

The reform of the Labour Code: What the Macron orders contain

Focus 1/5: Although rules regarding grounds for dismissals have been relaxed, companies must remain cautious when drafting termination letters.

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"Technicalities must not override substance", was one of the leitmotifs of the Macron government as it presented its orders on the reform of the Labor Code.

In other words, employers should not be punished (too harshly) if they fail to comply with a complex and constraining procedural rule when their decision to terminate a work contract is justified on its substance.

In light of this conviction, in the context of order n. 2017-1387 of September 22, 2017 and its enforcement decree n. 2017-1702 of December 15, 2017, the government has modified the rules on grounds for dismissal.

The new regulations went into effect on December 18, 2017.

A brief review of rules applicable up to the present (1) will make it possible to understand the contributions of this reform (2).

1. Pre-reform rules on grounds for dismissal

Under article L.1232-6 of the Labor Code, the dismissal letter must include a description of the reasons why the work contract is being terminated.

This description had significant bearing in the context of labor court proceedings initiated by an employee contesting his/her dismissal.

In order to assess the justification for a dismissal, the judge referred exclusively to the terms of the dismissal letter which, it was said, "set the boundaries for the litigation".

According to established case law, the insufficiency of grounds set out in the dismissal letter was punishable, not as an error of form, but of substance. The dismissal was then ruled as lacking actual and serious basis.

The employer could not influence the judge's position by presenting, in the context of the procedure, additional information or motives supporting the dismissal.

This case law forced companies to use caution when drafting dismissal letters.

It is worth bearing in mind that a dismissal ruled as lacking actual and serious basis entitles the employee to damages which, according to the scale provided for in article L.1235-3 of the Labor Code, applicable to dismissals pronounced subsequent to September 22, 2017 vary, based on the size of the company and the employee's seniority, from 0.5 to 20 months' salary.

2. Rules regarding grounds for dismissal applicable as of December 18, 2017

In order to avoid ambiguity in the terms of a dismissal letter resulting, ipso facto, in a penalty on substance, the grounds for the termination of a work contract can be specified by the employer after the fact, either on his/her initiative or at the request of the employee.

This possibility to specify a posteriori is subject to strict formal rules.

Under enforcement decree n. 2017-1702, applicable since December 18, 2017, employees must file their request for clarification by registered letter with acknowledgement of receipt within fifteen days following the notification of the dismissal.

If it wishes to do so, the company must send the requested clarifications within fifteen days by registered letter with acknowledgement of receipt or by hand-delivered letter against discharge.

When, on their own initiative, employers wishes to specify the terms of the dismissal letter, they must do so in the same manner, within fifteen days following the notification of dismissal.

Insufficient grounds in a dismissal letter, alone, no longer negate a dismissal for actual and serious cause if the employee does not

request that the employer specify the motives for his/her dismissal.

This insufficiency is a formal irregularity entitling the employee to compensation assessed at one month's salary.

The effect of these new provisions should not be overestimated.

Employers must still remain vigilant in the drafting of dismissal letters.

Two reasons lead to this conclusion.

First: The possibility to **secure the dismissal letter after the fact is limited to providing clarification and not additional grounds**, as was planned within the framework of the draft order. In other words, the employer is still unable to evoke grounds other than those mentioned in the dismissal letter.

Second: In the case where an employee requests clarification, if the judge considers that the grounds as stated in the dismissal letter and, when appropriate, in the response letter to the employee, remain too unclear, he/she will continue to punish the lack of sufficient grounds by granting the employee damages for a dismissal lacking actual and serious basis.