LUXEMBOURG

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1. SOURCES OF EMPLOYMENT LAW

1.1 What are the principal sources of law and regulation?

The principal sources of law and regulation are:

- European regulations and international conventions ratified by Luxembourg.
- Luxembourg statutory provisions: the Labour Code and the Grand- Ducal regulations implementing the provisions of the Labour Code.
- Collective bargaining agreements concluded at sector or company level. Collective bargaining agreements are concluded between, on the one hand, trade union(s) and, on the other hand, employers' organisation(s) or a specific undertaking or a group of undertakings or several undertakings active in the same sector. These agreements may be declared generally binding for a specific sector and therefore apply to all employers and employees of this sector.
- Employment contracts.
- Case law in the absence of statutory provisions or lack of clarity of the law on certain issues (French and Belgian case law may be of guidance in the absence of Luxembourg case law).
- Practices (under certain conditions provided for by case law).

1.2 What is the order of priority of the relevant sources? Which take precedence in the event of a conflict?

European regulations and Luxembourg statutory provisions take precedent over the provisions of collective bargaining agreements and employment contracts, unless the latter are more favourable for employees.

Collective bargaining agreement provisions take precedence over employment contract provisions, unless the latter are more favourable for employees.

1.3 What are the relevant statutes and international treaties?

The relevant statutes and international treaties are:

- Treaties from the European Union.
- Conventions and regulations from the Council of Europe.
- Conventions from the International Labour Organization (ILO) which have been ratified by Luxembourg.

2. PRINCIPAL INSTITUTIONS

The principal institutions are:

- The Ministry of Labour and Employment which is in charge of determining and implementing the policies relating to labour law.

- The Labour and Mines Inspectorate which is mainly in charge of ensuring the respect of the labour law statutory provisions (work conditions, salary, working time, health and safety at work, equal treatment and so on).
- The Employment Agency which is mainly in charge of the registration and placement of unemployed people.
- The Comité de Conjoncture which observes the evolution of the Luxembourg economic and employment market and advises on requests for early retirement and short-term unemployment.
- The Employment Fund which provides financial help to employees under certain conditions (bankruptcy, and so on).
- The National Conciliation Office which is in charge of resolving collective labour disputes.

3. ROLE OF THE NATIONAL COURTS

Employees and employers may bring their claims before the Labour Court, which has jurisdiction to hear claims relating to employment contracts, apprenticeship contracts and supplementary pension plans arising between employers and employees, including disputes occurring after the end of the employment contract.

A right of appeal lies with the Court of Appeal. The dispute may finally be referred to the Court of Cassation in the case of an issue relating to the application of the law (an extraordinary instance which is rarely used).

4. EMPLOYMENT STATUS AND CATEGORIES OF WORKER

4.1 What defines employment status (whether an individual is employed or self-employed)?

The decisive criterion to determine whether a person qualifies as an employee or is self-employed is subordination between the parties.

The person invoking the existence of an employment contract shall prove the existence of a link of subordination with his employer. In case of litigation on the qualification of a contract, the judge shall take into consideration not only the terms of the contract which has been concluded between the parties but also the concrete factual circumstances of the relationship.

In this respect, the following elements may be taken into consideration (i) instructions given to the employee relating to work performance, (ii) obligation to report, (iii) control of the employee's performance, (iv) respect of the rules and practices of the company, (v) fixed working hours, (vi) annual paid leave, and so on. These elements should be taken as a whole, one single element being insufficient to establish the presence of an employment contract.

4.2 What is the relevance of the distinction?

Employees benefit from the protective provisions of the Labour Code while self-employed persons are subject to the contractual provisions agreed between the parties. The distinction is all-important in the case of termination of the contract since the termination of an employment contract may only be made in accordance with the labour law rules.

4.3 What are the main categories of worker?

Since the Law of 13 May 2008 introduced a single statute for all employees of the private sector, there is no longer any distinction between blue-collar workers and white-collar workers, who are all called employees.

Different types of contracts may be concluded:

- Open-ended employment contracts which run indefinitely until termination by the parties or by effect of the law.
- Fixed-term employment contracts which may only be concluded in order to carry out a specific and temporary task. The renewal of such contracts is limited to two renewals for a period of time not exceeding 24 months. The following are considered as specific and temporary tasks justifying the conclusion of a fixed-term employment contract:
    - replacement of a temporarily absent employee or whose employment contract is suspended for reasons other than a collective labour dispute or lack of work resulting from economic causes or extreme weather conditions, as well as the replacement of an employee under an open-ended employment contract whose position has become vacant, while awaiting the effective entry into service of the employee called to replace the person whose contract has ended;
    - seasonal work as defined by a Grand-Ducal regulation;
    - jobs for which, in certain areas of activity, it is common practice not to conclude an open-ended employment contract due to the nature of the activity or the temporary nature of these jobs, the list of these areas of activity and jobs being drawn up by a Grand-Ducal regulation;
    - performance of a defined occasional and specific task which is not included in the daily activities of the business;
    - performance of an occasional and short-term task in case of a temporary and exceptional increase in the company's activity or in case of a start-up or expansion of the company;
    - performance of urgent work made necessary to prevent accidents, to repair faulty equipment, to organise measures of rescue of the installations or buildings of the company so as to avoid any prejudice for the company and its staff;
    - under certain conditions, employment of an unemployed person registered with the Employment Agency;
    - jobs intended to promote the recruitment of certain categories of job-seekers; and
    - jobs arising from the employer's commitment to provide the employee with additional professional training.
- Part-time employment contracts which provide less than the legal 40-hour working week or a shorter working week as defined by a collective bargaining agreement.

Please note that specific provisions are provided by law for interim workers, apprentices and students.

4.4 What is the position of directors?

Directors and managing directors exercise their corporate mandate according to the rules determined by the Law of 10 August 1915 on commercial companies and the provisions of the articles of incorporation of the company.

They may however combine their corporate mandate with an employment contract, provided that the functions carried out as employees are technical functions distinct from their corporate mandates and that these functions are carried out under a subordinate relationship with the company. Such a situation implies that both labour law termination rules and the rules

applicable to the revocation of a director/managing director (revocation ad nutum without notice period or compensation) shall be taken into consideration in the case of a termination.

Should the qualification of a relationship be challenged, the judge shall analyse the concrete circumstances of each case (for example, prior existence of an employment contract between the parties, powers of the director, holding of shares, size of the company), qualifications given by the parties to their relationship being irrelevant.

5. CONTRACT

5.1 What constitutes an employment contract?

In the absence of a legal definition, case law defines the employment contract as a convention by which a person (the employee) agrees to perform certain duties that are directed and controlled by another person (the employer) in return for an agreed salary.

5.2 What formal requirements are there in relation to the formation of an individual employment contract?

Employment contracts must be concluded in writing in two originals on the date of entry into service of the employee at the latest.

In the absence of a written document, the existence and the content of the open-ended employment contract may be proved by the employee by any legal means. A fixed-term employment contract shall however always be in writing since, in the absence of a written document, it is deemed to be an open-ended employment contract (without proof to the contrary).

There are no legal requirements regarding the language of the employment contract, the only condition being that the employee must be able to understand the terms of the contract. In case of litigation, a translation into one of the official languages of the Grand Duchy of Luxembourg (Luxembourgish, French or German) may be required. The employment contract shall generally be drafted in one of the official languages or in English.

5.3 Where do the terms come from?

Besides the will of the parties to the contract, the terms of employment contracts come from the statutory provisions and the collective bargaining agreements applicable to the company or to a sector.

A great part of the Labour Code provisions are imperatives meaning that the parties to the employment contract may only derogate from these provisions in a direction more favourable to the employee. Therefore, any term of the employment contract which is contrary to the Labour Code imperative provisions shall be null and void insofar as it seeks to restrict the rights of the employee or to increase his obligations. The same principle applies to the provisions of the collective bargaining agreements.

6. TERMS AND CONDITIONS

6.1 What terms, if any, must be included in a contract?

The employment contract shall mention the following elements:

- Identity of the parties.

- Effective date of employment.
- Workplace or, in the absence of a fixed workplace, the fact that the employee will be employed in various locations and/or, more specifically, abroad.
- The employer's registered office or address of residence.
- The nature of the employment with, if appropriate, a description of the employee's tasks or functions at the time of hiring, without prejudice to any new function in the future.
- The employee's normal working day or week.
- The normal working schedule.
- The basic salary and the additional payments, benefits, bonuses and the time of payment.
- Annual paid leave.
- The length of the notice period to be observed by the employer and the employee.
- The length of the trial period, if any.
- Any additional terms that the parties have agreed upon.
- A reference to any applicable collective bargaining agreement, if any.
- The existence and nature of a supplementary pension plan, if any, the mandatory or optional nature of this plan, the employee's rights under this plan, as well as the existence of personal contributions, if any.

In addition to the above elements, a fixed-term employment contract shall mention:

- The definition of its object.
- The expiry date of the contract.
- In the absence of expiry date, the minimum duration for which it is concluded.
- The name of the absent employee if the contract is concluded for the replacement for an absent employee.
- The duration of the trial period, if any.
- A renewal clause, if any.

6.2 What terms are typically included in a contract?

Employment contracts usually include a trial period clause and a non-competition clause.

A trial period clause must be concluded in writing on the date of entry into service of the employee at the latest. The minimum duration is two weeks and the maximum duration is in principle six months. However, the maximum duration is three months if the employee's level of education does not exceed the *certificat d'aptitude technique et professionnelle de l'enseignement secondaire technique* (this certificate is obtained at around the age of 18, after three years of professional/technical studies following the completion of the first three years of technical secondary school). The maximum duration

could be extended up to 12 months if the employee's gross monthly salary exceeds EUR4,154.91 (index 775.17). The trial period clause may not be renewed.

A non-competition clause is a clause by which an employee agrees not to carry out, after the termination of the employment contract, as a self-employed person, similar activities to those carried out by his former employer. This clause must be in writing and is considered invalid if the employee's annual salary, at the termination of the contract, does not exceed EUR52,843.88 (index 775.17).

The non-competition clause is only effective if it (i) applies to a specific professional sector and to similar activities to those carried out by the former employer, (ii) does not exceed 12 months as from the termination of the contract, and (iii) is limited geographically to places where the employee could be in a position to effectively compete with the former employer, without extending beyond the territory of the Grand Duchy of Luxembourg.

In addition to the above-mentioned clauses, employment contracts usually include an exclusivity clause, a confidentiality clause, an intellectual property clause, a non-solicitation clause, a data protection clause and a governing law/jurisdiction clause.

6.3 What rules apply to:

6.3.1 Working time and rest breaks

Labour Code provisions on working time do not apply to employees occupying an effective managerial position and to the senior executives whose presence is necessary to ensure the functioning and the supervision of the business.

Working time

Normal working hours may not exceed eight hours per day and 40 hours per week, without prejudice to provisions of collective bargaining agreements providing for lower limits.

Flexibility is possible by establishing a work organisation plan, by which the normal working hours may be exceeded provided that the average working week as calculated on a reference period of four consecutive weeks does not exceed 40 hours.

Any work carried out on request of the employer above the normal working hours or above the limits fixed by the collective bargaining agreement or the POT is to be considered as overtime. Overtime, which may not exceed two hours per day and eight hours per week, is only possible:

- To prevent the loss of perishable goods or to avoid the risk of compromising the technical outcome of the job.
- To perform special work, such as the drawing up of inventories and balance sheets.
- To deal with situations in matters of public interest.
- To perform tasks in response to an occurred or imminent accident.
- To perform urgent work to machines and tools or work required by an incident of force majeure – but only so far as necessary to prevent a serious hindrance to the normal functioning of the company.

In the first three cases above, the overtime must have prior notification/authorisation by the Ministry of Labour and

Employment. For the last two points, no prior notification/authorisation is required provided that overtime periods do not exceed three days per month.

Overtime must be taken as time off in lieu at a rate of 1.5 times the hourly pay or, if applicable, recorded on a time-saving account. Overtime may only be paid if the time off in lieu is not possible due to reasons inherent in the business' organisation or if the employee leaves the company before having his time off in lieu. In such cases, the employee is entitled to the payment of the overtime at his normal hourly salary increased by 40%.

Rest breaks

For a working day exceeding six hours, employees are entitled to one or more paid or unpaid breaks. The employees must have a daily rest of 11 consecutive hours in any 24 hour-period and a weekly rest of 44 consecutive hours per seven days.

6.3.2Annual leave

Employees are entitled to 25 days' paid annual leave and ten days' statutory public holidays.

Annual leave has to be taken during the current calendar year. Under exceptional circumstances and subject to the authorisation of the employer, any outstanding annual leave may be carried forward until 31 March of the following year if that outstanding annual leave was due to either business purposes or to the genuine needs of other employees. Outstanding annual leave shall only be paid in the case of termination of the contract by one of the parties during the year.

In addition to the leave mentioned under section 9.2 below, employees are entitled to paid leave such as marriage/partnership declaration leave (six days; two days for a child's marriage or partnership declaration); moving house leave (two days); military service leave (one day) and bereavement leave (three days for the death of a wife/husband or partner or for the death of a first degree family member (father, mother, father-in-law, mother-in-law, son, daughter, son-in-law, daughter-in-law) or a first degree member of a wife/husband or partner's family; one day for the death of a second degree family member (grandmother, grandfather, granddaughter, grandson, brother, sister, brother-in-law, sister-in-law) or a second degree family member of a wife/husband or partner).

Other specific leave (paid or not) is provided for by the Labour Code (leave for terminal care purposes, training purposes, political purposes, public duties, and so on).

7. EMPLOYEE REPRESENTATION

At national level, employees may be represented in various bodies within the undertaking, that is, the staff delegation, the works council or the board of directors or supervisory board.

At European level, they may be represented in a European works council. Specific rules apply in a European Company and a company resulting from a cross-border merger.

The above-mentioned employees' representatives benefit from specific protection against dismissal (see section 10.7 below).

Employees may also decide to join a trade union.

Staff delegation

Any employer with at least 15 employees must have a staff delegation.

Social elections are organised within all companies in Luxembourg every five years. Social elections must however be organised by the employer as soon as the undertaking employs at least 15 employees.

Employees' representatives are elected by the employees of the undertaking from among the employees of the undertaking. The number of members to elect depends on the number of employees occupied by the undertaking.

Works council

Any employer with at least 150 employees in the last three years must have a works council.

The works council is composed of an equal number of employer's representatives – who are appointed by the employer – and employees' representatives – who are elected by the staff delegation among the employees of the undertaking. The number of members of the works council depends on the number of employees employed by the undertaking.

The elections of the employees' representatives take place at the latest one month after the elections for the staff delegation.

Board of directors or supervisory board

Any company having its seat in the territory of Luxembourg which is incorporated as a société anonyme and occupying at least 1,000 employees in the last three years must have staff representation on its board of directors or supervisory board.

Within these undertakings, one third of the directors are employees' representatives who are elected by the staff delegation among the employees of the undertaking. The duration of their mandate is the same as for the other directors.

European works council

Any community-scale undertaking or any community-scale group of undertakings must have a European works council.

A community-scale undertaking means any undertaking with at least 1,000 employees within the member states of the EU and at least 150 employees in each of at least two member states. A community-scale group of undertakings means a group of undertakings having at least 1,000 employees within the member states and at least two group undertakings in different member states with at least one group undertaking with 150 employees in one member state and at least one other group undertaking with 150 employees in another member state.

Within such a body, the representatives of the employees occupied on the territory of the Grand Duchy of Luxembourg are elected by the staff delegation of the undertaking concerned.

European Company – cross-border merger

Specific rules apply to information, consultation and participation of employees in the event of the establishment of a European Company having its seat in the territory of the Grand Duchy of Luxembourg or, in the event of a cross-border merger, if the company resulting from the merger has its seat in the territory of the Grand Duchy of Luxembourg.

In such cases, negotiations may have to be started with the representatives of the employees of the companies participating in the European Company or in the cross-border merger.

Trade unions

Employees may choose to be affiliated with a trade union, which is in charge of defending the professional interests and the collective representation of its members as well as improving their life and working conditions.

8. INFORMATION AND CONSULTATION

Staff delegation

The general mission of the staff delegation is to safeguard and defend the interests of the employees with regard to working conditions, employment security and social statute, insofar as such mission does not fall within the scope of competence of the works council, if any. Without being exhaustive, the staff delegation has the following attributions.

The employer shall inform the staff delegation regarding:

- Any information that may help the staff delegation to understand the running and life of the undertaking, including recent and likely development of the activities of the undertaking and of its economic situation (once a month in undertakings with a works council and three times a year in undertakings without a works council).
- In share companies only (once a year): the economic and financial situation of the undertaking, as well as the recent and likely future activities of the undertaking; in this respect, the employer must present a written report on the activity, business income, global results, orders, evolution of the structure and of the level of remuneration of employees and the investments which have been realised.
- Any information on the risks to health and safety, on the protective or preventive measures taken within the undertaking, on the protective measures to be taken and, if necessary, the protection equipment to use.

The employer shall inform and consult the staff delegation regarding:

- The situation, structure and likely evolution of employment, as well as any contemplated anticipative measures, in particular, in the event of threat on employment (twice a year); in this respect the employer must provide the staff delegation with sex-based statistics on employees' recruitment, promotions, transfers, dismissals, remunerations and training.
- All decisions which are likely to entail important modifications in the work organisation or in employment contracts, including the decisions taken in the framework of a collective dismissal or a transfer of undertaking. Please note that, in addition to this obligation, specific information and consultation requirements must be respected for the transfer of an undertaking or a collective dismissal.

The staff delegation shall be entitled to give its opinion:

- On the improvement of working conditions, employment conditions and social situations of the employees.
- On the establishment, implementation or change to any internal policy.
- Prior to the establishment, implementation, change or withdrawal of a complementary pension scheme.

Finally, the staff delegation shall prevent or settle any individual or collective claim between the employer and the employees and refer any complaint to the Labour and Mines Inspectorate.

Works council

Depending on the matters involved, the works council is entitled to give a decision or to be informed and/or consulted.

The works council has a power of decision in matters involving:

- The introduction and implementation of any technical installations aiming at controlling the employees' behaviour and performance at the workplace.
- The introduction or change of any measures regarding health and safety at work, as well as the prevention of professional diseases.
- The introduction or change of the general criteria applicable to selection in the hiring, promotion, transfer, and dismissal processes, as well as for entitlement to early retirement.
- The introduction or change of general criteria applicable to the appraisal of employees.
- The introduction or change of internal policies.
- The granting of rewards to certain employees who have brought an outstandingly useful contribution to the company, through various initiatives or proposals of technical improvement.

The employer shall inform and consult the works council regarding:

- Any major decision relating to:
    - the construction, transformation or extension of production and administration facilities;
    - the introduction, improvement, renewal or transformation of equipment; or
    - the introduction, improvement, or renewal of work practices or production processes (manufacturing secrets are excluded).
- Actual and foreseeable needs of the workforce within the undertaking as well as training measures required for the employees (once a year).
- The economic and financial evolution of the business (at least twice a year); in this context the employer must present to the works council a written report mentioning the activities of the undertaking, the turnover, the global results, the orders, the evolution of the structure, the progress in the level of remuneration of employees and the investments which have been realised.
- In share companies only (prior to the annual general meeting of shareholders): presentation of the profit and loss account, the annual balance sheet, the auditor's report and as the case may be, the management report, as well as any other document presented to the shareholders.
- Any economic or financial decision that may have a substantial impact on the structure of the undertaking or on the level of employment (in particular decisions concerning the volume of production and sales, production programme and orientation, investment policy, plans to stop or transfer the undertaking or parts of the undertaking, plans to restrict or extend the undertaking's activity, plans to merge the undertaking, plans to change the organisation of the undertaking and the creation, modification or cancellation of a supplementary pension scheme).

The information and consultation must focus (i) on the repercussions of these measures on the volume and structure of the workforce and on the working conditions of the staff of the undertaking and (ii) on social measures, in particular training measures taken or planned by the head of the undertaking. Such information and consultation must be done prior to the contemplated decision, except when it may hinder the management of the undertaking or jeopardise the execution of the planned operation. In these latter cases, the information must be given to the works council within three days from the decision.

European works council

The rights of the European works council will be determined in the agreement to be concluded in this respect. In principle it will be limited to transnational economic and social questions concerning the entire community-scale undertaking or group of undertakings.

9. EQUAL OPPORTUNITIES

9.1 What protection do employees have from discrimination?

General principles

Any direct or indirect discrimination on the grounds of sex, religion or belief, disability, age, sexual orientation, or racial or ethnic origin is prohibited.

Direct discrimination means the situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation because of the above-mentioned grounds.

Indirect discrimination means the situation where an apparently neutral provision, criterion or practice would put persons having a particular sex, religion or belief, disability, age, sexual orientation, or racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Harassment on the basis of the above-mentioned grounds as well as an instruction to discriminate against persons on the above-mentioned grounds shall be deemed to be a form of discrimination.

The prohibition applies to:

- Conditions for access to employment, to self-employment or to an occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.
- Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience.
- Employment and working conditions, including dismissals and pay.
- Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

As an exception, discrimination based on a characteristic related to the above grounds may be justified 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. As regards discrimination on the grounds of sex, such an exception, however, only applies to conditions for access to employment.

Differences in treatment on the grounds of age are also authorised if they are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy, or labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Sexual harassment at work by the employer, an employee, clients or suppliers of the undertaking is prohibited.

Sexual harassment at work is defined as any behaviour – physical, verbal or non-verbal – of a sexual nature or any other behaviour based on sex through which the perpetrator knowingly affects the dignity of a person, provided one of the following conditions is met:

- Such behaviour is unwanted, misplaced, abusive and hurtful for the person concerned.
- Refusing or accepting such behaviour is used explicitly or implicitly as a basis for a decision which affects that person's rights regarding vocational training, employment, continued employment, promotion, remuneration or any other employment-related decision.
- Such behaviour creates an intimidating, hostile or humiliating work environment for the person concerned.

It is the responsibility of the employer to put an immediate end to any sexual harassment of which he has knowledge. The employer shall also take any necessary preventive measures in order to ensure the protection of his employees.

Moral harassment and violence

Moral harassment at work is defined as occurring whenever a person within the undertaking commits wrongful, repeated and deliberate acts against an employee or a manager the purpose or effect of which is to either:

- Affect his rights or dignity.
- Alter his working conditions or compromise his professional future by creating an intimidating, hostile, degrading, humiliating or offensive environment.
- Alter his physical or mental health.

Violence at work is defined as occurring whenever a person or a manager is assaulted deliberately, once or several times, by another person, the purpose or effect of which is to undermine his physical or mental integrity.

In consultation with employees' representatives, the employer shall take the necessary measures in order to prevent moral harassment and violence at work and in order to organise a specific procedure to be used in the case of an act of moral harassment or violence at work. This procedure may be detailed in an internal or sector agreement.

Protection of employees and legal means of action

Any discriminatory provisions included in employment contracts, collective bargaining agreements or internal policies are to be declared null and void.

Employees are protected against retaliation by the employer for a complaint, a refusal of discriminatory behaviour or the initiation of legal proceedings. Witnesses to discriminatory behaviour are also protected. Any dismissal in breach of the foregoing shall be considered automatically null and void. Should a dismissal nevertheless occur, the employee is entitled to bring the case before the president of the Labour Court dealing with urgent matters, within a period of 15 days after notification of the dismissal, in order to obtain confirmation of the nullity of the dismissal and his reintegration.

An employee who is a victim of sexual harassment at work may refuse to continue to work and terminate the employment contract for gross misconduct with payment of damages by the employer. A victim of discrimination or sexual harassment at work only needs to establish the facts from which the existence of the discrimination may be presumed, it is then up to the defendant to prove that there has been no breach of the principle of equal treatment.

Victims of moral harassment or violence at work, however, do not benefit from the same protection as victims of other types of discrimination. Firstly, these victims must prove that all the facts that they have stated are true. Secondly, there are no sanctions provided in the case of retaliatory measures towards victims of or witnesses to acts of moral harassment. An employee having been dismissed under these circumstances can therefore only bring an action for abusive dismissal.

On a general basis, a victim of discrimination may always bring a legal action before the Labour Court and claim reparation for the moral and/or material prejudice suffered. The Labour Code expressly provides for a fine of an amount between EUR251 and EUR2,000 when the employer or any other person publishes or circulates job offers or advertisements which are not in line with the guidelines concerning the equal treatment of men and women.

If such discrimination meets the conditions to qualify as a criminal offence, an imprisonment of eight days to two years and/or a fine of EUR215 to EUR25,000 may be pronounced.

9.2 What rights do parents have?

Parents have the right to the following types of leave:

- Maternity leave of between 16 and up to 20 weeks paid by the state, that is, eight weeks before the expected date of birth and eight weeks after the birth, with a possible extension of another four weeks in case of premature births, multiple births or if the mother is breastfeeding.
- Paternity leave of two days paid by the employer for the birth of a legitimate child or of an acknowledged natural child.
- Parental leave of six months (full-time) or 12 months (part-time) paid by the state. If both parents are entitled to parental leave, one of the parents must take the parental leave as soon as the maternity leave comes to an end (first parental leave). The other parent may take the parental leave at any time up to the child's fifth birthday (second parental leave).
- Adoption leave of eight weeks (12 weeks in the case of multiple adoptions) paid by the state for the adoption of a child who has not yet started his first year of primary school.
- Fostering leave of two days paid by the employer for fostering a child under 16 years for adoption purposes (unless the employee already benefits from the adoption leave mentioned above).
- Leave for family reasons of two days per child (under 15 years of age) per year paid by the employer in the case of serious illness or accident or for serious health reasons.

10. DISCIPLINE AND TERMINATION

10.1 What rules/procedures must be followed if an employer wishes to discipline an employee?

Disciplinary actions are not legally provided for by the Labour Code, except the possibility of temporarily suspending an employment contract, with continuation of pay, in the event of gross misconduct by the employee.

The internal rules of the company, if any, could be of interest regarding the disciplinary actions to be taken against an employee.

10.2 What disciplinary action may be taken?

See section 10.1. above.

10.3 What are the grounds on which employment contracts can be terminated (by both employer and employee)?

Open-ended employment contracts may be terminated by both parties either by mutual consent or on the sole initiative of the employer or employee with a notice period or for gross misconduct of the other party.

The termination with a notice period by the employer must be based on real and serious grounds which are linked to the employee's behaviour or conduct or to the operating needs of the business, establishment or department of the employer (such as economic reasons).

The termination for gross misconduct by the employer or the employee must be based on conduct which immediately and definitively makes it impossible to continue the working relationship.

10.4 What procedure must be followed?

Preliminary interview

Any employer with a staff of at least 150 employees who contemplates terminating the employment contract of an employee must, before taking any decision, interview the employee.

Notice of such an interview must be given by registered mail or by hand and there must be an acknowledgement of receipt. The notice must indicate the purpose of the interview, the date, time and place of the interview and inform the employee of his right to be assisted by a third person.

Dismissal must be notified the day after the interview at the earliest and eight days following the interview at the latest.

Termination letter

The termination letter must be sent by registered mail or given by hand against acknowledgement of receipt. The content of the letter differs depending on the type of termination.

Termination with a notice period: the letter must mention the duration and the start of the notice period. The notice to be given depends on the length of service of the employee. The employer must give a notice period of two months if the length of service is less than five years, four months if the length of service is five to ten years and six months if it is over ten years. The notice period to be given by the employee is equal to half the above-mentioned notice period.

If the termination is notified prior to the 15th day of the month, the notice period starts on the 15th day of that month. If the termination is notified after the 14th day of the month, the notice period starts on the 1st day of the following month.

The employer may discharge the employee from performing the notice period in the termination letter. However, the employer must continue to pay the employee's salary until the end of the notice period unless the employee finds a new job with equivalent remuneration.

Termination for gross misconduct: the termination letter must state the serious grounds justifying the termination for gross misconduct. The facts used as justification must have been known by the party terminating the contract for a maximum of one month prior to the termination.

Communication of the reasons justifying a dismissal with notice period

The employee who has been dismissed with a notice period has one month from the receipt of the termination letter to ask the employer, by registered letter, for communication of the reasons for his dismissal. The employer must notify the employee of the reasons underlying his dismissal by registered mail within one month from the receipt of such a request.

The employee may dispute the reasons for dismissal within a period of three months from the date of notification of the dismissal or the date of receipt of the grounds for dismissal. Following any such dispute, he may bring a legal action before the Labour Court within a period of 12 months.

10.5 What indemnities must be paid?

In addition to the notice period, the employee who has been dismissed with a notice period is entitled to severance pay, the amount of which varies depending on his length of service, as outlined below.

- For at least five years but under ten years: one month
- For at least ten years but under 15 years: two months
- For at least 15 years but under 20 years: three months
- For at least 20 years but under 25 years: six months
- For at least 25 years but under 30 years: nine months
- For at least 30 years and over: 12 months.

10.6 What are the consequences of not having the right grounds/following the right procedure?

The following principles apply equally to a termination with a notice period or to a termination for gross misconduct.

Not following the procedure: irregular dismissal

If the employer does not respect the obligation to organise a preliminary interview, to send the termination letter by registered mail or to give the letter by hand and receive an acknowledgement of receipt, the employee may introduce an action before the Labour Court and claim an indemnity for irregular dismissal of one month's salary.

Not honouring the notice period: payment of an indemnity

If the employer does not respect the legal notice period, the employee may introduce an action before the Labour Court and claim an indemnity corresponding to the salary due for the duration of the notice period which had to be respected. The same applies if a resigning employee does not respect the legal notice period.

Invalid termination grounds: abusive dismissal

Dismissal is regarded as abusive if the reasons justifying it have not been communicated within the legal limit (in the case of dismissal with notice period) or within the termination letter (in the case of dismissal for gross misconduct), or if it is not justified by the grounds mentioned in section 10.3 above.

If the employee challenges the reasons for the dismissal before the Labour Court, and if the employer cannot prove the existence and the seriousness of such reasons, the dismissal will be considered as abusive by the Labour Court and the employer will be condemned to pay damages for abusive dismissal to the employee (that is, material damages which may amount on an average basis to between four and 12 months' salary and moral damages which may amount on an average basis to between one and three months' salary).

The amount of material and moral damages is ascertained on the basis of the employee's family status, function with the employer, age, ability to find a new job and so on. The burden of proof for damages resulting from the abusive termination of the employment contract rests with the employee.

10.7 Do special rules apply in certain situations?

Termination of fixed-term employment contracts

Except in the case of gross misconduct, a fixed-term employment contract may not be terminated on the sole initiative of the employer or the employee before the expiry of its term.

In the case of termination of the contract by the employer before the expiry of the term, the employee is entitled to damages equal to the salary due until the expiry of the term, without, however, exceeding the salary corresponding to the notice period which would have applied in the case of termination of an open-ended employment contract.

In the case of termination of the contract by the employee before the expiry of the term, the employer is entitled to damages equal to the damage suffered, without, however, exceeding the salary corresponding to the notice period which would have applied in the case of termination of an open- ended employment contract.

If the employment relationship continues after the expiry of the term of the fixed-term contract, the contract becomes open-ended and the termination rules relating to open-ended employment contracts apply (see sections 10.3 to 10.6 above).

Termination of employment contracts during the trial period

Except in the case of gross misconduct, either party may not terminate the employment contract within the first two weeks of the trial period. After completion of the first two weeks' trial period, either party may terminate an open-ended or a fixed-term employment contract with a notice period which varies depending on the duration of the trial period.

If the expiration of the notice period falls after the expiration of the trial period, the contract shall be deemed to be an open-ended employment contract from the day of the commencement of the trial period and the termination rules relating to open-ended employment contracts shall apply (see sections 10.3 to 10.6 above).

Protection against dismissal

Certain categories of employees benefit from a specific protection against dismissal as described below.

Employees' representatives

During their mandate and for a period of six months following its expiry, members of the staff delegation and their substitutes, and employees' representatives at the works council and at the board of directors or supervisory board of a société anonyme may not be dismissed with a notice period. This protection also applies to candidates to these elections during a period of three months from their candidature.

For the staff delegation, a dismissal with a notice period notified during this period is automatically null and void. If the representative is dismissed with a notice period during this period, he may request the judge sitting in summary proceedings, within a period of 15 days, to ascertain the nullity of the dismissal and to order either his continued employment or reinstatement with the employer.

The employees' representatives at the works council may be dismissed with a notice period during this period but only with the agreement of the works council. The employees' representatives at the board of directors or supervisory board of a société anonyme may be dismissed with a notice period during this period but only with the agreement of the Labour Court.

Termination for gross misconduct is possible during this period for all representatives if ordered by the Labour Court.

Protection against dismissal also applies to Luxembourg employees' representatives within the European works council and within the representation bodies which had to be set up at the level of a European Company or in the context of a cross-border merger.

Pregnant employees, employees on maternity leave and parental leave

Employees may not be dismissed with a notice period from the date on which the employee's pregnancy has been medically certified until 12 weeks after the birth. The same protection applies to employees on adoption leave. Employees on parental leave are also protected from the last day of the deadline for notice of the parental leave application until the end of the parental leave.

A dismissal with a notice period notified during this period is automatically null and void. If the employee is dismissed with a notice period during this period, the employee may request the judge sitting in summary proceedings, within a period of 15 days, to ascertain the nullity of the dismissal and to order either the continued employment or reinstatement with the employer.

Employees on parental leave may be dismissed for gross misconduct, while for pregnant employees and employees on maternity or adoption leave, their terminations may only be decided for gross misconduct provided the procedure explained above for employees' representatives is respected.

Employees on sick leave, leave for family reasons and leave for terminal care purposes

The above-mentioned employees may not be invited to the preliminary meeting nor dismissed (even for gross misconduct) during a period of 26 (consecutive) weeks following the first day of absence. The termination of the employment contract of these employees shall be considered as abusive by the judge and shall entail the payment of damages for abusive dismissal (see section 10.6 above).

Victims and witnesses of discrimination and sexual harassment at work

See section 9.1 above.

11. COLLECTIVE DISMISSALS

11.1 What is the definition of collective dismissal?

Collective dismissal is defined as dismissal for reasons which are not linked to the employee's behaviour (that is, economic reasons) of at least seven employees over 30 days or at least 15 employees over 90 days. Provided that at least four employees are dismissed for economic reasons during this period, terminations of employment contracts by mutual agreement and departures in early retirement shall also be taken into consideration.

A dismissal with notice period based on economic reasons must be notified to the Comité de Conjoncture if the company has more than 15 employees. However, no sanction is provided for by the law should such notification not be made.

When there have been five dismissals for economic reasons within three months or eight dismissals within six months, the Comité de Conjoncture must invite the social partners to begin discussions aiming at concluding an employment safeguard plan. In companies facing economic and financial problems, this plan aims at avoiding a collective dismissal by taking various measures to adapt the workforce while safeguarding employment (such as short-term unemployment, voluntary part-time work, reduction of working time, continuing training, retraining, temporary loan of workforce, early retirement).

Even if the Comité de Conjoncture were not to intervene, the social partners may decide to take the initiative to begin discussions to conclude such a plan when they foresee economic or financial problems in the company that may have an impact on employment.

11.2 What is the procedure that must be followed in the event of collective dismissals?

When an employer with at least 15 employees contemplates proceeding with a collective dismissal, a social plan must be negotiated with the staff delegation, the works council, if any, and the trade unions, which have signed the applicable collective bargaining agreement, if any.

Prior to starting the negotiation of a social plan, the staff delegation and the works council must be informed and consulted in this respect, as well as the Employment Agency.

Negotiations for a social plan shall cover the means of avoiding or reducing the number of dismissals and of mitigating the consequences of these dismissals by recourse to accompanying measures aimed at aid for redeploying or retraining dismissed employees. Unless an employment safeguard plan has been concluded during the six months preceding the start of the negotiations, the following topics shall be discussed:

- Application of the legislation on short-term unemployment.
- Possible working time arrangements (including a longer period of reference).
- Temporary reduction of working hours not falling within the scope of legislation on short-term unemployment, making provisions, where appropriate, for participation in continuing training and/or retraining during the working hours that have been freed up.

- Possibilities for training or even retraining with a view to reassigning employees within the company.
- Possibilities of training, continuing training or retraining to allow for the reassignment of employees in another company, if necessary in the same sector of activity.
- Application of legislation on the temporary loan of workforce.
- Personal career guidance, using outside experts if necessary.
- Application of the legislation on early retirement adjustment.
- Principles and procedures governing the implementation and monitoring of the social plan.

The negotiations shall also address the financial compensation(s), if any, which will be paid to the relevant employees.

Within 15 days after the beginning of the negotiations, the parties must record the outcome of their discussions in the form of an agreement, called a "social plan" agreement, which shall be sent to the Employment Agency.

11.3 What are the consequences of not complying with the applicable procedures?

If the employer notifies the employees concerned of the dismissals prior to the conclusion of a social plan, the dismissals will be null and void and the concerned employees will be entitled to bring a claim for reinstatement before the Labour Court within 15 days as from the dismissal.

Should the concerned employees not ask for their reinstatement within the above-mentioned time limit, they could make a claim for the payment of damages for abusive dismissal before the Labour Court (see section 10.6 above).

11.4 What are employees' rights in the event of collective dismissals?

See sections 10.4 and 10.5 above regarding the minimum legal notice period and the severance pay to be paid by the employer. A minimum notice period of 75 days shall, however, be given by the employer in the case of a collective dismissal. Note that, in case of dismissal for economic reasons in the banking sector, the legal notice period is doubled and the number of months due as severance pay might differ.

In order to obtain agreement on the conclusion of a social plan, the employer usually provides for extra-legal compensation and/or non-pecuniary advantages (such as outplacement).

11.5 Are there other circumstances which trigger collective dismissal rights?

The closure of a company and the liquidation of a company shall be considered as a collective dismissal and shall require the collective dismissal procedure to be respected. The same applies in case of business cessation due to a declaration of bankruptcy, despite the fact that employment contracts are automatically terminated by virtue of the law.

A modification of a substantial element of the employment contracts, which is detrimental to the employees, may also lead to the application of the collective dismissal procedure. Indeed, except with an employee's written approval, such modification is only possible provided a specific procedure is followed. At the end of this procedure, the employee may refuse the modification, resign and claim the requalification of his resignation as abusive dismissal in front of the Labour Court.

12. FORTHCOMING LEGISLATION

A bill of law (No 6545) reforming the social dialogue within undertakings was submitted on 25 February 2013. This bill of law aims to modify the current rules on employee representation, in particular by removing the works council and by entrusting the tasks of this body to the staff delegation. As of today the bill has been on hold but it appears that the government has chosen to go forward with certain amendments.

A bill of law (No 6678) reinforcing senior employees' rights within undertakings was submitted on 3 April 2014. This bill of law introduces an employees' age plan management in undertakings with more than 150 employees. It also foresees adjustments on working hours for senior employees as well as additional professional trainings, early retirement incentives, and so on.

A bill of law (No 6611) reinforcing the legal provisions regarding gender equality within undertakings was submitted on 6 May 2014.

13. USEFUL REFERENCES

Internet sites

- Ministère du Travail et de l'Emploi: *www.mte.public.lu.*
- Inspection du Travail et des Mines: *www.itm.lu*.
- Legiwork: *www.legiwork.lu*.

Books

- M. Feyereisen, *Code du Travail Luxembourgeois Annoté 2014,* Promoculture, Larcier.
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- J.L. Putz, *Comprendre et appliquer le droit du travail*, Vademecum (2ème ed.2014/2015).