



Global Rewards Update

France – Constitutional challenge to employer social contribution paid at grant for free share awards (RSUs)

Key Points to Know

- In February 2017, two French judicial bodies referred a question to the French Constitutional Council to determine whether it is constitutional to apply an employer's social contribution at grant even where employees do not acquire shares at vesting, such as where an employee terminates prior to vesting.
- If the French Constitutional Council finds that the application of contributions in such situations is unconstitutional, it may be possible to claim a refund on employer social contributions paid at grant for qualifying awards when the employee never acquired the shares at vesting.

Background

In 2008, the French social security financing act introduced an employer contribution on qualified free share awards, payable upon grant of the award. This tax was payable at grant and was non-refundable, even in the event that employees never vested in such shares.

Constitutional question

On February 8 and 9, 2017, the *Conseil d'Etat* (the French Council of State) and the *Cour de cassation* (the French supreme court of appeal) each referred a *question prioritaire de constitutionnalité* (QPC - priority question of constitutionality) to the *Conseil constitutionnel* (the French Constitutional Council) to confirm the constitutionality of the application of employer's contribution at grant on qualifying free share award regime (RSUs) granted before the Macron law (i.e. before August 8, 2015), even if shares are not acquired by employees at vesting (e.g., in the case of termination of an employee prior to vesting or in the case of vesting subject to performance conditions).

The question referred to the Constitutional council is based on one argument: how terms and provisions regarding the contribution payment date could be compatible with the constitutional principle of equality before the law and with respect to fair taxation since related income may remain virtual income when award vesting is subject to performance and /or presence tests.

The questions referred insist on the absence of restitution of the employer contribution paid at grant in the absence of awards vesting.

A decision from the Constitutional council is expected in the next three months.

Deloitte's view

The Constitutional council can modulate its decision and limit its application, which means that a limited window may be available to claim a refund in the event of a favorable decision.

While waiting for a definitive decision, it is recommended that employers evaluate their French qualifying free share award plans to determine whether they have any awards that may be eligible for a refund and, if so, the possible amounts involved and to consider whether to file a claim without awaiting the decision.



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