

Reform of the Labour Code: Latest modifications and ongoing projects

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There were two significant reforms to the Labour Code at the end of 2017.

Our July 2017 Newsletter reviewed the ongoing reform regarding certain special leave[1]. This reform became the Law of 15 December 2017[2].

In addition, a law passed on 30 November 2017 partially reforming the early retirement system[3].

Finally, the legislator is still currently working on Bill n°7086 (introduced in October 2016) aiming at the modification of several provisions of the Labour Code, the most important of which are described below.

REFORM OF SPECIAL LEAVE

As predicted in our July Newsletter, paternity leave was increased to 10 days by the law of 15 December 2017 (instead of 5 days, as originally planned by the Bill). For the rest, if the legislator took into account the comments of the State Council ("Conseil d'Etat") regarding the computation of relocation leave, this was not the case for calculating family leave, which will likely pose difficulties in practice[4].

The table below summarizes the differences between the new and former schemes:

Reform of special leave

	2017 scheme	2018 scheme
Paternity leave / settling-in leave for the father adopting a child less than 16 years old	2 days (to be taken at the time of the event).	10 days (to be taken during the two-month period following the child's birth or adoption).
Postnatal leave for women	8 or 12 weeks in cases where the child is breastfed for at least 5 weeks.	12 weeks for all women.
Leave for caring for a sick child	2 days per year and per ill child aged below 15. Cannot aggregate the leave days on several years.	<ul style="list-style-type: none"> - 12 days for children under 4 years old; - 18 days for children between the ages of 4 and 13; - 5 days for children between the ages of 13 and 18. <p>Splitting and carry-over possibilities now exist.</p> <p>N.B.: Parents cannot take the leave at the same time.</p>
Move home	2 days	2 days every three years.
Death of a relative of the second degree of an employee or employee's spouse/husband or partner	2 days	1 day
Marriage of an employee	6 days	3 days
Declaration of partnership	6 days	1 day
Marriage of an employee's child	2 days	1 day
Declaration of partnership of an employee's child	2 days	0 day

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REFORM OF EARLY RETIREMENT SCHEMES

The second reform passed at the end of the year 2017 concerned the early retirement schemes and fits into a programme initiated by the OCDE in 2010 aiming in particular at progressively increasing the effective retirement age in order to index it to life-span and abolish early retirement schemes in the long term. The new law of 30 November 2017 contributes to this goal by, among other things, **abolishing early retirement scheme based on solidarity** and reinforcing the conditions of the other schemes.

Only three early retirement schemes remain:

- Early retirement for job creation[6];
- Early retirement of shift workers and night workers[7]; and
- Progressive early retirement[8].

From now on, all early retirement schemes require a **5-year minimum occupation** with the requesting company. In addition, the allowance period of early retirement is **limited to a 3-year maximum period**, it being specified that it will, in any case, cease at the age of 63 years[9]. Finally, the early retirement allowance is calculated based on the last twelve-month period of employment[10].

If this reform reflects a certain will to restrict employees' access to an early retirement scheme, it should nevertheless be noted that the legislator has broadened the panel of people who may be hired by the employer in order to compensate for the departure of an employee benefitting from progressive early retirement[11].

ONGOING REFORMS

A number of reforms are currently ongoing in respect of Bill n°7086 filed with the Chamber of Deputies in October 2016. This Bill, which touches various subjects, aims not only at compensating for certain abusive behaviour observed in practice and contrary to the initial purpose of the law, but also enshrining certain recent judicial solutions in the Labour Code.

The main reforms initiated through this bill address the following points:

Treating employees who fairly resigned for a serious misconduct of the employer the same way as employee who was unfairly dismissed for serious misconduct

The legislator essentially wishes to take into account the decisions handed down by the Constitutional Court on 8 July 2016[12] regarding equality of treatment between employees who fairly resigned for serious misconduct of the employer and employees who were unfairly dismissed for serious misconduct thus submitting all unilateral terminations of labour contracts with immediate effect to the same legal provisions.

As a result, the Bill envisions that an employee who resigns with immediate effect because of the employer's serious misconduct, in the same way as an employee unfairly dismissed with immediate effect for serious misconduct[13]:

- will have the right to obtain **severance pay** (indemnité de départ) as well as **compensation in lieu of notice** if his resignation is found to be justified;
- will be able to request from the President of the Labour Court the **authorization to receive unemployment benefits pending the Court's decision on the merits of the case**; and
- would be ordered to **reimburse to the Luxembourg State** all or part of the unemployment benefits he had been authorized to receive **if his resignation with immediate effect is declared unfair** by the Labour Court, ruling on the merits (if his resignation is declared justified, the Luxembourg State will be reimbursed by the employer[14]).

Finally, the Bill intends to ensure (with some minor adjustments) and extend to all cases of unilateral terminations of the employment contracts with immediate effect that a settlement agreement concluded between an employer and an employee dismissed with immediate effect is not binding on the Luxembourg State where the employee was allowed to receive unemployment benefits on an interim basis[15] [16].

The Bill provides that, if an employee whose employment contract was terminated with immediate effect (either through dismissal or resignation) files a court claim but does not see it through to the end because of a withdrawal from proceedings:

- he must reimburse to the State the unemployment benefits he has received on an interim basis; or
- if withdrawal is the result of a settlement agreement that was concluded between the employee and the employer, each of them will have to equally reimburse (50/50) the unemployment benefits the employee received on an interim basis.

Stricter framework of the temporary re-employment support

With regard to the abuse noted in cases of re-employment support of certain categories of unemployed worker or employees[17], Bill n°7086 specifies that such support will, in future, be reserved to people aged 45 and older, who have been registered with the ADEM for at least one month and have been employed in Luxembourg for the 24-month period before the loss of employment[18].

The Bill plans in addition that this support will be limited to a maximum amount equivalent to 50% of the salary paid by the employer.

Clarification of the base of calculation regarding the obligation of the employer to maintain the full salary and other benefits of incapacitated employees

In the context of the implementation of the legal principle guaranteeing the maintaining of the full salary of an employee unable to work due to illness, there remains an uncertainty regarding the exact base and items relevant to the calculation of the salary owed by the employer. This uncertainty has led to numerous actions before the Labour Court, which retained a wide interpretation of the base each time.

Bill n°7086 uses the abundant case law in order to define the calculation rules to be applied to determine the salary the employer has to pay in cases of incapacity to work.

The Bill introduces a distinction between:

- employees knowing their hourly work-schedule at the beginning of the month;
- employees not knowing such schedule at the beginning of the month; and
- employees working by piecework or by yield, or whose wages are a percentage, depend on the annual turnover or vary greatly;

and gives for each category, a precise definition of what should be understood by “maintaining the full salary” by means of the items to be taken into consideration in order to determine the remuneration owed to the employee in such a case.

The Bill expressly provides that overtime pay, non-recurring benefits, gratifications, bonuses and ancillary expenses are not to be taken into account.

However, the State Council opposes this reform as currently drawn-up, invoking agreements made between the social partners, which resulted in the Unique Status introduced in 2009.

French version

[1] <http://molitorlegal.lu/reforme-des-conges-speciaux-quoi-sattendre/>

[2] Law of 15 December 2017 amending: 1. the Labour Code; 2. the modified law of 31 July 2006 introducing a Labour Code and repealing 3. the modified law of 12 February 1999 introducing parental and familial leave (in force since January 1st, 2018).

[3] Law of 30 November 2017 amending: 1. article L.521-4 and Title VIII of Book V of the Labour Code; 2. article 3 of the law of 23 July 2015 altering the social dialogue within companies and modifying the Labour Code and the modified law of 19 December 2002 regarding the Trade and Companies' Register and the accounting records and annual accounts of companies.

[4] See the details of the State Council's criticisms on these points in our July 2017 Newsletter: <http://molitorlegal.lu/reforme-des-conges-speciaux-quoi-sattendre/>

[5] Only in case of hospitalization

[6] In the case of business restructuring or closure (to avoid dismissal).

[7] Reserved to employees who can provide proof they have worked for at least 20 years either in a shift job, as part of a work organisation arrangement involving successive shifts, or in a permanent night-work job.

[8] Enabling the employer to gradually decrease his worker's employment time through the hiring of another worker.

[9] Legal exceptions exist allowing the indemnification period to be pushed back until the maximum age of 65.

[10] The previous legal framework only took into account the last three months.

[11] The employer has to justify the hiring (i) under full-time contract, (ii) under a part-time permanent contract or (iii) under an apprenticeship contract of either (a) an unemployed person in receipt of benefit / registered with the ADEM, (b) of an employee under fixed-term contract, which will be transformed into a permanent contract, (c) of a worker or apprentice from a company in difficulty and exposed to an imminent risk of dismissal, (d) a worker from a company having signed a job maintenance plan, or (e)

[12] Constitutional Court, decisions n°123/16 and 124/16 having declared Articles L.124-6 and L.124-7 of the Labour Code unconstitutional.

[13] Also regarding the employee having resigned with immediate effect as a result of sexual harassment by the employer.

[14] Regarding this last point, Bill n°7086 provides that, in such a case, the losing party would not only be ordered to reimburse the unemployment benefits allocated by the Luxembourg State to the employee, but also the unemployment benefits the Luxembourg State will have reimbursed to employment public services of other Member States of the European Union in application of regulation (EC) n°883/2004 on the coordination of social security systems (Article 65) according to which the Member State that received the social security contribution for the unemployment insurance i.e. in principle, the Member State where the employee works, will have to reimburse within a 3 to 5 month time limit, the unemployment benefits allocated by the Member State where the employee resides. The Luxembourg State should therefore also be brought into the procedure when the employee who resigned/was dismissed with immediate effect resides in another Member State where he received unemployment benefits.

[15] Court of Cassation, 15 July 2010 n°51/10 ; Court of Appeal, 30 May 2013, n°38349.

[16] The legislator intends to enact another constant judicial solution regarding dismissal with notice through this Bill i.e. that if the dismissal with notice period is declared unjustified, the employer will have to reimburse to the Luxembourg State the unemployment benefits allocated to the employee.

[17] The re-employment support currently guarantees workers who accept a lower-paid job 90% of their prior remuneration for 4 years. The

aim of the legislator was to encourage the dismissed employee (or the employee at risk of dismissal) to accept a lower-paid job and to allow the new employer a 4 year adaptation period with its new employee. This period was meant to allow for salary adaptations in order to bring the salary back to a level close to that of the prior job before the end of the re-employment support. The re-employment support has, however, been diverted from its goal in order to systematically hire employees at the minimum social wage. The financial participation of the State was often more important than the minimum social wage or even the new salary paid by the employer.

[18] The initial Bill reserved the re-employment support to unemployed workers who previously benefitted from a permanent labour contract. The State Council raised objections to this version of the Bill, considering that it violated equality of treatment and the principle of equality between employees under permanent or fixed-term contracts. The Bill was consequently amended.

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