Pinboard - October 2018

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1. Update on the coverage of incapacity for work by the CNS [Luxembourgish National Health Service]

Employees suffering from serious illnesses currently lose the entitlement to their cash sickness benefit after a certain period and their employment contract is terminated automatically. To reduce the effects of this rule, an Act was passed on 10 August 2018 to change the starting date and period of coverage by the CNS. This law will enter into force on 1 January 2019.

- **Extension of the entitlement to the cash sickness benefit**

Up to now, the entitlement to the cash sickness benefit was limited to 52 weeks over a reference period of 104 weeks. As of 1 January 2019, incapacity for work shall be covered up to a maximum threshold of **78 weeks**, still over a period of 104 weeks. This limit shall apply to all employees, irrespective of their pathology. The contract of employment shall therefore cease to exist after these 78 weeks of compensation.

- **New reference period for the salary to continue to be paid by the employer**

The employer is currently required to continue to pay the employee who is incapacitated for work for the 77 first days of disablement, which are counted over a reference period of 12 months. The

employer is then entitled to an 80% reimbursement of this wage burden. Beyond these first 77 days, the *Caisse nationale de santé* (CNS) [National Health Service] takes over from the employer and compensates directly the employee in the event of incapacity for work.

The new law extends the reference period to **18 months.** This extension will have a double effect: it will reduce the employer's charges and transfer the costs to the CNS more rapidly.

2. Increase in the minimum social wage

Following the legislative elections, the Luxembourg government decided to raise the minimum social wage once again. As of January 1st, 2019 this one should increase by 1.1%. However, we are waiting for a confirmation in an official text.

3. Update on workplace surveillance

Following the entry into force of the GDPR on May 25th of this year, Luxembourg abrogated its former Data Protection Act (2002) and passed a new act implementing the GDPR on 1 August 2018. This law amended Article L 261-1 of the Labour Code on employee surveillance.

- **Employer's obligations in implementing a surveillance system**

The prior consent of the *Commission nationale de protection des données* (CNPD) [National Data Protection Commission] is no longer required to put a new surveillance system in place (e.g. a punch clock, access badge, installation of cameras, etc.). The processing of personal data for surveillance purposes is henceforth authorized in the following cases:

- If it is necessary in order to:
  - Perform the contract of employment;
  - Comply with a legal obligation on the part of the employer;
  - Defend the legitimate interests of the employer or a third party, unless employee's fundamental rights and freedoms or interests take precedence;
  - Safeguard the vital interests of the employee or another natural person;
  - Carry out an assignment in the public interest or under auspices of the public authority under which the employer falls;
- Or if the person concerned has agreed to the processing of his personal data.

In addition to complying with this rule, the employer will also have to comply with the principles set out by the GDPR: purpose limitation, proportionality, transparency, limits on storage time, security and confidentiality.

The principle of transparency, which requires that the persons concerned by the processing of their personal data have to be informed, has been reinforced considerably since the GDPR entered into force. This information must include a detailed description of the purpose of the planned processing

as well as the procedures for the implementation of the surveillance system, and, where necessary, the data storage time. Irrespective of the processing concerned, the employer is prohibited from using the collected data for a purpose other than that initially provided.

The proportionality principle supposes that only information that is relevant and necessary for the aims pursued has to be recorded. It is necessary to tread very carefully when implementing this principle, particularly as regards video surveillance. Compliance with this principle at the work place by the employer entails resorting to surveillance means and resources that provide the greatest protection of the employee's privacy. Accordingly, permanent and continuous surveillance of employees is not authorized because it is out of proportion with the aim pursued.

Thus, the installation of a camera to film the inside of an office, an open space or any other room in which one or more employees work continuously is not authorized. To avoid permanent and continuous surveillance, the controller must therefore limit the field of vision of the cameras only to the area necessary to achieve the objectives pursued.

- **The rights of employees when introducing a surveillance system**

When the employer introduces a surveillance system, he must inform the employees individually in advance but also the staff delegation or, in the absence thereof, the *Inspection du travail et des mines* (ITM) [Labour Inspectorate]. It is therefore a collective right to information for the employees.

The new Article L 261-1 of the Labour Code introduces another new feature: when the employer plans an employee surveillance measure that entails the processing of personal data, the staff delegation or, in the absence thereof, the employees concerned by the surveillance measures, may submit an application to the CNPD for a preliminary opinion on the compliance of the processing plan.

This application will have a suspensive effect, i.e. the processing may not be carried out as long as the CNPD has not given its opinion. The Commission shall then have a month from the time the application is filed to decide. The employer is not required to respect the CNPD's opinion, but is strongly advised to do so.

4. Company elections – Electronic platform

In a bid to simplify the organization of company elections, an act on the digitization of the procedures relating to elections was passed on 10 August of this year. This law will enter into force on 1 February 2019 and will therefore apply for the subsequent company elections.

Pursuant to the parliamentary proceedings, this digitization will lead to an electronic platform on MyGuichet.lu. To be able to connect to the platform and see to the necessary administrative formalities, the company director must receive an access code before the start of the electoral operations.

The new law henceforth requires the chairman of the staff delegation to inform the employer in writing, within 3 days of the inaugural meeting, of the identity of the:

- Chairman of the staff delegation;
- Vice-chairman of the staff delegation;
- Members of the board;
- Health and safety officer;
- Equality officer.

Upon receiving this information, the employer will have 5 days to enter it on the electronic platform and send it to the ITM. This obligation used to be incumbent on the staff delegation.

In addition to this information, the act also provides for the electronic transmission of the following information via the platform:

- Automatic election returns: this document is drawn up when it is not necessary to organize elections because the number of candidates standing for election corresponds to the number of delegates to be elected. The candidates shall be elected automatically.

- Non-election returns: this document is drawn up when no candidate came forth in the company.

The electoral procedure remains identical nonetheless. Please note that Securex can assist you in implementing it.

5. Carry over of annual leave

As the end of the year is looming on the horizon, it is worth reiterating the rules concerning the carry over of annual leave. Whereas the paid annual leave must be granted and taken in its entirety during the current year, there are exceptions under which it can be carried over beyond 31 December.

By way of exception, leave can be carried over beyond 31 December of the current year in the 4 following cases:

- The proportional leave during the first year of employment with an employer may be carried over **until 31 December of the following year**. The employee must apply to the employer, who may not refuse such carry over. (Art. L 233-9 subparagraph 2 of the Labour Code).

- The leave not taken at the end of the year on account of the department's needs or justified wishes of other employees may be carried over **until 31 December of the following year.** (Art. L 233-10 of the Labour Code).

- The annual leave not yet taken by a pregnant employee at the start of her maternity leave could be carried over to the subsequent year, in theory **until 31 March of said subsequent year** (Art. L332-3 of the Labour Code). The same applies to the adoption leave and parental leave.

- Pursuant to a decision of the Court of Justice of the European Union (CJEU; “Schultz vs. Hoff”; 20 January 2009), an employee who has been ill for a long period need no longer lose his entitlement to the annual leave. Thus, since it is not possible to take the days of leave during the year for which they are due owing to an incapacity for work, the employee may carry over the leave to the following year.

The employer is nonetheless always authorized to introduce a more flexible system for the carry over of leave (e.g. : unlimited carry over of days of leave from one year to the other, introduction of a time savings account, etc.).

It is important to note that when the employer indicates on the payslip the carry over of hours of leave not taken from one year to the other, the carry over is presumed to be unlimited. The leave not taken can then be used until 31 December.

Conversely, the fact that the employer agreed to the carry over of leave to 31 March of the following year must not be misconstrued as systematically established practice of carrying over leave not taken to the following year.