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TABLE OF CONTENTS

1. Calculation of holiday allowance

The employer must continue to pay the employee during the annual paid leave period. The holiday allowance must enable the employee to rest during his or her legal leave "without any drop in his or her standard of living." The aim is to ensure that an employee on leave receives an allowance which "fully compensates his or her salary," i.e. an allowance that corresponds to the salary s/he would have received by working normally.

In order to achieve this directive, Article L 233-14 of the Labour Code has provided a specific method for calculating the allowance payable for each day of leave: the employee is entitled to an allowance equal to the **average daily salary of the three months immediately prior to the leave.** For salaries which are fixed in terms of a percentage of the turnover or are subject to wide variations, the average salary of the previous 12 months serves as a basis for calculating the holiday allowance.

The holiday allowance is therefore based on the average daily salary, established from the gross monthly salary, including overtime and ancillary perquisites. Non-periodic benefits, such as gratuities, 13th month or bonuses are not taken into account when calculating this average.

It is worth noting that this specific calculation method has no impact on salaries where the gross total pay remains unchanged from one month to the next. The salary received remains the same, whether there are leave periods or not.

Conversely, this "average of the last 3 months" influences the holiday allowance for employees whose pay varies from month to month because of periodic perquisites and supplements.

Depending on the stance of the Inspectorate of Labour and Mines, this particular calculation method applies also to the:

- Compensatory rest granted when a public holiday falls on a non-working business day or a Sunday;
- Compensatory rest granted for overtime;
- Compensatory rest granted for work on Sunday;
- Additional leave granted to employees whose work does not allow for 44 hours of uninterrupted rest per week;
- Extraordinary rest granted to employees who have to take time off work for certain personal reasons;
- Leave for personal reasons granted to employees who have to care of a sick child under 18.

Consequently, particular attention must be given to leave taken by employees whose remuneration changes from month to month. In order to apply this specific calculation method correctly, the employer must make the company's various stakeholders duly aware. Employees on the payroll must be informed in detail about **all** leave time, irrespective of its nature.

2. Franco-Luxembourgish tax treaty already reformed!

Only a few months after they ratified the tax treaty, the two countries signed an amendment thereto on Thursday, October 10th, to clarify the tax treatment of French cross-border commuters and to avoid double taxation for them.

In point of fact, as initially drawn up, the treaty provided for a change in the taxation treatment, namely from the exemption method to the credit method. The credit system would have in certain cases entailed that, once they had paid their taxes in Luxembourg, French cross-border commuters would have been taxed again on their Luxembourgish income in France.

With this amendment, France goes back to the previous situation by introducing the exemption method with progression **to eliminate the double taxation of income derived from salaried occupation** in particular. It follows that cross-border commuters will not be taxed in France on their salary earned in Luxembourg.

In their meeting, the Luxembourgish and French ministers indicated that the provisions of the new treaty and the amendment will apply to the tax periods as of 1 January 2020.

3. Implementation of an "employment inclusion assistance activity"

The Act of 1 August 2019 created an **employment inclusion assistance activity** to train people who work with employees with disabilities or who are in external deployment in line with their disability or reduced work capacity. This new act will enter into force on 1 February 2020.

More specifically, the purpose of this assistance will be to supervise and promote the integration of employees with disabilities and those in external deployment on the labour market through advice and support adapted to their needs.

This activity will be carried out by one person, in a self-employed capacity or as an employee of an assistance service, subject to prior ministerial approval.

The assistance activity comprises in particular:

- An assessment of the work situation;
- A description of the employee's specific problems and needs at his or her workplace;
- The identification of the needs of the employer and the company's staff.

To be eligible for such assistance, the employee with disabilities or on external deployment must meet one of the following conditions:

- Be hired by an employer in the private sector under a support measure for employment;
- Be hired by the employer under an employment contract.

To obtain this assistance, an application must be filed jointly with the Director of the ADEM [Luxembourg Employment Office] by the employee, the employer and the assistant or the assistance service. If the application is approved, the assistant or the assistance service will have to submit an **individualized inclusion plan** to the Director of the ADEM, the employee and the employer within a month of approval being notified. This plan must contain a detailed work programme with a schedule of actions to be carried out, specifying the number of hours, duration and frequency of the assistance. Once endorsed by the employee and his or her employer, the plan will be subjected to the Director of the ADEM for approval. If the plan is approved the parties will have to conclude a **cooperation agreement.**

The consent of the Director of the ADEM means that the Employment Fund can pay for the work of the assistant or the assistance service for the number of hours and duration provided in the individualized inclusion plan, with a maximum of:

- 150 hours for an ADEM contract or measure for employment of at least 12 months, but less than 18 months.
- 225 hours for an ADEM contract or measure for employment of at least 18 months, but less than 24 months.
- 300 hours for an ADEM contract or measure for employment of at least 24 months.

4. Recognition of the right of an employee on leave to "disconnect"

Between the growing digitization of our society and the pervasive pressure that is at times exerted in companies, employees are more and more connected to their professional telephone or computer outside their working hours. Placed at the disposal of employees, these tools are supposed to facilitate

communication. However, this increased strain on employees is curtailing the boundaries between professional and personal life. A recent court judgement is perhaps a first step towards enshrining the **right of employees to disconnect when on leave.**

In Luxembourg, the Labour Code does not provide for a right to disconnect expressly. Only some disparate provisions make a futile reference to it. Article L 312-1 of the Labour Code for instance stipulates that the employer has a general obligation to ensure the health and safety of his employees. As they become more and more dependent on all these new professional digital tools, employees seem nonetheless to be in real need of indispensable protection. It is against this background that in a **judgement handed down on 2 May 2019,** the Court of Appeal recognized for the first time the right of employees to disconnect when they are on paid leave.

In that court case, an employee who had been hired as a "restaurant manager" was dismissed effective immediately in particular because of his aggressive and inappropriate attitude to his superior. What had actually happened is that the employee, on holiday with his family, had asked his superior to leave him alone and to stop bothering him during this period.

The Court of Appeal rules that the employee, who was on recreational leave, was obviously unable to intervene physically to solve a problem raised by his employer, before recognizing that, independently of his position as manager of the restaurant, the employee ***"had a right to disconnect while on holiday."***

5. Postponement of the annual holiday

As the end of the year is fast approaching, it is worth reiterating the rules on postponing the annual holiday. Whereas the paid annual holiday should in theory be granted (and taken) in its entirety during the current year, there are exceptions under which postponement is possible beyond December 31st.

By way of exception, a postponement beyond December 31st of the current year is possible in the following 4 cases:

- The proportional leave to the first year in the employer's employ may be postponed **until December 31st of the following year**. The employee will have to ask his or her employer to postpone the leave, but the latter may not refuse (Article L 233-9, paragraph 2, of the Labour Code).

- The leave not taken at the end of the year because of the department's needs or justified wishes of other employees can be postponed **until March 31st of the following year**. (Article L 233-10 of the Labour Code).

- The days of annual leave not yet taken by a pregnant employee at the start of her maternity leave may be carried forward to the following year, in principle **until March 31st** (Article L332-3 of the Labour Code). The same applies for the settling-in leave and parental leave.

- Following a judgment of the Court of Justice of the European Union (CJEU – "Schultz-Hoff," 20 January 2009), employees who have been ill for a long period, need no longer lose their

entitlement to annual leave. Accordingly, if they cannot take their holidays during a given year because of incapacity for work, they can carry them forward to the following year.

Even so, the employer is still authorized to put in place a more flexible leave postponement system (e.g. unlimited postponement of days of leave of one year to the other, introduction of a time savings account, etc.).

It is worth noting that when the employer indicates on the payslip the postponement of hours of leave not taken from one year to the next, the postponement is presumed to be unlimited. Holidays not taken can then be used until December 31st.

Conversely, the fact that the employer has granted the postponement of holidays once until March 31st of the following year must not be misconstrued as established practice on the part of the company to carry holidays not taken systematically forward to the next year.

6. What about the next wage indexation?

With the preparation of HR budgets under way, this recurrent question is particularly significant. In September 2019, the national consumer price index was down 0.2% from the previous month. The six-month average of the index was up, however, from 871.82 to **872.80 points.** The next indexation will be triggered when the value of **873.94** is reached.