

Paid Leave in France: New Rules Applicable

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In a series of decisions given on 13 September 2023, the French Supreme Court has overruled its previous case law regarding the paid leave entitlements of employees who are absent from work as a result of sickness, an accident at work, or parental leave, in order to align French law with European law.

The French Labor Code prevents employees from accruing paid leave: (i) during sick leave that is not due to an “occupational disease” (*maladie professionnelle*);¹ or (ii) beyond a period of one year in cases where the employee’s absence is due to an occupational disease or a work-related accident (*accident du travail*).

In light of the decisions rendered on 13 September 2023, and from now on:

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- Employees who are on sick leave will be entitled to accrue paid leave during their period of absence, even if the absence is not due to work accident or an occupational disease;²
 - In the event of a work-related accident or occupational disease, the calculation of paid leave entitlement will no longer be limited to the first year of absence;³
 - The statute of limitations for entitlement to paid leave, which is three years, does not start to run until the employer has given the employee the opportunity to exercise the right to take paid leave;⁴ and
 - Paid leave entitlements are not “lost” when parental leave is taken; paid leave accrued at the beginning of parental leave must be carried forward to the date on which the employee returns to work.⁵

With these decisions, the French Supreme Court has relied on the provisions of European law, which is more protective of the employees’ interests and excludes the rules laid down in the French Labor Code.

This new case law has immediately been applied by the lower courts: in two decisions dated 27 September 2023⁶ and 12 October 2023⁷, the Paris Court of Appeal followed the position of the French Supreme Court.

The Paris Court of Appeal based its decisions on European regulation and recalled that European law made “no

distinction between employees who were absent on sick leave during the reference period and those who have actually worked” in support of its decision that:

- An employee who was on sick leave that was not due to an occupational disease was entitled to accrue paid leave for the period of sickness absence. The Paris Court of Appeal ordered the employer to pay a paid leave “pay-in-lieu” compensation covering a period of more than three years, amounting to €6,000;⁸ and
- An employee who took several periods of sick leave during the employment relationship was entitled to a paid leave back-payment for these periods. The Paris Court of Appeal ordered the employer to pay a paid leave “pay-in-lieu” compensation of more than €7,000.⁹

WHAT ARE THE PRACTICAL IMPLICATIONS OF THESE DECISIONS FOR COMPANIES?

The decisions rendered by the French Supreme Court on 13 September 2023 leave many uncertainties as to the practical consequences of these decisions for employers in France.

Should an employer proactively regularize the entitlements of employees who are currently off sick? What about employees who have been on sick leave for several years? What about employees who have left the company? The

French Supreme Court has ruled that, in the absence of any action to enable employees to take their paid leave, the statute of limitations has not started to run for paid leave acquired during previous periods of sick leave. It is unclear exactly what “actions” are being referred to by the French Supreme Court and when, in practice, an employer should start to implement these new rules.

The view of the Dean of the Labor Section of the French Supreme Court, Jean-Guy Huglo, is that employees should be able to claim back-payments for sick leave taken since 1 December 2009 (being the date on which the Lisbon Treaty came into force). In practice, this means that employees could claim back-payments over almost 14 years.

A more conservative interpretation of the French Supreme Court’s decisions would suggest that these new rules only apply from the date of the decisions, i.e., 13 September 2023. However, this is undecided.

In light of the above, further clarification is necessary and awaited, especially from the French Government and from the representatives and unions of each professional sector of activity, to remedy the practical issues which arise out of the implementation of these new rules.

In the meantime, it is clear that:

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- Companies would be well advised not to rely on the provisions of the French Labor Code to deny paid leave to an employee who is on sick leave, without running the risk of a claim; and
 - Companies should review and audit their practices to assess the cost of this change, should they need to respond to a request for accrued leave from an employee.

The practical consequences of the new position adopted by the French Supreme Court in relation to accrual of paid leave still need to be clarified; this debate is not over yet.

¹ Under French labor law, an “occupational disease” is a technical term to define illness contracted by an employee during their professional activity. To qualify as an “occupational disease”, and to be recognized as such by French social security authorities, the disease must meet several criteria and the employee must comply with a specific and formal procedure

² **French Supreme Court, 13 September 2023, no. 22-17.340; French Supreme Court, 13 September 2023, no. 22-17.341; French Supreme Court 13 September 2023, no. 22-17.342**

³ **French Supreme Court, 13 September 2023, no. 22-17.638**

⁴ French Supreme Court, 13 September 2023, no. 22-10.529

⁵ French Supreme Court, 13 September 2023, no. 22-14.043

⁶ Paris Court of Appeal, Section 6 - ch. 9, 27 September 2023, no. 21/01244

⁷ Paris Court of Appeal, Section 6 - ch. 10, 12 October 2023, no. °20/03063

⁸ Paris Court of Appeal, Section 6 - ch. 9, 27 September 2023, no. 21/01244

⁹ Paris Court of Appeal, Section 6 - ch. 10, 12 October 2023, no. °20/03063