THE LITTLER MENDELSON GUIDE TO INTERNATIONAL EMPLOYMENT AND LABOR LAW

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LUXEMBOURG

AUTHORS:

Michel Molitor

Virginie Liebermann

of

MOLITOR, Avocat à la Cour

Luxembourg

LITTLER EDITOR:

Johan Lubbe

New York, New York, USA

LUXEMBOURG CHAPTER—CONTACT INFORMATION:

Michel Molitor michel.molitor@molitorlegal.lu
Virginie Liebermann virginie.liebermann@molitorlegal.lu

Mailing address:
MOLITOR, Avocats à la Cour
8, rue Sainte-Zithe
L-2016 LUXEMBOURG

Telephone: +352 297 298 1
Fax: +352 297 299
Website: www.molitorlegal.lu

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although the major developments are generally covered, this publication is not all inclusive, and the current status of any decision or principle of law should be verified by counsel. To adhere to publication deadlines, developments and decisions subsequent to March 1, 2016 are generally not covered.

SYNOPSIS

LUXEMBOURG

§ 1 I. SOURCES OF LAW

§ 1.1 A. What are the primary constitutional provisions, statutes and regulations related to employment?

Luxembourg employment law is governed by the Luxembourg Constitution of October 17, 1868, which recognizes the right to work as a fundamental right. Specifically, Article 11(4) states that "*the law guarantees the right to work and the State shall ensure that each citizen may exercise this right. The law guarantees freedom of association and organizes the right to strike.*"

The definition of labor contracts was first regulated by statute in 1919 by the Law of October 31, 1919 ("*Civil Code*"). Its objective was to grant employees a minimum of protection in their relationships with the employer. It had a positive impact on the professional dignity of employees, but required amendments on several points.

The most important reform of the legal provisions governing the relationship between employers and employees was introduced by the Law of May 24, 1989, as amended. A Labour Code was subsequently introduced by the Law of July 31, 2006.

The Law on the Unified Regime ("*statut unique*") of May 13, 2008 ended the existing differences between white-collar and blue-collar workers, notably in relation to severance indemnity, overtime work, payment of the thirteenth month, and continuance of remuneration during sickness. Since January 1, 2009, the labor law defines only one category of worker: i.e., the employees.

Under Article 36 of the Constitution, the Grand Duke may enact the necessary legal instruments and regulations for the purpose of implementing law (Labour Code or special law).

Also, as Luxembourg has been part of the European Union since 1957, European legislation and regulation—directly applicable (regulations) or invoked and transposed into domestic law (directives) within the Member States—are part of the legal framework regarding employment in Luxembourg.

Collective bargaining agreements ("*convention collective*") concluded between trade unions and employers also constitute a source of law for employment. In Luxembourg law, there are two categories of such agreements. One may be declared as a binding agreement by a Grand-Ducal regulation, and the other does not have this binding character.

Another source of law is agreements issued from an inter-branch social dialogue, which may be declared as binding in terms of a collective bargaining agreement.

Finally, the employment contract also serves as a source of law between parties.

§ 1.2 B. What international treaties apply to employment?

International treaties are: the Charter of Fundamental Rights, European Union treaties, directives and regulations; International Labour Organization (ILO) standards; Regulation 864/2007 of the

European Parliament and of the Council on the law applicable to non-contractual obligations; and Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations.

§ 1.3 C. What are the primary mechanisms for enforcement?

Luxembourg is a constitutional monarchy. The executive power is in the hands of the Grand Duke and a cabinet presently consisting of 15 ministers (including one Prime Minister), while the legislative power rests with the Parliament, elected by nationals over 18 years of age.

A law becomes effective when it is given the Grand Duke's assent and when it is published in the official gazette, the *Memorial*. The legal system is primarily based on the French and Belgian systems (Napoleonic Code), although significant modifications have been enacted. Due to its size and political stability, Luxembourg has been able to introduce European Union (EU) legislation faster than other Member States.

§ 1.4 D. What are the primary means for resolving disputes between employees and employers?

§ 1.4(a) *Dispute Resolution*

The competent jurisdiction for dispute resolution is the Labour Tribunal composed of a magistrate, who acts as the chair, and two assessors, of which one is chosen from among the employers and one from among the employees.

The Ministry of Justice nominates for each of the existing Labour Tribunals (Luxembourg, Esch/Alzette, and Diekirch) two active and six substitute employer-assessors, as well as one active and three substitute employee-assessors for each category of employees. These assessors are recommended by the Ministry of Employment after having been proposed by the concerned professional bodies. All nominations are made for a renewable period of five years.

§ 1.4(b) *Jurisdiction*

The Labour Tribunal is competent to hear all disputes relating to a labor contract or an apprenticeship contract, complementary pension schemes, and insolvency insurance. The principal place of work determines which of the three Labour Tribunals is competent to hear the case.

If the principal place of work is outside Luxembourg, the competent tribunal is determined by reference to the rules of Council Regulation (EC) No. 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[1]

§ 1.4(c) *Procedure*

The employer or the employee may initiate the case by means of a request to the Labour Tribunal with a petition submitted to the office of the court clerk. The request should state the surname, first name (or company name), address, and profession of the parties, and the function in which they act. The request should state its subject and provide a summary of the facts. The petitioner or a proxy should sign the document.

The clerk of the tribunal then advises the parties by registered mail of the date, time, and place of

[1] http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044-idx.htm.

the hearing. After the preliminary investigation of the dispute, the chair of the tribunal and the two assessors deliberate. The judgment is sent to the parties by registered mail.

§ 1.5 E. What are the definitions of employee, employer, independent contractor, and contingent worker (i.e., a temporary or agency worker)?

Article 1710 of the Civil Code defines the labor contract as a contract by which one of the parties agrees to do something for the other on the basis of a price agreed upon by both of them. In terms of jurisprudence, the subordination of the employee constitutes the essential criterion of the labor contract. A judgment of the *Cour de Cassation* on February 2, 1989 defines the *labor contract* as the agreement by which a person agrees to put his or her activity at the disposal of another, under whose subordination he or she places him or herself, in return for remuneration.

Thus, the constitutive elements of the labor contract are: (1) the provision of work; (2) the remuneration or salary as a counterpart for the provision of work; and (3) the position of subordination to the power of direction inherent to the employer.

To determine whether there is a position of subordination, the judge should consider not only the terms of the agreement between the parties, but also all the indications supplied by their special situation in which the position of subordination should be integrated and from which their true intention can be seen.

This position of subordination normally results from the fact that the employee is subject to the rules and usages of the establishment by executing orders from the employer concerning the working schedule, the work to be accomplished, and work discipline.

The terminology ("employer" and "employee") used by the parties to the labor contract does not bind the court. The courts have held that a person who holds a plurality of offices and is a technical director placed in a situation of juridical subordination may still be subject to labor law.

Agents and independent contractors are normally not considered employees unless the courts determine that their financial subordination is strong enough to meet the conditions used to define an employee. An in-service traineeship cannot be considered as a labor contract.

§ 1.6 F. What are the most important characteristics of the legal culture relating to employment?

The employment law of Luxembourg was governed on a contractual basis (Napoleonic Code), but more and more mandatory provisions are implemented for the purpose of protecting employees in their work conditions, to avoid discrimination and to ensure health and safety.

Social dialogue was and is always a priority and guarantee of social peace.

§ 2 II. HIRING

§ 2.1 A. Must a foreign employer set up a local entity to employ local workers, and if so, what are the requirements?

§ 2.1(a) *Business License*

In principle, a foreign company that wants to set up a local entity to carry on business in Luxembourg needs a business license prior to starting the activity.

A business license is only required for businesses specified in the law.

A business license is required by any natural person or legal entity wishing to exercise commercial (trade, transport, food service), skilled crafts and industrial activity, as well as for exercising certain professions on a self-employed basis (architect, engineer, chartered accountant, economic adviser, industrial property adviser, land surveyor).

There are additional requirements for the setting up of a company or a branch in the field of the financial sector. Specific obligations exist in connection with the Luxembourg Supervisory Authority of the Financial Sector ("*Commission de Surveillance du Secteur Financier*" or CSSF).

An EU citizen who temporarily or occasionally wishes to collect orders or to provide services in Luxembourg in the course of his or her commercial activity or liberal profession does not need a business license.

In order to obtain this business license, the foreign company should establish a subsidiary or a branch in Luxembourg.

The right of establishment is granted to any individual who fulfills the double condition of honorability and professional qualification.

If the applicant is a legal entity, it is the manager(s) who will have to meet these two requirements.[2]

The application for a business license is filed with the Minister of Economy.

§ 2.1(b) *Other Formalities*

Before hiring employees, a foreign employer must submit an operating declaration to the Joint Social Security Centre ("*Centre Commun de la Sécurité Sociale*" or CCSS) in order to be registered as an employer.

This operating declaration enables the CCSS to assign a registration number to the business and the risk class for its business activities.

§ 2.2 B. What rules apply to the employment of foreign nationals? How much time should an employer allow to obtain the required work authorization documents?

The Law of 29 August 2008 on the free movement of people and immigration is applied to foreign nationals.

The proceedings regarding the right to stay and work in Luxembourg are different depending on whether the foreign employee is a European citizen or a third-country national.

European citizens, European Economic Space Member State citizens (except Croatian citizens) and Swiss citizens can reside and move freely in the territory of Member States of the European Union without any authorization. They can also work freely in the European Union.

Croatian citizens must have a work permit for their first year of work in Luxembourg territory.

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[2] Law on Business Establishment of 1988, art. 3.

Third-country nationals may enter Luxembourg for less than three months with a valid passport and a visa, if it is required.

During this period, they cannot exercise a salaried activity in Luxembourg.[3] Nevertheless, no authorization is required for third-country nationals who wish to stay in Luxembourg for less than three months within a calendar year for the purposes of the provision of occasional services, such as:[4]

- staff of fairground attractions, circuses and other traveling establishments;
- sportsmen and sportswomen;
- invited researchers, conference speakers or university lecturers;
- persons making business trips such as visits, canvassing, negotiation and conclusion of contracts, participation in exhibitions, trade fairs, shows, companies' board meetings or general meetings; and
- service providers in the same business group, excluding subcontracting.

However, if a third-country national wishes to stay and work for more than three months in Luxembourg, he or she must apply to the Immigration Directorate of the Ministry of Foreign and European Affairs of Luxembourg for a (temporary) authorization to stay (including an authorization to work), prior to entering Luxembourg.

There are several categories of authorizations to stay in Luxembourg, i.e., for:

- salaried worker;
- highly qualified worker;
- transferred worker; and
- posted worker.

The most common types of authorizations to stay in Luxembourg are those for highly qualified worker and posted worker.

In 2009, European law introduced a European Blue Card by the Council Directive 2009/50/EC of May 25, 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

The European Commission has stated that "*the object of this directive is to improve the European Union's ability to attract highly qualified workers from third countries*".

The necessary conditions to obtain a temporary residence authorization as a highly qualified worker are determined by Article 45 (2) of the Law of 2008, which states that *highly qualified employment* is the employment of a worker who exercises a paid employment for which he or she

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[3] Law of 29 August 2008 on the free movement of people and immigration, art. 35(1).

[4] Law of August 29, 2008 on the free movement of people and immigration, art. 35(2).

has the necessary, specific and adequate competence, and he or she is certified by high professional qualifications.

The third-country national must also have: (1) a work contract for highly qualified employment for a period equal to or greater than one year; (2) a document confirming the high professional qualification necessary for the employment or the conditions stipulated in the work contract; and (3) a minimum salary of an amount fixed by Grand Ducal Regulation, currently EUR 73,296 per year (as of August 1, 2016).

If all these conditions are met, the temporary residence authorization is valid for a period of two years or for the duration of the work contract, plus three months if this period is less than two years.

When a third-country national wants to stay and work in Luxembourg for a short term or in order to accomplish a specific transnational provision of services, it is recommended that he or she apply for a temporary authorization to stay as a posted worker.

In order to be granted a temporary authorization to stay as a posted worker, the sending undertaking ("foreign service provider") has to introduce a request for posted workers.

Article 48 of the Law of 2008 defines *posted workers* as all salaried workers normally working abroad and carrying out their work on Luxembourg territory for a preset period for the execution of the service for which the contract of service has been concluded.

During the posting, the sending undertaking must comply with Luxembourg's mandatory provisions (minimum social wage, paid leave, public holidays, principle of nondiscrimination, etc.).

Each temporary authorization is valid for a limited period. After three months, the third-country national has to apply for a residence permit.

Such authorizations are, in principle, issued within a deadline of three months.

There is a currently a Bill of law under consideration, No.6992 of May 18, 2016, which would modify the Law of August 29, 2008 on the free movement of people and immigration as applied to foreign nationals. The Bill aims at implementing Directive 2014/36/EU of the European Parliament and the Council of February 26, 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

§ 2.3 C. What rules apply to background checks?

Luxembourg law does not specifically restrict or prohibit background checks when an employer hires an employee.

An employer has to check certain information about the candidate in order to respect some mandatory provisions.

For that purpose, the employer must confirm the age of the candidate. Employment of children under 15 years of age and/or subject to school obligations is prohibited.[5]

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[5] Labour Code, art. L.342-1.

If the employer wishes to hire a foreign employee, the employer must check whether the employee needs an authorization for work (refer to §2.2 above).

The employer must also comply with principles of nondiscrimination and of equality, which apply to the recruiting process (refer to § 4.1 below). In light of these principles, the scope of any background check should be directly linked to the nature of the position applied for.

The employer can ask the employee for a copy of his or her criminal record.

As a rule, the requested information must be strictly necessary to the assessment of the employee's ability to perform the proposed job, so as to comply with the Luxembourg law dated August 2, 2002, as amended, on the Protection of Persons with regard to the Processing of Personal Data. Also, processing operations that reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life, including the processing of genetic data, are forbidden.

§ 2.4 D. What rules apply to medical examinations or health-related tests?

Article L.326-1 of the Labour Code states that all employees have to undergo a pre-recruitment medical examination.

This medical examination has to be performed within two months of hiring. However, night workers must undergo this examination prior to hiring.

If the medical examination occurs after hiring, the employment contract is concluded on the condition that the employee is declared medically fit. If not, the employment contract is terminated for a valid reason.

§ 2.5 E. May an employer require drug and alcohol testing?

In Luxembourg law, there is no specific provision that requires a drug and alcohol test.

In the absence of specific provisions regarding drug and alcohol testing, the Luxembourg Court clarified the conditions of validity of such practice.[6]

First, drug testing within the company must pursue a legitimate aim and be proportionate; otherwise, it would constitute a restriction on the rights of persons and individual freedoms. The employer is not entitled to demand that the entire staff undergo testing by urinalysis, citing a risk of discrimination between employees holding positions at risk and other employees of the company. In this respect, it cannot be justified purely in relation to positions of risk within the establishment but only if a serious incident justifies the introduction of the test.

In addition, the court stated that the test should be performed by a doctor and not, for example, by a member of the Staff Delegation or an HR representative. Any agreement by the Staff Delegation to conduct such testing on all employees has no bearing on its alleged validity.

Accordingly, the court held that the results of the screening test as implemented and carried out within the company was vitiated with illegality and, *a fortiori*, could not be the basis for

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[6] Labour Court of Esch-sur-Alzette, October 24, 2013 n° 2461/13, n°2462/13, n° 2463/13, n° 2464/13 and November 7, 2013, n° 2545/13, n° 2546/13.

immediate dismissal of employees.

§ 2.6 F. Are there mandated preferences in hiring?

Under Luxembourg employment law, there are no mandated preferences in hiring.

However, in certain circumstances, the employer must comply with the required ratio of disabled employees (see § 4.3 below), or implement a gender-based preference where it is required to compensate for an under-represented sex or a positive action established in the undertaking (see § 4.5 below).

§ 2.7 G. Are there mandated sources for recruiting employees, such as local labor authorities, agencies, or to recruit from within an existing workforce?

Before hiring an employee, an employer has to declare any job vacancy to the National Employment Administration ("*Agence pour le développement de l'emploi*" or ADEM).[7]

§ 2.8 H. Are there requirements to advertise or post openings in particular places?

Refer to § 2.7.

The Labour Code provides some situations where employees or former employees have priority of re-employment or should be informed of a job vacancy.

For example, an employee who resigns from employment after maternity or adoption leave,[8] or employees dismissed for economic reasons[9] have a priority of re-employment.

An employee hired under a fixed-term employment contract must be informed by the employer of a job vacancy.

Otherwise, there are no requirements to advertise or post openings in particular places.

§ 2.9 I. Are there restrictions on filling openings with contingent workers?

There are no restrictions on filling openings with contingent workers.

§ 2.10 J. What are the consequences of misclassifying a worker as an independent contractor, contingent worker, or temporary worker?

In principle, the misclassification of a worker as independent contractor, contingent worker or temporary worker results in the conversion of the contract into an open-ended employment contract. Consequently, the employer is not allowed to terminate the contract without complying with dismissal rules, or has to pay a compensation equivalent to that which would apply to an open-ended contract.

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[7] Labour Code, art. L.622-5.

[8] Labour Code, art. L.332-4.

[9] Labour Code, art. L.125-9.

§ 3 III. EMPLOYMENT CONTRACTS

§ 3.1 A. Are written employment contracts required for certain employees?

An employee must enter into an individual written employment contract when the employment relationship begins.[10] If the employee is not given a written document, a contractual relationship is still presumed to exist, and the employee has the right to receive a written contract from the employer. A fixed-term employment contract must be concluded in writing. If it is not, the contract is deemed an indefinite employment contract, as the employer cannot prove otherwise.

§ 3.2 B. Are there certain essential terms in employment contracts?

An employment contract must contain the following details:

- the names of both parties;
- the date on which the contract takes effect;
- either:
  - the place of employment; or
  - if there is no fixed or main place of employment, a statement that the employee will be employed at various locations or abroad (in this case, the employer's head office or residence must be specified);
- the nature of the employment and a description of the tasks that the employee is employed to perform, without prejudice to any subsequent change;
- the employee's standard working hours and usual working schedule;
- the employee's basic salary, any additional payments, and the frequency of payment;
- paid holiday entitlement or the method of determining this;
- the notice period if the employment contract is terminated;
- the length of any trial period;
- collective bargaining agreements (CBAs) governing the employee's working conditions; and
- any supplementary pension scheme.[11]

§ 3.3 C. In what language(s) must employment contracts be written?

There is no specific provision regarding the language in which employment contracts must be written, as long as the language is understandable by the employee. Since there are three official

[10] Labour Code, art. L.121-4(1).

[11] Labour Code, art. L.121-4(2).

languages in Luxembourg—French, German, and Luxembourgish—it is likely that the contract will be written in one of those languages. However, due to the international work context in Luxembourg, English also remains a common option.

§ 3.4 D. What rules exist relating to the duration of employment contracts?

A labor contract for an indefinite period is often referred to as the "normal" labor contract. However, there are other labor contracts that are governed in part by different legal provisions.

Some contracts merely aim to organize the work in a specific way (e.g., contracts for a definite period, for temporary work, for voluntary part-time work and for intermittent work). Most employers want their employees to prove their ability to work during a trial period, whether the contract is for a definite or an indefinite time. Article L.121-5 of the Labour Code defines the rules to be applied in relation to the trial period (see § 3.5 below).

A contract for a definite period may only be concluded in exceptional instances and is governed by Articles L.122-1 to L.122-13 of the Labour Code and other specific rules. These rules are a compromise between the employer's necessity to hire people without being required to keep them when the job is done and the protection of the employee's right to a stable job. The following tasks allow for the conclusion of a contract for a definite time:

- replacement of an employee who is temporarily absent or whose labor contract has been suspended;
- seasonal employment (e.g., activity relating to crops or grape harvesting, to hotels and restaurants during the tourist seasons, and to travel guides);
- jobs for which contracts with an undetermined period are not usual, such as actors, fashion models, scriptwriters, professional sportsmen, specialists for private banking, and specialists in swaps, shares, risk capital, deposits, mergers, and acquisitions;
- occasional tasks that are not part of the usual activity of the company, such as auditing and accounting expertise;
- precise and short-term tasks to be carried out in cases of exceptional and temporary increase of the activity of the company;
- urgent work that is necessary to prevent accidents, as well as specific task-oriented jobs, such as the reorganization of the installation of the company to avoid detriment to the employer and its employees;
- jobs for unemployed persons registered at the Job Agency benefiting from an insertion or reinsertion plan, or jobs for a specific category of unemployed persons defined by the Grand-Ducal Regulation;
- jobs to encourage the hiring of a specific category of unemployed persons; and
- jobs offering additional professional training.

Contracts with a time limit should include, in addition to the definition of the task to be accomplished, the following provisions relating to its duration:

- the date of expiration if the contract is concluded for a previously determined period;
- the minimum duration if the contract expires upon the accomplishment of a determined task;
- the name of the replaced employee if the contract has been concluded for such purpose;
- the duration of the trial period; and
- a renewal clause.

If the contract was not concluded in writing, it is presumed to be concluded for an indefinite period, and proof to the contrary may not be offered. The duration of a contract for a definite term cannot exceed 24 months, including renewals and the trial period. The contract may be renewed twice within the 24-month period.

Nevertheless, the Minister of Labour and Employment may grant requests to hire employees for a definite period of more than 24 months for work requiring highly specialized knowledge.

If the principle of renewal of the contract or of the conditions relating to the period is not contained in the initial contract, the law presumes that the renewed contract is for an indefinite period, and proof to the contrary is not allowed.

The tacit renewal of an expired contract for a definite period automatically generates a contract without a time limit. Employees hired for a definite time should be paid the same salary or wage as employees hired without a previously determined limitation of time.

§ 3.5 E. Are probationary periods allowed, and if so, what restrictions apply?

According to the Luxembourg Labour Code, a trial period clause is not mandatory. However, if applicable, Article L.121-4 (2) of the Code provides that the employment contract must contain the length of the trial period.

Article L.121-5 of the Luxembourg Labour Code requires the trial period to be written in the employment contract and specified, at the latest, at the time the employee starts work.

The trial period cannot last less than two weeks or more than six months. It can be extended up to a maximum of 12 months for an employee whose gross monthly salary equals or exceeds EUR 4,154.91 at index 775.17 (as of August 1, 2016).

§ 3.6 F. Must employment contracts specify termination provisions, and if so with what degree of specificity?

A contract terminates on its expiration date, even if it has been suspended prior to such date. If the employer pre-terminates the contract, it is liable to the employee for damages in an amount equal to the salary or wages the employee would have earned during the remaining period of the contract, but up to the limit of two months' salary.

If the employee pre-terminates the contract, he or she may be liable for damages to the employer in an amount equivalent to the salary due for the duration of the notice period, i.e., at most one month's salary.

§ 3.7 G. Do employment contracts customarily contain covenants to safeguard the employer's intellectual property, covenants not to compete and/or agreements not to solicit the employer's customers or employees?

§ 3.7(a) *Intellectual Property*

§ 3.7(a)(i) *Copyright*

An employee is, in principle, the owner of the copyright of works created in the course of his or her employment unless otherwise contractually agreed.[12]

Exceptions apply where:

- a computer program is created by an employee in the execution of its duties or following the instructions given by his employer. Unless otherwise contractually agreed, the employer exclusively shall be entitled to exercise all economic rights in the computer program.[13] Moral rights remain on the employee; or

- a work is created by various authors under the initiative and supervision of a natural or legal person who edits it, publishes it and discloses it under his or her direction and name, and in which the personal contributions of the various authors who participated in its production are merged in the overall work. Unless otherwise contractually agreed, such directed work is the property, unless proved otherwise, of the natural or legal person under whose name it is published.[14]

§ 3.7(a)(ii) *Patents*

Unless otherwise contractually agreed between the employer and employee, inventions made by an employee belong to the employer when (1) created under an employment contract comprising an inventive mission corresponding to his effective functions, or during studies and research that the employee has been explicitly charged with, or (2) created in the field of the activities of the employer, or created with the use of the employer's knowledge, technology, data or other means specific to the employer.[1514] An employee owns all inventions that do not meet these criteria.

§ 3.7(a)(iii) *Designs*

Unless otherwise contractually agreed between the employer and employee, the right to a design created by a worker or an employee in the course of his or her employment is the property of the employer.[16]

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[12] Law of April 18, 2001 on Copyright, Neighbouring Rights and Databases, as amended.

[13] Law of April 18, 2001, art. 32, §2.

[14] Law of April 18, 2001, art. 6.

[15] Law of July 20, 1992 relating to patents, as amended, art. 13.

[16] Benelux Convention on Intellectual Property, art. 3.8, §1.

§ 3.7(b) *Restraint of Trade*

§ 3.7(b)(i) *Restriction of Activities*

Employees must comply with the duty of good faith and not harm their employer's interests during the employment contract.[17]

§ 3.7(b)(ii) *Post-employment Restrictive Covenants*

An employer can include a noncompetition clause in the employment contract. This prohibits employees from carrying out independent activities similar to those of their employer for a certain period after the employment relationship is terminated.[18] Its aim is to prevent former employees from harming the employer's interests.

To be enforceable, a noncompetition clause must comply with certain conditions. For example:

- The employee must earn a gross monthly salary of at least EUR 4,403.65 (index 775.17 as of August 1, 2016) before leaving the company and must not be a minor when signing the clause.
- The clause must be in writing and included in the employment contract.
- The prohibition can only extend to prohibiting carrying out activities similar to those of the employer and requiring the employee to exercise his or her business independently.
- The relevant period must not exceed one year.
- The prohibition must be restricted geographically, meaning it cannot extend outside Luxembourg.

Employees are not legally entitled to any compensation or other consideration for complying with a noncompetition clause.

§ 3.8 H. Are the terms of employment contracts considered confidential?

There is no specific legal provision regarding the confidentiality of the terms in employment contracts.

§ 4 IV. DISCRIMINATION IN EMPLOYMENT

§ 4.1 A. What prohibitions against discrimination exist, and how are they defined?

At the highest level of the hierarchy of national norms, the principle of equality is guaranteed by Article 10 *bis*(1) of the Luxembourg Constitution, which states that all Luxembourg citizens are equal before the law. The Luxembourg State promotes the equality of women and men in rights and obligations.[19]

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[17] Civil Code, art. 1134.

[18] Labour Code, art. L.125-8.

[19] *See* Luxembourg Constitution, art. 11(2).

The Law of November 28, 2006 prohibits discrimination based on the following grounds:[20]

- religion, conviction or belief;
- disability;
- age;
- sexual orientation; and
- real or assumed membership or non-membership in an ethnic group.

Discrimination can be direct (e.g., being treated less advantageously) or indirect (e.g., a neutral practice having a negative effect only on the persons discriminated against). It can concern the recruiting process, promotions, working conditions, activities outside of the job, professional training, continuing education or entry to a worker union or a professional association.[21]

The Inspectorate of Labour and Mines ("*Inspection du Travail et des Mines*" or ITM) is responsible for enforcing compliance with the principle of nondiscrimination. Dismissals that violate this principle are void.

The Labour Code[22] prohibits discrimination based on grounds of sex, either directly or indirectly, by reference in particular to marital or family status.

The Criminal Law also prohibits discrimination if it is based on the following grounds:[23]

- gender;
- sexual orientation;
- health or disability;
- nationality, color or origin;
- real or assumed membership of an ethnic group, race or religion;
- political or philosophical belief; and
- union membership.

If an employer refuses to hire employees, subjects them to detrimental treatment or dismisses them due to any of the above discriminatory grounds, one or both of the following penalties can be imposed:

- A fine of between EUR 251 and EUR 25,000.
- A prison sentence from eight days up to two years.

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[20] Labour Code, arts. L.251-1 to L.254-1.

[21] Labour Code, art. L.251-2.

[22] Labour Code, art. L.241-1.

[23] Penal Code, arts. 454 and 455.

There is no qualifying period of service before an employee can bring a claim.

The Labour Code also guarantees protection against sexual harassment. If employees who have complained about sexual harassment are dismissed or experience other detrimental consequences, the burden of proof lies on the employer to show that the action was not based on the harassment complaint.[24] In these circumstances, no penal sanction can be imposed on the employer, but the measures taken against the employees are invalid. A victim of sexual harassment can terminate the employment contract and claim damages.

A draft bill on protection against moral harassment (also known as *mobbing*) was presented to the Parliament ("*Chambre des Députés*") on July 4, 2002, but as yet no vote has been taken. *Moral harassment* includes abusive, repeated nonphysical acts, behavior, intimidation, gestures, or unilateral writing, that aim to affect the personality, dignity, physical or psychological integrity of an employee in the workplace, and to create a hostile, intimidating and humiliating working atmosphere.[25] The trade unions OGBL ("*Onofhängege Gewerkschaftsbond Lëtzebuerg*") and LCGB ("*Lëtzebuerger Chrëschtleche Gewerkschaftsbond*") and the employers' association UEL ("*Union des enterprises luxembourgeoises*") have concluded a convention proposing general obligations to prevent harassment and violence at work.

§ 4.2 B. What prohibitions exist against religious discrimination, and what accommodations of religious practices are required of the employer?

As mentioned above, the Labour Code, and specifically Article L.251-1 (1) and Article 454 of the Penal Code, prohibit discrimination based on religion, conviction and belief.

Luxembourg law does not provide a specific regulation on certain accommodations of religious practices. The employer is not obliged to put such accommodation in place in its undertaking.

§ 4.3 C. What prohibitions exist against disability discrimination, and what accommodations of disabilities are required of the employer?

All disability discriminations are prohibited under the Labour Code and also under the Penal Code.[26]

The Labour Code establishes that employers who employ a certain number of employees must employ disabled employees:

- employers of more than 25 employees must engage at least one disabled employee;
- employers of more than 50 employees must engage at least 2% disabled employees of the total staff; and
- employers of more than 300 employees must engage at least 4% disabled employees of the total staff.

If an undertaking consists of several units, this obligation to employ disabled employees applies

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[24] Labour Code, arts. L.245-1 to L.245-8.

[25] Draft bill of July 4, 2002, art. 2.

[26] Labour Code, art. L.251-1; Penal Code, art. 454.

to all units taken in isolation.

An employer who engages more than the legal requirement will be exempt from the payment of the employer's part of social contribution. These contributions will be taken over by the Luxembourg State.[27]

§ 4.4 D. What prohibitions are there against harassment?

The Labour Code governs the issue of sexual harassment.[28]

Sexual harassment is defined by the Labour Code as unwanted conduct related to sex with the purpose or effect of affecting the dignity of a person and creating an intimidating, hostile, offensive or disturbing environment.[29]

The employer is obliged to take all necessary preventive measures to ensure the protection of the dignity of every person in the workplace. The employer must not only refrain from any acts of sexual harassment at work, but it must also prevent and stop any acts of harassment. Measures that are aimed at stopping sexual harassment cannot be applied against the victim. Any provision or act taken against the victim, especially the termination of the employment contract, will be null and void.

Under the Grand-Ducal Regulation of December 15, 2009, the collective agreement of June 25, 2009 relating to harassment and violence at work is generally binding on all employers and employees (see § 4.1 above).

§ 4.5 E. What exceptions are permitted to the prohibitions against discrimination (e.g., job requirements that mandate hiring candidates of a certain age or gender, or quotas to address past discrimination)?

As an exception to the principle of nondiscrimination, the Labour Code states that a difference in treatment that is based on a characteristic relating to Article L.251-1 (1) will not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[30]

This exception is also applicable when a difference of treatment occurs that is based on grounds of religion or belief,[31] age[32] or disability.[33]

Additionally, affirmative action measures may be put in place in some undertakings. The Labour Code foresees that these undertakings may adopt measures providing for specific advantages in order to make it easier for an under-represented sex to pursue a vocational activity or to prevent

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[27] Labour Code, art. L.562-5.

[28] Labour Code, arts. L.245-1 to L.245-8.

[29] Labour Code, art. L.245-2.

[30] Labour Code, art. L.252-1(1).

[31] Labour Code, art. L.252-1(2).

[32] Labour Code, art. L.252-2(1).

[33] Labour Code, art. L.252-3(2).

or compensate for disadvantages in professional careers.[34]

The measures are, among others, the implementation of a new work organization, specific training program, etc.

The Penal Code also provides four exceptions to the principle of nondiscrimination. Two of these exceptions are of interest in labor law.

Articles 454 and 455 of the Penal Code do not apply in certain circumstances, such as when differentiations based on health status are made in order to prevent a risk of death, physical integrity or a risk of work incapacity or invalidity. Such differentiations may be made when they consist in a refusal of employment or a dismissal based on medically established incapacity. An exception also applies when differentiations based on nationality intervene in hiring when the nationality of the employee is considered as a determining factor under national law, such as in the public sector.

§ 4.6 F. What are the potential remedies for prohibited discrimination and harassment?

The concerned person may bring an action before the Criminal Court. Article 457 of the Luxembourg Penal Code defines the potential sanctions (see § 4.1 above).

The Labour Code provides a number of remedies to employees who are victims of discrimination or harassment. Prior to entering into contractual relationships, an employer who publishes job offers that are not in compliance with the principle of nondiscrimination may be subject to a fine of between EUR 251 and EUR 2,000.[35]

All provisions contained in an employment contract, a collective bargaining agreement or the undertaking's internal rules that do not comply with the principal of nondiscrimination are considered null and void.[36]

Finally, as mentioned above, the employee may bring an action before the President of the Court when his or her dismissal is based on a discriminatory ground. In such situation, the employee must bring his or her action within 15 days of notification of the dismissal. The employee must request a declaration of the invalidity of the dismissal and an order stating that he or she must remain employed.[37]

An employee who is a victim of harassment may refuse to execute his or her employment contract under such conditions and terminate the contract without notice.[38]

A female employee who has been dismissed of the grounds of her marriage can invoke the invalidity of her dismissal within two months of the dismissal.[39]

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[34] Labour Code, arts. L.242-3 and L.243-1(1).

[35] Labour Code, art. L.241-11.

[36] Labour Code, arts. L.241-9 and L.253-3.

[37] Labour Code, arts. L.241-8 and L.253-1.

[38] Labour Code, art. L.245-7.

[39] Labour Code, art. L.337-6.

§ 4.7 G. What prohibitions exist regarding retaliation/reprisal?

European law, and specifically Directive 2002/73/EC,[40] provides that national legal systems must introduce such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

The Luxembourg Labour Code expressly prohibits reprisal in cases of protest or refusal to perform an act that would violate the principle of equal treatment or in case of a legal proceeding aimed at enforcing compliance with this principle. This protection is also applicable to anyone witnessing such act.[41]

If an employee is dismissed on this ground, he or she can bring an action before the President of the Court in order to request the invalidity of the dismissal and obtain an order that he or she be allowed to remain in the undertaking (see § 4.6 above).

§ 4.8 H. May individual persons be liable for discrimination, harassment, or retaliation/reprisal?

As mentioned above (see §§ 4.1, 4.6 and 4.7 above), an employer may be liable for discrimination, harassment or retaliation/reprisal under the Labour and Penal laws. In these circumstances, he or she may be ordered to pay damages to his or her employee.

The employer or an employee who perpetrates discrimination or harassment may be liable under civil law. The victim may bring an action for civil liability.[42]

§ 5 V. COMPENSATION

§ 5.1 A. What restrictions are there on hours that may be worked?

Working time is defined as the time where the employee is at the disposal of his or her employer or the employer's employer. Periods of rest time are excluded.[43]

The Labour Code provides that normal working hours are 40 hours per week and eight hours per day,[44] but collective bargaining agreements may contain shorter working times.

The maximum number of working hours, including overtime, must not exceed 48 hours per week and ten hours per day.[45]

However, the Labour Code contains some provisions[46] allowing more flexibility in working times, mainly in a work organization plan or flexitime regulation with respect to the normal

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[40] Directive 2002/73/EC of the European Parliament and of the Council of September 23, 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[41] Labour Code, arts. L.241-8 and L.253-1.

[42] Civil Code, arts. 1134, 1382 and 1383.

[43] Labour Code, art. L.211-4.

[44] Labour Code, art. L.211-5.

[45] Labour Code, art. L.211-15.

[46] Labour Code, art. L.211-6, L.211- 7.

average duration of work (40 hours a week and eight hours a day).

The flexitime regulation allows employees to organize their working time while respecting the core hours of work imposed by the employer during the reference period.

Other provisions contained in the Labour Code introduce some flexibility in working time, for example:

- when working time is scheduled on five days of the week, the daily working hours may be extended to nine hours but must not exceed 40 hours a week;[47]

- in a business in which the work cannot be interrupted or be delayed or organized in shifts, the working time can exceed normal working time limits under the condition that the amount of the average duration of weekly normal working time does not exceed 40 hours a week within a reference period of four weeks;[48] or

- under restricted conditions, the Ministry of Employment may allow normal working time to be exceeded.

§ 5.2 B. What minimum wage requirements exist?

All rules regarding the minimum wage, named *minimum social wage* or MSW, are mandatory provisions and consequently are imposed on all employers and employees.

The MSW varies with the age of the employee and his or her professional qualification and is subject to automatic indexation of remuneration and to regular increases.

Employee	**% of MSW**	**Gross Monthly MSW (EUR)** (Index 775.17 on August 1, 2016)
15-17 years old	75%	1,442.22
17-18 years old	80%	1,538.37
After 18 years:		
MSW for unskilled employee	100%	1,922.96
MSW for skilled employee	120%	2,307.56

A *skilled employee* is defined as an employee who has, for the profession concerned, gained a professional skill usually resulting from:

- a school education or a vocational education attested by a certificated course (vocational skills certificate, manual skills certificate and certificate of vocational ability) with at least two years of professional experience,

- vocational initiation ability resulting from a technical secondary school with at least five years of practical professional experience,

- a practical professional experience of at least ten years in a profession attested by a diploma, or

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[47] Labour Code, art. L.211-18.

[48] Labour Code, art. L.211-19.

- at least six years in a profession unattested by an official certificate but requiring certain technical skills.[49]

§ 5.3 C. What is the required schedule for paying wages, and in what form and currency must they be paid?

The remuneration is global compensation, including cash remuneration and other benefits and accessory compensations (i.e., fringe benefit, bonus, *ex grata* payment, awards, free housing, etc.).

Wages stipulated in cash must be paid each month and no later than the last day of the calendar month[50] in question, but other accessory benefits and compensation are paid no later than the end of the second month of the service year or the close of financial year or the date of the annual report.

There are no provisions regarding the method of payment of the remuneration. Usually the payment is made by a bank transfer, but it may also be paid in cash.

In addition, the employer must provide the employee with a salary slip indicating the exact amount of the remuneration and the method of calculation (working period and hours, hourly rate of salary, etc.).

The currency of payment in Luxembourg is in principle the Euro, but a salary may be paid in another currency.

§ 5.4 D. What overtime pay requirements exist?

Overtime hours are defined as hours that are worked beyond eight hours per day and 40 hours per week at the request or with the consent of the employer.

In a company where a work organization plan or a flexitime regulation is in place, overtime hours are the hours worked beyond the limit fixed by the plan or regulation at the request or with the consent of the employer (see § 5.1 above).

As the maximum number of working hours, including overtime, must not exceed 48 hours per week and ten hours per day,[51] it is not possible for an employee to carry out more than two overtime hours per day and eight overtime hours per week.

Overtime gives rise to additional compensation or additional compensatory rest time.

Each overtime hour worked is compensated by an hour and a half of time off or recorded at the same rate in a time saving account. However, only a few companies use a time saving account system, which is quite complicated to set up. A Bill regarding time saving accounts was introduced but is currently suspended.[52] The National Action Plan for employment, introduced in 1999, was renewed for another year at the end of 2015, however the government has promised a

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[49] Labour Code, art. L.222-4.

[50] Labour Code, art.L.221-1 and L.125-7.

[51] Labour Code, art. L.211-15.

[52] Bill n°6233 related to the introduction of a time saving account in the private sector introduced on September 16, 2010.

reform planned for 2016, allowing for more flexibility of the work time. Discussions are currently underway though no Bill has yet been published.

If the employer cannot grant time off for reasons linked to the business or the leave of other employees, it will allocate to the employee in compensation of each overtime hour a payment of the normal hourly rate plus 40%. The hourly wage is calculated by dividing the monthly remuneration by 173 hours. The payment of overtime hours is partially exempt from social security contributions.

Overtime is subject to a notification or a request for an authorization made to the Inspectorate of Labour and Mines by the employer.

§ 5.5 E. What rules apply to the payment of commissions?

No legal provision governs the payment of commissions, and the conditions of the payment of commissions can be freely agreed upon between employer and employee, but mandatory provisions regarding the minimum social wage must be respected.

§ 5.6 F. What bonuses are mandated or customary?

There are no legal obligations for an employer to grant bonuses to its employees.

In principle, the allocation of a bonus is considered as a goodwill gesture. Therefore, the payment of a bonus remains at the employer's sole discretion.

As an exception, if the bonus is owed according to an express commitment by the employer, which can result from the employment contract, a collective bargaining agreement or any other document, such as a bonus plan, it is considered part of the employee's remuneration. If so, the bonus is compulsory and has to be paid by the employer in the same way as the employee's basic salary, even if the employee is no longer with the company at the time of the payment. A judicial decision[53] has expressly declared void a provision of an incentive plan according to which the bonus will not be paid to employees who are no longer in the company at the time of the payment, insofar as the bonus could be considered a part of the employee's remuneration.

An employee who has left the company before the payment of the bonus is, however, only entitled to a *pro rata* share of the bonus.

Moreover, if the bonus results expressly or implicitly from the terms of a document attesting to the employer's express commitment that the payment of the bonus remains at the employer's sole discretion, then the bonus will be considered as a goodwill gesture, and its payment will remain at the employer's sole discretion.

Furthermore, the Luxembourg Financial Supervisory Authority ("*Commission de Surveillance du Secteur Financier*" or CSSF) has published several circulars and guidelines for remuneration policies in the Luxembourg financial sector. In most cases, high bonuses were awarded with little or no counterbalance. In that sense, this was viewed as encouraging excessive risk-taking (i.e., short-term gains).

The remuneration policy should be properly documented, include specific rules regarding the payment of bonuses, and be structured in such a manner that the variable remuneration part,

[53] Tribunal du Travail, Luxembourg, April 27, 1995.

including the bonuses, is reasonable in comparison to the fixed remuneration part.

The remuneration policy should not induce excessive risk-taking and should be in line with the business strategy and long-term interests of the financial undertaking. When setting it up, the remuneration policy should take into account the principle of proportionality.

§ 5.7 G. What special rules exist for stock options or stock grants?

Luxembourg law does not specifically regulate employee share plans, and, consequently, there are various types of plans and conditions from which employees can benefit.

These plans are particularly common in the financial sector and are broadly split into two different categories:

- *Ordinary share* option plans: in which the employer grants employees options to purchase shares;
- *Tradable share option plans*: which carry forward all features of an ordinary share option plan but allow employees to sell their options freely.

The latter category of plan is not so popular, because employers prefer to impose a holding period on the options rather than allow employees to sell them freely.

Share option plans are mainly discretionary, so they can be granted either to individual employees or a section of employees, over any amount or part of shares, on any terms.

However, the share option plan must comply with anti-discrimination rules and must be offered to participants on an objective basis.

There is no limit to the number of shares that can be held under a share option plan for companies, groups or individuals. A share option plan can be granted at or below market value, or free of charge.

On December 28, 2015, Circular L.I.R. No. 104/2bis relating to employee stock option plans introduced a new reporting requirement, with effect on January 1, 2016. From that time, employers wishing to set up stock option (or warrant) plans must notify the competent tax authority at least two months before the implementation date of the plan. The notification includes a copy of the plan rules as well as a list of the beneficiaries of the plan.

In addition, employers are obliged to also inform the competent tax authority at their earliest convenience if such a plan was set up before January 1, 2016 but the issuance of options/warrants took place after this date.

§ 6 VI. TIME OFF FROM WORK

§ 6.1 A. What public, statutory or national holidays are required, and what are the requirements if employees work on such holidays?

There are ten statutory public holidays a year. These are in addition to the minimum holiday entitlement. Article L.232-2 of the Labour Code lists as public holidays:

Holiday	Date
New Year's Day	January 1
Easter Monday	*Variable*
Labor Day	May 1
Ascension Day	*Variable*
Whit Monday	*Variable*
National Holiday	June 23
Assumption Day	*Variable*
All Saints' Day	November 1
Christmas Day	December 25
Boxing Day	December 26

If a public holiday falls on a Sunday, it must be replaced by a compensatory day off that employees can take within three months.[54] Employees who work on a public holiday receive three times their standard salary for that day. The employer must keep a record of all hours worked (and the corresponding remuneration) on statutory public holidays.

§ 6.2 B. What are the requirements for short-term sick pay, and who pays it?

§ 6.2(a) *Entitlement to Time Off*

Employees who are ill or injured by an accident must inform their employer on the first day of absence,[55] either orally or in writing. They must also provide a medical certificate before the end of the third day of absence. If this procedure is followed, the employer cannot dismiss employees or summon them to a preliminary meeting, even if the dismissal is justified by a serious fault on the employee's part that was committed before the absence. This special protection only applies during a certain period (see below) and is not available if the employee's illness or injury is due to voluntary participation in a crime or an offense.

Employees are protected against dismissal for any reason for 26 weeks from the first day of absence (if they are ill for the whole of that period). Dismissals made during this period are invalid, and affected employees can claim damages. After the 26-week period expires, the employer can terminate the employment contract.

Civil servants do not have an employment contract, so their working conditions and entitlement to sick leave are fixed under the Administrative Code, which is part of public law.

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[54] Labour Code, art. L.232-3.

[55] Labour Code, art. L.121-6.

§ 6.2(b) *Entitlement to Paid Time Off*

During a period of sick leave, the employer must pay employees an amount corresponding to their full gross monthly salary until the end of the month that includes the 77th day of incapacity for work.[56] After this period, the employee receives sickness allowance from the Health Insurance Fund ("*Caisse Nationale de Santé*").

The right to receive sick pay applies for 52 weeks within a period of 104 weeks. If employees stop receiving sick pay from the health insurance because their employment contract is terminated and they are not entitled to unemployment benefits, they can claim social security benefits.

§ 6.2(c) *Recovery of sick pay from the state*

The employer recovers some of the sick pay paid from the Employer's Mutual Insurance ("*Mutualité des employeurs*"), a social security institution set up for this purpose. The Employer's Mutual Insurance will reimburse up to 80% of the sickness allowance paid by the employer within the 77-day period mentioned above. After this time period, the health insurance pays the employees directly.

§ 6.3 C. What are the requirements for paid vacation or annual leave?

Article L.233-4 of the Labour Code confers on all employees the right to an annual vacation of at least 25 working days. War-disabled employees, handicapped employees and employees who do not have an uninterrupted weekly rest of 44 hours are entitled to an additional vacation of six days. Mine employees are entitled to three additional days of vacation.

The right to a paid vacation arises after three months of uninterrupted work with the same employer.[57] The employer may withhold this right if the employee's unjustified absences exceed 10% of the time during which he or she ought to have worked.

However, the absence is not considered unjustified if it is due to sickness, accident, an event over which the employee has no influence (except absence due to imprisonment), or if the employer previously authorized it. Public and paid holidays and legal strike days are regarded as working days.

Although the law provides that annual vacation is to be taken all at one time, this is generally not the case in practice. The vacation cannot be taken after March 31 of the following year.[58] The employee may not carry out any paid work during holidays.

Annual leave must be approved at least one month in advance upon request from the employee.

In principle, the employee may plan vacation leave as he or she wishes. Nevertheless, the employer may object:

- due to operational requirements; or

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[56] Labour Code, art. L.121-6(3)(2).

[57] Labour Code, art. L.233-6.

[58] Labour Code, art. L.233-10.

- due to the justified wishes of other employees (e.g., in certain businesses, priority is given to employees with children).

However, the employer cannot impose individual leave dates without the employee's approval nor force him or her to take unpaid leave.

If the holiday leave is split up, it must include at least one period of 12 consecutive working days (except in the event of an agreement between the employer and employee).

If the employee falls ill during his or her holidays, those days for which a medical certificate is produced will not be considered part of the vacation.[59] The medical certificate should be sent to the employer within three days, if the employee is in Luxembourg, or as soon as possible if he or she is abroad.

If the labor contract is terminated before the end of the calendar year, the employee is entitled to a vacation of 1/12 of his or her annual vacation for each full month. If at the moment of departure the employee has not taken all the vacation days to which he or she is entitled, compensation should be paid for the days remaining.[60] This payment is calculated by taking into consideration the average salary of the last three months.[61]

§ 6.4 D. May the employer mandate when vacation is taken under any circumstances (e.g., year-end shutdown, furlough, prohibitions on vacation use in busy periods)?

The employee may, in principle, take leave when he or she wishes. Nevertheless, the employer may object due to operational requirements or due to the justified wishes of other employees (e.g., in certain businesses, priority is given to employees with children).

However, the employer cannot impose individual leave dates without the employee's approval nor force him or her to take unpaid leave.

§ 6.5 E. What requirements exist for paid or unpaid maternity and paternity leave?

§ 6.5(a) *Maternity Leave*[62]

A pregnant woman is entitled to a maternity leave of eight weeks before the expected date of birth and eight weeks after the birth of a child. The maternity leave is extended to 12 weeks in case of premature or multiple birth or breastfeeding.

A financial maternity benefit is allocated during the maternity leave under the condition that the employee has been registered with the sickness and maternity insurance for at least six months during a period of 12 months before the maternity leave.

If these conditions are not met, the employee will benefit from a maternity allowance.
The maternity benefit is calculated like the allowance for sick leave for a salaried worker on the

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[59] Labour Code, art. L.233-11.

[60] Labour Code, art. L.233-12.

[61] Labour Code, art. L.233-14.

[62] Labour Code, art. L.332-1.

basis of the highest salary during the three months prior to maternity leave and the average of complementary and accessory benefits of the 12 months preceding the month prior to the start of the maternity leave.[63]

During maternity leave, the employee is protected against dismissal, and the employer is obliged to maintain the employee's position or to provide a similar position after maternity leave. The employment contract is suspended, but the maternity leave is considered as a period of effective work of the employee. Consequently, the maternity leave generates annual holiday leave and is taken into account for length of service.

§ 6.5(b) *Parental Leave*

A parental leave is granted to both parents under the condition that they are both legally employed in Luxembourg at the time of birth or adoption and have been legally and continually employed with the same employer in Luxembourg during a period of 12 months prior to the parental leave.

On October 11, 2016, Luxembourg's Parliament ("*Chambre des députés*") approved the draft Law No. 6935 on the reform of parental leave ("*Projet de loi portant réforme du congé parental*"). This law, which is supposed to enter into force on December 1, 2016, will enable more employees, especially fathers, to take parental leave. It provides more flexible and, from a financial point of view, more attractive rules on parental leave.

Parental leave can take the following forms: full-time leave (four or six months): part-time leave (eight or 12 months): a reduction of working time (80% for 20 months); or four single months over a period of 20 months.

Each parent[64] of a child under six years of age is allowed parental leave.

The law enables two periods of parental leave to be requested (one for each parent), provided that the first period of leave is taken immediately after the maternity leave; otherwise one of the parents loses his or her entitlement to parental leave.

For employers it is important to know that, as before, they must still grant full-time parental leave if requested, but they can reject part-time and flexible models.

The benefits during parental leave will be considered a replacement for income. The amount depends on the salary lost by the parent taking the leave. Consequently, parents who choose to take a full-time parental leave will receive a replacement indemnity between 1,922 EUR and 3,204 EUR.

While an employee is on parental leave, his or her labor contract is suspended. At the end of the period, the employee is entitled to be reinstated into his or her previous work position. The employer is not entitled to dismiss the employee during parental leave except for gross misconduct.

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[63] Social Security Code, art. 25.

[64] Labour Code, art. L.234-43.

§ 6.6 F. What requirements are there for new mothers (e.g., part-time work, breaks for breast feeding, or day care)?

When the employee returns to work after maternity leave, in the case of breastfeeding, she benefits from a break of two periods of 45 minutes at the beginning of the normal working day or to a period of 90 minutes if only one break is allocated in the working day or if the employee cannot breastfeed her child in a location close to the workplace. This break is assimilated into her working time.

§ 6.7 G. What requirements exist for paid or unpaid medical leaves of absence, and how do these differ from short-term sick pay?

Please refer to § 6.2 above, but, as mentioned, during a period of sick leave the employer must maintain the remuneration of employees until the 77th day of incapacity for work.[65] After this period, the employee receives sickness allowance from the Health Insurance Fund ("*Caisse Nationale de Santé*").

§ 6.8 H. What are the employer's duties if an employee requests a flexible working schedule?

There is no obligation for the employer to agree to a request for flexible working hours.

However, where there is such an agreement, both parties to the contract must respect the conditions of the flexible hours set out in the contract subject to the mandatory provision of the Labour Code regarding working time. (See discussion at § 5.1 above.).

§ 6.9 I. What other paid or unpaid leaves of absence must be provided by employers?

Unpaid leave does not exist in Luxembourg law but may be agreed upon between employee and employer.

Outside of annual leave, an employee is entitled to extra holidays when the following events occur:

- one day for the death of a parent or relative up to the second degree;
- two days when the employee's wife gives birth or for the birth of a legitimate or naturally recognized child, the marriage of his or her child, for a declaration of legally recognized partnership of his or her child, for the adoption of a child of less than 16 years, or when moving into a new home;
- three days for the death of the employee's spouse or of a parent or a relative in the first degree; and
- six days for the employee's marriage or declaration of legally recognized partnership.[66]

Other specific types of leave are provided for by Labour Code.

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[65] Labour Code, art. L.121-6(3)(2).

[66] Labour Code, art. L.233-16.

§ 7 VII. BENEFITS

§ 7.1 A. What benefits must employers furnish to employees?

The social security code makes it mandatory for all employees to be insured with the Social Security Services (Health National Insurance, Accident Insurance, Pension National Insurance).

The employer is required to declare all national or foreign employees to the Social Security Services and to contribute to financing the social security system. Employers must send a declaration of the start of employment to the Joint Social Security Centre within eight days of the beginning of the employee's work.

Both the employer and employee pay social contributions to the Social Security Services.

The employee is entitled to national social security benefits, such as illness or pregnancy insurance, old age (Bill No. 6678 of April 3, 2014 plans a reformation of the Labour Code and provides specific measures for policies relating to aging), accident, dependency (nursing care insurance) and occupational illness, family allowances (Bill No. 6832 of July 3, 2015 provides for a reform of the family allowance scheme), and other specific benefits.

§ 7.2 B. What health benefits must be provided to employees (and their families), and what is the employer's role in the provision of these benefits?

Refer to § 7.1.

In principle, social benefits are paid by the Social Security Services. Social benefits will be granted to the employee and to his or her family except for benefits exclusively allocated to an insured employee, such as sickness allowance. Thus, the employer does not directly contribute to the employee's social benefits.

§ 7.3 C. What pension contributions must be made and to whom?

Both the employer and employee will pay a social contribution for pension to the National Pension Insurance.

§ 7.4 D. What percentage of overall compensation do benefits usually represent?

The percentage of social contribution on remuneration for both the employer and employee is set at 26.86% (14.55% for employees and 12.31% for the employer).

§ 7.5 E. What requirements exist for mandatory retirement?

The Luxembourgish retirement regime is based on a solidarity system rather than a capitalization system. The usual retirement age in Luxembourg is 65.

To be entitled to a retirement pension at age 65, the beneficiary must have worked and paid social security benefits for at least ten years (120 months). If this condition is not met, the employee can continue working until the age of 68.

However, it is possible in certain circumstances to take early retirement from age 57, or from age 60, if the beneficiary has worked and paid social security benefits for 40 years (480 months) under certain conditions. This is a variant of the Luxembourg retirement regime called the

"solidarity early retirement regime". Bill No. 6844 of August 3, 2015, currently under discussion at the Luxembourg Chamber of Deputies, plans to abolish the solidarity early retirement regime and adapt the other early retirement regimes.

§ 8 VIII. TAXATION

§ 8.1 A. What taxes must be paid by the employer and employee, at what rates, and which taxes must the employer withhold from wages?

In Luxembourg, taxable income varies between residents and non-residents.

Residents are taxed on worldwide income, and non-residents are taxed on their Luxembourg-sourced income.

The tax base is assessable income less allowable deductions (tax-deductible expenses and social security contributions). The assessable income includes business income, income from agriculture and forestry, self-employment, salaried activities, pensions, savings and securities, rental income and other income such as capital gain.

The taxable income for employees includes income from employment and all benefits in kind.

The rate of income tax is based on a marginally increasing rate, ranging from 0% to 40%.

The rate varies with an individual's personal status. There are consequently three tax classes: "class 1" for single payer; "class 2" for married tax-payers; and "class 1a" for intermediate.[67]

For employees, the employer withholds tax at source. It is a mandatory obligation of the employer.

For the employer there is no tax regarding wages; on the contrary, wages are considered as a deductible expense.

§ 8.2 B. Are there specialized tax or pension requirements for expatriates?

On January 27, 2014, the Luxembourg Tax Authorities issued a Circular on the "Impatriates Tax Regime."[68] The main aim of the Circular is to broaden the scope of application of this favorable tax system to employees working in Luxembourg for the benefit of companies established within the European Economic Area (EEA) instead of only Luxembourg resident companies, as previously provided.

The Circular came into force with a retroactive effective date of January 1, 2014.

By *impatriates*, the Circular means employees who are part of an international group and who are seconded to a Luxembourg company of the group or employees directly recruited abroad by a Luxembourg company or by a company established in another EEA.

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[67] Class 1a includes widow(er)s, single parents, and certain separated or divorced persons.

[68] Circular LIR 95/2 of January 27, 2014.

For an impatriate to be eligible for this tax regime, he or she must:

- not replace a non-expatriate employee;
- meet minimum wage criteria;
- be Luxembourg tax resident;
- not have been tax resident for the last five years;
- not have lived less than 150 km from the Luxembourg border for the last five years; and
- not have been taxable in Luxembourg for the last five years.

Companies must fulfill the following requirements: (1) employ or commit to employing at least 20 full-time staff in the midterm; and (2) if in existence for more than ten years, the percentage of impatriate employees should not exceed 30% of company's entire staff.

The Circular covers, among other things, the following expenses and costs relating to hiring expatriates: (1) moving expenses; (2) housing costs; (3) school fees of children; (4) relocation and repatriation costs; (5) travel costs; (6) tax equalization; (7) cost-of-living allowances or lump-sum compensation; and (8) repatriation expenses.

These expenses are deductible expenses for the employer and are not considered a taxable income.

The recurring deductible costs are limited at EUR 50,000 (EUR 80,000 with spouse or partner) or to 30% of the annual salary of the highly qualified worker.

The threshold of the minimum wage (gross remuneration) has been decreased from EUR 108,781.56 (index 757.17) per year to EUR 50,000.

This Circular no longer refers to "highly skilled workers" but to "impatriates," and the conditions of holding a specific diploma or contributing to the development and creation of economic activities in Luxembourg with high added value are no longer required.

For the companies, the tolerance percentage of impatriate employees has been increased from 10% to 30% of the company's entire staff.

The main change of this Circular is that the employer no longer needs prior approval from the Luxembourg tax authorities to highlight the professional skills needed by the company and to justify hiring an employee from a foreign country.

§ 9 IX. INTELLECTUAL PROPERTY

§ 9.1 A. Who owns intellectual property created during the employment relationship?

§ 9.1(a) *Patents*

The right to a patent belongs to the inventor. Regarding an invention created by an employee, Luxembourg law[69] distinguishes between *free inventions* (i.e., inventions that are not the result of employment and have no link with the employee's work) and *work inventions* (which are linked to the work performed). In this context, the second category of invention belongs to the employer unless otherwise contractually agreed, where the invention is:

- created by the employee in the performance either of his or her functions (provided that the employment contract includes an inventive mission) or of studies or research explicitly entrusted to the employee by the employer; or
- created by the employee in the area of activities of the company he or she is working for or
- created with the use of the employer's knowledge, technology, data or other means specific to the employer.

In order to compensate the employee for the invention, an employer realizing a significant benefit from this invention has to grant the employee a fair share of this benefit.

§ 9.1(b) *Designs*

The right to a design protection belongs to the creator.

A design created by an employee in the course of his or her employment is, however, the property of the employer, unless otherwise contractually agreed.[70]

§ 9.1(c) *Copyrights*

An employee is, in principle, the owner of the copyright in works created in the course of his or her employment, unless otherwise contractually agreed upon.[71]

Exceptions apply where:

- a computer program is created by an employee in the execution of his or her duties or following the instructions given by his or her employer. Unless otherwise contractually agreed, the employer exclusively shall be entitled to exercise all economic rights in the computer program.[7271] Moral rights remain on the employee; or

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[69] Law of July 20, 1992 relating to patents, as amended, art. 13.

[70] Benelux Convention on Intellectual Property dated February 25, 2005, art. 3.8, §1.

[71] Law of April 18, 2001 on Copyright, Neighboring Rights and Databases, as amended.

[72] Law of April 18, 2001, art. 32, §2.

- a work is created by various authors under the initiative and supervision of a natural or legal person who edits it, publishes it and discloses it under its direction and name, and in which the personal contributions of the various authors who participated in its production are merged into the overall work. Unless otherwise contractually agreed, such directed work is the property, unless proved otherwise, of the natural or legal person under whose name it is disclosed.[73]

§ 9.1(d) *Trademarks*

There are no specific rules in Luxembourg trademark law (i.e., Benelux Convention on Intellectual Property dated February 25, 2005 as amended) regarding trademarks created by an employee.

However, as logos or slogans created by an employee may be protected by a copyright, employers must be careful to obtain all potential copyrights on the sign to be filed before filing it as a trademark.

§ 9.2 B. What are the primary means that employers use to prevent theft of trade secrets?

Confidentiality provisions are usually included in employment contracts to prevent public disclosure by employees of the company trade secrets.

Employers also use technical and organizational measures to restrain access to confidential information to a limited number of employees, such as passwords or access codes, and to prevent theft of computer data.

§ 9.3 C. After employment ends, what restrictions exist on the employer's ability to impose covenants not to compete or covenants not to solicit customers or employees?

If an employment contract does not contain any specific provisions, the employee maintains a duty of loyalty, even after the end of his or her employment relationship, not to harm his or her previous employer.[74]

Otherwise, employment contracts may contain clauses in order to protect the employer's business after the departure of an employee. An employer may include a non-competition clause in the employment contract.

This prohibits employees from carrying out independent activities similar to those of their employer for a certain period after the employment relationship is terminated.[75] Its aim is to prevent former employees from harming the employer's interests.

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[73] Law of April 18, 2001, art. 6.

[74] Civil Code, art. 1134.

[75] Labour Code, art. L.125 8.

To be enforceable, a non-competition clause must comply with certain conditions, or example:

- The employee must earn a gross monthly salary of at least EUR 4,403.65 (index 775.17) before leaving the company and must not be a minor when signing the clause.
- The clause must be in writing and included in the employment contract.
- The prohibition can only extend to prohibiting carrying out activities similar to those of the employer and requiring the employee to exercise his or her business independently.
- The relevant period must not exceed one year.
- The prohibition must be restricted geographically, meaning it cannot extend outside Luxembourg.

Employees are not legally entitled to any compensation for complying with a noncompetition clause.

Even if it is not regulated as such, it is usual for employment contracts to contain non-solicitation clauses to prevent an employee or former employee from soliciting the employer's clients and current employees.

§ 9.4 D. What duties do employees have to their present and former employers with respect to intellectual property?

Employees must, even after the termination of their employment contract, respect the intellectual property rights belonging to their employer. Otherwise, they could face an action for counterfeiting.

Regarding intellectual property rights belonging to an employee, the employment relationship implies an obligation to perform the contract in good faith, which means that both parties must refrain from any behavior likely to harm the other party.

Luxembourg case law is consistent that employees are not allowed to develop any activity that competes with their employer.

Consequently, employees must refrain from exploiting their intellectual property rights to the detriment of their employer.

§ 10 X. CODES OF CONDUCT

§ 10.1 A. What requirements exist for a code of conduct governing employees?

§ 10.1(a) *Implementation & Modification Procedure*

The implementation as well as the modification of internal regulations must follow a specific procedure.

First, in companies of 15 or more employees, the staff representatives ("*délégation du*

personnel") have to be informed and consulted about the implementation and any modification of internal company regulations.[76]

§ 10.1(b) *Content*

There is no specific obligation under Luxembourg law regarding the content of internal company regulations, such as codes of conduct.

However, the Luxembourg National Commission for the Protection of Data (CNPD) monitors the use of whistleblowing policies in companies and requires the company to notify its policy according to the Luxembourg Law on Data Protection.[77]

The CNPD also recommends that whistleblowing policies follow these four guidelines:

1. The conduct subject to notification should be restricted to accounting or internal accounting control, auditing matters, banking or financial matters and the fight against corruption or bribery.

2. Anonymous denunciations should be discouraged while safeguarding, as far as possible, the identification of the whistleblowers.

3. Specific structures to collect and deal with allegations should be installed. The people in charge of such structures must be trained and subject to an obligation of confidentiality relating to the data to which they have access.

4. The person concerned should be informed as soon as the evidence is available in order to allow him or her to exert his or her rights of opposition, access and correction.

§ 10.1(c) *Enforceability*

There is no specific legislation regarding the enforceability of internal rules and regulations. Nevertheless, in order to ensure the enforceability of a code of conduct, it is advisable to add the code of conduct as an appendix to the employment contract and to add a clause in the employment contract to ensure the confirmation of the employee's receipt.

§ 10.1(d) *Languages*

Luxembourg law does not provide any specific rules regarding the language in which documentation made to attention of employees has to be written.

However, in order to be enforceable, employees must understand rules that they are required to follow. In this respect, it is recommended to draft the code of conduct at least in one of Luxembourg's three official languages (i.e., French, German or Luxembourgish).

§ 10.2 B. What whistleblowing protections exist?

An employee cannot be a victim of reprisal because of his or her protest against any act that he or she considers, in good faith, to constitute an illegal conflict of interest, corruption or undue influence under Articles 245 to 252 and 310-1 of the Luxembourg Penal Code, where this act is

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[76] Labour Code, arts. L.414-1 *et seq*.

[77] Law of August 2, 2002 (as amended), arts. 12, 13.

committed by his or her employer or any other person senior in rank, or any colleague or external person who has any relationship with the employer.

Article L.271-1 of the Luxembourg Labour Code states that any termination of the employment contract based on whistleblowing will be declared null and void.

The employee can claim the nullity of the termination of the contract and, subsequently, the retention of his or her job or re-employment by a request addressed to the President of the Labour Court within a 15-day period after the notification of the dismissal.

The employee may, instead, claim for compensation for unfair dismissal, if he or she prefers.

This protection only applies to protestations made in good faith. If not, the whistleblower can face disciplinary sanctions or penalties for slander or defamation.

§ 10.3 C. How are codes of conduct (including whistleblowing protections) enforced?

The code of conduct may provide for sanctions for violation of its terms. To be valid, these sanctions cannot be less favorable than those set out by the Labour Code and must be proportionate to the gravity of the violation.[78]

§ 11 XI. EMPLOYMENT INFORMATION & PRIVACY

§ 11.1 A. What rules protect the privacy of data about employees?

Privacy at work is protected in Luxembourg through the two following principles:

1. The right to respect for private and family life and to secrecy of correspondence.[79]

2. Personal data protection.[80]

§ 11.2 B. What restrictions are there on electronic surveillance of employees and on the employer's ability to monitor use of computers, personal digital assistants (PDAs), telephones, or other technology?

Monitoring employees at the workplace is strictly regulated by the Luxembourg Data Protection Law.

To be lawful, permanent monitoring by the employer of employees' use of computers, PDAs, telephones and other technology must comply with the general principles of the Luxembourg Data Protection Law. Monitoring the use of electronic devices by employees must therefore have a legitimate purpose and be proportionate to this purpose.

Monitoring of employees may only be legitimate if it is justified by one of the following grounds,

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[78] Cour de cassation, April 25, 2013.

[79] European Convention for the Protection of Human Rights, art. 8; Charter of Fundamental Rights of the European Union, art. 7; Luxembourg Constitution, art. 11(3); Law of August 1, 1982 on the protection of private life, art. 1.

[80] Charter of Fundamental Rights of the European Union, art. 8; Law of August 2, 2002 on the protection of individuals with regard to the processing of personal data, as amended ("Luxembourg Data Protection Law"), art. 23; Labour Code, arts. L. 261-1 *et seq*.

set out by Article L. 261-1 of the Labour Code:

- the safety and health of employees;
- the protection of the employer's goods;
- the control of the production process containing machines;
- the temporary control of the production or the performance of employees when such measure is the only means to fix the exact salaries of the employees; or
- the control of the employees' working time in the case of flexible working time.

Monitoring of employees cannot be legitimized by the consent of the employee.

The proportionality principle requires that the employer opt for the least intrusive methods, which means opting for blocking mechanisms, as opposed to monitoring measures.

The employer should therefore avoid systems that automatically and continuously monitor the use of electronic devices, even if the use of the device for private purposes is forbidden by the company.

The employer must first carry out global controls for the use of the devices (for example, on the basis of a list of URL addresses of websites visited during a limited period and of the time spent). If such global controls reveal some irregularities in or misuse of the devices, such as excessive use of the Internet bandwidth, the employer may perform individual controls and then view the contents of the websites visited by a single employee.

Finally, any processing whose purpose is to monitor employees requires a prior authorization by the CNPD.

Penalties, a temporary or definitive ban on the processing, and/or the destruction of the data may be incurred in the case of non-compliance with the above requirements.

§ 11.3 C. What restrictions apply to the export of data to related companies in the United States?

The regulation of the transfer of data outside of Luxembourg is strictly regulated by the Luxembourg Data Protection Law.

As a rule, the transfer of personal data is free within the EEA, provided that data subjects are duly informed of such transfer.

Transfer of personal data outside the EU is only possible to third countries that ensure an "adequate level of data protection" in terms of protection of the private life and basic freedoms and rights of individuals ("safe countries") (Article 18, paragraph 1 of the Luxembourg Data Protection Law). It is up to the European Commission to decide whether a third country ensures an adequate level of protection.

Transfers of personal data to a country which does not offer an adequate level of data protection are not impossible but may require the prior authorization of the competent national data protection authority, and such an authorization is generally only granted if an agreement which defines the conditions of the personal data transfer and matches the European data

protection requirements is entered into between the sender and the recipient of the data, among other requirements. By exception, a data controller may transfer personal data to a non-safe country within the meaning set out above if the transfer is necessary, among other reasons, for the performance of a contract.

The European Commission has recognized very few "safe countries," i.e., Andorra, Argentina, Canada, Israel, Switzerland, Uruguay, and the islands of Guernsey, Jersey, Isle of Man and Faeroe Islands.

The United States is not considered as a "safe country" in this respect. However, on July 26, 2000, the European Commission adopted a decision recognizing the "Safe Harbor Privacy Principles" and "Frequently Asked Questions," issued by the US Department of Commerce, as providing adequate protection for the purposes of personal data transfers from the EU to the US (the "Safe Harbor Decision"). As a result, US companies that have voluntarily adhered to the Safe Harbor scheme[81] were entitled to freely receive personal data from Luxembourg.

However, the Safe Harbor Decision was declared invalid by the European Court of Justice on October 6, 2015.

Following this ruling, the Safe Harbor scheme is no longer regarded as ensuring an "adequate level of protection." Consequently, companies based in the EU, which relied on this decision in order to transfer personal data to the US, have to suspend their transfers of personal data to the US and consider other legal bases to make such transfers, such as (1) data transfer agreements based on European Commission approved Standard Contractual Clauses, or (2) Binding Corporate rules, which are not impacted by the European Court of Justice's ruling.

The European Commission and the US government are currently negotiating a new agreement (the "EU-US Privacy Shield") in order to replace the Safe Harbor Decision.

§ 11.4 D. What information must the employer provide to employees before processing (e.g., collecting, storing, using, disclosing, etc.) their personal data?

The Luxembourg Data Protection Law requires that the employer must inform the data subject, no later than the date on which the data was collected, on appropriate media (such as registered letter with acknowledgement of receipt, circulars, or signs), of the following information:

- the identity of the data controller (the employer) and of his or her representative, if any;
- the purposes of the processing for which the data are intended to be used;
- the data subject's right to obtain communication, in an accessible form, of the data processed and his or her right to rectify such data; and
- the data subject's right to object, at any time, to the processing for justified and legitimate reasons.

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[81] *See* the US-EU Safe Harbor page at the export.gov website, http://www.export.gov/safeharbor/eu/eg_main_018365.asp.

Employees' representatives must also be properly informed of such monitoring of their activities.

§ 11.5 E. What access do employees have to records kept about them by the employer?

Each employee has the right to access twice a year, during the hours of work, the personal records concerning him or her. He or she may be assisted by a member of the Staff Delegation or by the delegate to equality, who is required to keep secret the contents of personal records to the extent he or she has not been released from this obligation by the employee. The employee's explanations concerning the contents of his or her personal record must be included in it at his or her request.[82]

Furthermore, according to Article 28 of the Luxembourg Data Protection Law, upon request to the employer, the employee, or his or her beneficiaries who can prove they have a legitimate interest, may obtain, free of charge, at reasonable intervals and without excessive waiting periods:

- access to data concerning the employee;
- confirmation as to whether data relating to the employee are being processed and information at least concerning the purposes of the processing, the categories of data concerned and the recipients or categories of recipients to whom the data are disclosed;
- disclosure to the employee in an intelligible form of the data undergoing processing and of any available information as of their source; and
- the justification involved in any automatic processing of data concerning the employee, at least in the case of automated decisions.

§ 11.6 F. What record-retention duties does the employer have with respect to information about employees?

According to the Luxembourg Labour Code, especially Articles L.211-29 and L.232-8, the employer must record the employees' daily working hours, hours worked on Sundays, public holidays or at night, as well as the corresponding fees paid to the employees.

Article 16 of the Luxembourg Commercial Code provides that supporting documents related to the accounts must be retained for ten years from the end of the financial year to which they relate.

According to Article 2277 of the Luxembourg Civil Code, the time limit for bringing legal actions in relation to allowances owed to employees is three years. This time period leads in practice to employers retaining documents related to allowances for at least three years.

Personal data concerning employees processed by the employer must be retained in compliance with the general principles set out by the Luxembourg Law on Data Protection. The employer must particularly ensure that:

- the data are accurate and, where necessary, kept up to date or erased;

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[82] Labour Code, art. L.414-7.

- the data are kept in a form that permits the identification of data subjects for no longer than is necessary for the purposes for which the data were collected and processed; and

- all appropriate technical and organizational measures are taken to ensure the protection of the data against accidental or unlawful destruction or accidental loss, falsification, unauthorized dissemination or access, and against all other unlawful forms of processing.

§ 12 XII. REPRESENTATION OF WORKERS

§ 12.1 A. Do workers have a freedom of association and representation?

Workers have freedom of association and representation.[83] They are free to be members of trade unions or not, and to resign from or to change trade unions.

The reform of staff representatives that had been pending before the Luxembourg Chamber of Deputies was adopted and became the Law of July 23, 2015 reforming the social dialogue.

The new measures provided for by this law will enter into force in two stages; the first on January 1, 2016 and the second for the next social representatives' elections in 2018.

§ 12.2 B. How may workers obtain trade union representation?

§ 12.2(a) *Staff Delegate*

Staff delegates are the representatives of the employees in the company. Employees may obtain staff representation only by election, although the staff representative is generally a member of a national representative trade union.

When a company employs at least 15 workers, staff representative elections must be organized[84] by the employer.

The number of staff delegates to be elected depends on the number of employees in the company.

The national staff representative elections take place every five years in the relevant companies.

The reform of 2015 has not impacted the employees' thresholds for electing staff representatives which remain the same. Staff representatives should, however, now be looked for in every undertaking and not in every establishment.

§ 12.2(b) *Works Council*

The reform of 2015 has abolished the Works Council ("*Comité mixte d'entreprise*") as well as central and divisional delegations, and young workers delegations.

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[83] Law of May 11, 1936 guaranteeing freedom of association; Constitution art. 26.

[84] Labour Code, art. L.411-1.

§ 12.3 C. Are there workers who, by law, must be represented by one or more trade unions?

There is no case in Luxembourg law where a trade union or staff representative must represent workers.

The Labour Code sets out some conditions under which workers may be assisted by a staff representative or where trade unions have the right to represent a worker or workers in restrictive legal actions.

The Labour Code states that an employee has the right to be assisted by a member of a national representative trade union represented in the Staff Delegation or by another employee during the preliminary interview before dismissal in a company that employs more than 150 workers.[85]

Trade unions do not have a legal personality and consequently may not take legal action except in restrictive cases, i.e.:

- In the field of collective bargaining:[86]
    - where they may take legal action in relation to the interpretation of the collective bargaining in favor of one of their membership without a specific mandate, as long as the member has received prior information and has not refused to give his or her mandate; and
    - where they may intervene in legal action born out of the collective bargaining agreement;
- In both cases, the trade union must be a party to the collective bargaining agreement. However, a trade union cannot be the claimant or defendant in a legal action for damages;
- In matters relating to inequality or discrimination.[87]

Trade unions have the right to appeal to certain authorities or to the employer, such as an appeal to the Labour Inspectorate against the postponing of parental leave by the employer.[88]

§ 12.4 D. What is the role of unions or works councils on a day-to-day basis?

§ 12.4(a) *Trade Union*

The role of trade unions is to defend employees' professional interests and to ensure collective representation of their membership and to improve their working and living conditions.[89]

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[85] Labour Code, art. L.124-2.

[86] Labour Code, art. L.162-13.

[87] Labour Code, art. L.253-2 and L.253-4.

[88] Labour Code, art. L.234-48.

[89] Labour Code, art. L.161-3.

The Labour Code allocates some roles to trade unions in collective negotiation, in labor disputes or in certain institutions; for example, the trade union can:

- directly intervene in the negotiation of the collective bargaining agreement or in other professional agreements (inter-branch agreement, agreement for the saving of employment or, in cases of bankruptcy, agreement regarding transfer);
- request a declaration of general obligation of the collective bargaining agreement;
- intervene in labor disputes before the National Conciliation Office ("*Office National de Conciliation*"), in cases of strikes and in collective dismissals and social plans;
- play a role in certain internal decisions of the company (i.e., in cases of technical, accidental or cyclical unemployment for saving jobs, in decisions relating to working time and parental leave); and
- participate in institutions (i.e., Economic and Social Council ("*Conseil Economique et Social*"), Tripartite Coordination Committee ("*Comité de Coordination tripartite*") or National Office of Conciliation).

In Luxembourg, trade unions influence the social dialogue in companies by the presence of affiliated memberships in the Staff Delegation.

§ 12.4(b) *Staff Representatives*

The Staff Delegation's main task is to protect and defend the employees'[90] interests regarding working conditions, employment security and social status.

The Staff Delegation has a **right of information** and may act in order to:

- prevent and assist in the resolution of individual and collective matters arising between the employees and the employer;
- bring claims against the employer; and,
- file claims before the Luxembourg Inspection of Labour (ITM).

The employer must consult or inform the Staff Delegation regarding:

- working time (e.g., working organization plan, reference period, flexitime, working rest, overtime);
- working contract (e.g., part-time jobs, teleworking, temporary employment);
- measures relating to the saving of jobs, retirement and health;
- security risks or health risks as well as the measures taken to protect the working environment and prevent accidents; and,

[90] Labour Code, art. L.414-1.

- progress of leaves of absence.

The Staff Delegation has a **right of information and consultation regarding the business life**.

Its missions are the followings:

- advising and making proposals in order to improve working conditions and employment;
- advising on the drafting of internal regulations or their modification;
- making suggestions on modification of the internal regulations;
- in undertakings with more than 100 employees, taking part in the training of apprentices;
- collaborating and participating in the establishment of professional training;
- promoting the integration of people with disabilities;
- participating in the protection of the working environment and preventing accidents;
- participating in the prevention of moral and sexual harassment and violence at work;
- advising on a pension scheme prior to its establishment or modification;
- advising on working time;
- collaborating in the internal reclassification plan; and,
- promoting the balance between private and professional life.

The employer must therefore provide the staff delegate with certain information on security, health risks and protective or preventative measures.

The Staff Delegation has a **right of information and consultation regarding technical, economical and financial issues**.

This applies in undertakings with at least 150 employees.

The Employer must inform and consult staff delegates as regards:

- building, transforming or expanding the business installations; and,
- introduction, improvement or renewal of the business equipment.

The employer has to provide, on a monthly basis, some information relating to the company's activity and any recent and/or probable change of activities and economic situation.

In a public limited company, the employer must at least once a year inform the Staff Delegation about changes in the economic and financial situations.

The employer should also provide information or consult with the Staff Delegation about economic situations and probable changes to the employment and in cases where decisions are taken triggering modification in work organization and employment contracts.

The reform of 2015 has reinforced and expanded staff representatives' missions: they will be able to seek assistance from experts, they will receive more hours of training, and restrictions on their movements, methods of communication and freedom of organization have been relaxed.

§ 12.4(c) *Works Council*

The reform of 2015 has abolished the Works Council.

§ 12.5 E. What is the scope of the employer's duty to bargain?

The Labour Code provides some situations where collective negotiation must start.

Regarding collective bargaining, where there is a request to begin collective bargaining, the parties to the convention must start the negotiation within 30 days following the notification of the request.[91]

Regarding collective dismissal, the employer must begin negotiation with staff representatives prior to announcing any collective dismissal.[92]

The employer is obliged to provide the Staff Representative with some information defined by the law, to consult them or request their approval (refer to § 12.4 above).

§ 12.6 F. Must the employer pay for time spent on union business or allow leaves for union business?

The Labour Code grants time to the staff representative to exercise his or her function as delegate.

A staff delegate is authorized to leave his or her workstation without reduction of his or her remuneration for the time required to accomplish his or her mission conferred by the law.[93]

Employers must allocate necessary time to the staff delegates to exercise their functions and pay this time as working time.[94]

Employers with 100 to 149 employees must grant to staff delegates a certain number of hours ("credit of hours") proportionate to the number of employees they represent, on the basis of 40 hours a week for 250 employees.

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[91] Labour Code, art. L.162-2.

[92] Labour Code, art. L.166-2.

[93] Labour Code, art. L.415-1.

[94] Labour Code, art. L.415-5(1).

Moreover, employers of more than 250 employees must release one or more staff delegates from normal duties and maintain their remunerations:

- for employers of between 250 to 500 employees, one staff delegate must be released from his or her duties;
- for employers of between 501 to 1,000, two delegates;
- for employers of between 1,001 and 2,000 employees, three delegates;
- for employers of between 2,001 to 3,500, four delegates;
- for employers with more than 3,500 employees, one additional delegate is required per 1,500 employees.

§ 12.7 G. What restrictions exist on picketing, strikes, lockouts, and secondary action?

Luxembourg's Constitution guarantees the right to strike,[95] but the country has always promoted social peace and social dialogue.

For that reason, the Labour Code subjects the right to strike to a prior conciliation before the National Conciliation Office and makes all strikes or measures of lockout subject to a statement of non-conciliation.[96]

The right to strike and conduct a lockout are also not authorized during the period of validity of the collective bargaining,[97] but some lawyers believe that this is only applicable to strikes in relation to collective bargaining agreements and not to the other obligations of the employer.[98]

§ 12.8 H. How are disputes with union-represented workers or with unions resolved?

Collective labor disputes are under the jurisdiction of National Conciliation Office.

The National Office of Conciliation is charged with solving collective disputes relating to working conditions and to solving disputes when social negotiations for a collective bargaining or a professional agreement are unsuccessful.[99]

§ 13 XIII. WORKPLACE SAFETY

§ 13.1 A. What general health and safety rules apply in the workplace?

Luxembourg law provides safety rules of statutory, administrative, or conventional origin to be

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[95] Constitution, art. 11.5.

[96] Labour Code, art. L.163-2.

[97] Labour Code, art. L.162-11.

[98] Jean-Luc Putz, *Le Droit du travail collectif*, Tome I: Relations professionnelle, Edition Promoculture, p. 379 (citing Guy Castegnaro, "The Right to Strike").

[99] Labour Code, art. L.163-1-8.

respected by the employer and the employees. The nature of the rules depends on the activity of the employer.

The Inspectorate of Labour and Mines (ITM), placed under the authority of the Ministry of Employment, is authorized to ensure the application of safety rules in the workplace. It also provides advice to employers and employees on improving safety in the workplace, and determines the conditions under which dangerous industrial activities may be carried out.

Employers have a general obligation to guarantee health and safety at work for the employees.[100]

§ 13.2 B. What kinds of specialized workplace safety rules apply in certain industries?

The minimum requirements concern the following:

- the worksite;
- the use of work equipment;
- individual protection equipment;
- manual movement of loads;
- display screen equipment; and
- temporary or mobile jobsite.

For example, in an industry where there are risks related to chemical agents at work, the employer has to determine and evaluate the level of danger of the chemical agent; put in place protection and prevention measures; determine the applicable measure in the case of accident, incident and emergency; and inform workers of the potential danger and provide them with specific training. The ITM will monitor the health of the worker. The employer must also consult and involve the workers in the process.

§ 13.3 C. What compensation is provided for workplace injuries and illnesses?

Accident insurance covers work accidents, accidents occurring while going to or coming from work, and occupational illnesses.

The worker will benefit from compensation in-kind (e.g., medical care, compensation of dependency insurance, material damages) and compensation in cash (e.g., the remuneration will be maintained by the employer until the 77th day of the accident or of illness, after which the employee will receive an indemnity ("*rente complete*") corresponding to the remuneration less social contribution).

A limited indemnity will be awarded if the incapacity to work is partial.

If the worker is totally unable to perform any job, he or she will be entitled to invalidity benefits. He or she is also entitled to compensation for extra patrimonial (monetary) damages, e.g., for

[100] Labour Code, art. L.311-1.

plastic surgery, physiological prejudice (loss) or physical pain.

Accident insurance also gives injured members or their families the right to receive benefits for invalidity, as well as the surviving spouse and/or orphan of a deceased employee.

§ 13.4 D. What reassignments or "light duty" is required for injured or ill workers?

An injured or ill worker has the right to retraining, either externally or internally, or to the adaptation of his or her workstation, if he or she is not able to perform his or her job functions under the same conditions.

§ 14 XIV. TERMINATION OF EMPLOYMENT

§ 14.1 A. What grounds for dismissal are permitted?

Under Luxembourg law, an employee may be dismissed with or without notice.

§ 14.1(a) *Notice of Dismissal*

When an employee has concluded an open-ended contract, he or she may be dismissed for cause with notice. The dismissal must be based on actual and serious grounds. The employer may invoke three types of grounds: (1) relating to the employee's aptitude or capacity; (2) based on the employee's conduct; or (3) based on the operational requirements of the undertaking, establishment or service.

An employer may not dismiss an employee without respecting certain rules of form designed to protect the wage earner from an arbitrary decision. The legal procedure consists of three steps, the first of which concerns only employers who employ at least 150 employees:[101]

1. Any employer who employs at least 150 persons should call the employees subject to dismissal to a preliminary interview. The letter of notice should indicate the date, time, place, and purpose of the interview, but it need not state the reasons for the dismissal. The letter should also inform the employee of his or her right to be assisted by any staff member or representative of a nationally representative union organization represented in the Staff Delegation of the plant. The reasons for the dismissal should be given during the preliminary interview, and the employee should be given an opportunity to be heard.

2. The letter of termination may be sent up to eight days after the preliminary interview—or immediately, where the employer employs fewer than 150 persons and thus the preliminary interview is not required. The employer is not required to give the reasons for the dismissal in the termination letter, but the employee may request them.

3. Employees may request the reasons for the dismissal within a month after notification of the dismissal. The employer is required to answer such request within one month after the request of the employee. The reasons should be real and serious and in connection with the three types of grounds mentioned above.

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[101] Labour Code, art. L.124-2.

If an employee who has concluded an open-ended employment contract or a fixed-term contract is dismissed without notice, the dismissal must be based on gross misconduct. *Gross misconduct* is defined as any fact or fault immediately or permanently making it impossible to maintain or continue the employment relationship.[102]

Both the employer and the employee may immediately terminate their relationship in the case of a serious fault by the other party. A serious fault should be reviewed in context. The courts should consider the degree of education of the employee, his or her social situation, professional experience, the consequences of the dismissal, and all other elements that could have an influence on the employee's responsibilities.

The burden of proof rests on the employer, who is required to include in the letter of notification of dismissal the exact reasons for the dismissal and the circumstances that make them serious. If such reasons are not indicated or if they are not given with the required precision, the dismissal is presumed irregular and unwarranted.

The facts or faults that may justify a termination without previous notice may not be cited more than one month after the day on which the party that wants to take advantage of them has come to know of them. This time limit does not apply if the fact involved a criminal activity or if the fact or fault is linked with a new fact or fault.

In any case, grounds are left to the court's discretion. If the grounds are not justified, the dismissal will be declared unfair and the employer will be ordered to pay material and moral damages.

§ 14.1(b) *Dismissal Procedure*

§ 14.1(b)(i) *Preliminary Meeting*[103]

If an employer has a workforce of at least 150 employees, a preliminary meeting must be held before a dismissal is made. When calculating the number of employees in the workforce, all persons must be taken into consideration, even if they are employed in different companies within the group, provided they form an economic and social unit.

The letter must explain that the employee has the right to be represented or assisted by any member of staff or a national trade union representative belonging to the company's Staff Delegation. A preliminary meeting is necessary whether or not the dismissal is made with notice. The employer must send the employee a written convocation letter to the preliminary meeting by registered mail, indicating the date, time, place and purpose of the meeting. The employer does not have to indicate in this letter the reasons for the dismissal. At the preliminary meeting, the reasons for the dismissal must be specified, and the employee must be given an opportunity to be heard.

§ 14.1(b)(ii) *Notification of Dismissal*[104]

If a preliminary meeting is required, the letter of dismissal must not be sent on the same day as the preliminary meeting takes place, but at the earliest, on the day thereafter, and no later than eight days after the meeting. The letter of dismissal has to be sent by registered letter with

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[102] Labour Code, art. L.124-10(2).

[103] Labour Code, art. L.124-2.

[104] Labour Code, arts. L.124-1 *et seq*.

acknowledgement of receipt. Luxembourg law also accepts hand delivery of the letter of dismissal to the employee.[105]

§ 14.1(b)(iii) *Acknowledgement of Receipt*

However, if the employee does not acknowledge receipt by signing the letter right away, there is a risk that the employee can take medical leave. As previously mentioned, the employer will not be allowed to give notice of the dismissal to an employee who is on medical leave. The implications of this can therefore be serious.

For a dismissal with immediate effect, the letter of dismissal must contain the reasons for dismissal.

If a dismissal is with notice, and the employee requests it within the first month of receiving notice of dismissal, the employer has to provide the employee with the grounds of the dismissal in a letter that must clearly and very precisely specify the reasons for termination.[106]

This letter containing the grounds for dismissal has to be sent by the employer by registered letter within the month following the request of the employee. The employee then has the right to challenge the dismissal within three months after having received the reasons for his or her dismissal. In such event, the employee has one year to bring the case before a court and claim for compensation.[107]

§ 14.1(b)(iv) *Effective Date of a Dismissal With Notice*

Where an employee is dismissed with notice, the notice period can only start on the 1st or the 15th day of the month in which notice of the termination of the contract is given. Consequently, if the termination letter is sent or hand delivered between the 1st and the 14th day of the month, the notice period starts on the 15th. If the termination letter is sent or handed over between the 15th and the last day of the month, the notice period starts on the 1st of the following month.[108]

§ 14.2 B. Under what circumstances may the employee claim that the employer has breached its contract with the employee or that the employer has "constructively dismissed" the employee?

Luxembourg employment law does not provide a mechanism for recognizing termination of the employment contract when the employer does not comply with legal or conventional requirements.

However, Article L.121-7 of Labour Code provides an exception to this principle and states that an employee's resignation directly resulting from his or her refusal to accept a unilateral modification of his or her employment contract may be considered by the court as a dismissal.

The unilateral modification of the employment contract must follow the same procedure of dismissal, with or without notice.

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[105] Labour Code, art. L.124-2(3).

[106] Labour Code, art. L.124-5.

[107] Labour Code, art. L.124-5.

[108] Labour Code, art. L.124-3(3).

§ 14.3 C. What notice requirements are there for dismissal and may the employer provide pay in lieu of notice?

A fixed-term contract expires on the date stated in the contract or when a specified event occurs. However, the contract can be terminated earlier if either party has committed a serious fault.

The notice period for terminating an indefinite-term employment contract depends on both:

- the employee's length of continuous service; and
- whether it is the employer or the employee who wishes to terminate the employment contract.

If the employee terminates the contract, the relevant notice period is:

- one month, if the employee worked for the same employer for less than five years;
- two months, if the employee worked for the same employer for between five and ten years; and
- three months, if the employee worked for the same employer for at least ten years.

If the employer terminates the contract, the relevant notice period is:

- two months, if the employee has worked with the same employer for less than five years;
- four months, if the employee has worked with the same employer for between five and ten years; and
- six months, if the employee has worked with the same employer for at least ten years.

An employer who has less than 20 employees may avoid paying severance if he or she extends the notice period (five months if the employee has less than five years of service and up to 18 months if he or she has at least 30 years of service).[109]

For both dismissal and resignation, the notice period runs from the 15th of the calendar month during which the termination has been notified, if the notice was given before this date, and from the first day of the following month, if the notice was given after this date.

If an employer dismisses an employee without complying with the length of the notice period, such dismissal is not automatically considered as unfair, but the employee can request the court to order the employer to pay him or her an indemnity for the notice period.[110]

If the employer does not provide any notice period to the employee, the dismissal is considered as having immediate effect. In that case, the employee can claim before the court an indemnity for the notice period and ask for the dismissal to be considered as unfair because the employer has not mentioned the grounds of the dismissal in the letter.

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[109] Labour Code, art. L.124-7(2).

[110] Labour Code, art. L.124-6.

In addition, specific requirements apply in the financial sector, and according to the collective bargaining agreement applicable to bank employees, in the event that the dismissal is based on the following reasons:

- rationalization;
- restructuring; or
- cessation of activity.

The legal notice period is extended as follows:

- four months, if the employee worked for the same employer for less than five years;
- eight months, if the employee worked for the same employer for between five and ten years; and
- 12 months, if the employee worked for the same employer for at least ten years.

§ 14.4 D. How is termination pay calculated, including any commissions, and when must it be paid?

Whatever the cause of the termination of the employment contract, the employee is entitled to:

- Payment of the remaining unused holidays calculated until the end of the notice period, even if the employer pronounces a work exemption during the notice period. According to Article L.233-4 of the Labour Code, any employee is entitled to annual paid leave of at least 25 days. In principle, annual leave has to be taken and cannot be substituted by a financial compensation. However, Article L.233-12 of the Labour Code states that in cases of termination of an employment contract, notwithstanding the reason for the breach, the employer must pay the unused leave to the employee.
- A *pro rata* share of any bonus that can be considered part of the remuneration and is not construed as a discretionary bonus.

§ 14.5 E. Are there rights to severance pay and how is severance calculated?

An employee with an indefinite employment contract dismissed by the employer, other than for gross misconduct, is entitled to severance payment after five years of uninterrupted service with the same employer, if the employee does not qualify for a retirement pension (the anticipatory old-age pension is not regarded as a pension for the benefit of such severance pay).[111] The service period is determined on the day of the notice's expiration, and cannot be less than:

- one month's gross salary after at least a 5-year uninterrupted service period;
- two months' gross salary after at least a 10-year uninterrupted service period;

[111] Labour Code, art. L.124-7(1).

- three months' gross salary after at least a 15-year uninterrupted service period;
- six months' gross salary after at least a 20-year uninterrupted service period;
- nine months' gross salary after at least a 25-year uninterrupted service period; and
- 12 months' gross salary after at least a 30-year uninterrupted service period.[112]

In the financial sector, the CBA also provides extended allowances in the event that the dismissal is on the grounds of rationalization, restructuring or cessation of activity. In such cases, the departure allowance must be increased to:

- one month's gross salary after at least a 5- to 7-year uninterrupted service period;
- two months' gross salary after at least an 8- to 12-year uninterrupted service period;
- three months' gross salary after at least a 13- to 17-year uninterrupted service period;
- six months' gross salary after at least an 18- to 22-year uninterrupted service period;
- nine months' gross salary after at least a 23- to 27-year uninterrupted service period; and
- 12 months' gross salary after at least a 28-year uninterrupted service period.

An employer with less than 20 employees can opt in the dismissal letter either for the severance pay or to prolong the notice period.

The severance payment is calculated based on the gross salary effectively paid to the employee during the last 12 months immediately preceding the termination notice. Calculation of the severance pay takes into account the illness allowance, as well as bonuses and current supplements, excluding salaries corresponding to overtime, gratuities and indemnities for incurred accessory costs.[113]

The employer has to pay the severance indemnity when the employee effectively leaves work.

Severance pay is not due in the following cases:

- dismissal for serious misconduct;
- if the employee resigns;
- if the contract ends on its own; or
- if the employee is entitled to either an ordinary retirement pension or an early retirement pension.

This exclusion does not apply where the employee benefits from an invalidity pension, or an

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[112] Labour Code, art. L.124-7(1).

[113] Labour Code, art. L.124-7(3).

anticipated retirement pension.

However, if the employee qualifies for an anticipatory old-age pension, the employer must pay the indemnity.[114]

Severance pay is not due if the employment contract is terminated due to the death of the employer, as this does not qualify as a dismissal.

An employer can increase the severance pay to its employees but may never offer less than the minimum legal requirement.

Finally, the severance indemnity established by the Labour Code is exempt from taxation.

§ 14.6 F. What reasons for dismissal/termination of contract are prohibited, and what remedies does the former employee have?

In Luxembourg employment law, there are three different sanctions when a dismissal does not comply with the law.

§ 14.6(a) *Dismissal Vitiated by a Substantial Defect*

If the dismissal is based on actual and serious grounds, but the employer has failed to comply with a substantial formality, it will be considered as vitiated by a formal defect.

A dismissal may be declared irregular when it:

- does not comply with the preliminary interview when the employer employs at least 150 employees;[115] or
- does not comply with the notification procedure of the dismissal[116] (registered letter by post).

§ 14.6(b) *Unfair Dismissal*

A dismissal may generally be declared unfair when:

- it is based on insufficient actual and serious grounds regarding the employee's aptitude or capacity, the employee's conduct or the operational requirements of the undertaking, establishment or service; or
- the motivation letter or the letter of the immediate dismissal is not sufficiently precise.

The Luxembourg Labour Code also provides that a dismissal is unfair when:

- it results from a transfer of undertaking;[117]

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[114] Labour Code, art. L.124-7(5).

[115] Labour Code, art. L.124-2(4).

[116] Labour Code, art. L.124-3(1).

[117] Labour Code, art. L.127-4(1).

- it results from a participation in a strike that is based on legal and legitimate purposes;
- it takes place during a sickness leave;[118]
- it takes place during the exercise of the employee's right to withdrawal;[119] or
- it results from the employee's refusal to agree to assist in several service meetings
- and information sessions during his or her parental leave.[120]

The dismissal may also be declared unfair when the employee refuses to:

- accept a part-time job while he or she already holds a full-time job, and vice versa;[121]
- work beyond hours initially fixed in the part-time employment contract;[122]
- claim the early retirement benefit;[123] or
- do teleworking.

§ 14.6(c) *Null and Void Dismissal*

In specific circumstances, the employer cannot dismiss its employee under certain grounds.

If, notwithstanding a prohibition to dismiss set forth in the Luxembourg Labour Code, the employer dismisses its employee, the dismissal is always declared null and void. The employee may request his or her reintegration in the undertaking.

The dismissal may be considered as null and void when:

- it is based on discriminatory grounds (age, sex, etc.);[124] or
- an employee is the victim of or witness to sexual harassment.[125]

§ 14.6(d) *Remedies*

§ 14.6(d)(i) *Dismissal Vitiated by a Substantial Defect*

When the dismissal is justified on real and serious grounds but is vitiated by a substantial defect (as described above), the employee may sue his or her employer and claim for compensation. The

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[118] Labour Code, art. L.121-6(3).
[119] Labour Code, art. L.312-4(4).
[120] Labour Code, art. L.234-48(11).
[121] Labour Code, art. L.124-11(5).
[122] Labour Code, art. L.124-11(6).
[123] Labour Code, art. L.124-11(7).
[124] Labour Code, arts. L. 241-8(4) and L.253-1(4).
[125] Labour Code, art. L.245-5(3).

amount of this compensation may not exceed one month's salary.[126]

However, if the dismissal is declared unfair, the employee cannot invoke a substantial defect and cannot claim compensation on this basis even if the claim is really based on such defect.

§ 14.6(d)(ii) *Unfair Dismissal*

The employee may challenge the grounds for dismissal invoked by his or her employer. In order to claim for compensation in that case, the employee must follow the procedure explained in §14.1 above.

If the dismissal is declared unfair, the court will order the employer to pay material and moral damages. The calculation of the amount of compensation is left to the court's discretion.

However, Luxembourg case law defines criteria that the court takes into account when the amount of the compensation is calculated.

The allocation of the material damage, also called financial damage, results directly from the employee's loss of income.

In order to calculate the material damage, a reference period is determined by the court under several criteria, such as the employee's age and experience, labor market conditions, etc. This period corresponds, in principle, to the period in which the employee can find new work. If the employee does not find new work, despite making serious efforts to do so, the reference period may be extended.

The employer must pay material prejudice after the notice period (in the case of a dismissal with notice) or after the dismissal (in the case of a dismissal without notice) and during the period fixed by the court.

This compensation is calculated on the basis of the salary granted by the former employer and the income (salary or unemployment benefit) granted after the notice period.

If the dismissal is declared unfair, the employer must reimburse any unemployment benefits to the Employment Fund that were paid to the employee during the reference period.

The employee may also claim for moral compensation. This compensation is based, among other things, on the employee's age, seniority, and the circumstances of the dismissal. Generally, the court awards a lump sum.

In addition, when an employee has been dismissed without notice, if the Luxembourg Court has declared that the dismissal is unfair, he or she may also claim for compensation in lieu of notice.

§ 14.7 G. How may former employees bring claims on behalf of other workers (i.e., a collective or class action)?

No collective or class action may be initiated under Luxembourg employment law.

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[126] Labour Code, art. L.124-12(3).

§ 14.8 H. May employers compel employees to arbitrate claims of wrongful dismissal?

Luxembourg employment law does not provide for preliminary mandatory conciliation or arbitration, but the parties may pursue conciliation before engaging in a lawsuit.

§ 14.9 I. What restrictions exist on obtaining a release of claims from a former employee?

The principal restriction that could be encountered is when the Luxembourg State is involved in the claim made by an employee to the Employment Court for the purpose of obtaining damages for wrongful dismissal.

In such litigation, the intervention of the State, represented by the Employment Fund, is mandatory, because it is entitled to claim for the reimbursement of unemployment allowance if the dismissal is declared wrongful by the Court.

Courts have for many years hesitated to hinder an employer and employee involved in a contentious proceeding from reaching a valid settlement agreement to end the case.

However, in a 2011 decision,[127] the judge ruled that, in the case of dismissal with immediate effect, the State can oppose the waiving of the action by the employee and claim for the reimbursement of unemployment allowance to the employee.

§ 14.10 J. What procedures and terms are required to have an enforceable separation agreement with a former employee?

An employer and employee can breach an employment contract with mutual agreement[128] under the condition that the mutual agreement is in writing in duplicate and signed by both the employer and the employee. If this condition is not met, the breach will be considered null and void.

This mutual breach can be supported by a settlement agreement. To be enforceable, a settlement agreement must fulfill the conditions of the Civil Code[129] relating to transactions and should be the result of reciprocal concessions.

§ 14.11 K. What are the best practices employers should observe regarding dismissals of employees?

To avoid any wrongful dismissal, employers must take care to have real and justifiable reasons for the dismissals. They must ensure that the reasons are sufficient to justify the dismissal and that it is able to provide proof of all of them.

The employer must make sure that all timelines provided by the law are respected.

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[127] CSJ, 26 mai 2011, n°35484 infosjuridique, cited by Jean-Luc Putz in "Comprendre et Applique le droit luxembourgois," Promoculture page 460.

[128] Labour Code, art. L.124-13.

[129] Civil Code, art. 2044.

§ 15 XV. COLLECTIVE DISMISSALS (LAYOFFS), BUSINESS CESSATION & SALE OF A BUSINESS

§ 15.1 A. What rules apply to collective dismissals?

Unlike individual dismissals, collective dismissals are distinguished by two criteria.[130]

First, the reason given in support of dismissal: a collective dismissal must always be based on economic reasons (restructuring of the company resulting in job losses, bad financial situation of the company, etc.) and not based on reasons inherent to the employee (e.g., relating to the ability of the employee or his conduct in the company).

Secondly, the number of dismissed workers: a collective dismissal must be considered when the number of expected dismissals is:

- at least seven employees within a period of 30 days; or
- at least 15 employees within a period of 90 days.

For the calculation of these thresholds, Article L. 166-1 (2) of the Labour Code further specifies that, as soon as four economic redundancies are foreseen, these terminations of employment contract by the employer for one or several reasons that are not inherent to the employee must be counted together.

From four redundancies upwards, therefore, other terminations of employment contracts that have occurred at the initiative of the employer for one or several reasons not related to the individual employees should be included when calculating the thresholds referred to above. Such other terminations include:

- early retirement;
- voluntary negotiated redundancies; or
- special invalidity schemes.

Any dismissal for economic reasons must be communicated to the Economic Committee ("*comité de conjoncture*").

The latter may invite the social partners to enter into negotiations for the establishment of a plan for job retention as soon as it identifies five dismissals for reasons not related to the individual employees during a reference period of three months, or eight dismissals for the same reasons during a reference period of six months.

§ 15.1(a) *Provision of Information to the Staff Representatives*

To enable staff representatives to make constructive proposals, the employer is required, preferably before the beginning of the negotiations, and, if not, no later than at the beginning of the negotiations, to provide the staff representatives with all the relevant information concerning the proposed dismissals. The information should include at least one written communication setting forth, for example, the reasons for the proposed collective dismissals, the number and

[130] Labour Code, art. L.166-2.

categories of workers affected by the proposed dismissals, and the criteria proposed for the selection of workers to be dismissed. This provision of information to the staff representatives is without prejudice to the authority of the Staff Delegation. The employer must send a copy of the written communication with the staff representatives to the Employment Administration (ADEM), which transmits it to the Inspectorate of Labour and Mines (ITM).

§ 15.1(b) *Communication to the Employment Administration (ADEM)*

The employer must give written notice of any proposal for collective dismissal to the ADEM, which will forward a copy to the ITM.

The employer must send a copy of the notification to the staff representatives.[131] They can then send their comments to the ADEM, which will transmit a copy to the ITM.

§ 15.1(c) *Negotiations for the Establishment of a Social Plan*

During the negotiations, the parties should consider opportunities to avoid or reduce the number of collective dismissals.

In this context, the following possibilities need to be considered. In particular:

- implementation of the legislation on part-time work;
- possible arrangements concerning working hours, especially a longer reference period;
- temporary reduction of working time not falling under the scope of application of the legislation on part-time unemployment, organizing if necessary the appropriate participation in further education and/or redeployment during free working hours;
- implementation of the legislation on the temporary loan of workforce;
- implementation of the legislation on early retirement (see below);
- opportunities for training or retraining for reassignment of employees within the company;
- opportunities for training, permanent training, or retraining allowing for the reallocation of employees to another company and, if possible, in the same sector of activity;
- personal assistance with career transitions, if necessary, with the intervention of external experts;
- principles and procedures regulating the implementation and monitoring of selected measures; and
- opportunities to mitigate the consequences of these dismissals.[132]

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[131] Labour Code, art. L.166-4(2).

[132] Labour Code, art. L.166-2(2).

The Labour Code provides the following mechanisms to mitigate collective dismissals:

- accompanying social measures (in particular, aid for the redeployment or retraining of dismissed workers and the possibilities of immediate rehabilitation on the labor market); and

- the introduction of financial compensatory measures.

§ 15.1(d) *The Outcome of the Negotiations*

Within 15 days after the start of the negotiations, the parties must record the outcome of these negotiations in a signed agreement, entitled the "social plan." It must be transmitted without delay to the ADEM, which will forward it to the ITM.

If the parties have not reached an agreement within 15 days, the minutes of the negotiations recording the substantiated positions of the parties as to the elements that have been subject to negotiations must be transmitted to the ADEM, who will forward a copy to the ITM.

In the case of disagreement, the parties jointly engage the National Conciliation Office ("*Office national de conciliation*").

The outcome of the deliberations must be recorded in the minutes, a copy of which must be sent to the ADEM and the ITM.

§ 15.1(e) *Carrying Out the Dismissals*

An employer may not proceed with the notification of individual dismissals to the employees until after the signing of a social plan or of the minutes of the National Conciliation Office. Failure to comply with this timeline will result in such dismissals being declared null and void and the awarding of damages for unfair dismissals.

§ 15.2 B. Are there special rules that apply when an employer ceases operations?

When an employer ceases operation, there are no specific rules. The employer must respect ordinary rules for dismissal (refer to §14 and §15.1 above).

If a transfer of employees results from the cessation of operations, refer to §15.5 below.

§ 15.3 C. Are certain employees protected from collective dismissal?

§ 15.3(a) *Pregnant Employees*

The Labour Code prohibits[133] the notification of termination of the labor relationship to pregnant women, those who have given birth (during the eight weeks after delivery), and breast-feeding mothers (in this case, leave is extended to 12 weeks). A pregnant employee is protected against collective dismissal until the end of maternity leave.

§ 15.3(b) *Staff Representatives*

Once an employee has announced his or her candidacy to serve as a staff representative, he or she may not be dismissed for a period of three months.

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[133] Labour Code, art. L.332-3.

The special protection for employees elected as staff representatives covers their term and a period of six months after such term has ended. If the employer has dismissed a staff representative, the Labour Tribunal would be required to order his or her immediate reinstatement and may impose a daily fine on the employer. The legal protection of staff representatives does not apply in the case of a serious fault. In that case, the employer may order the immediate exclusion from work and request the Labour Tribunal to rescind the employment contract.

In cases of collective dismissal, the staff representative must not be dismissed during the process of negotiation. In practice, the case of the staff representative will usually be solved by an agreement.

The reform of staff representatives was adopted by the Law of July 23, 2015 on the social dialogue. The principle of protection against dismissal remains the same. However, the proceedings have been completely redesigned granting certain options to both the employer and the staff delegate, i.e.:

- *Dismissal in spite of the protection*: the staff delegate can request the Labour Tribunal to cancel the dismissal and order a reintegration. Or, alternatively, he or she can request the Labour Tribunal to order a judicial cancellation of the employment contract and order the employer to pay damages.

- *Termination for gross misconduct*: the staff delegate's employment is suspended by the Employer for a limited period of time ("*mise à pied*"). The staff delegate must still be paid for the three months following the suspension. During this period, the staff delegate can ask the Labour Tribunal to maintain the remuneration after this three months' period until the Labour Tribunal's final decision on the gross misconduct and the dismissal. Whatever the final decision of the Labour Tribunal, the remuneration paid by the employer during the three month period is kept by the staff delegate. If the staff delegate does not use this option, he or she can ask the Labour Tribunal to order a judicial cancellation of the employment contract and to order the employer to pay damages.

The employer has one month after the notification of the suspension to ask the Labour Tribunal to examine the dismissal. If the Employer fails to do so, the staff delegate can then request the continuation of his contract and the cancellation of the suspension.

§ 15.3(c) *Employees on Parental Leave*

An employer is not allowed to terminate the contract of an employee on parental leave, except on serious grounds that justify dismissal without prior notice. Apart from this case, dismissal during parental leave is null and void, and the employee may request his or her immediate reinstatement. This rule is also applicable in the case of collective dismissal.

§ 15.3(d) *Sick or Injured Employees*

These employees are protected against dismissal for a period of 26 weeks. Consequently, the dismissal could be notified after this period.

§ 15.4 D. How long does the collective dismissal process usually take?

The collective dismissal process usually takes around 40 days.

§ 15.5 E. What rules govern the transfer of undertakings (including employment and labor agreements) when a business is sold?

The transfer of undertaking under Luxembourg law is governed by Articles L.127-1 *et seq.* of the Luxembourg Labour Law, which implemented the European Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ("Transfer of Undertakings Directive").

The Transfer of Undertakings Directive's rules apply "*to any transfer of an undertaking, business, or part of an undertaking or business particularly as a result of a contractual transfer, merger, succession, de-merger, transformation of purchased goodwill or contribution to a company*".[134]

Apart from this, a transfer of undertaking also occurs where there is a transfer of "*an economic entity, which retains its identity and which constitutes an organised grouping of human or material resources allowing the pursuing of a central or ancillary economic activity*".[135]

According to the case law of the European Court of Justice (ECJ) adopted by Luxembourg case law, the absence of contractual relations between the former contractor and the new one does not prevent a situation from being characterized as a transfer of undertaking.[136]

Regarding the theory of maintained economic entity, the ECJ ruled that: "*the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity.*"[137]

The legal consequences of a business transfer are included in the provisions of the Labour Code concerning safeguarding employees' rights in the case of a business transfer.

Due to the transfer, all employees, and all rights and duties arising from an employment relationship with the seller that already existed on the date of the transfer, are automatically transferred to the buyer.[138]

These rules apply to both share and asset sales. A business transfer is not considered a valid reason for dismissals. Consequently, employees are protected against dismissal.

The buyer assumes all rights and obligations arising under the employment relationship with the seller (see above regarding the automatic transfer of employees).

In addition, if a collective agreement remains applicable, the terms of employment can only be modified after the collective agreement expires. If no collective agreement applies, the new employer could harmonize the transferred employees' terms of employment with those of its

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[134] Labour Code, art. L.127-1(1).

[135] Labour Code, art. L.127-1(2).

[136] *See* ECJ, 10 February 1988, *Foreningen af Arbejdsledere I Danmark v. Daddy's Dance Hall A/S*; Court of Appeal of Luxembourg, 24 October 1991, *Irringer Verwaltungsgesellschaft mit Beschränkter Haftung und Company Kommanditgesellschaft v. Deboni*; Lately, Labour Court of Luxembourg, February 19, 2008, in *Bulletin d'Information sur la Jurisprudence 2008/9*, p. 205 *et seq*.

[137] *See* ECJ, 24/85, March 18, 1986, *Spijkers v. Benedik*, Point 11.

[138] Labour Code, art. L.127-3.

other employees, provided that this harmonization is mutually agreed upon between the new employer and each individual employee.[139]

§ 16 XVI. KEY TRAPS TO AVOID

§ 16.1 A. What are the five most common mistakes foreign employers make and what can be done to avoid them?

1. The conclusion of a fixed-term contract is allowed in some foreign countries' laws but not under Luxembourg law. If the working relationship continues after the end of the fixed term, the relationship becomes an open-ended contract under Luxembourg law. It is essential to follow the requirements of Luxembourg law when concluding a fixed-term contract.

2. Using a template for an employment contract under the common law or American law may result in the use of clauses not compatible with Luxembourg law.

3. Starting work without authorization for a salaried worker in the case of employees in an international group is allowed only for a period of 90 days per year. Employers should not overlook the need to request the right authorization for work.

4. Foreign employers may neglect to request the necessary authorization in the field of data protection; for example, to notify and request approval before processing employees' personal data.

5. Dismissing an employee without complying with notice periods and/or on the basis of unjustified reasons may result in a lawsuit and the imposition of an award of damages.

The main recommendation for avoiding mistakes is to consult Luxembourg labor and employment counsel and to provide proper training to human resources managers.

[139] Labour Code, art. L.127-5.