

Corporate Immigration in France Outlook and Annual Update 1st September 2010

OUTLOOK

Besson Draft Law

During the course of 2010 the government expects to bring its very controversial immigration reform law (referred to as the Besson Draft Law) to parliamentary debate. This draft law transposes the 3 recent European Directives: (1) Directive 2008/115/CE on standard procedures for returning illegal Third-Country Nationals; (2) Directive 2009/50/CE stating the conditions of entry and stay of highly qualified Third-Country Nationals, also referred to as the European Blue Card directive; and (3) Directive 2009/52/CE setting the standards for minimal sanctions against employers of Third-Country Nationals staying illegally in the European Union.

Europeanization of French Immigration Laws or the gallicisation of European Immigration Laws

In the Impact Study of the Besson Draft Law the government states its ambition as follows: "The laws of the European Union determine more and more today the laws applicable to foreigners, as in other areas of laws. This is the consequence of the new direction being taken since the Schengen Agreements, the Dublin Convention, and the Treaty of Amsterdam: the immigration problems are being apprehended today as European priorities, and no longer as just a national matter. The French government, a long-time proponent of the European policy in this area, wishes to be one of its driving forces, after its reinforcement by the Lisbon Treaty."

UPDATE

The following are extracts from our periodical Client Alerts published between 31 August 2009 and 1st September 2010. These alerts are meant to bring to the attention of corporate immigration practitioners and mobility managers the significant changes in French regulations or government practice. The dates in italics are those on which our Client Alert was published.

The 10-year residence permit issued to foreigners for "exceptional economic contributions"

22 September 2009

The decree dated 11 September 2009 implementing article 124 of the Act of 4 August 2008 on modernisation of the economy, was published in the Official Journal on 15 September 2009. This provision, which was been inserted into the French Immigration Code as article L 314-15 (CESEDA) pertains to the residence permit « issued to a foreigner who has made an « exceptional economic contribution to France, either by creating or saving jobs or by making a substantial capital investment in France.

The long-term permit cannot normally be obtained until after 5 years' residence in France :

This permit is valid 10 years and is the French permit granting the most extensive residence rights to foreigners. It is automatically renewable – the only exceptions being a threat to public order and an interruption of French residence for more than three years. The 10-year card also exempts its holder from the requirement to obtain a work permit for employment or an administrative authorisation to operate a commercial business.

So far, foreigners have not been allowed to apply for a 10-year permit until they have five years' uninterrupted legal residence in the country (excepting certain cases of close family ties to France). In addition, the applicants must have resources which are both « stable and sufficient », as well as being « integrated » and evidencing they intend to settle in France on a “durable” basis.

The recent decree allows foreigners to apply for the 10-year permit even without meeting the above criteria, provided they create jobs or make a substantial investment in France.

The decree stipulates that as long as the foreigner is legally resident in France, he/she may obtain the long-term residence permit – without the five-year wait – in either of the following two cases :

- 1° if the foreigner creates – or saves – 50 jobs in France, whether in person or by way of a company he/she heads or holds a 30% interest in, or
- 2° if he invests 10 million Euros in France (in person or via his/her company).

The Préfet has some latitude to accept a smaller number of jobs created or a lesser amount of funds invested, in cases of an exceptional nature or in certain areas of France.

An undertaking to create or save jobs or to invest funds can also suffice, however if there has been no progress towards the objective a year after the permit is issued, or if the funds are shown to come from illegal sources, the Préfet can decide to revoke it the permit.

Publication of the EU Visa Code

27 October 2009

Regulation EC N° 810/2009 establishing a Community Code on Visas was published 15 September 2009 in the Official Journal of the EU (ref : L 243, p. 1). The Code on Visas, most of which will become applicable as of 5 April 2010, represents a new step in the direction of developing a common EU policy on short-stay and transit visas.

1) Visas covered by the Code :

The visas referred to in the Community Code on Visas are exclusively transit and short-stay visas for travel to the EU.¹ Long-stay visas are not covered by European common visa policy rules : they continue to be issued according to the national criteria of each member state.

The rules and principles outlined in the Code will apply to applicants from non-EEE states who do not benefit from any short-stay visa waiver, as well as those from the 12 countries whose nationals must obtain an airport transit visa (ATV) to travel through the international transit areas of EU airports.²

In accordance with the Schengen Accords, the Code on Visas will not apply to visas for the United Kingdom or Ireland, whereas it will be relevant for travel to certain non-members of the EU, such as Switzerland, Liechtenstein, Norway and Iceland.

2) Simplification and harmonisation of the EU common visa policy :

The regulation simplifies the EU visa regime and makes it more easily accessible to applicants, first by incorporating into the Code on Visas legal texts which were previously dispersed throughout a large number of other legal instruments, such as the Schengen Convention, the Common Consular Instructions, and decisions of the Schengen Executive Committee.

Secondly, uniform forms and model documents annexed to the Code will contribute to harmonising the application procedure and issue of visas as implemented by consulates and border control points of the various member states

¹ Visas covered by the Code » :

- Short-stay visas valid for three months maximum over a six-month period as from initial entry ;
- Airport transit visas (ATV)

Visas can be single or multiple entry. They can be « uniform visas », i.e. valid for entry to all European states, or can have limited territorial validity (LTV) ;

² The list of 12 countries whose citizens are required to obtain an airport transit visa is found in Appendix IV of the Code ;

(eg. standard application form, non-exhaustive list of supporting documents, rules on issuing visas at border control points, list of 11 motives resulting in rejection of applications).

It should be recalled that the regulation instituting the Community Code on Visas must be read as part of a corpus of EU instruments on visas and movement of persons across borders, the most important of which are Regulation EC N° 539/2001 establishing the list of countries whose citizens are subject to the short-term visa requirement³, regulation EC N° 562/2006 known as the «Schengen Border Code » and regulation EC N° 767/2008 called the «VIS regulation».

Processing Visa Applications

- A website will be set up and regularly updated by the Commission in order to provide the public with all relevant information on common visa policy and visa application requirements ;
- the distinction between C visas (uniform short-stay visas) and D visas (long-stay national visas) will be discontinued ;
- Until the « VIS » system begins operation,⁴ the consulates will stamp visa applicants' passports with the date their application was submitted (and considered complete/admissible). This could have unfavorable consequences for the applicant in the event the visa is ultimately refused, since the stamp and the lack of a visa will be visible in the passport ;
- Consular authorities shall come to a decision on the application two weeks following submission (the two week timeframe can be extended in certain cases to 30 days, the maximum being 60 days) and shall indicate the motive for refusal of the visas on the form provided for that purpose (11 situations are listed as possible motives for refusal to issue the visa).
- The EU Commission will publish “instructions” as guidelines for member states, the purpose being to avoid the emergence of varying interpretations and ways of applying the Code at the practical level.

The Code on Visas is an EC Regulation, meaning that as a legal instrument it is directly applicable in the member states and can be relied on by individuals in the courts.

It could become the source of litigation in France in the future, in particular with respect to the timeframe for a response and the obligation for the consulates to indicate the motive for rejection of an application (NB. the latter provision will not be applicable until April 2011). Currently, there is only a limited number of cases under French law where the motive for rejection of the application must be provided (see article L 211-2 of the CESEDA).

Temporary residents must show valid residency permits when re-entering France.

4 December 2009

Recently we have observed that foreign nationals (non-EU nationals) who temporarily reside in France and are seeking re-entry after an international trip, may be required to produce a valid residency permit (*carte de séjour*) or DCEM (*document de circulation pour étranger mineur*) for minor children.

We therefore recommend to foreign nationals whose residency permit (or DCEM for minor children) have not been issued, or are pending renewal, that they postpone any foreign travel plans till when such documents are issued, or be prepared to apply for a re-entry visa in their home country.

³ the list was most recently modified in 2006

⁴ a system enabling the consular authorities of the member states to exchange information on visa refusals.

Multinational groups transferring employees to France: risk of illegal or undeclared employment

21 December 2009

Article 75 of the law of 12 May 2009 inserted a new provision into the French Social Security Code, whose implications were commented on in recent ACCOS guidelines dated 3 November 2009. This provision is clearly part of a current policy to reinforce measures aimed at fighting against illegal and/or undeclared employment. The French government has announced that EU Directives on employer sanctions and deportation of foreigners employed illegally will be implemented in domestic law in the coming months.

1) Illegal and/or undeclared work

Employers can be found guilty of « undeclared employment » (*travail dissimulé*) for failure to declare to the authorities employees hired, or for declaring fewer than the actual number of hours the employees worked (article L 8221-1 and following of the French Labour Code). Undeclared employment is one of the main types of employment and payroll tax fraud expressly defined in the Labour Code.

Multinationals groups with a branch or subsidiary in France have welcomed and made good use in recent years of the procedure instituted in 2006 allowing for intra-group transfers of personnel. Intra-group transfers are one of three types of secondment (*détachement*) described in article L.1262-1 of the labour Code (secondment to a French branch or subsidiary of the group, to a client company under an international services agreement or for the foreign company's own account).

There is however a real risk of incurring liability for undeclared employment in the context of an intra-group secondment the offence can be committed in various situations of illegal employment, for example if no work permit has been obtained for a foreign employee working for a French company. Even if a work permit has been obtained, the liability can arise if the activities the employee has been transferred to France to perform are not among those authorised for posted workers (i.e. temporary assistance to the French host company).

Another case of undeclared employment would arise if a foreign employee with a secondment assignment intra-group transfer work permit (*détachement salarié en mission*) is in fact assigned to work for one of the French subsidiary's clients, under the sole supervision and authority of the subsidiary. The French subsidiary could be found guilty in this case of undeclared employment of the foreign assignee, because the work actually performed would fall into the category of work that can be performed only under local hire status for the French entity, versus secondment status.

So there is a risk for multinational groups assigning foreign employees to France to be found guilty of undeclared employment in the event the assignees' work in France is performed without a work permit or, if a secondment assignment permit is obtained, if and when the activity performed is not effectively limited to activities benefiting the French subsidiary, as authorised for intra-group transfers.

2) Penalties

The offence of undeclared employment carries criminal sanctions, as do the other offences in Book II of the Labour Code under the heading « Illegal Employment » (employment under unfavourable conditions, illegal procurement of workers, employment of foreigners without a work permit and illicit combination of different jobs). Failure to declare employees or correct number of hours worked is subject to a fine of up to €45 000 and three years' imprisonment (art. L 8224-1 du Code du Travail). These penalties are applicable to any individual or legal person found guilty of having recourse, whether directly or through another person, to undeclared employment or to the services of a company guilty of undeclared employment .

Joint and several liability of the other contracting party (art. L 8222-2): as long as the operation involving the employees is the subject of a contract for at least €3000, the other contracting party of the entity found guilty of undeclared employment, can themselves be held liable, jointly and severally, with the latter for payment of salaries, social contributions, penalties and taxes which would normally have been due had the employment been duly declared, as well as for refunding any state aids or benefits, in the event the other party had failed to verify previously that the convicted company had fulfilled its obligations as detailed under articles D 8222-4 to 8 of the Labour Code.

3) Joint liability of the foreign parent company

As well as the other contracting party's joint and several liability for payment of salaries, contributions and penalties owed by the company guilty of undeclared employment, the law of 12 May 2009 introduced a new « joint but subsidiary » liability, which has been explicated in the recent ACCOS⁵ guidelines dated 3 November 2009:

This new liability is set forth in article L 243-7-3 of the French Social Security Code as follows:

If the employer is part of a group of persons where there is dependence or a controlling interest between them, [...] in the event a case of undeclared employment is documented in an inspector's report against the employer, the parent company or holding company of the group shall be liable, jointly but on a subsidiary basis for payment of social contributions, as well as penalties due as a result

This liability is distinct from the liability a third party having contracted with the guilty company can incur. The liability which the controlling company of the employer's group can incur by virtue of the new provision is « subsidiary », as the ACCOS guidelines point out. That is interpreted in the guidelines to mean that the controlling interest of the parent or holding company in the employer company must be established and evidenced at the date of the offence committed by the employer's company.

Given the complexities of enforcing claims of financial liability against companies located outside the EU, and the existence of bilateral social security treaties exempting certain employers from payment of social contributions for foreigners temporarily employed in France, one may wonder whether the French authorities will be in a position to implement this new provision as part of the fight against illegal employment. Whether or not the multinational group has a French subsidiary or not, the authorities may be expected to give priority to sanctions which can be implemented in France, such as for example, the possibility to refuse new applications for work permits in cases where the applicant company has been found to be in breach of French employment regulations in the past.

Increase in government fees (*Taxe OFII*)

2 February 2010

As of 1st January 2010 Government taxes, referred to as *taxe OFII*, have increased. These are the government fees to be paid by employers hiring foreign workers upon their entry in France, or when such workers acquire the *salarié* immigration status for the first time.

I- The government fees are due from all employers hiring a foreign employee

Immigration regulation (specifically Article L.311-15 of CESEDA) would have all employers hiring a foreign employee pay a fee to the OFII administration when the foreigner enters France or acquires the *salarié* status. The amount of the fee will vary with the nature of the work permit, length of employment, and amount of salary.

We recall that the Budget promulgated on 27 December 2008 (Article 155), and the decree of 2 January 2009 had revised the calculation of the OFII fees. The circular of 17 March 2009 specified the fees applicable when a foreign employee is hired.

II- The amounts applicable as of 1st January 2010

For foreign employees who will work in France for 12 months or more.

From 1st January 2010, the amount of fees is 60% of the monthly salary paid to the foreign worker, with a ceiling of 2.5 times the legal minimum wage (SMIC).

For foreign employees who will work in France for more than three months but less than 12 months.

The fee will vary with the amount of salary, as follows:

€70 when the salary does not exceed the full time monthly minimum (SMIC) amount.

€200 when the salary exceeds SMIC but is less than or equal to 1.5 times SMIC

⁵ L'Agence centrale des organismes de Sécurité sociale (Acos).

€300 when the salary exceeds 1.5 times SMIC

Travel in the Schengen Area for Long Stay Visa Holders

26 March 2010

As of 5 April 2010, Long Stay Visas should allow freedom to travel within the Schengen Area.

As of 5 April 2010, Long Stay D Visas, of a three to twelve months validity, should allow their holders to travel inside the Schengen Area for stays of up to three months within six-month periods.

Until now, these visas did not grant freedom to move around the Schengen Area and their holders, except for the nationalities exempt from short stay visa requirements, had to apply for a Schengen visa to be authorised to travel to another country of the Schengen area.

The European Parliament legislative Resolution of 9 March 2010 on the proposal for a regulation of the European Parliament and of the Council should accordingly amend the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006.

This will put an end to a situation described as “simply unacceptable” by Portuguese Carlos Coelho (European People's Party), Rapporteur on this subject at the European Parliament.

The Office of Immigration and Integration (OFII) will reinforce its cooperation with France's public Employment Agency (Pôle Emploi)

15 June 2010

On 18 May 2010, the l'OFII signed an agreement with the French (public) Employment Agency (Pôle Emploi), with a view to improving cooperation between the two public bodies in order to better achieve the objective of integrating foreigners having just immigrated to France, by assisting them in finding employment, as well as managing professional immigration of third country nationals in order to respond more efficiently to the needs of French businesses looking for employees in fields where foreign workers may be hired.

The OFII (ex-ANAEM) is a public agency responsible for implementing the immigration policy defined by the Ministry of Immigration. It organises in particular the initial program designed for foreigners recently arrived, as well as the “aide au retour” program in support of immigrants who decide to return to their home country.

With the exception of foreigners coming to France without the intention to stay « durably », all non-EU nationals are encouraged by the OFII to sign an « Integration » agreement (called the « Contrat d'Accueil et d'Intégration ») when they pass their medical exam shortly after arrival.

Some of these newly arrived immigrants already have a job offer when entering the country, for example if they have been sponsored by an employer for a particular job. Others, however, come to join family members already resident in France, under the “Family Reunion” program.

Closer collaboration between the OFII and the Pôle Emploi aims to better coordinate the services they each offer to the newly arrived family members, in order to achieve their integration into French society through employment. To prepare these foreigners to successfully find and hold a job in France, the OFII will call on Pôle Emploi to provide services such as language training, evaluation of skills and vocational training.

The second aim of the agreement is to better identify job offers where the employer has not found any workers qualified to fill the position – this will be Pôle Emploi's role. The OFII will then be in a position – whether through its representatives in foreign countries or through its close relations with the local employment agencies familiar with the labour market in their own countries – to propose a pre-selection of job applicants.

The agreement also mentions two specific categories of workers which the OFII and Pôle Emploi will work together to make better known to French businesses :

- Exchanges of « young professionals »⁶, and
- Seasonal workers.

Franco-Indian treaty on social security: Proposed ratification law in France

18 June 2010

The Governments of the Republic of France and India had signed a treaty on social security coverage on 30 September 2008 in Paris. A law proposal ratifying the treaty has been deposited before the Senate on 3 March 2010.

What does the treaty change

Ever since the globalisation of the economy, India has progressively become the world's provider of highly technical services, primarily in the IT area. One of the biggest difficulties experienced by Indian service providers, when sending their Indian personnel to execute international service agreements, has been the high cost of social security compliance in France. Since there was no bi-lateral treaty between France and India on social security matters, Indian service providers had to make all the French social security contributions, the biggest component of which is the state health insurance.

During the negotiation of the bi-lateral treaty, Indian service providers had hoped that this treaty would allow them to keep the Indian assignees on Indian regime, and escape the high cost of French social security contributions for health insurance, as is the case with assignees from many other countries with which France has a bi-lateral treaty.

Unfortunately this will not be the case here. The Indian service provider will have to subscribe to French state health insurance. They will however be able to maintain the Indian assignee on the Indian retirement plan and avoid French retirement contributions. The present state of social security regulations (after the décret 2009-34 of 9 January 2009) would have allowed the Indian employer to opt out of the French basic retirement contributions anyways. In our opinion this long awaited bi-lateral treaty does not bring a significant change in social security considerations of assignment of Indian personnel to France, except to enlarge the avoidance to include the complementary retirement (the AGIRC/ARRCO contributions).

State of ratification of the treaty

The negotiations, which had started in January 2008 between the French and Indian authorities, have allowed the conclusion of a bi-lateral treaty on social security coverage, during the Franco-Indian summit at the end of September 2008. India does not need to ratify the treaty by a parliamentary act. The treaty will therefore enter into effect as soon as it is ratified by the French government in the form of a law. Such a law has been proposed by the French government and deposited at the senate on 3 March 2010. The treaty will be effective as of the date fixed by the decree approving the treaty and published in the Journal Officiel.

Purpose of the treaty

The stated purpose of the treaty is to facilitate professional mobility between France and India, to improve the attractiveness of France for Indian investors, to respond to the demand of French companies doing business in India, and Indian companies doing business in France, by facilitating the movement of workers.

Secondment under this bi-lateral social security treaty would allow the maintenance of retirement regimes in home countries, and make temporary assignments abroad more attractive to French employees. Having said this, retirement contributions being only a fraction of the social security contributions, the increase in the attractiveness for Indian and French investors and workers, which is the focus of the impact study annexed to the proposal of law, is all quite relative.

Beneficiaries of the treaty and risks covered

The scope of the treaty covers salaried and non-salaried workers, including civil servants. The treaty allows the maintenance of the social security in the sending state only with respect to retirement benefits, invalidity, survivor rights, for a maximum period of 5 years. On the other hand, it does not cover health and accidents at work and

⁶ These professionals are allowed to work in France, without application of the local labour market test. They come either under exchange agreements with the following countries : Argentina, Bulgaria, Canada, USA, Morocco, New Zealand and Romania, or under certain agreements to control migratory flows (Benin, Cameroon, Cap-Verde, Congo, Gabon, Maurice, Montenegro, Russia, Senegal and Serbia).

work related illness. For these risks, French employees seconded in India and Indian employees seconded in France, will have to continue to be covered under the social security insurance of the country where work is performed. In other words Indian workers being seconded to France will be exempted from contributions to the retirement funds, but shall continue to be registered and make contributions to the relevant health insurance fund (URSSAF of Bas-Rhin).

Article 10 of the treaty nevertheless allows the signing States to agree to increase the scope of the exemptions.

Retroactive application of the treaty

The treaty does not provide for retroactive application for persons who had been already sent to one of the contracting states before the effective date of the treaty. They may however benefit under the terms of the treaty and be seconded from its effective date.

Liaison authority

The CLEISS (Centre de liaisons européennes et internationales de sécurité sociale) shall be the liaison authority in France which will liaison with the social security authorities of India.

Visa waiver for short-term work in France

23 June 2010

The recent « arrêté » dated 10 May 2010, published in the French Official Journal of 20 May 2010, clarifies the question of whether the nationals of certain states who normally benefit from a visa waiver for stays under three months, can be required to obtain the visa if the purpose of their stay is work.

The nationalities concerned are the following : Australia, Brazil, South Korea, United States, Japan, Mexico, Singapore and Venezuela.

These countries are on the list attached to EU Regulation N° CE N° 539/2001 of states whose nationals benefit from a visa waiver for stays in Europe lasting less than three months within a six-month period.

European states were however allowed to provide for an exception to the visa waiver rule in the case of persons with a professional activity during their stay. France had in fact decided to apply this exception to the visa waiver rule, meaning that an American coming to work in France was obliged, at least in theory, to obtain a short-stay visa before travelling as well as a work permit.

In practice, however, certain French Consulates declined to issue short-stay visas to nationals of the countries listed above, even if the purpose of their trip was to work in France, and even if the foreigner actually applied for a short-stay visa. The lack of a visa covering professional activity in France, as long as it was for less than three months, has thus been quite widely tolerated.

The “arrête” dated 10 May 2010 is therefore a welcome clarification of a point which had not previously been provided for by any French legal provision:

The arrêté confirms that nationals of the countries listed above are indeed required to obtain a visa in order to work in France for a period of less than three months. But it provides at the same time that the visa requirement will not apply if the foreigner is able to show his/her work permit (obtained prior to arrival from the local French Labour Office) at the border on entry to France.

Therefore, nationals of Australia, Brazil, South Korea, United States, Japan, Mexico, Singapore and Venezuela, travelling to France to work for a period of less than three months, do not need to obtain a visa as long as they have their work permit with them on arrival in France.

Cabinet Karl Waheed – tous droits réservés

