October 2015

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1. When is the next indexation?

The declarations of the minister of economic affairs last July revived speculation about a possible indexation in December 2015. Nevertheless, STATEC's forecasts do not confirm an indexation as of December for the time being.

The situation is still uncertain and we may have to wait until November to see whether the indexation is confirmed in December.

2. New amount of mileage allowance

By regulation of the government in council, travel for business purposes by an employee in his private car has since 1 August 2015 been compensated at a rate of €0.30 per kilometre covered, instead of the previous rate of €0.40.

The amount of €0.30 corresponds to a flat rate which covers in particular the fuel, maintenance and vehicle depreciation costs. Reimbursement beyond this amount is considered as remuneration, and no longer as reimbursement of expenses, and must therefore be taxed.

3. End of the TTBSB is announced

The Temporary Tax to Balance the State Budget (TTBSB) in force since January 2015 should disappear on 1 January 2017 when the tax reform enters into force.

4. New developments in worker retraining

The Act of 23 July 2015 on the retraining procedure will enter into force on 1 January 2016. It is aimed at promoting vocational retraining in the company.

Objectives and measures:

- Promote internal retraining through the abolition of quotas and the reinforcement of the equalisation tax.
- Acceleration of the procedure (with concurrent referral of the Occupational Physician and the Joint Committee by the Social Security Medical Examination) and administrative simplification.
- Replacement of the tideover allowance by a professional tideover allowance subject to taxation and social security charges.
- Attribution of retrained status to persons who are undergoing external retraining (this status enables a person to retain his or her rights if the contract of employment is terminated).
- Possibility to assign the jobseeker to external retraining for work of a public service nature (for the government, municipalities, public institutions).
- Periodic reassessment of the retrained worker by the occupational physician (with possibility of withdrawal of the status).
- The certificate of aptitude for the work position becomes a precondition to eligibility for the retraining procedures for employees who have held their last work position for less than three years (attention: the pre-recruitment medical examination is mandatory).
- For a medical examination by the occupational physician, a company with fewer than 50 employees may be required to reassign the employee to another position if s/he is unfit. This reassignment shall become an obligation as of 25 employees. The inclusion of the quota of workers with disabilities will be abolished.

It is worth noting that the Mixed Committee will take into consideration the “actual” situation of each company before taking account of an internal retraining decision, and that the maximum period of 52 weeks of compensation is maintained as is the automatic expiry of the contract of employment.

5. Focus on part-time cross-border workers

When a cross-border worker is hired on a part-time basis, it is prudent to ensure that he does not work elsewhere as a salaried employee in his country of residence.

If that turned out to be the case and the employee devoted at least 25% of his working time in his country of residence, he would have to be affiliated with the social security office of the country of residence pursuant to the European rules set out in Regulation EC no. 883/2004.

If that is not the case, he may be affiliated with the Luxembourgish social security system.

The employer must nonetheless bear this issue in mind during the entire term of the cross-border's employee's part-time contract of employment. Because if he were to conclude another part-time contract of employment in his country of residence, for a duration equivalent to at least 25% of his work time, the social security office in his country should collect the social security contributions, not the Luxembourgish social security office.

To avoid the risk of a foreign social security office coming to claim social security contributions from you for an employee, for whom those contributions were already paid in Luxembourg, you must require the worker, in the contract of employment, to keep you informed of any change in his situation.

6. Deferment of the annual holiday

The paid annual holiday must in theory be granted and taken in its entirety **during the year** in progress. It may, however, be deferred in the following cases:

- Up to **31 December of the following year**, at the employee's request, in the case of **holidays in the 1st year in the employer's employ**, which could not be taken in their entirety;
- Until **31 March** of the following year;
- If the employee was unable to take his or her holidays because of **the needs of the department** or justified wishes of other employees;
- If the employee still has annual holidays when said employee goes on maternity, adoption or parental leave.

Finally, for a few years now, sickness is a reason for deferring holidays not taken after **returning to work** if the employee was unable to take his or her holidays because of incapacity for work.

The employer may implement a more flexible annual holiday deferment system

where so desired (for instance, unlimited deferment of holidays not taken from one year to another, introduction of a time savings account, etc.).

When the employer indicates on the pay slip the deferment of holiday hours not taken from one year to the next, the deferment is then presumed to be unlimited.

Conversely, the fact that the employer has granted the deferment of holidays to 31 March of the following year once must not be misconstrued as established practice in the company to defer systematically holidays not taken to the following year.

7. Telephone, Internet and privacy

Using work tools for private purposes is a delicate matter.

A recent decision upheld the dismissal for wilful misconduct of an employee who misused his company telephone to make private international calls. It is worth noting that this usage was frequent and extended, hampering the proper operation of the department (C.S.J., 09/07/2015, Cause list no. n°40338).

Conversely, the dismissal of an employee from another company for the private use of the Internet was declared to be unfair because of lack of details and consistency of the evidence provided by the employer (C.S.J., 11/06/2015, n°40871).

The employer must therefore weigh the gravity of the alleged facts against the employee and, above all, gather sufficient proof to justify dismissal for wilful misconduct.

8. The time an employee spends travelling between his home and the sites of his first and last customer is regarded as working time (Decision of the CJEU, 10 September 2015, C-266-14)

The Court of Justice of the European Union was seized by a Spanish court following a dispute about the time spent travelling by employees of a company that installs and maintains security devices. Each of said employees was accorded a company car to travel to the different customers, and then return home after their working day.

The question was whether the travel at the start and the end of the day was to be regarded as working time, i.e. the time spent travelling from “home to customer and customer to home” which the employer considered as rest time.

The case was referred to the court concerning in particular the interpretation of Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 which defines working time as "**any period during which the worker is working, at the employer's disposal and carrying out his activity or duties."**

As regards the first constituent element of the notion of working time, it is impossible to claim that only the time spent at a customer is regarded as working time. In fact, the time spent travelling constitutes an integral part of the activity of those employees and is a necessary instrument for their performance. The workers are therefore performing their duty during the time they spend travelling for their work.

The second constituent element of the notion of working time entails that the worker is put in a situation where he is under the employer's constraint and must meet the obligations imposed on him. In the case at hand, a list of customers and a precise appointment schedule was issued to the employees. The employer moreover reserved the option of changing the instructions initially given, for instance by changing the order of customers or by cancelling or adding appointments. The employees thus remained subject to the instructions issued by their employer.

As to the last notion of working time, the court pointed out that if the worker no longer has a fixed work place, but carries out his duties whilst travelling, he must be considered to be working during such travel. More specifically, the travel is part and parcel of the worker's capacity, as the workplace could not be reduced to merely the physical interventions at the customer. Thus, such travel cannot be considered as rest time, since these workers could not avail themselves freely of that period of time for personal purposes.

Accordingly, the following conclusion is drawn from the court's analysis: **when a worker does not have a fixed or usual workplace, the time spent travelling between his home and the sites of the first and last customers designed by the employer constitutes time actually worked.**