Terminating employment contracts by mutual agreement: 10 years later

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AUTHORS

Laurent Guardelli

Léa Fonseca

Introduction

The Modernisation of the Labour Market Act of 25 June 2008 recently celebrated its 10th anniversary. The act introduced a legal procedure for terminating employment contracts by mutual agreement.

The procedure was immediately successful and its success has continued over time. For example, no fewer than 36,600 mutual termination agreements were signed in May 2018, an increase of more than 5.5% compared to the previous month, while 421,000 were signed in 2017, an increase of 7.8% compared to 2016.

The procedure's success may derive from its flexibility and simplicity; however, despite other successful aspects, the procedure is not without its pitfalls.

Termination procedure

Articles L.1237-11 and following the Labour Code set out the procedure for terminations by mutual agreement.

No grounds for this type of termination are required. In other words, it involves two contracting parties that wish to end their contract on their own terms and without an external review (eg, from a judge or an administrative body) to determine whether legitimate reasons for termination exist.

Under the Labour Code, irrespective of which party requests the termination, the employer and the employee must first hold an interview to define the termination package and date of termination. The parties then complete and sign a mutual termination agreement, which is a relatively uncomplicated two-page form. This document summarises:

- the identity of each party;
- the employee's salary for the previous 12 months; and
- the dates of the procedure.

The parties sign three copies of the original agreement: one each for the employer and the employee, and one for the Labour Administration. This is an essential condition for the courts; if an employee can evidence that they were not provided with an original copy, the termination is null and void (Cass Soc, 7 March 2018, No 17-10.963).

A 15-day period then commences in which either party can decide to withdraw its agreement. In

such cases, it is the expressed will to withdraw that must be considered, as opposed to the receipt of the other party's withdrawal letter (Cass Soc, 14 February 2018, No 17-10.035).

After this period, one party (typically the employer) must send an original copy of the agreement to the Labour Administration, which validates the termination. This must be done within 15 working days.

Compensation and benefits

The rule is simple: employees cannot receive less than the amount of the dismissal indemnity (though they can obviously receive more).

This amount is not subject to social contributions if it is under €79,464; however, if it exceeds €397,320, it is entirely subject to such contributions.

Below €79,464, the amount corresponding to the dismissal indemnity is subject to no social contributions, while the part exceeding such amount is subject to two taxes equal to 10% and 20%, respectively.

Further, the amount is not subject to personal income tax if it does not exceed €238,392; however, as exceptions exist, this aspect should be reviewed carefully.

Aside from this, the employer must pay the paid holiday indemnity.

Possibly the most important factor in successful terminations has been the employee's ability to take advantage of the same unemployment benefits as those offered to employees following a dismissal (notwithstanding cases where employees that resigned were deemed ineligible for such benefits).

Offering these benefits has allowed employers and employees to terminate their contracts without having to deal with tricky dismissal procedures and settlement agreements (which are more expensive for employers).

This was evident in several cases where employees wanted to leave but did not want to resign because they were ineligible for unemployment benefits. Employers may have little interest in retaining an employee who wants to leave; however, dismissing such an employee puts the employer at risk as they have no grounds for dismissal.

Mutual termination agreements have resolved some of these issues.

Litigation

The Labour Administration examines only the mutual termination agreement's timing conditions and amounts served. After examination, courts typically decide that an agreement cannot be challenged; however, this has not applied to agreements that were entered into with employees:

- on sick leave (Cass Soc, 30 September 2013, No 12-19.711);
- following an occupational disease or workplace accident (Cass Soc, 30 September 2014, No 13-16.297); and
- during maternity leave suspension periods, whether during the maternity leave or during the 10 weeks after that period (Cass Soc, 25 March 2015, No 14-10.149).

Further, the termination's impact on an employee's mental health may also nulify a mutual termination agreement (Cass Soc, 16 May 2018, No 16-25.852).

Challenges

While flexible, mutual termination agreements are far from perfect.

While it is difficult to challenge the conditions of the termination itself following Labour Administration approval, it has no settlement effect on the contract's execution and employees may

sue their employers on these terms (eg, for unpaid salaries, discrimination or harassment).

Further, the Labour Administration will refuse a termination if it considers that such a method is only a way to avoid public order legislation. For example, the administration received instructions on the extent of its control when a company used mutually agreed termination to avoid establishing a mass redundancy plan, which would have been a far more complex and costly procedure.

Mutually agreed termination goes collective

Collective mutual termination agreements are among the flagship measures of the government's Labour Law reform implemeneted in 2017. These entered into force on 1 January 2018 (in accordance with Articles L.1237-19 and following the Labour Code).

This new procedure for employees who wish to leave is addressed to all companies, regardless of their workforce, and is implemented through a collective bargaining agreement subject to administrative control.

For further information on this topic please contact Laurent Guardelli or Léa Fonseca at Coblence & Associés by telephone (+33 1 53 67 24 24) or email (lg@coblence-avocat.com or lf@coblence-avocat.com). The Coblence & Associés website can be accessed at www.coblence-avocat.com.
