Although a particular factor may be given more weight than the others, the employer is required to take account of all these factors. Non-compliance with the rules on selection criteria exposes the employer to damages up to the amount payable in the case of unfair termination.

Finally, an employee dismissed for economic reasons must be given priority for reemployment during a period of one year from the date of termination if he or she requests. In this case, the employer must inform the employee of any job that becomes available within the company and is compatible with his or her qualifications.

Additional detail regarding collective dismissals for economic reasons in both the U.S. and France is provided later in this article.

PROCEDURES FOR INDIVIDUAL TERMINATIONS

In the U.S., unless otherwise provided in an employment contract or collective bargaining agreement, no federal law requires employers to follow a formal procedure when discharging individual employees. Several states do require employers to provide a notice to a terminated employee as to the date of termination and loss of employee welfare benefits, if provided. Additionally, employees covered under an employer's health insurance program must be provided notice as to the option to continue coverage for a specific period of time following the termination, typically 18 months, at the employee's own expense.

In France, the procedure that employers must follow with respect to individual terminations is more specific, and there are penalties for noncompliance. The employer must invite the employee by letter to a preliminary meeting and



advise the individual of his or her right to be assisted at the meeting. A minimum of five days must elapse between the delivery of the letter to the employee and the date of the meeting. During the meeting, the employer must state the reasons for the termination and note any response made by the employee. No sooner than two days after the meeting, the employer must notify the employee of the termination by letter, specifying the reasons for this decision.

An employer's failure to follow the required procedure in connection with the dismissal of an employee having at least two years of seniority in a company of at least 11 employees is subject to a penalty of up to one month's salary. A determination that the employee engaged in serious or willful misconduct, however, deprives the employee of the required notice of termination and corresponding damages for failure to give such notice.

SEVERANCE PAYMENTS

Again, unless otherwise provided in an employment contract or collective bargaining agreement, U.S. employers need not make severance payments to terminated employees. However, employers often offer severance payments to bind an agreement made between the employer and employee at the time of termination to waive any potential claims arising out of the employment relationship.

An employer in France who dismisses an employee for a real and serious cause must provide a dismissal indemnity of one-fifth the average monthly salary for each year of service for employees with at least one year of seniority, as well as compensation for unused holidays. Generally, collective bargaining agreements provide for more favorable compensation upon termination. They apply to almost all business sectors and are usually mandatory in all companies in the relevant sector (after approval by the Ministry of Labor).

Employers in France must also inform and consult their Works Council with respect to collective plans. If the employer does not set up a redundancy plan or if a court finds the plan insufficient, all the pronounced dismissals can be cancelled.

PROCEDURES FOR COLLECTIVE TERMINATIONS

As long as they are within bounds under the anti-discrimination and retaliation statutes, U.S. employers are not restricted in their ability to collectively dismiss employees. However, a federal statute, the Worker Adjustment and Retraining Notification Act (WARN), requires covered employers to provide notice 60 days in advance of covered plant closings and mass layoffs to the affected workers or their representatives, as well as other entities specified in the statute. The WARN Act details very specific procedures that employers must follow to avoid liability, including monetary penalties and other remedies, for failure to provide adequate notice. In addition to the federal WARN Act, many states have implemented their own collective dismissal notification statutes, known as "mini-WARN" laws. The state mini-WARN laws often mirror the federal statute, but often lower the minimum thresholds for providing notice.

The requirements in France for collective dismissals are significantly more stringent. When a company with 50 or more employees plans to dismiss at least 10 employees in a 30-day period, the employer must establish and implement a plan to avoid layoffs or limit their number. This "collective redundancy plan" must, in particular, contain measures aimed at the employees' internal redeployment, encourage external redeployment, support the creation of new businesses or the takeover of existing businesses by employees, and provide for professional training and validation of professional experience. Employers in France must also inform and consult their Works Council with respect to collective plans. If the employer does not set up a redundancy plan or if a court finds the plan insufficient,



all the pronounced dismissals can be cancelled and the employer will be ordered to reinstate the employees. The terminated employees can, however, reject the reinstatement and elect instead to receive damages equal to 12 months of salary.

CHALLENGING TERMINATION OF EMPLOYMENT

U.S. employees who believe they have been unfairly terminated may seek redress in various federal, state and local administrative agencies, and the U.S. federal and state courts. Individuals who assert their termination was discriminatory must first file a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) or the relevant local agency before bringing a lawsuit against the employer in court. The agency will then investigate and determine whether or not there is reasonable cause to believe that discrimination occurred. If the agency finds that there is reasonable cause, it will attempt to reach a voluntary settlement with the employer. In some cases, the agency will file a lawsuit in federal court on the employee's behalf. The employee can only sue the employer in court if the agency does not find reasonable cause or cannot obtain recovery for the individual.

In some situations, the collective bargaining agreements negotiated between the employees' labor union representative and the employer govern the process for challenging termination of employment in the U.S. Formalized grievance and binding arbitration procedures are the means for resolving disputes concerning the termination of union members. The union represents the employees during these proceedings, and the decision of the neutral arbitrator is binding.

In France, an employee who believes he or she was discriminated against, either directly or indirectly, may

In the U.S., if the court finds that a termination was unlawful, the employee may be entitled to reinstatement, monetary damages and attorneys' fees.

submit his or her complaint to "le Défenseur des droits," an independent administrative authority that will attempt to help the parties reach an agreement to settle the dispute. While this entity cannot sue the employer on the employee's behalf, it can support his or her claim in the civil, administrative or criminal court.

An employee who intends to formally challenge a termination decision must file his or her complaint with the Conseil de Prud'hommes (Industrial Court). The CPH is an unusual tribunal as it is elected

and provides for equal representation of employers and employees. The judges – referred to as "counselors" – are non-professional and are elected by employees and employers. The employee can elect to be represented by a lawyer but legal representation is not required by the CPH; the employee can also choose to be represented by a union steward or by any other qualified person.

The first step in the judicial process is a conciliation hearing, in which two counselors endeavor to lead the parties to an agreement. The parties, or their lawyers, explain the case and their arguments to the counselors. If no settlement is reached, the counselors set a date for the judicial hearing. The parties then exchange their submissions, including their demands and supporting evidence. The judicial hearing is held before two employer counselors and two employee counselors. In the event of a tied vote, a professional judge ("le juge départiteur") is brought in to decide the case.

REMEDIES FOR SUCCESSFUL TERMINATION CHALLENGES

Whereas French law offers more protection for employees, U.S. law provides more robust remedies. In the U.S., if the court finds that a termination was unlawful, the employee may be entitled to reinstatement, monetary damages and



attorneys' fees. Monetary damages include compensation for wages and benefits lost as a result of the termination, and, in some cases, for emotional or physical distress suffered as a result of the employer's actions. In cases involving an egregious violation of the law, U.S. employers may be liable for punitive damages. Most federal laws have a "cap" on damages ranging from \$50,000 to \$300,000.

In France, a finding by the CPH that a termination lacked real and serious cause entitles the employee to damages. If the employee was employed for at least two years by an enterprise having 11 or more employees, the judge can propose reinstating the employee but either of the parties can reject reinstatement. The judge can also award damages to the employee, with the minimum amount equal to the employee's salary for the past six months. If the employee has been employed for less than two years or by an employer with less than 11 employees, the judge will award compensation equal to the damages suffered but without a legally-prescribed minimum amount. The judge may also order the employer to reimburse the appropriate governmental agencies all or part of the unemployment compensation paid to a terminated employee.

Under French law, if an employee can demonstrate that his or her termination was the result of discrimination, the employer will be ordered to reinstate the employee in his

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or her job. Only the employee can reject the reinstatement and elect instead to receive damages. In addition, the employee can be awarded compensation for the termination, for the lack of notice of termination, and for any unused vacation. The Criminal Code also provides that discrimination committed against a person or entity is punishable by up to three years imprisonment and a penalty of € 45,000, although the prison term is never used for this offense.

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There are significant differences between U.S. and French law with respect to the reasons and process for lawfully terminating employees. While there are less restrictions on U.S. employers when it comes to a termination decision, employers must contend with the constant specter of employment discrimination lawsuits, which can be extremely costly and disruptive. French employers must be circumspect in their termination decisions as failure to follow the proper procedures and demonstrate real and serious cause can be quite expensive. Under both legal regimes, the best approach for employers is to document employee performance issues and make objective employment decisions that are defensible in court. One of the best ways to avoid termination-related issues is to pay close attention to hiring decisions and communicate with employees about performance problems before they escalate.

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