



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2023**

The Legal 500 Country Comparative Guides

France

EMPLOYEE INCENTIVES

Contributor

Flichy Grangé Avocats



Camille Ventejou

Partner | ventejou@flichy.com

Romain Guichard

Partner | guichard@flichy.com

This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in France.

For a full list of jurisdictional Q&As visit legal500.com/guides

FRANCE

EMPLOYEE INCENTIVES



1. What kinds of incentive plan are most commonly offered and to whom?

On an individual basis, the most commonly offered incentive plans are bonuses in cash and equity bonuses (free-shares and stock-option). Those plans are usually offered to high level employee (whose work directly influences the company's results) and certain corporate officers (see question 5).

Note that on a collective basis, in companies having at least 50 employees it is mandatory to set up a profit-sharing agreement ("participation"). Also, it is very common to have company saving plans ("PEE") or optional profit-sharing plan ("intéressement"). These kinds of schemes are not "tailor made", as all employees, and sometimes company officers, are beneficiaries. We will therefore not mention them in this questionnaire.

2. What kinds of share option plan can be offered?

Most common are the stock-options, which allow employees (usually managers) of a company (whether listed or not) to subscribe or purchase, for a fixed period, shares of their company (or, under specific conditions provided for by the Commercial code, shares of other companies belonging to the same group), at a price fixed in advance, which cannot be modified during the term of the option. The beneficiaries, conditions for granting and exercising options must be defined in the plan. The scheme, when it meets the conditions laid down by the French Commercial Code, benefits from preferential social and tax regime.

There exist other kind of option plans, such as:

- Shares purchase warrants ("BSA"), which give right to subscribe, for a fixed period of time, for shares whose price has been determined in advance;
- Warrant to subscribe for shares of a business creator ("BSPCE"), which entitle the

beneficiary to subscribe, during a specified period, for shares whose price is fixed at the time of grant. The gains realized by the beneficiaries of the BSPCE are subject to a preferential social and tax regime, if the conditions set by the General Tax Code are met.

3. What kinds of share acquisition/share purchase plan can be offered?

In addition to the plans mentioned in question 2 (BSA...), the most common schemes includes free-shares that may be set up by any company (whether listed or not). These are plans which allow for the free allocation of shares of the company to an employee (generally a manager) (or, under specific conditions provided for by the Commercial code, shares of other companies belonging to the same group). The beneficiaries and conditions for granting shares must be defined in the plan. The scheme, when it meets the conditions laid down by the French Commercial Code, benefits from preferential social and tax regime.

4. What other forms of long-term incentives (including cash plans) can be offered?

The other most common forms of incentives are incentive bonuses in cash or phantom shares (similar to cash bonus but the amount of which depends on the value of the company's shares). The conditions for receiving these incentives, the methods of calculating them and the timeframe for acquiring them must be defined in the plan.

Investment funds can also offer their employees the possibility of acquiring carried interests.

5. Are there any limits on who can participate in an incentive plan and the

extent to which they can participate?

Generally speaking, as far as employees are concerned, there are no limits on who can participate.

However, note that Under French law, the “equal work, equal pay” principle applies and that discrimination is prohibited. Differences between employees are possible if justified by objective reasons. Accordingly the incentive plan must in principle be offered to all employees who are in similar situation in terms of responsibilities and position within the French entity.

In order to benefit from the preferential social and tax regime, note that non-listed companies may only grant free shares or stock options to their own employees and to employees of companies in which they hold at least 10% of the capital.

Concerning corporate officers (who do not have an employment contract), the Commercial Code provides for some limits in the event of free shares or stock options award so that the scheme can benefit from the favourable tax and social security regime.

More particularly, a restrictive list of officers is provided for by this code:

- the chairman of the board of directors (“président du conseil d’administration”);
- the chief executive officer (“directeur general”);
- the deputy chief executive officer (“directeur général délégué”);
- the members of the management board (“membres du directoire”);
- the manager of a joint-stock company (“gérant d’une société par actions”).

However, by way of exception, stock options may be granted to corporate officers even if they do not hold a management position or an employment contract when they participate with employees in the creation of a company or its takeover by the purchase of the majority of its voting rights. This possibility is only available during the two years following the registration of the company or the purchase of the majority of its voting rights.

In addition, the Board of Directors must set additional conditions limiting, compared to employees, the possibility for corporate officers to exercise their stock options or to sell the shares they receive under these plans.

Finally, to grant stock options or free shares to corporate officers, a listed company must meet at least one of the

following conditions during the financial year in which the allocation takes place:

- either, granting stock options or shares to all of its employees and to at least 90% of the employees of its French subsidiaries in which it holds at least 50% of the capital;
- or setting up an additional profit-sharing agreement for the benefit of its employees and at least 90% of all employees of its aforementioned subsidiaries;
- or, in the case of free shares, a payment by the company to the company savings plan for the benefit of its employees and at least 90% of all employees of its aforementioned subsidiaries.

In any event, to benefit from the favourable tax and social regime, no free shares or stock options may be granted to an employee or a corporate officer holding more than 10% of the share capital or if the effect of the grant is to increase his shareholding to more than 10% of the share capital.

6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

Yes, awards are often subject to performance criteria, vesting schedules (mandatory for free shares in order to benefit from the favourable social and tax regimes) and presence conditions, which, if not complied with, entail forfeiture.

As far as presence conditions are concerned, they must not have the effect of forfeiting a beneficiary’s already acquired right. Thus, it is not possible to make the payment of the remuneration conditional upon the presence of the beneficiary in the company on a given date if the element of remuneration has already been acquired.

Finally, pecuniary penalties are prohibited under French labour law. Thus, it is not possible to deprive an employee of an award in the event of dismissal for misconduct.

Subject to these conditions, the clause providing for the loss in the event of termination of the employment contract before the vesting date is valid. However, the competent courts retain the possibility of assessing the legitimacy of the termination grounds and to grant compensation should the termination be deemed as unfair.

7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

As explained, it is not possible to provide that the benefit will only be paid if the employee is still present on the scheduled payment date (see question 6). On the other hand, it is possible to provide for holding periods for the shares for a certain period, which may go beyond the period of employment. These kinds of provisions (holding periods of the shares) are quite frequent. However, it is not very common for them to apply post-employment (unless the retention period has not been reached at the date of termination of the contract, in the case of free shares, in order to benefit from the preferential social and tax regime).

8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

As mentioned in question 6, French law prohibits pecuniary sanctions. Accordingly, reduction or cancellation of an employee's remuneration, particularly variable remuneration, on the grounds that the employee has committed a fault is not allowed.

This regulation, which has a very general scope and is subject to civil and criminal sanctions, leads to a prohibition in principle of malus and clawback clauses.

However, to "clean up" the remuneration policies defined within certain financial institutions, the law has been adapted to provide for an exception to the prohibition of pecuniary sanctions in this particular sector.

Indeed, in credit institutions and investment firms, employees whose professional activities have a significant impact on the risk profile of the company, or the Group may be subject to malus and clawback clauses.

In these sectors, malus and clawback provisions are almost systematic.

Apart from these specific sectors, these clauses cannot, for the moment, be generalized under French law.

9. What are the tax and social security consequences for participants in an

incentive plan including: (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares or securities; and (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

On a preliminary basis, note that:

- Cash bonuses or bonuses resulting from phantom shares plans are subject to national social security contributions and income tax (through withholding tax) under the same conditions as salary;
- If the requirements of the French Commercial Code are not respected, bonuses in shares (stock options and free shares) are subject to social security contributions under the same conditions as salary based on the value of the shares (stock market price) on the date of grant (or possibly on the date the shares are actually made available). They are also subject to income tax (through withholding tax) in the wages and salaries category for the year of grant of the bonus in shares. In this case, the amount subject to income tax is equal to the value of the shares at the date of their acquisition but may also take into account the capital gain realized by the employee on the sale of the shares if it is considered that this capital gain was acquired as a result of the duties performed by the beneficiary in the company.
- Bonuses in shares (stock options and free shares) are subject to preferential social and tax regime provided that the requirements of the French Commercial Code are complied with (see Q5) and specific disclosure requirements are fulfilled (see Q11). The social and tax regime depends on the date of authorization to grant the shares. The rules set out below are those applicable since January 1, 2018, and provided that the conditions set out in the French Commercial Code are complied with.

i. on grant;

There are no tax and social security consequences on grant for bonuses in shares.

ii. on vesting;

When the free shares are vested, the gain (which corresponds to the value of the shares at the date of acquisition) is treated differently depending on its amount:

- for the fraction that does not exceed €300,000, the gain is subject to income tax like a salary, but benefits from a 50% deduction. It is also subject to CSG and CRDS, like income from assets, and various social security deductions (at a global rate of 17.2%),
- for the fraction exceeding €300,000, the gain is subject to income tax like a salary. This gain is also subject to CSG and CRDS, like wages, as well as a 10% employee contribution.

The tax and these social contributions are due when the shares are transferred.

There are no tax and social security consequences on stock options as long as they are not exercised.

iii. on exercise;

When stock options are exercised, the gain from the exercise of the option (which corresponds to the difference between the value of the share when the option is exercised and the purchase price of the share that had been set in advance) is subject to income tax in the same way as wages. This gain is also subject to CSG and CRDS, like wages, as well as a 10% employee contribution. The tax and these social contributions are due when the shares are transferred.

In the case of stock options, taxation and social security contributions may also be due in the year of exercise of the option if a discount of more than 5% has been offered by the company on the value of the share.

iv. on the acquisition, holding and/or disposal of any underlying shares or securities; and

The capital gain realized on the sale of the shares (since the exercise of options for stock options or the allocation of shares for bonus shares) is subject to a flat tax of 30% (12.8% for income tax and 17.2% for social contributions).

v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Note that social security contributions are due from the date of payment, even if it is an advance payment. In

addition, the income tax is therefore, and the withholding tax must be applied as soon as the gain is available for its beneficiary.

10. What are the tax and social security consequences for companies operating an incentive plan? (i) on grant; (ii) on vesting; (iii) on exercise; (iv) on the acquisition, holding and/or disposal of any underlying shares or securities; (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

On a preliminary basis, note that:

- The cost of incentive plans may, under certain conditions, be deducted from the taxable profits of companies.
- Cash bonuses or bonuses resulting from phantom shares plans are subject to national social security contributions under the same conditions as salary;
- If the requirements of the French Commercial Code are not respected, bonuses in shares (stock options and free shares) are subject to social security contributions under the same conditions as salary based on the value of the shares (stock market price) on the date of grant (or possibly on the date the shares are actually made available).
- Bonuses in shares (stock options and free shares) are subject to preferential social and tax regime provided that the requirements of the French Commercial Code are complied with (see question 5) and specific disclosure requirements are fulfilled (see question 11).
- The social and tax regime depends on the date of authorization to grant the shares. The rules set out below are those applicable since January 1, 2018, and provided that the conditions set out in the French Commercial Code are complied with.

i. on grant;

The granting of bonuses in shares does not give rise to the payment of national social security contributions at the time of granting.

However, a specific contribution is due by the company for stock-options: 30 % of the value of the options

granted calculated based on:

- either the fair value of the options ;
- or 25% of the value of the shares to which the options relate on the date of the decision to grant the shares.

This contribution is due the month following the date of the decision to grant the options. However, if the granting of stock options is subject to conditions, and these conditions are not met and consequently no stock options are granted, it may be possible to request the reimbursement of this contribution, based on a decision of the French Constitutional Council regarding free shares.

ii. on vesting:

A specific contribution is due by the company for free shares: 20 % of the value of the shares on the date of the acquisition. This contribution is due the month following the acquisition date.

iii. on exercise;

No national social security contributions are due.

iv. on the acquisition, holding and/or disposal of any underlying shares or securities;

No national social security contributions are due.

v. in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan.

Note that social security contributions are due from the date of payment, even if it is an advance payment.

11. What are the reporting/notification/filing requirements applicable to an incentive plan?

Cash bonuses or bonuses resulting from phantom shares plans must be reported by the employer on its annual wages declaration (DSN) to the "URSSAF" (French agency in charge of collecting the national social security contributions).

With regard to stock options and free shares, the preferential tax and social regime is subject to reporting obligations:

- i. on grant, the company must inform the "URSSAF" of the beneficiaries' identity;

- ii. on vesting, the company must issue an individual statement for each beneficiaries having acquired shares and send such statement to the employee no later than March 1 of the year following vesting.

Information relating to the awards must also be reported by the employer on its annual wages declaration (DSN) to the "URSSAF".

The beneficiary must, for his part, make declarations to the tax authorities when the shares are transferred. Note that additional reporting requirements are applicable for incentive plans benefiting to company officers, in particular in listed companies.

12. Do participants in incentive plans have a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?

a. In principle, assuming that the plan does not state otherwise, employees have no right to compensation for loss of their awards when their employment terminates regardless of the reason for the termination.

Note that a clause depriving the employee from the benefit of the plan only in the event of dismissal for misconduct shall be deemed unwritten. Such a clause constitutes a pecuniary sanction, prohibited under French employment law (see Q6).

b. However, as an exception, an employee has a right to compensation in the event of a dismissal ruled unfair by judges. In that case:

- for "cash bonuses", the bonus would be due even if the employee does not meet the attendance condition;
- with regard to stock options and free shares, the employee may be awarded damages for loss of opportunity to definitively acquire the shares or to exercise the option. Note that some judges may have decided on the total allocation of the shares or their equivalent value in such a case.

13. Do any data protection requirements apply to the operation of an incentive plan?

Implementation of an incentive plan generally involves the collection and processing of some personal data of the beneficiaries. As such, this requires compliance with

the European General Data Protection Regulation (GDPR).

14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

French bodies such as the Tax administration, the Financial Markets Authority ("AMF"), the French Institute of Administrators ("IFA") or the national association of joint-stock companies ("ANSA") issued guidelines on these specific matters, which are regularly updated.

In addition, for companies whose securities are admitted to trading on a regulated market, the AFEP-MEDEF Code provides for some recommendations that applies to incentive plans offered to company officers.

15. Are there any prospectus or securities law requirements that apply to the operation of incentive plans?

a. Some provisions relating to securities may have an impact on incentive plans.

Insider trading and misconduct are prohibited in France. To limit this risk, "negative windows" have been set up. Accordingly, pursuant to the French Commercial Code, in a company whose securities are admitted to trading on a regulated market, stock options may not be granted:

1. Within the 10 trading days preceding the date on which the annual and interim consolidated financial statements or, failing that, the annual and half-yearly financial statements are made public, as well as the day of publication;
2. Within the period between:

the date on which the company's corporate bodies become aware of information which, if it were made public, could have a significant impact on the price of the company's shares,

and the date which is ten market days after the date on which such information is made public.

In the same way, free shares may not be transferred:

1. Within 30 calendar days prior to the announcement of an interim financial report or year-end report that the issuer is required to make public;
2. By corporate officers and employees with knowledge of privileged information, within

the period between:

- i. the date on which the company's corporate bodies become aware of information which, if it were made public, could have a significant impact on the price of the company's shares,
- ii. and the date which is 10 market days after the date on which such information is made public.

b. Concerning prospectus regulations, the Financial Markets Authority ("AMF") stated that free shares allocation plans and stock option plans are not subject to the requirement to produce a prospectus provided that such shares are of the same class as those already admitted to trading on a regulated market.

16. Do any specialist regulatory regimes apply to incentive plans?

There is no specialist regulatory regime on incentive plans.

Nevertheless, as mentioned above (see Q14), for companies whose securities are admitted to trading on a regulated market, the AFEP-MEDEF Code provides for some recommendations that applies to incentive plans offered to company officers.

Also, some specific organization that have authority in that matter (such as the Financial Markets Authority ("AMF") or the national association of joint-stock companies ("ANSA") issued guidelines on these specific matters, which are regularly updated.

17. Are there any exchange control restrictions that affect the operation of incentive plans?

Depending on the plans' provisions, exchange control restrictions may affect the operation of incentive plan.

18. What is the formal process for granting awards under an incentive plan?

a. For employees, main steps are the followings:

- Draw up the incentive plan (recommendation to draft or translate the plan into French, to avoid any dispute on its enforceability);
- Consultation of the "Social and Economic Committee" (CSE) if required;
- Communicate the plan to the employee at the beginning of the reference period.

b. Special requirements apply for company officers, in particular in listed public limited companies. The plan must first be approved by the Compensation Committee and the Board of Directors and then by the general meeting of shareholders (Say on pay ex ante). Vote of the general meeting of the shareholders is also required at the end of the vesting period (Say on pay ex post). In other words, in listed public limited companies, the principles and criteria for determining and allocating shares to company officers must be approved annually by the general meeting of shareholders.

c. Specific formal procedures are also provided for stock option plans or free share allocations provided for by the French Commercial Code. Allocations must be authorized by the company's extraordinary general meeting. The board of directors then decides on the grants and sets the conditions.

19. Can an overseas corporation operate an incentive plan?

Yes, the company whose registered office is located abroad may set up an incentive plan.

It may also grant stock options or free shares to employees working in a French parent or subsidiary entity. An overseas corporation may also grant shares to employees employed in France in a permanent establishment (e. g. a branch office) or a permanent establishment of another foreign company related to it. The favourable tax and social regime will be applicable provided that such allocation comply with the conditions provided for by the French Code of commerce (these can nevertheless be adjusted). In particular, the foreign company must have a corporate form that is similar to a company eligible under French law.

20. Can an overseas employee participate in an incentive plan?

Yes, an overseas employee can participate in an incentive plan. Also note that by application of the "equal treatment, equal pay" principle (see Q5), the employer might be forced in certain circumstances to grant the incentive plan to an overseas employee.

21. How are share options or awards held by an internationally mobile employee taxed?

The taxation of share options or awards held by internationally mobile employee depends on his or her tax domicile and tax treaty concluded between the

countries concerned (if any).

If the employee's sole tax domicile is France, share options and awards are taxed in accordance with French law (see Q9).

22. How are cash-based incentives held by an internationally mobile employee taxed?

As for share options or awards, cash-based incentives held by internationally mobile employee depends on his or her tax domicile and tax treaty concluded between the countries concerned (if any).

If the employee's sole tax domicile is France, cash-based incentives are taxed in accordance with French law (see Q9).

23. What trends in incentive plan design have you observed over the last 12 months?

Incentive plans that do not comply with the conditions of the French Commercial Code for stock options or free shares must take into account the evolution of the case law of the French Supreme Administrative Court ("Conseil d'Etat"), which now considers that the value of the shares allocated to the beneficiaries, within the framework of the plan, as well as the capital gain they realize on the sale of the shares, may be subject to income tax, depending on the conditions under which the shares are sold.

Moreover, the performance criteria for incentive plans increasingly include Corporate Social Responsibility ("CSR") criteria.

24. What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?

In the context of inflation, the French government is considering reforms to improve the purchasing power of employees, which could include the development of employee shareholding and changes to the conditions for benefiting from existing schemes with preferential social and tax regime.

In addition, the AFEP-MEDEF Code, which sets out recommendations that apply to incentive plans offered to corporate officers, was updated in December 2022 and recommends, among other things, that executive compensation should include at least one criterion

related to CSR and climate objectives.

Contributors

Camille Ventejou
Partner

ventejou@flichy.com



Romain Guichard
Partner

guichard@flichy.com

