TRANSPARENT AND PREDICTABLE WORKING CONDITIONS: EMPLOYER'S REINFORCED INFORMATION OBLIGATION TO HIS EMPLOYEES

In 2019, the European UNION (EU) adopted **Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union** to succeed and reinforce a directive from 1991, thereby extending the list of compulsory information to be provided to workers when they are hired.

Principle n°7 of the European Pillar of Social Rights already provided that workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship.

The Directive to be transposed into local law stresses the information obligations of employers. It requires all companies established on EU soil to provide employees, apprentices, temporary workers, students/pupils and seafarers with an **extensive and detailed flow of information** about them. It also reinforces working conditions by **promoting more transparent and stable employment**.

Bill n°8070 was tabled in the Chamber of Deputies on 7 September in order to transpose the Directive into national law and implement this new legislative framework.

In order to comply with the new European and Luxembourgish requirements, employment contracts will have to be recast by adding new clauses and amending others. New rights will also be introduced to secure more stable forms of work. Protection against retaliation and sanctions will also be provided to enforce these new measures.

1) IMPACT ON THE CONTRACT OF EMPLOYMENT

The first and far from least novelty is that from now on the **employer will be explicitly required to put the employment contract in writing**.

As to the content of the employment contract itself, Article L.121-4 of the Labour Code stipulates that it must contain certain information. **The transposition of the Directive** nonetheless **requires the amendment of several articles of the Labour Code**, in particular the one mentioned above. While some of the changes are minimal, others deserve attention.

CLAUSES TO BE AMENDED

The clauses of the employment contract on the points listed below will have to be reviewed and amended as and where necessary:

- **Place of work**
  The contract must stipulate a place of work defined by the parties and in particular a fixed or predominant such place.

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- **Nature of the work**
  The category or a summary description of the work and its tasks must be defined.
- **Duration of the work**
  It will be imperative to indicate the duration and distribution of the work for part-time employees, otherwise they will be presumed to be employed on a full-time basis.
- **Overtime and its procedures**
  The employment contract will henceforth have to define the cases in which employees may work overtime, while complying with the very restrictive legal framework on the matter.
- **Remuneration**
  A clear distinction must be drawn between the basic salary and salary top-ups.
- **Termination of the contract**
  In addition to referring to periods notice, it will henceforth be necessary to set out the procedure to be followed if the contract is terminated, such as the formal requirements and an indication of the deadline for bringing an action to contest the termination.
- **Trial period**
  The conditions applicable to this trial period will have to be mentioned, in particular by including the period of notice if either party wishes to terminate the employment relationship before the end of said period, the time at which the employer must inform his employee at the latest if he intends to terminate the relationship, the situations extending the trial period, etc.

  As regards fixed-term contracts in particular, the bill provides that the trial period will henceforth be proportionate to the term of the contract, i.e. it may not be less than 2 weeks or more than a quarter of the term stipulated in the contract.

  The rules on the status of skilled or unskilled employee and on how to express the trial period in whole months will still apply however.
- **Exclusivity clauses**
  Clauses intended to prohibit an employee from entering in another employment relationship outside normal working hours will be null and void as a matter of principle. Exceptions will be provided for if the combination of employment is incompatible with objective reasons, of which there are four according to the bill: health and safety at work, protection of business confidentiality, prevention of conflicts of interest and the integrity of the public service.

NEW CLAUSES TO BE INTRODUCED

New clauses are to be inserted in the contracts:

- **Right to training**
  If the employer provides training, it should be included in the written employment contract to inform the employee of the number of training days he or she is entitled to per year and the general conditions of the training policy.

- **Social security institutions**
  The identity of this institutions should be mentioned in contracts in future.

GOOD TO KNOW

The contract of employment must in principle contain these details in writing **by the time the employee joins the company at the latest**.

The bill however covers the case where the contract does not specify all these terms and conditions and enables the employer to provide the employee with the missing information within **7 calendar days**, or even within **1 month** for others.

If the employer does not fulfil his obligation, the employee can put him on notice and ask the president of the labour court to order him to **provide the missing information** on pain of a fine. The same shall apply in the event of a mutually agreed amendment that is not recorded in writing.

It will not be necessary to sign an amendment for existing contracts but the employee may ask to receive a written document pursuant to the new provisions of Article L.121-4 of the Labour Code.

2) REQUEST FOR A TRANSITION TO MORE SECURE AND PREDICTABLE EMPLOYMENT

Other new elements have been introduced by the European Directive concerning the transition to another form of employment comprising more predictable and secure working conditions, such as the **transition from fixed-term to open-ended employment and from part-time to full-time** and vice versa.

A right to request a transition to these forms of employment is created, as well as **a right to a reasoned response from the employer** when the employee has at least 6 months' seniority and his or her **trial period has ended**.

The employee who wants to lodge such a request must do so **in writing** within a limit of **once per 12-month period**, while being entitled to maintain all his rights and obligations attached to his current employment contract.

Once the formal requirements are met, the employer will be **required to respond**, either by amending the employment contract by mutual agreement to record his consent, or by stating precisely and **in writing the reasons why he cannot comply with the employee's request within one month**.

An employer who fails to fulfil this obligation is liable to a criminal fine and the employee may also claim damages on account of the employer's failure to respond to his or her legitimate request.

Furthermore, and more specifically on **the transition to an open-ended contract for an employee on a fixed-term contract**, many wonder about the consequences of the employer's simple consideration of this type of request because Luxembourg labour law is very restrictive as to the reason for resorting to a fixed-term contract.

In point of fact, and by way of reminder, the use of this fixed-term contract is limited and must correspond to a precise task that is not lasting in time, which is defined in the fixed-term contract.

The fact that an employer would consider this type of request could be proof that the reason for hiring under a fixed-term contract would not reflect reality and would consequently correspond to a permanent task in the company's usual activity, as is the case for an open-ended contract. The use of a fixed-term contract would therefore not be in line with the Labour Code and the employer would not have complied with the provisions of the social legislation.

Finally, on the request for a **transition from full time to part time**, the employee will have to make a concrete request as to the number of weekly hours he or she wishes to work.

3) PROTECTION AGAINST REPRISALS

This bill provides that *"no employee may be subjected to unfavourable treatment or reprisals as a result of protest or in response to a complaint nor for the exercise of a remedy to ensure respect for his or her rights as provided under Article L.010-1"*, which lists the parts of labour law considered to be of public order.

It «prohibits» serving notice of the termination of the employment contract as well as of an amendment of an essential clause of the contract **by way of reprisal**.

In practice, **an employee who feels that he or she has been the victim of reprisals and therefore dismissed can ask his or her employer to cite the reasons for the decision and then bring an action in court for compensation for unfair termination** of the employment relationship.

This way of proceeding is already the case, however. **The only new element that seems to have been introduced by the bill is the case of the employee whose trial period has been discontinued**.

No written motivation by the employer can be required in such a case nowadays, but **if the employee feels that this is a reprisal, then he or she can ask his or her employer to justify the termination**.

It would seem that no concrete sanctions are foreseen for forms of retaliation other than dismissal or alteration of the employment contract, which, moreover, would only concern salaried employees and not all categories of workers.

4) INTRODUCTION OF EFFECTIVE AND PROPORTIONATE SANCTIONS

The bill provides for the introduction of several new articles and in particular the future Article L.121-11 which will penalize employers who do not comply with the new requirements regarding written employment contracts by imposing a **fine**.

The following offences will henceforth be considered (the list is non-exhaustive):

- failing to put the employment contract in writing at the time when employment is taken up;
- failing to draw up it up in two original counterparts;
- failing to provide employees who so request with a written document that complies with the new requirements within a period of two months.

In addition, the future new Articles L.122-9bis and L.123-9 will further condemn the employer who:

- fails to comply with the requirements for fixed-term contracts, i.e. fails to include the mandatory clauses or to respond in a reasoned manner to an employee who makes an admissible request for a transition to an open-ended contract;
- and will not respond in a reasoned manner to an employee who requests a change to part-time/full-time within one month.

In practice, the employer will be liable for a fine between €251 and €5,000, doubled if the offence is repeated within two years. In addition, as these are fines for misdemeanours, the bill provides that these fines will be incurred for each employee and will therefore be cumulative without limitation.

This same type of fine will be applicable in the case of the hiring of pupils, students and temporary workers, but also to training organizations managing apprentices.

CONCLUSION

New and far from the least important responsibilities will soon weigh on companies when the new law is passed.

All employers will have to put their **new obligations into practice**, starting with the first document that is going to link them with their future employees: the employment contract.

The clauses of employment contracts are expected to be reworked, but such recasting towards more information, transparency and ease of understanding will undoubtedly lead to successful onboarding.