Flash Reports on Labour Law November 2021

Summary and country reports

Written by The European Centre of Expertise (ECE), based on reports submitted by the Network of Labour Law Experts

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Contact: Marie LAGARRIGUE

E-mail: Marie.LAGARRIGUE@ec.europa.eu

European Commission

B-1049 Brussels

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Flash Report 11/2021 on Labour Law

Country	Labour Law Experts
Austria	Martin Gruber-Risak Daniela Kroemer
Belgium	Wilfried Rauws
Bulgaria	Krassimira Sredkova Albena Velikova
Croatia	Ivana Grgurev
Cyprus	Nicos Trimikliniotis
Czech Republic	Nataša Randlová
Denmark	Natalie Videbaek Munkholm Mette Soested
Estonia	Gaabriel Tavits Elina Soomets
Finland	Ulla Liukkunen
France	Francis Kessler
Germany	Bernd Waas
Greece	Costas Papadimitriou
Hungary	Tamás Gyulavári
Iceland	Leifur Gunnarsson
Ireland	Anthony Kerr
Italy	Edoardo Ales
Latvia	Kristīne Dupate
Liechtenstein	Wolfgang Portmann
Lithuania	Tomas Davulis
Luxemburg	Jean-Luc Putz
Malta	Lorna Mifsud Cachia
Netherlands	Hanneke Bennaars Suzanne Kali
Norway	Marianne Jenum Hotvedt Alexander Næss Skjønberg
Poland	Leszek Mitrus
Portugal	José João Abrantes Isabel Valente Dias
Romania	Raluca Dimitriu
Slovakia	Robert Schronk
Slovenia	Barbara Kresal
Spain	Joaquín García Murcia Iván Antonio Rodríguez Cardo
Sweden	Andreas Inghammar Erik Sinander
United Kingdom	Catherine Barnard

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Executive Summary

National level developments

In November 2021, extraordinary measures associated with the COVID-19 crisis continued to play a significant role in the development of labour law in many Member States and European Economic Area (EEA) countries.

This summary is therefore again divided into an overview of developments relating to the COVID-19 crisis measures, while the second part sums up other labour law developments with particular relevance for the transposition of EU labour law.

Developments related to the COVID-19 crisis

In response to an increase in infection rates in November 2021, many countries still have measures in place to prevent the spread of the COVID-19 virus in the workplace.

A state of emergency and/or restrictions were extended or re-adopted in many countries, including **Austria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**, **Norway**, **Portugal**, **Romania** and **Slovakia**. Moreover, with the advent of the Omicron variant of COVID-19, several countries (e.g. the **Czech Republic**, **Spain**) have reintroduced travel bans or temporary restrictions for non-essential travel.

Teleworking is once again being strongly recommended in several countries (e.g. **Austria** and **Portugal**). In **Belgium**, a Royal Decree has mandated teleworking again, but provides for the possibility of weekly physical presence at the company. In **Greece**, a new ministerial decision is expected to define the minimum amount that employers will have to pay to their employees to cover the costs related to teleworking.

Most legislative developments are related to the requirement for specific categories of workers to provide a COVID-19 certificate (so-called '3G Certification', 'Green Pass', 'SafePass', etc.) attesting vaccination against COVID-19, recovery or providing a negative test result. This requirement has been introduced in several countries, such as **Germany**, **Slovakia** and **Lithuania**, where the Parliament has bypassed the President's veto and has passed a law imposing the duty on employees to present evidence of their vaccination or for unvaccinated employees to undergo periodical testing at their own expense. In **Luxembourg**, the optional scheme according to which employers may require their employees to demonstrate that they have been vaccinated, cured or tested against COVID-19 is to become compulsory in all workplaces from mid-January 2022.

Likewise, in **Croatia**, a new act requires workers in the public sector to undertake regular testing. In the **Czech Republic**, the government has reintroduced the obligation for all employers to ensure regular (at least weekly) testing of their employees.

In a few countries, the government introduced the possibility for employers to require their employees to be vaccinated against COVID-19 (**Hungary**) or to undergo periodical testing (**Denmark**).

Mandatory vaccination of some or all categories of workers are being discussed in some countries. In the **UK**, the government plans to introduce COVID-19 vaccination as a condition of deployment for all frontline health and social care workers. In **Austria**, the government has announced the introduction of a vaccine mandate as of 01 February 2022, but its implications at the workplace are still to be defined in more detail.

More case law relating to employees who do not adhere to COVID-19 rules emerged in the **Netherlands**, where a District Court ruled that refusing to wear a protective facemask is a gross misconduct.

Measures to alleviate the financial consequences for businesses and workers

To alleviate the adverse effects of the COVID-19 crisis, State-supported short-time work, temporary layoffs or equivalent wage guarantee schemes have been reintroduced in many countries.

Previously enacted COVID-19 support measures for businesses have been reintroduced in the **Czech Republic**, **Denmark** and the **Netherlands**.

In **Norway**, a temporary compensation scheme for self-employed persons has been extended until 01 February 2022.

In **Luxembourg**, the maximum number of reduced working hours in the context of short-time work has been extended for 2021.

Leave entitlements and social security

Special care benefits or family leave for parents whose child needs to quarantine or in the event of school closures have been reintroduced in **Denmark**. General care leave has been introduced in **Portugal** from 02 to 09 January 2022.

In **Belgium**, a collective agreement has introduced the right for paid justified leave from work for undergoing COVID-19 testing.

Measure to ensure the performance of essential work

In the **Czech Republic,** the government has imposed a work obligation on doctors and other health workers.

Table 1: Main developments related to measures addressing the COVID-19 crisis

Topic	Countries
COVID-19 restrictions	AT HR CY CZ DK NO PT RO SK
Mandatory COVID-19 certificate or testing at the workplace	HR CZ DE LT LU SK
Teleworking	AT BE EL PT
Measures for businesses	CZ DK NL
Mandatory vaccination against COVID-19	AT UK
Care leave	DK PT
Protective equipment	NL
Short-time work	LU
Measures for the self-employed	NO
Leave for undergoing COVID-19 testing	BE
Work obligation	CZ

Other developments

The following developments in November 2021 were of particular significance from an EU law perspective:

Working time

In **Austria**, the Supreme Court has ruled on a case on the stand-by time of fire fighters.

In **Estonia**, a new regulation regulates the employment contract for variable working hour arrangements. This contract will be applied in the retail sector for the next two years.

In **Italy**, the Court of Cassation ruled that the employer can modify the working hours of full-time employees as long as this does not represent discrimination.

In the **Netherlands**, a Court of Appeal has ruled that the Dutch regulations providing that maximum working time limitations do not apply to employees who earn at least three times the minimum wage might not be in compliance with the EU Working Time Directive.

Occupational health and safety

In **France**, the Court of Cassation has ruled on the compensation of damages related to anxiety.

In **Slovenia**, EU Directive 2019/1832 on personal protective equipment used by workers and Directive EU 2019/1834 on minimum requirements for medical care of crew on board ship have been transposed into legislation.

In **Spain**, Directive 2019/1833, which includes SARS.CoV-2 as a biological agent, has been fully transposed into legislation.

Workers' representation

In **France**, the Constitutional Council has found the provision depriving managers of their right to vote for the social and economic council due to their proximity to the employer to be unconstitutional.

In **Germany**, the State Labour Court did not grant injunctive relief against the election of works council of a bicycle delivery service.

Other developments

In **Estonia**, new rules on the extension of conditions of a collective agreement have entered into force. These rules also establish criteria for the representativeness of trade unions.

In **Germany**, the Federal Labour Court has held that the calculation of annual leave must take cases into account in which individual working days were fully lost due to short-time work.

In **Germany**, the Federal Labour Court has held that bicycle delivery workers are entitled to have their employer provide them with the essential work equipment they need to perform their work.

In **Italy**, a specific derogatory regime has been introduced in the case of a transfer of an air transport company in a special administration procedure to a public company.

In **Romania**, a decision of the Constitutional Court stated that police officers have the right to be assisted by a lawyer during disciplinary proceedings.

In the **UK**, a new decision clarifies the implications of the new status of 'retained EU law' as developed in the EU (Withdrawal) Act 2018 to provide continuity between EU law and the new post-Brexit status.

Table 2: Other major developments

Topic	Countries
Working time	AT EE IT NL
Health and safety	FR SI ES
Workers' representation	FR DE
Collective agreements	EE
Annual leave	DE
Transfer of undertakings	IT
Labour disputes	RO
Disciplinary proceedings	RO
Brexit	UK
Platform work	DE

Implications of CJEU Rulings

Working time

This Flash Report analyses the implications of two CJEU rulings on the qualification of stand-by periods and on time spent on vocational training as 'working time' within the meaning of Directive 2003/88/EC.

CJEU case C-214/20, 11 November 2021, Dublin City Council

This case, which arose from a request for a preliminary ruling raised by an Irish court, concerned the qualification of the stand-by time of a retained fire fighter.

Following the line of argumentation in cases C-344/19, *D.J. v Radiotelevizija Slovenija*, and C-580/19, *RJ v Stadt Offenbach am Main* (analysed in the March 2021 Flash Report) and in case C-107/19, *Dopravní podnik hl. m. Prahy* (analysed in the September 2021 Flash Report), the CJEU further clarified that periods of stand-by time, including those based on a stand-by system during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the worker to freely manage the time during which his or her professional services are not required and to pursue his or her own interests do constitute working time.

However, in the present case, the CJEU observed that the possibility of the worker to carry out another professional activity during his periods of stand-by time, as well as the fact that he was not required to participate in the entirety of interventions, was an important indication that the terms of the stand-by system did not place that worker under major constraints that have a very significant impact on the management of his time.

Although the facts of this case are very specific, most national reports indicate that this judgment provides further clarity to national courts on the distinction between working time and rest periods.

Most reports indicate that their national legislation or established case law are in line with the interpretation of the CJEU in the present judgement. However, a handful of countries, including **Croatia**, **Estonia**, **France**, the **Netherlands** and **Slovenia**, report that their legislation seem to not be fully consistent with CJEU case law on stand-by duty (see also March 2021 Flash Report).

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In the present case, the CJEU clarified that the period during which a worker participates in vocational training required by his or her employer, which takes place outside his or her usual place of work, at the premises of the training services provider, during which he or she does not perform his or her regular duties, constitutes working time.

Most countries report that the legislation or case law in their country seems to be fully in line with this judgement. However, a few national reports, including **Latvia** and **Poland**, indicate that in the absence of a specific regulation on the qualification of vocational training as working time, national regulations may require amendments to be fully in line with this judgement.

This judgement is expected to have significant implications in a few countries only. This includes **Luxembourg**, where training hours outside normal working hours, despite being compensated, are not considered working time, and in particular **Romania**, where the courts have so far not qualified periods of vocational training at the initiative of the employer as working time. As the request for preliminary ruling originates from a Romanian court, this decision is expected to have a significant impact on Romanian case law, with a wide range of consequences in terms of overtime pay and increasing organisational difficulties to ensure the professional training of employees.

Austria

Summary

(I) Measures to respond to the COVID-19 crisis have been tightened. Working from home has again been recommended for employees.

(II) The government has announced the introduction of a mandatory vaccine mandate as of 01 February, but its effects on the workplace are still unclear.

(III) The Collective Bargaining Agreement on Corona Measures has been declared universally applicable.

(IV) The Supreme Court has ruled on a case on the stand-by time of firefighters.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Temporary health and safety measures

From 22 November 2021 until presumably 12 December 2021, the Austrian government has introduced another nationwide lockdown based on the fifth COVID-19 Emergency Measures Ordinance (*5. COVID-19-Notmaßnahmenverordnung* - 5. COVID-19-NotMV, BGBl. II 2021/475).

Regarding the workplace ('places of professional activity'), § 8 of the Ordinance stipulates the following:

- Preference should be given to working from home (WFH) if the professional activity allows for it and an agreement between the employer and employee on working from home can be reached (hence, WFH has been recommended);
- The '3G-rule' (see October 2021 Flash Report) continues to apply, i.e. staff may only enter a workplace where physical contact (physical contacts do not include a maximum of two physical contacts per day which take place outdoors and last no longer than 15 minutes each) with others cannot be excluded if they can provide a valid 3G certification proving that they either have a valid vaccination, have recovered or have recently tested negative for COVID-19;
- An obligation to wear masks unless physical contact with others not living in the same household can be excluded or the risk of infection can be minimised through other appropriate protective measures (e.g. technical protective measures such as the installation of partitions or Plexiglas walls and, if technical protective measures would make it impossible to perform the work, organisational protective measures such as the formation of fixed teams shall be considered);
- Stricter regulations apply when employees are in contact with vulnerable groups: providers of mobile care and support services may only enter external workplaces (their clients' home) if they present a 2G certificate and wear a mask when in contact with clients (§ 8 Abs 4 of the 5. COVID-19-NotMV), staff in senior and in nursing homes, in-patient residential facilities for the disabled and hospitals may only be admitted to their workplace with a 2G certificate and must wear a mask. Exception are possible, however, in case a valid PCR-test can provided (§ 12 Abs 5 and § 13 Abs 5 of the 5. COVID-19-NotMV).

1.1.2 Mandatory vaccine mandate against COVID-19

In the course of the announcement of the fourth nationwide lockdown, the Austrian government has announced the introduction of compulsory SARS-CoV-2 vaccinations as of 01 February 2022. So far, it is unclear how the mandatory vaccine mandate will be extended to the workplace and if not, how it will affect the workplace.

It is argued that a mandatory vaccine mandate will allow employers to introduce a general '2G' rule in the workplace (meaning that only staff who have recovered from COVID-19 or are fully vaccinated can be admitted to their workplace where they are in physical contact with others, see news article). So far, the government has not announced any details in this regard.

1.1.3 Collective Bargaining Agreement

The Collective Bargaining Agreement on Corona Measures (*Erklärung des Generalkollektivvertrages zu Corona-Maßnahmen zur Satzung*) has been declared universally applicable.

The General CBA on Corona Measures applies to all employees employed by employers/companies who are members of the Austrian Chamber of Commerce (and consequently applies to roughly 98 per cent of the workforce). By Ordinance of the Federal Office of Conciliation at the Federal Ministry of Labour, the CBA on Corona Measures was declared universally applicable (e.g. a so-called Statute), therefore applying to all employees, regardless whether their respective employer is a member of the Austrian Chamber of Commerce as of 30 October 2021.

The Collective Bargaining Agreement on Corona Measures is valid until 30 April 2022 and contains, as reported, the right to a 'mask break', e.g. entitlement to remove the mask for at least ten minutes after wearing it for three hours. Other regulations in the agreement, such as an entitlement to not wear a mask in case a valid 3G certificate can be provided do not currently apply as they contravene the most recent lockdown measures (see above).

1.1.4 Employees with a COVID-19 risk certificate

By Ordinance (*Verordnung über Festlegung des Zeitraums für Freistellungen nach § 735 Abs. 3 Allgemeines Sozialversicherungsgesetz und § 258 Abs. 3 Beamten-Kranken- und Unfallversicherungsgesetz*, BGBl II 474/2021) of 19 November 2021, employees who have been provided with a valid COVID-19 risk certificate are (again) entitled to an exemption from work and continued payment of remuneration in the period from 22 November 2021 until 14 December 2021, in case WFH or any other risk minimising organisation of work is not possible (see § 735 ASVG). The employer is refunded for the cost of remuneration.

The National Assembly passed an amendment on the issuance of risk certificates on 19 November 2021. Accordingly, as of 03 December 2021, a COVID-19 risk certificate may only be issued to individuals who:

- are fully vaccinated, but for medical reasons a severe course of COVID-19 is expected in case of infection; or
- cannot be vaccinated against SARS-CoV-2 for medical reasons (renewed § 735 Abs 2 ASVG).

Any COVID-19 risk certificates issued prior to 03 December 2021 expire on the 14 December 2021 (§ 735 Abs 3d ASVG). This amendment is expected to pass the Federal Assembly on 02 December 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Stand-by time

Supreme Court, 9 ObA 73/21g, 28 September 2021

In this judgment, a professional fire fighter employed by a city and covered by the working time regulation of the Act on Contractual Municipal Employees of the Federal State of Upper Austria (*Oberösterreichischen Gemeinde-Dienstrechts- und Gehaltsgesetzes 2002* - *Oö GDG 2002*) claimed additional payment for stand-by duties performed on Sundays and public holidays as well. Part of his argument was that his working time exceeded Article 6 of the Working Time Directive 2003/88/EC and he sought to initiate a procedure for a preliminary ruling before the CJEU.

The Supreme Court did not agree with this argument and pointed out the possibility of derogation provided for in Article 22(1) of the Working Time Directive (WTD) based on an individual opting out if thus provided for in national law. The national legal provisions applicable, on the one hand, contain provisions for the correct implementation of the maximum permissible working time resulting from Article 6 of the Working Time Directive (§97 (3) Oö GDG 2002) and a derogation provision corresponding to Art 22 para 1 of the Directive (§97 (4) Oö GDG 2002). The latter is linked to the employee's consent, which was also given in this case.

In Austria, the Working Time Act (*Arbeitszeitgesetz* – AZG) that applies to nearly all private employers does not include a possibility for an opt-out. Such an option is only envisaged in the legislation for hospitals (*Kranken-Anstaltenarbeitszeitgesetz* – KA-AZG) and for employees of the Republic of Austria as well as of federal states, as is the case in the Act relevant in this particular procedure. Interestingly the claim again concerned a fire fighter, a profession that has been dealt with at numerous instances also before the CJEU.

As far as the substance of the claim is concerned, the opt-out provision (§97 (4) Oö GDG 2002) is in line with the prerequisites of Article 6 of the Working Time Directive, which states:

> "*Longer periods of service in excess of the maximum limit under para. 3 shall only be permissible with the consent of the employee(s) concerned. The employee(s) who is (are) not willing to work longer hours shall not suffer any disadvantages as a result*" (unofficial translation by the author).

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In Austria, the qualification of stand-by time as working time or rest period also depends on the degree of the limitation of private autonomy. This concept is very much in line with the one used by the CJEU in the present case as it refers to:

> "*the level of constraints imposed on the worker during a specific period of stand-by time that allows him or her to manage her own time, and to pursue his or her interests without major constraints*" (para. 39 of the ruling).

It is to be expected that this ruling will not change the Austrian concept, but it is likely that it will be applied in case the employee is allowed to engage in a self-employed activity during on-call time. Also relevant from the Austrian perspective is the lack of

obligation to work when called on or, in the words of the CJEU, 'the absence of obligation to participate in the entirety of interventions' as this would increase the employee's level of autonomy during his or her on-call time.

The number of on-call duties that are not considered working time are restricted in Austria. §20a of the Working Time Act (*Arbeitszeitgesetz* – AZG) reads as follows:

> *"On-call duty outside working hours may only be agreed on for ten days per month. The collective agreement may allow on-call duty to be agreed on for 30 days within a period of three months."*

§6a of the Hours of Rest Act (*Arbeitsruhegesetz* – ARG) includes the following provision: "*On-call duty outside working hours may only be agreed during two weekly rest periods per month*."

Austrian working time legislation, therefore, includes provisions that restrict the duration and frequency of on-call duties and thereby observes the general obligation of Articles 5 and 6 of the Working Time Directive for employers to observe the health and safety of workers.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Austrian working time law does not provide a specific regulation on working time and vocational training, and the issue has not been explicitly dealt with in front of labour law courts. In academic literature, general principles on working time are applied to the issue of vocational training, thus distinguishing whether the vocational training is/was required by the employer or was purely voluntary, and the employer additionally granted (paid) time-off work voluntarily.

If the employer requires vocational training (be it based on a legal obligation for further training, or the employer's wish to better train her or his employees), the time the employee spends at the training and travels to and back from the training venue is considered working time. Only in case the employee participates in the vocational training purely voluntarily at her or his own will, and for her or his own benefit, time spent at the vocational training venue is not considered working time.

This reasoning is now supported by the CJEU's ruling in the present case.

4 Other Relevant Information

4.1 Protection of whistleblowers

EU Directive 2019/1937/EU on the Protection of Whistleblowers must be transposed by 17 December 2021. To date, no legislative proposal for the transposition has been made publicly available, hence it is expected that the transposition of the Directive will not be implemented on time.

Belgium

Summary

(I) A Royal Decree has mandated teleworking again, but provides for the possibility to be physically present at the company on certain days.

(II) The Collective Bargaining Agreement (CBA) No. 160 introduces the right for employees to paid justified absence from work to undergo COVID-19 testing based on the Self-Assessment Testing Tool.

(III) The Belgian *Cour de Cassation* has decided that if the department of the company to which the workers' representative belonged no longer exists, that all employees working in that department were dismissed and that the department's former activity was absorbed and integrated into the ordinary operation of the employer's company, there is no closure of the department in the employers' enterprise, justifying the dismissal of the workers' representative.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Teleworking

A Royal Decree of 19 November 2021 has mandated teleworking again from 20 November 2021. This obligation applies to all companies, associations and services, for all persons employed by them, regardless of the nature of their employment relationship. Apparently, the intention is to also impose this obligation on employers who are physical persons working 'at' their own enterprise. Some form of employment relationship exists even among self-employed persons and their enterprise, hence it can be assumed that this obligation also applies to them.

The obligation to telework does not apply if teleworking is not possible due to the nature of the work, or to ensure the continuity of the business, its activities or services.

Employers must provide persons who cannot telework with an attestation or any other form of evidence confirming the need for their presence at the workplace.

Under certain conditions, employees for whom teleworking is compulsory may be physically present in the company:

- until 19 December 2021: for a maximum of one day per week (maximum 20 per cent of employees for whom teleworking is compulsory may be present at the company at the same time);
- from 20 December 2021: for up to two days per week (up to 40 per cent of employees for whom teleworking is compulsory may be present at the same time).

In small and medium enterprises employing fewer than 10 workers, a maximum of five employees for whom teleworking is compulsory may be present at the same time.

As was the case in the first half of 2021, employers are required to submit a monthly declaration on teleworking.

1.1.2 Right to absence with pay for COVID-19 test

The federal government aims to relieve the pressure on general physicians by promoting a self-assessment tool. It consists of an online questionnaire that allows people with mild symptoms to assess whether they should take a COVID test. If so, they can request a test code to conduct a coronavirus test free of charge.

To regulate the absence of employees who undertake a COVID-19 test based on the result of the self-assessment tool, CBA No. 160 was adopted in the National Labour Council. It entitles the employee the right of absence from work for the purpose of getting tested, without losing his or her right to his/her salary from 19 November 2021 to 28 February 2022. This guaranteed salary is equal to the employee's regular salary calculated in accordance with the legislation on public holidays. An employee who cannot telework may be absent from work for the time needed to undergo COVID-19 testing.

An employee who can telework may also be absent from work for the time needed to undergo COVID-19 testing. Until the test result is received, the employee continues to perform the employment contract through teleworking. Employees who can and those who cannot telework are subject to a maximum duration of a 36-hour absence from the time the certificate is generated by the Self-Assessment Testing Tool.

During the term of the applicable collective agreement (i.e. from 19 November 2021 to 28 February 2022), an employee can be absent from work a maximum of three times to undergo COVID-19 testing based on the Self-Assessment Testing Tool.

The new CBA links a number of obligations to the right to absence from with retention of salary. An employee who is absent from work to undergo COVID-19 testing must:

- notify his or her employer immediately by submitting the certificate issued by the Self-Assessment Testing Tool;
- use the absence from work for the purpose for which it is authorised;
- be tested as soon as possible;
- be tested by an authority from which he or she can reasonably expect to receive the test result as quickly as possible, and which is a reasonable distance from his home, residence or place of work;
- notify his or her employer as soon as they learn the result of the test, whether they have resumed work or will be absent for a longer period.

The employee does not have to disclose the completed questionnaire of the Self-Assessment Testing Tool and/or the result of his/her test to the employer.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Dismissal of workers' representatives

Cour de cassation, S.20.0051.N, 04 October 2021

Pursuant to Article 3, § 1, of the Special Regulation on Dismissals of Workers' Representatives in the Works Council Act of 19 March 1991, in the absence of a decision by the competent joint body within the stipulated period concerning the existence of economic or technical reasons for which an employer wishes to proceed with the dismissal, and before the labour courts have acknowledged the existence of such economic or technical reasons, the employer may only dismiss a workers' representative in the event of the closure of the company or of a department of the company.

By closure, the law means the definitive cessation of the enterprise's or department's main activity.

The Labour Court of Appeal found that the academic department to which the workers' representative belonged no longer existed, that all employees working in that

department had been dismissed and that 'the former activity was absorbed and integrated into the ordinary operation' of the employer's company.

In this judgement, the Belgian *Cour de Cassation* ruled that the main activity of the academic department had not ceased, but was being carried out by other employees of the company, and consequently dismissed the Labour Court of Appeal's prior decision.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In the present case, the CJEU determined that the on-call time of a reserve fire fighter, who was permitted to carry out an independent professional activity during this time with the permission of his employer, did not constitute 'working time' within the meaning of the Working Time Directive. The plaintiff was not required to be at any particular place at any time during his on-call duty. He was not required to participate in all assignments carried out from his duty station. It would be different if the overall assessment of all circumstances indicated that the restrictions imposed on him as an employee during his on-call duty objectively quite significantly constrained his ability to freely organise his time during which his professional services as a fire fighter were not required during his on-call duty. Hence, the referring court had to take into account whether he was able to pursue his other professional activity during his on-call duty according to his own interests and to devote a considerable part of these times to those without the average frequency of emergency calls and the average duration of the assignments preventing him from the actual exercise of his professional activity.

This decision is of significant relevance for the further development of the case law of Belgian labour courts regarding working time. Moreover, there are no known Belgian court decisions that conflict with the ruling discussed here.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

This decision is obviously important for the further development of the case law of the Belgian labour courts on working time. In the context of the Belgian Employment Act of 16 March 1971, the decision is not surprising either, since Article 19 of this Law defines the concept of working time very broadly as 'the time during which staff is at the disposal of the employer'.

Belgian case law has traditionally ruled that working time does not necessarily coincide with work actually performed: see e.g. Court of Cassation, 09 January 1984 (*Journal des Tribunaux de Travail* 1984, 150). In the settled case, the training was 'required' by the employer.

4 Other Relevant Information

Nothing to report.

Bulgaria

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

There is no Bulgarian legislation addressing the situation dealt with in the present case.

According to Article 43(2) of the Disaster Protection Law, during periods of participation in activities related to disaster protection, individuals shall receive compensation from the central budget.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Bulgaria, the periods during which a worker attends vocational training required by his/her employer have always been treated as working time and paid by the employer. Moreover, pursuant to Article 352(1)(5) of the Labour Code, the time spent participating in courses, attending schools and other forms of vocational training and retraining with interruptions of employment shall likewise be included in the total length of employment service.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) The government has extended the temporary COVID measures to limit risks of contagion in the workplace.

(II) Mandatory testing for the SARS-CoV-2 virus of persons employed in the public sector has been introduced.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Temporary health and safety measures

Due to the ongoing COVID-19 pandemic, the government has adopted a decision on necessary epidemiological measures restricting gatherings and introducing additional necessary epidemiological measures and recommendations to prevent the transmission of COVID-19 through gatherings (Official Gazette No. 119/2021), extending the temporary measures to limit the risks of contagion in the workplace. Employers are still required to prohibit the arrival at work of employees who have fever and respiratory problems; reduce physical contact between employees, whenever possible; introduce flexible working hours, where possible; organise work in shifts, i.e. in groups, where possible; reduce the number of physical meetings to a minimum; and regularly ventilate the areas where employees are present.

1.1.2 Mandatory testing of persons employed in the public sector

With the decision introducing a special security measure of mandatory testing for officials, civil servants and employees, public servants and employees in public service, public servants and employees in local and regional self-government and employees of companies and institutions run by the Republic of Croatia or by units of the local and regional self-government (Official Gazette No. 121/2021), Croatia has introduced a special security measure of mandatory testing for the SARS-CoV-2 virus for public sector employees. Testing is carried out upon arrival at work at least twice a week.

The testing is not mandatory for vaccinated persons or those who have recovered from COVID-19, unless they have signs of respiratory infection, other symptoms or signs of COVID-19 infection.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Provisions of the Firefighting Act of 2019 as well as the provisions of the Labour Act of 2014 (amended in 2017 and 2019) are relevant for the stand-by time of fire fighters in

Croatia. According to Article 93(4) of the Firefighting Act, professional fire fighters (outside their working hours in the fire brigade) and volunteer fire fighters are required to respond to the superior fire commander's call for readiness and/or to be available to participate in an intervention as soon as possible. Article 93(5) of the Firefighting Act also states that in case the fire fighter on stand-by is not able to respond to the call to participate in the intervention, he or she is required to justify his or her absence within 24 hours of receiving the call for participation in the intervention.

Stand-by time is not considered working time by the Labour Act. More precisely, according to Article 60(2) of the Labour Act, the period during which the employee is available to respond to the employer's request to perform work (stand-by), should the need arise, is not considered working time, where the employee is neither located at his or her working place nor at another place determined by the employer.

For the sake of clarity, this provision should be reformulated in order for stand-by time to be considered working time because in some cases, stand-by time does in fact constitute working time, for example when, during stand-by time, the employee is objectively and very significantly constrained in his/her ability to freely manage his or her time during which his or her services are not required.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The rights and obligations of employees to vocational training is regulated in Article 54 of the Labour Act of 2014 (amended in 2017 and 2019). This provision does not provide any details on the relationship between vocational training and working time. However, such details can be regulated in collective agreements, working regulations or employment contracts.

As regards the employee's claim for overtime payment for the time spent outside his/her regular working hours on vocational training, it should be noted that certain conditions must be fulfilled in Croatia for the performance of overtime work. Overtime must be requested by the employer in writing, and it can only be requested in case of force majeure, an extraordinary increase in the scope of work and in other similar cases of a pressing need (Article 65(1) of the Labour Act). According to the wording of this provision, when read *stricto sensu*, it can be concluded that vocational training may not take place outside regular working hours, since this could limit the employee's right to vocational training. However, if vocational training cannot be organised to take place during the employee's regular working hours, but the employee is required to participate in the vocational training, it must be considered overtime work.

4 Other Relevant Information

4.1 Remuneration and minimum wage

The government has adopted a series of amendments to the Minimum Wage Act (Official Gazette No. 120/2021). The amendments introduce a prohibition for employers to determine the net amount of remuneration in the employment contract, as well as a prohibition for employees to waive the right to that wage. These measures were adopted to address these issues.

In the case of extended collective agreements, another amendment provides that labour inspectors and tax inspectors shall monitor whether wages are paid in accordance with collective agreements that regulate the amount of minimum wage more favourably than the legislator. Apart from this case, the increase in wages due to difficult working conditions is excluded from the amount of minimum wage. This should result in higher wages for employees working under such conditions.

4.2 Average monthly salary

The Central Bureau of Statistics has published data (Official Gazette No. 118/2021) on the average monthly net salary for employees in paid employment in legal entities of the Republic of Croatia for the period January - August 2021, which amounted to HRK 7 086. The average monthly gross salary for employees in paid employment in legal entities of the Republic of Croatia for the period January - August 2021 amounted to HRK 9 537.

4.3 Collective bargaining in the public service

The social partners have started negotiating the Basic Collective Agreement for Public Services (Official Gazette No. 119/2021).

Cyprus

Summary

As the number of COVID-19 infections have been on the rise, the government has gradually started introducing stricter emergency measures to contain the pandemic, including tightened restrictions for unvaccinated persons.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 restrictions

As COVID-19 infections are on the rise, the government has imposed stricter measures to contain the spread of the virus.

Four new decrees have been issued in November:

- Αριθμός 5625, Κ.Δ.Π. 452/2021, on 05 November 2021;
- Αριθμός 5627, Κ.Δ.Π. 463/2021, on 11 November 2021;
- Αριθμός 5629, Κ.Δ.Π. 465/2021, on 18 November 2021;
- Αριθμός 5633, Κ.Δ.Π. 487/2021, on 26 November 2021.

Specifically, the government imposed stricter measures in schools, such as the wearing of masks for all children at schools. Moreover, some restrictions were imposed on those who are not vaccinated; they face increasing restrictions to access non-essential services, such as the closed parts of restaurants, cafes and other places of gatherings, sports, etc.

The current spike is likely to result in tighter restrictions, and there are reports that the scientific advisory committee is recommending mandatory teleworking in the private and public sector as well as a ban on Christmas events organised inside shopping malls or any other indoor area. It is also reported in the news (see here) that the Health Minister will propose the organisation of outdoor events only with all attendees—vaccinated and unvaccinated—having to present a negative COVID test that is not older than 48 hours.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The Cypriot Working Time Law copies verbatim the definitions of Directive Article 2.1 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, in accordance with national laws and/or practice*". Article 2 of the Cypriot law also copies verbatim the Directive,

and 'rest period' is defined as 'any period which is not working time' (Article 2 of *Ο Περί της Οργάνωσης του Χρόνου Εργασίας Νόμος του* 2002 (63(I)/2002)).

Cypriot law seems to be in line with the present decision. However, there is little case law on the issue in Cyprus. Only three cases have been dealt with before the Cypriot courts on the issue of working time: Attorney General v Michalis Kongorizi and Agapiou v Attorney General (*Πολιτική Έφεση* Αρ. 55/2005) (2006), 1 ΑΑΔ 457, 22 May 2006, analysed in the March 2021 Flash Report and September 2021 Flash Report. In the most recent case, case 1471/2015, of 15 April 2020, Nicoli and others v. Republic, the Administrative Court allowed an appeal by fire fighters on the recognition and compensation for on-call waiting time. In 2015, the applicants appealed against the decision of the Police Chief to compensate them for their on-call time. The Court also referred to the established practice, namely that the on-call duty had been in force for over 20 years, which entailed adverse discrimination in the treatment of two different groups of fire brigade officers, i.e. duty officers, on the one hand, and the district/assistant district officers, on the other. Until 29 July 2015, the duty officers were not expected to be on duty after completing their service due to a change in their working hours to 11 hours and 24 hours of rest after a 13-hour workday and a 48-hour rest period, while the district/assistant district officers continued to perform their on-call duties. Furthermore, in addition to the complaint of non-payment of compensation, the Court considered the problems created by how the on-call duty is operated: the maximum average weekly working duration of 48 hours concerns fire fighters and within this limit on-call duty is considered overtime, as established by the relevant jurisprudence. There is no derogation for fire fighters. The Court referred to the wording of the concept of 'rest time' where the employee has no obligation to his or her employer that prevents him/her from pursuing his/her interests freely and uninterruptedly to neutralise the effects on his/her safety and health. The Court considered the claim by the applicants that non-observance of the obligations and deadlines imposed on a Member State by a Community Directive cannot be justified by any national law provisions or practices. The Administrative Court decided that the Police Chief's decision was insufficiently justified and allowed the appeal recognising that compensation is warranted for on-call waiting time

The CJEU cases are of relevance for the Cypriot law as they more precisely clarify the qualification of 'working time'.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Cypriot law is in line with the present CJEU decision, since vocational training requested by the employer is considered working time.

It appears that no case on this issue has been brough before the Cypriot courts.

4 Other Relevant Information

Nothing to report.

Czech Republic

Summary

(I) A state of emergency has been declared by the government. Hence, numerous restrictions have been adopted, such as travel restrictions and businesses restrictions and rules for mass events and assemblies.

(II) Financial support for businesses have been extended until the end of February 2022.

(III) The government has imposed a work obligation on doctors and other health workers.

(IV) The government has reintroduced the obligation for all employers to ensure regular (at least weekly) testing of employees.

(V) A bill introducing an extraordinary allowance for employees who have been ordered to quarantine as well as a bill introducing a compensation bonus have been proposed and are currently under discussion.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

With effect from 26 November 2021 until 25 December 2021, the government has declared a state of emergency in response to the COVID-19 crisis – under the state of emergency, the government is authorised to issue certain measures.

The state of emergency was declared in response to the deteriorating COVID-19 situation in the Czech Republic. Although the state of emergency has been declared for a finite period, it can be extended – for this, the approval of the Chamber of Deputies is necessary.

1.1.2 COVID-19 restrictions

With the Extraordinary Measure of the Ministry of Health No. MZDR 14601/2021-28/MIN/KAN of 20 November, with effect as of 22 November 2021, the conditions on the operation of businesses have been readopted and amended. Furthermore, requirements for holding mass events and assemblies have been adopted as well.

Compared to the previous measure (see October 2021 Flash Report), the main difference is that in general, COVID-19 tests will no longer suffice – with a few exceptions, only persons who have been fully vaccinated or have recovered from COVID-19 over the last 180 days may enter a business or attend an event. Exceptions apply to persons (1) who have not yet reached the age of 18, (2) who cannot be vaccinated due to contraindication, or (3) who do are not fully vaccinated (i.e. 14 days have not elapsed since the second dose of vaccine or the person is waiting to receive his or her second dose). These groups need to present an RT-PCR test (an antigen test will not suffice) which is not older than 72 hours.

These extraordinary measures of the Ministry of Health were cancelled and substituted by a Resolution of the Government No. 1066 of 25 November 2021, which entered into effect on 26 November 2021. The text of the resolution is almost identical to that of the previous measures. However, in addition to the restrictions, the government has restricted business hours to 5:00-22:00; furthermore, Christmas markets cannot open and the consummation of alcohol in public places is prohibited.

Finally, to decrease the spread of the new omicron variant of COVID-19, the government has amended the travel ban. With the Resolution, it strongly discourages travel to a number of African countries. Further, it prohibits entry of third-country citizens, who stayed in said countries for more than 12 hours within the last 14 days, into the Czech Republic (unless they have a residence permit for more than 90 days). Lastly, it orders all persons who stayed in said countries to fill in an arrival form, submit a negative RT-PCR test and to undergo another two RT-PCR tests after arriving in the Czech Republic (though exceptions apply).

1.1.3 State financial aid for employers – the 'Antivirus' programme

The Resolution of the government of 29 November 2021, No. 1086 was adopted. The government has thereby extended the 'Antivirus' programme.

We previously reported on the 'Antivirus' programme in Flash Reports nos. March 2020, April 2020, May 2020, June 2020, August 2020, October 2020, March 2021, April 2021 and May 2021.

Under the 'Antivirus' programme, employers who provide salary compensation to employees to whom they cannot allocate work due to obstacles to work (i.e. where employees are not working but are kept on the employer's payroll) may apply for state contribution (as full or partial reimbursement of the relevant payroll costs).

With effect until 28 February 2022, employers may apply for a state contribution amounting to 60 per cent of the compensation of salaries paid to employees whose employer cannot carry out activities due to a significant number of employees in quarantine or isolation, in case of lack of raw materials or inputs, or in case of reduced demand for goods and services, amounting to a maximum of CZK 29 000 (i.e. approx. EUR 1 532) – Regime A of the Antivirus programme.

With effect until 28 February 2022, employers may apply for a state contribution amounting to 80 per cent of the compensation of salary provided to employees in case of quarantine or isolation amounting to a maximum of CZK 39 000 (i.e. approx. EUR 1 139) – Regime B of the Antivirus programme.

1.1.4 Obligation to ensure work

To ensure sufficient provision of health care, the government, with Resolution No. 1067 of 25 November 2021, has imposed a work obligation on doctors and other health workers (with certain exceptions).

1.1.5 Mandatory testing against COVID-19

With the Extraordinary Measure of the Ministry of Health No. MZDR 42085/2021-1/MIN/KAN, subsequently amended by the Measure of the Ministry of Health No. MZDR 42085/2021-2/MIN/KAN, the government has re-introduced mandatory testing of employees.

According to the measure, all employers are required to ensure regular testing of their employees (at least once per week) – this shall take place based on testing with rapid antigen tests (RATs), either in the form of self-tests or conducted by a health care provider. All employees are required to undergo such testing upon the employer's request. Should they refuse, the employer must inform a Public Health Protection Authority with jurisdiction. Employees who refuse to get tested are required to wear a medical grade facemask at all times, keep a distance from other employees and eat separately. The employer is required to restrict such employee's contact with other persons to the extent necessary.

The obligation to undergo RATs does not apply to (a) fully vaccinated employees, (b) employees who have had COVID-19 within the last 180 days, or (c) employees who have undergone a PCR-RT test or a rapid antigen test (RAT) performed by a health care professional within the last 7 days with a negative result. Employees are required to prove these facts to the employer.

Employers are required to keep records of the tests conducted, and the records must include the names of the persons tested and the dates of testing.

In case an employee tests positive with the employer, the employee must, among other things, leave the workplace and conduct a test to confirm infection, and remain absent from the workplace until a confirmatory test result verifies that the employee can return to work. There is an exception for employees who do not come into contact with other persons at work – they are not required to undergo any testing.

The above rules apply to self-employed persons in a similar manner.

1.1.6 Health and safety measures

The extraordinary measure of the Ministry of Health No. MZDR 15757/2020-61/MIN/KAN of 27 October, adopted with effect as of 01 November 2021, stipulates the obligation to wear protective respiratory equipment (respirators or other similar equipment) inside buildings (stores, services, health facilities, etc.) with some exceptions. It also requires employers to equip their employees with a sufficient number of respirators; this does not apply to employees who do not come into physical contact with other persons.

This instrument has been amended with a measure that expands the obligation even for students inside classrooms to wear protective equipment, if there are more than 50 in the same room.

1.1.7 Extraordinary quarantine allowance

A Bill of an Act on an extraordinary allowance for employees ordered to quarantine has been passed by the government and submitted to the Chamber of Deputies for deliberation. A similar Act was adopted in the past but regulated entitlement to the allowance until 30 June 2021 only.

According to the Labour Code, employees ordered to quarantine are entitled to compensation of their salary in the amount of 60 per cent of their average earnings. This compensation is provided by the employer for the first 14 days of quarantine; thereafter, the employees are entitled to sickness pay provided by the State.

Because quarantined employees receive a lower income, they are discouraged to disclose that they have an infection or have been exposed to infection, hence potentially spreading the COVID-19 virus at their workplace. To prevent this risk, this Bill have propose that employees who are entitled to compensation of salary pursuant to the Labour Code are also entitled to an allowance amounting to CZK 370 (approx. EUR 14.51) for each calendar day but for no longer than the first 14 days of ordered quarantine. This allowance would be exempt from income tax, and paid by the employer.

The Bill is still in the early stages of the legislation process, and it is likely that it will undergo some changes.

1.1.8 Compensation bonus

A Bill of an Act on a compensation bonus for 2022 has been passed by the government and submitted to the Chamber of Deputies for deliberation. A similar Act was adopted in the past (see March 2021 Flash Report).

Similar to last year, the government proposes a compensation bonus for businesses suffering a decrease in earnings due to the COVID-19 pandemic.

The compensation bonus aims to help businesses that have experienced a decrease in earnings of at least 30 per cent due to the COVID-19 pandemic. In certain cases, persons working under agreements outside an employment relationship shall be entitled to the compensation as well.

The bonus amounts to CZK 1 000 (approx. EUR 39.25) per day for businesses and CZK 500 (approx. EUR 19.63) per day for employees under agreements outside employment relationships (i.e. zero-hours contracts, so-called 'DPP' and 'DPČ'). The first bonus period of entitlement shall last from 22 November 2021 to 31 December 2021; the second from 01 January 2022 to 31 January 2022.

Compared to the previous Act, the Bill requires a 30 per cent decrease in business earnings instead of the previous 50 per cent decrease.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

As described in the March and September 2021 Flash Reports, the Czech Labour Code differentiates between 'work breaks for meal and rest', which are provided by the employer after an employee has continuously worked for a maximum of six hours, and 'reasonable time for meal and rest', which takes place when the work cannot be interrupted. The former lasts at least 30 minutes and is considered a rest period and is thus unpaid; the latter, on the other hand, is considered working hours since the employee does not benefit from any real rest because the nature of the work requires him or her to continue working (e.g. an employee supervising boilers who cannot leave the boilers' proximity for more than 5 minutes due to the technical requirements of the boilers), and is therefore awarded a salary.

When the Supreme Court was deciding the original case C-107/19 of 09 September 2021, it used the above procedure (despite the CJEU case law and criticism from the expert public); contrary to the lower court, which had already applied the CJEU's reasoning in its original decision, the Supreme Court set it aside and referred the case back to the District Court, making the lower court decide in line with the Supreme Court's ruling (in accordance with the procedural rules of the Czech Republic). Instead, the District Court referred questions to the CJEU for a preliminary ruling, and the CJEU ruled as it did, i.e. in favour of the District Court (see September 2021 Flash Report).

The main implication of ruling C-107/19 is that the District Court will likely decide the case in a manner similar to its original ruling, i.e. determining that the worker's breaks are stand-by work periods which must be considered working hours (rather than a rest period), taking into account the consequences for the worker's ability to freely manage his time, the time limit within which he must resume work, the frequency of the interventions, other constraints imposed on the worker and the facilities granted to him (in line with CJEU rulings C-107/19, C-344/19 and C-580/19).

The present ruling adds more detail to stand-by time and will help courts decide such cases in line with CJEU case law.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Act No. 262/2006 Coll., Labour Code differentiates between 'entry training', 'professional practice for graduates', 'strengthening qualification' and 'increasing qualification'. The situation of the above case, i.e. an employee who was ordered to undergo vocational training by the employer, falls under the definition of 'strengthening qualification', which is often confused with 'increasing qualification' (Sections 230 and 231, respectively).

The difference between these two types of training lies in the relation to the work being performed. In case the nature of the employee's qualifications remain unchanged, he/she only strengthens or deepens his/her knowledge in the field of his/her current qualifications or maintains/renews these. In case of increasing his/her qualifications, however, the employee aims to change the value of his/her qualifications – either broaden his/her current skills or gain new ones – and it may consist of only studying, education, training or other forms of earning a higher level of education.

Generally, employees are required to strengthen their qualifications and employers are entitled to order employees to undergo training, etc. As regards the assessment of such training as working hours and its remuneration, in accordance with Section 230 para. 3 of the Labour Code, attendance in trainings or other forms of preparation or studying to strengthen one's qualifications shall be considered work performance for which the employee shall be remunerated. In addition, the employer bears all related costs (unless the employee requests a more expensive level of training than required by the employer; in that case, the employee participates in the costs).

Moreover, if the training takes place outside the agreed workplace, the trips to and from the trainings are considered work trips pursuant to Section 42 of the Labour Code. As such, the employee's prior agreement is necessary; if the employee refuses to agree, the employer may order the employee to undergo the training within the agreed workplace only. In case of a work trip, the employee is entitled to reimbursement of the costs connected to the trip in accordance with the Labour Code.

With a view to the above, Czech employment law is already in line with the present judgment. It appears that it is common practice that employers remunerate and bear the costs of such trainings.

4 Other Relevant Information

4.1 Care leave

A Bill of an Act on further amendments to the provision of nursing allowance in connection with extraordinary measures to fight the COVID-19 pandemic has been passed by the government and submitted to the Chamber of Deputies for deliberation.

The Bill aims to widen the range of persons entitled to the nursing allowance. The Bill is still in the early stages of the legislation process.

The nursing allowance is already regulated in Act No. 187/2006 Coll., on Sickness Insurance. In short, it is an allowance for employees who cannot perform work because they are caring for another person. The Sickness Insurance Act further stipulates conditions under which an entitlement to nursing allowance arises (who can be cared for, for how long, etc.).

Current legislation seems to be insufficient with a view to the pandemic. They propose, among others:

- increasing the period of time during which an employee can take the allowance;
- widening the range of persons for whom the employee can care for;
- making the allowance available also to employees who work under agreements outside the employment relationship;
- increasing the amount of the allowance (from 60 per cent to 80 per cent of the contribution basis per calendar day);
- setting a minimum amount of the allowance.

Since the Bill has just entered the Chamber of Deputies, it is probable that it will undergo some changes.

4.2 Minimum wage

Government Regulation No. 405/2021 Coll., amends the amount of minimum wage; the minimum hourly wage has been set to CZK 96.40 (i.e. approx. EUR 3.78) and the minimum monthly salary to CZK 16 200 (i.e. approx. EUR 635.60).

The amounts of guaranteed salary (i.e. minimum wage for certain job categories depending on level of responsibility, complexity and difficulty) have increased as well. For the lowest category, it is CZK 96.40 (i.e. approx. EUR 3.78) per hour or CZK 16 200 (i.e. approx. EUR 635.43) per month. For the highest category, it is CZK 192.80 (i.e. approx. EUR 7.56) per hour or CZK 32 400 (i.e. approx. EUR 1 270.86) per month.

The Government Regulation will enter into effect on 01 January 2022.

4.3 Pay of state employees and members of the security forces

Government Regulation No. 420/2021 Coll., on the amendment of Government Regulation No. 341/2017 Coll., on pay of employees in public services and administration, as amended, updates the pay of public sector employees. As public sector employees receive pay based on laws and implementing legislation, not at the discretion of the employer (as is the case for private employees), the legislation on pay needs to be updated frequently.

The basic rules on pay of public employees are determined by the Labour Code. The Regulations have been adopted on the grounds of Section 123 of the Labour Code.

Likewise, the government has adopted Government Regulation No. 421/2021 Coll., on setting a scale of basic tariffs for members of the security forces. It cancels the previous Government Regulation No. 336/2019 Coll.

These Government Regulations will enter into effect on 01 January 2022.

Denmark

Summary

(I) As COVID-19 infection rates increase in Denmark, restrictions have been reintroduced. The use of COVID-19 certificates has been reintroduced as well.

(II) Tripartite agreements have reintroduced the possibility for employers to require their employees to present a valid COVID-19 certificate.

(III) Financial support for enterprises have been reintroduced to cover the cost of sick leave of employees who contract COVID-19.

(IV) An exceptional care leave has been reintroduced for parents who are sent home from work to care for their children that have contracted COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Reintroduction of COVID-19 restrictions

Following a resurgence of COVID-19 among the Danish population, the Epidemics Committee—a committee consisting of members of Parliament—decided to re-classify COVID-19 as a 'socially critical disease'. COVID-19 had been downgraded as not constituting a 'socially critical disease' in Denmark in September. The classification is a prerequisite for Parliament to adopt restrictions for society.

As of 12 November 2021, the use of the COVID-19 passport was reintroduced as a requirement in restaurants, cafes, discos, casinos, conference venues, etc.

As of 29 November 2021, the use of facemasks in public transport, shops, malls, the health sector, airports, etc. was reintroduced and the use of COVID-19 passports has been extended to the education sector, public workplaces, hairdressers, etc.

Travel restrictions from five countries in Southern Africa have been introduced to prevent the spread of the new omicron variant.

The vaccination rates are relatively stable with 77.7 per cent of the population being vaccinated once and 75.8 per cent fully vaccinated. 13.5 per cent of the population have now been re-vaccinated. Children between the ages of 5-11 years are now also being offered the COVID-19 vaccine after the EMA approved it for this age group. Vaccines are still free and on a voluntary basis.

1.1.2 COVID-19 certificate

On Friday 12 November 2021, the government, the Danish Confederation of Trade Unions (FH) and the Danish Employers' Confederation (DA) agreed to reintroduce the possibility for employers to require their employees to present a valid COVID-19 certificate. This requirement can only be enforced as long as COVID-19 is categorised as a 'socially critical disease' according to the Danish Epidemics Act.

An employer may also require an employee to be tested for COVID-19 as soon as possible and to inform the employer of the result.

A broad political majority in the Danish Parliament, shortly thereafter, adopted the agreement as a statutory Act. Act No. 2098/2021 entered into force on 26 November 2021.

1.1.3 Sick leave and exceptional care leave

Another tripartite agreement has recently been concluded to help companies and parents, who cannot work due to COVID-19 lockdowns or isolation requirements.

First, the agreement suspends the duty of the employer to finance the first 30 days of sick leave benefits when an employee is on sick leave due to COVID-19, and instead places the payment obligation on the local municipality. The employee will receive full sick leave benefits, but instead of being paid by the employer for the first 30 days and then by the local municipality, the payment now rests fully with the local municipality. Some groups of employees have an express legal basis for receiving full salaries, e.g. in the Salaried Employees Act or in collective agreements. If the employee is entitled to receive his or her full salary during sick leave, the employer is entitled to receive reimbursement of sickness benefits from the municipality from the first working day, on which the employee cannot work due to a COVID-19 infection.

Second, the tripartite agreement re-introduces the right to parental leave benefits for parents who are not able to work during periods in which their children are sent home from school or day care due to COVID-19 closures. The scheme covers not only workers, but also self-employed persons.

The schemes are similar to those previously used during the pandemic, which expired on 01 July 2021. The schemes are in force from 23 November 2021 until 28 February 2022. Parliament is expected to adopt legislation quickly.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The Working Time Directive 2003/88 has been implemented in Denmark in three different statutory acts as well as in collective agreements. The calculation of daily and weekly rest periods has been implemented in the Work Environment Act. From the Executive Order issued by the Minister of Employment in 2002 (amended in 2003), Section 16 (1-2), it follows that 'an employee's stand-by time outside the workplace is considered rest time'. If an employee is called to work during his or her stand-by time, the rest period is suspended when the call to work comes in or the employee is given another work commitment, and the rest period does not continue until the employee returns home or the work commitment expires, respectively.

The criteria used by the CJEU does not conflict with existing Danish regulations or case law, which has been interpreted in conformity with the case law of the CJEU, particularly in cases on working time and stand-by time. The most recent example is a Western High Court ruling of 26 August 2019, U 2019.4136 V (see September 2019 Flash Report), where stand-by time for a parcel courier in the private home was considered working time. Response times varied and sometimes was even negative. The average response time was 29 minutes. The Western High Court referred to CJEU case law in its assessment.

The CJEU ruling is likely to affirm the interpretation of Danish courts in cases on stand-by time.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The ruling by the CJEU clarifies that the concept of 'working time' may cover work that takes place away outside his or her usual workplace (at the premises of a training services provider) and during which he or she does not perform his or her regular duties. Working time is given a broad interpretation.

This approach is fully in line with working time covered by collective agreements, where courses and educational training are carried out during working time.

Chapter X of the Industrial Agreement 2020-2023, which is the model agreement for most collective agreements in production and manufacturing, explicitly addresses education and upskilling. Upskilling is funded by the Labour Market Education Fund and the company, which includes salaries for courses required by the company, including up to 2 weeks per year for upskilling courses for employees with 6 years' seniority.

In a recent Labour Court ruling, case No 2020-1444, the Labour Court found that testing time for COVID-19 was working time. The tests were a result of an outbreak at the workplace, and the guidelines from the Health Authorities required that all contacts at the workplace be tested. The employer sent out an email requiring employees to be tested at certain times before starting work again. Even though the email only contained the same guidelines as those of the health authorities, the duty to be tested was perceived as a managerial order, and therefore, the time spent on testing outside of normal working hours was considered working hours.

The ruling by the CJEU is in line with the general legal basis in collective agreements for participation in courses and upskilling mandated by the company. For employees not covered by collective agreements, the situation will be subject to case-by-case interpretation. The solutions in the collective agreements are often also found to inspire solutions for persons not covered by a collective agreement. The overall notion is that what the employer orders, the employer also pays.

Even though payments for working time are not the same as working time versus resting time in the Working Time Directive, the payments are indicative of what is considered working time and what is considered a rest period. In the present case, where the issues is 'unusual duties', the payment does reflect the working time – rest time divide.

With this recent CJEU ruling, the interpretation of Danish courts in cases concerning working time versus rest periods when the employee performs 'unusual' duties, training, etc. will be even more clear.

4 Other Relevant Information

Nothing to report.

Estonia

Summary

(I) Estonian labour legislation has introduced an employment contract for variable working hour arrangements. This contract will be applied in the retail sector for the next two years.

(II) New rules on the extension of conditions of a collective agreement have entered into force. These rules also establish criteria for the representativeness of trade unions.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Variable working hour arrangements

On 25 November 2021, Parliament passed the Employment Contracts Act and the Taxation Amendment Act (*Töölepingu seaduse ja maksukorralduse seaduse muutmise seadus* 403 SE), which introduces variable working hour arrangements in the retail sector. The changes are scheduled to take effect on 15 December 2021. This topic was discussed in the October 2020 Flash Report, May 2021 Flash Report and April 2021 Flash Report.

1.2.2 Extension of collective agreement

On 22 November 2021, amendments to the Collective Agreements Act and other related laws entered into force (*Kollektiivlepingu seaduse ja teiste seaduste muutmise seadus*, in force on 22 November 2021). The amendments to the Collective Agreements Act include, specifically, the extension of the conditions of collective agreements, which was discussed in the September 2021 Flash Report, May 2021 Flash Report, April 2021 Flash Report, and October 2020 Flash Report. A collective agreement may be extended by agreement of the parties.

The question whether the Minimum Wage Regulation shall be considered an extended collective agreement has now been resolved by law. According to §4(6)(1) of the Collective Agreement Act, by way of a collective agreement, a confederation of employers and of employees may agree on a national minimum wage applicable to all employees and employers. In addition, some changes to the Trade Union Act, the Employees' Trustee Act, etc. have been introduced.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The present case is of relevance for Estonia, and several previous CJEU cases concerning stand-by time (or on-call time) have been discussed in previous Flash Reports.

The legal status of rescue servants is established in the Rescue Service Act (Rescue Service Act, *Päästeteenistuse seadus*, 01 March 2008). In short, rescue servants are:

- officials of the rescue service;
- rescue workers.

Officials of the rescue service are covered by the Civil Service Act, taking into account the specifications arising from the Rescue Service Act. Rescue workers are covered by the Employment Contracts Act and other acts governing employment relationships, considering the specifications arising from the Rescue Service Act.

That is, employment in the rescue service in Estonia can be divided into two categories: (i) employment under an employment contract and (ii) employment as a civil servant (civil servants do not work under an employment contract but are appointed under an administrative act).

In Estonia, the Employment Contracts Act (hereinafter ECA) regulates on-call time. Work-related time is divided into three categories: working time, rest period and on-call time. According to the general principle, on-call time is neither working time nor a rest period. Article 48 of the ECA stipulates that if an employee and the employer have agreed that the employee shall be available to perform duties outside of his/her working time, this time shall be considered as on-call time. An agreement on the application of on-call time, which does not guarantee that the employee will enjoy a daily and weekly rest period, is void. The part of the on-call time during which the employee is in subordination to and control of the employer is considered working time.

According to the long-standing interpretation of the ECA, on-call time is neither working time nor a rest period.

Pursuant to §20 (6) of the Rescue Service Act, as a special rule, the on-call time of a rescue worker is considered part of his/her rest period. The on-call time of a rescue worker shall not exceed 155 hours per month. The part of on-call time during which the worker performs functions is considered working time.

Some of the following views were taken into account when the law in the explanatory memorandum was adopted (Explanatory Memorandum of the Rescue Service Act, p. 13-14)

- On-call time (§20) takes place during the rest period of a rescue worker, i.e. the rescue worker undertakes to be available for rescue work during that time. Rescue work is extraordinary and urgent in nature, hence the interruption of the worker's rest period to perform rescue work reflects the principle of the Working and Rest Time Act;
- A rescue worker who undertakes to be available to perform work during on-call time must take into account that he or she may be called upon to perform rescue work at any time, even outside of official working hours;
- On-call time is paid and is not included in working time. During on-call time, the rescue worker can rest, engage in his or her hobbies, etc., but must be available to perform work and that he or she might be called on to perform rescue work at any time.

Under the conditions established by the CJEU in the present case, on-call time in Estonia might more often be considered a rest period.

Estonian legislation does not regulate whether the employee may remain outside the employer's premises during the on-call period, how quickly the employee must arrive at the site, nor whether the employee has the right to engage in professional activities during his/her on-call period. It appears that these issues have not been addressed in the case law of the Estonian Supreme Court.

Rescue workers usually work 24-hour shifts and drive to the site within minutes from being called on.

To date, no changes in the legislation have been introduced, and on-call time continues to neither qualify as working time or as a rest period. In the present case, the Court stated that employers cannot establish stand-by periods that are so long or so frequent that they constitute a risk to the safety or health of workers, irrespective of whether those periods are classified as 'rest periods' within the meaning of Article 2(2) of Directive 2003/88. It is for the Member States to define the detailed arrangements for the application of that obligation in their national laws. Such detailed arrangements are not available in Estonian labour law, but at the same time, the requirements for rest periods are regulated. In case of special provisions, they may not harm the health or safety of the rescue workers and their working time may not exceed certain restrictions.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The CJEU's decision is of relevance for Estonian labour law in terms of interpretation of the national labour law.

According to the Estonian Employment Contracts Act S 28 (2) 5) (Employment Contracts Act (*töölepingu seadus*)), an employer has the obligation to support the development of employees' professional knowledge and skills, to provide employees with training based on the employer's and enterprise's interests, and to carry the training costs as well as to pay his or her average wages during the training period.

According to the ECA, any training organised by the employer that is mandatory shall be considered working time, and the employer guarantees payment of average wages. The employer's obligation to provide such training does not mean that it must take place on the employer's premises.

In this regard, Estonian labour legislation is in line with the CJEU's interpretation.

4 Other Relevant Information

4.1 Increase in average wages

According to Statistics Estonia, the average gross monthly wage in the third quarter of 2021 was EUR 1 553, which is 7.8 per cent higher than a year ago. An increase in wages occurred in information and communication, financial and insurance activities and energy.

The highest gross monthly salary was reported in the Harju (EUR 1 700) and Tartu counties (EUR 1 531), and the lowest in the Hiiu and Ida-Viru counties, where the gross monthly salary was EUR 370 lower than the Estonian average.

The average gross monthly salary continued to be highest in information and communication (EUR 2 878), financial and insurance activities (EUR 2 539) and energy (EUR 2 007). The lowest wages were earned in accommodation and food services (EUR 976), real estate activities (EUR 1 133) and other service activities (EUR 1 260).

Compared to the third quarter of 2020, the average gross monthly wage increased the most in arts, entertainment and leisure (13.9 per cent), and information and

communication (13.1 per cent). The lowest increase was registered in energy (1.5 per cent) and education (2.6 per cent).

Finland

Summary

Parliament has approved amendments to the Employment Contracts Act and the Seafarers' Employment Contracts Act to reduce the use of unfounded non-competition agreements.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Non-competition agreements

Parliament has approved amendments to the Employment Contracts Act (55/2001) and the Seafarers' Employment Contracts Act (756/2011) proposed by the Government Proposal (HE 222/2020) seeking to reduce the use of unfounded non-competition agreements. A non-competition agreement requires a particularly compelling reason related to the employer's operations or to the employment relationship. Employers will have to compensate employees for non-competition agreements that last for less than six months.

The employer will be entitled to terminate a non-competition agreement during the employment relationship if the circumstances change. A notice period must be observed amounting to one-third of the restriction period stipulated in the non-competition agreement which is not less than two months. An employer may nevertheless no longer terminate a non-competition agreement after the employee has terminated the employment relationship.

Subject to certain exceptions and following a transition period of one year, the new provisions will also govern non-competition agreements that were made before the provisions' entry into force. The new provisions will not regulate old non-competition agreements if the employer has already paid reasonable compensation under the current legislation, either in whole or in part, for a non-competition agreement lasting for more than six months. The employer may terminate an old non-competition agreement during the transition period, thereby avoiding the duty to pay compensation under the new provisions.

The formal reply of Parliament to the Government Proposal was considered at a government session on 18 November 2021. The amendments to the Employment Contracts Act and Seafarers' Employment Contracts Act will take effect on 01 January 2022.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In Finland, according to Section 4 of the Working Hours Act (872/2019), time spent on stand-by is not considered working time unless the employee is required to remain at the workplace or in its immediate vicinity. Stand-by may not unduly hamper the employee's leisure time.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Finland, according to the Working Hours Act, participation in compulsory vocational training is considered working time.

4 Other Relevant Information

4.1 Pay equality between women and men

The tripartite working group that prepared the pay transparency legislation has proposed amendments to the Act on Equality between Women and Men (609/1986) to strengthen pay equality and prevent pay discrimination based on gender. The working group's report (Reports and Memorandums of the Ministry of Social Affairs and Health 2021:67, Ministry of Social Affairs and Health) proposes for the Act on Equality between Women and Men to provide personnel, staff representatives and employees suspecting discrimination better access to information on pay.

To enhance the implementation of the prohibition of pay discrimination, the report proposes provisions to be enacted on the right of an employee who suspects gender-based pay discrimination to obtain information directly from the employer on another employee's pay to establish potential discrimination. According to the report, the employee representatives' right of access to information to prepare a pay survey should be increased, and employees should be provided better access to information about gender equality plans and pay systems at the workplace. The objective of increasing pay transparency is to prevent gender-based pay discrimination and to promote equal pay.

The report includes a joint dissenting opinion of the representatives of the Federation of Finnish Enterprises, Local Government and County Employers KT, and the Commission for Church Employers; a supplementary opinion of the Office for the Government as Employer; a dissenting opinion of the representative of the Central Organisation of Finnish Trade Unions SAK and of the joint representative of the labour organisations representing employees; a dissenting opinion of the Finnish Confederation of Professionals (STTK), and a supplementary opinion of Akava - Confederation of Unions for Professional and Managerial Staff in Finland.

France

Summary

(I) The Court of Cassation has ruled on the compensation of damages related to anxiety.

(II) The Labour Division has ruled on the difference between a penalty clause and a non-competition clause in an employment contract.

(III) The Constitutional Council has found the provision depriving managers of their right to vote for the social and economic council due to their proximity to the employer to be unconstitutional.

(IV) The Court of Cassation has also found that pay in lieu of notice must be paid by the employer in case of unjustified dismissal for prolonged absence due to illness, even if employee was not able to work during that time due to this illness.

1 National Legislation

Nothing to report.

2 Court Rulings

2.1 Health and safety

Labour Division of the Court of Cassation, No. 20-16.585, 13 October 2021 and Labour Division of the Court of Cassation, No. 20-16.584, 13 October 2021

In the present case, 30 employees were dismissed for economic reasons following the closure of their establishment. Some were given a certificate of exposure to asbestos; others received a certificate of exposure to benzene. They applied to the labour court for compensation for work anxiety. The case was first brought before the Court of Cassation in 2016, but the Court dismissed their claims (Cass. Soc., 17 February 2016, No. 14-23.962), as compensation for anxiety was, at that time, only available to employees who had been exposed to asbestos and were eligible for early retirement.

Indeed, the origin of the prejudice against anxiety lies in Article 41 of Law No. 98-1194 of 23 December 1998 on the financing of social security for 1999, which instituted an early retirement allowance for workers who had been exposed to asbestos, paid to employees 'from establishments manufacturing materials containing asbestos' which appear on a list established by decree. In 2010, the Court of Cassation recognised the existence of specific anxiety among employees who had worked in one of these establishments (Cass. Soc., 11 May 2010, No. 09-42.241). However, the Social Chamber of the Court of Cassation systematically refused to compensate employees who had been exposed to asbestos whose establishment was not listed in the decree. In April 2019, the plenary general assembly of the Court of Cassation finally extended the right to compensation for work anxiety disorder , which is no longer reserved solely for employees who have been exposed to asbestos and now employees who have been exposed to other substances can also claim the benefit (Cass. Ass. Plén., 05 April 2019, No. 18-17.442).

On 28 February 2020, the Court of Appeal to which the case had been referred for retrial ordered the company to compensate the workers for their work anxiety disorder. The Court justified its decision, stating that a breach of the employer's safety obligation had occurred, ruling that when the certificates of exposure to asbestos or benzene had been handed to the employees, they were informed of the possibility of post-work-related impacts on their health, that the employees' anxiety disorder was the direct consequence of the assessment of the situation by the medical and health authorities,

and finally that employees are justified to be permanently concerned about the risk linked to a declaration of an asbestos-related disease at any time, including the risk of a particularly serious pathology that could cause death.

In its judgments of 13 October 2021, the Court of Cassation censured the appeal judgment for lack of demonstration of a prejudice suffered personally by the plaintiff employees. The Court recalled that an employee who can prove exposure to asbestos or another toxic or harmful substance generating a high risk of developing a serious pathology may bring an action against his or her employer for the latter's failure to fulfil his or her safety obligation, but must prove that he or she has suffered a personal injury or mental anguish from anxiety resulting from such a risk to obtain compensation. However, a work anxiety disorder does not solely result from exposure to the risk created by a harmful or toxic substance, but consists of the psychological disorders caused by the knowledge of the high risk of developing a serious pathology. Thus, the drawing up of an exposure certificate and the information provided to employees about the possibility of post-work-related impacts on their health is general information and therefore insufficient for claiming the existence of a work anxiety disorder suffered personally by the employees.

The Court of Cassation therefore referred the parties back to the Court of Appeal. Thus, the Court did not close the door to the evidence by the employees of a personal prejudice by demonstrating the psychological disorders they actually suffered, particularly through medical certificates or testimonies.

2.2 Financial compensation for non-competition clause

Labour Division of the Court of Cassation, No. 20-12.059, 13 October 2021

In the present case, a development engineer, who was subject to a non-competition clause, brought an action before the Labour Court following his resignation to obtain payment of the financial compensation provided for in the contract.

The employer argued that the clause was null due to the exorbitant nature of the financial compensation requested, i.e. EUR 79 968, in consideration of the company's financial capacity and the provisions of the collective agreement. The employer also argued that such a clause could be considered a penalty clause comparable to a contractual termination indemnity that would be up to the judge 'to reduce in fair proportion' if necessary.

The Labour Court partly accepted the employer's request by moderating the amount of the non-competition indemnity. The Court of Appeal rejected this position.

On 13 October 2021, the Social Division of the Court of Cassation first recalled the nature of the salary and the sum due under this non-competition clause insofar as it is an indemnity to compensate the wages lost as a consequence of not being able to carry on the activity following the termination of the employment contract, or any activity competing with that carried out for the former employer. However, the Court did not consider this sum to be a lump-sum indemnity provided for in the event of non-performance of a contractual obligation. In other words, the Court did not consider this a penalty clause within the meaning of Article 1231-5 of the French Civil Code.

The Court of Cassation held that the financial compensation of the non-competition clause is not a penalty clause, so that the judge does not have the power to moderate or increase its amount if it appears excessive or derisory. As a consequence, it rejected the appeal lodged and thus confirmed the Court of Appeal's solution, which had ordered the employer to pay the employee EUR 79 968 for the non-competition clause stipulated in the contract, without moderating its amount.

2.3 Workers' representation

Constitutional Council, No. 2021-947 QPC, 19th November 2021

In the present case, a trade staff union organisation submitted a claim to the court to have 80 shop managers removed from the electoral lists for the election of members of the management college of a social and economic council.

The judicial court and later the Court of Cassation granted and then approved this request in accordance with the legal approach of the Social Chamber, which concluded that the exclusion was justified with regard, in particular, to the role of animation of the proximity representatives which the shop managers assumed by delegation of the employer (Cass. Soc., 31 March 2021 No. 19-25.233).

Following this decision, the national management union of the group concerned requested the transmission of a Priority Question of Constitutionality allowing any individual to question the Constitutional Council on the constitutionality of a legislative provision. This question concerned the constitutionality of the provision of Article L.2314-18 of the Labour Code, as interpreted by the case law of the Court of Cassation, which deprives certain workers of the right to vote in professional elections with regard to the principle of worker participation through their delegates in determining working conditions as defined by the Preamble to the Constitution of 27 October 1946.

In its decision of 19 November 2021, the Constitutional Council, with regard to the eighth paragraph of the Preamble to the 1946 Constitution, considered that the provisions of Article L.2314-18 as interpreted by the Court of Cassation,

> "*by depriving employees of any possibility of participating as voters in the election of the social and economic council, solely on the grounds that they have such a delegation or such a power of representation (...) infringe on the principle of employee participation in a manifestly disproportionate manner*".

Thus, the Constitutional Council concluded that Article L.2314-18 of the Labour Code was contrary to the Constitution.

2.4 Dismissal for prolonged absence due to illness

Labour Division of the Court of Cassation, No. 20-14.848, 17 November 2021

In the present case, an employee who had been absent from work due to a (non-occupational) illness, extended successively for 18 months, was dismissed by his employer in view of the disruption that his absence had caused to the company's operations and the need to permanently replace the employee.

In principle, no employee may be dismissed because of his or her state of health or disability, so that any act to the contrary is void (Labour Code, L.1132-1 and L.1132-4). Nevertheless, by way of exception, the law allows for the dismissal of an employee whose incapacity for work is established by the occupational physician and when the employer cannot redeploy him or her (Labour Code, L.1226-2 et seq.). Furthermore, although illness cannot in itself constitute grounds for dismissal, case law considers that dismissal may be justified when the illness leads to extended absence or repeated absences of the employee which, cumulatively, disrupt the operation of the company and make it necessary to permanently replace the employee.

Challenging the conditions of his dismissal, the employee won the case before the Court of Appeal, which concluded that there was no real and serious cause and ordered the employer to pay compensation for the notice period. The employer appealed to the Court of Cassation, arguing that the employee was unable to complete his notice period.

In its decision of 17 November 2021, the Court of Cassation set down the principle that when the dismissal, pronounced due to prolonged absence, which in turn disrupts the company's operations and necessitates the definitive replacement of the employee

concerned, is devoid of real and serious cause, and that the judge must grant the requesting employee the indemnity in lieu of notice and the related paid annual leave.

The employee is then entitled to payment of compensation in lieu of notice, without his or her absence from work due to illness during this period having to be taken into account.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In French law, a period of on-call duty is a period during which the employee, without being at his or her workplace and without being at the permanent and immediate disposal of the employer, must be able to intervene to perform work for the company (Labour Code, L.3121-9). Thus, case law considers that the obligation to remain permanently available by mobile phone to respond to the company's possible needs and to be ready to intervene in case of need constitutes on-call duty (Cass., Soc., 12 July 2018, No. 17-13.029).

With regard to the assimilation of on-call periods to actual work, the Labour Code provides that on-call time without employee intervention is not assimilated to a work period. This period is even expressly taken into account in the compulsory rest periods, so that only the duration of interventions constitutes actual work time that must be paid (Labour Code, L.3121-9 & L.3121-10).

According to established case law, a period of on-call duty can only be requalified as actual working time when the employee is at the employer's disposal, without being able to freely pursue his or her personal interests.

Like the CJEU case law, French law does not consider the on-call period as actual work as long as the worker is not subject to constraints that would prevent him/her from using this time as he/she wishes.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Under French law, any training activity as a condition for the exercise of an activity or function, pursuant to an international agreement or legal and regulatory provisions, constitutes effective working time and gives rise to the maintenance of remuneration by the employer during its duration (Labour Code, L.6321-2). More generally, training activities other than those mentioned in Article L.6321-2 of the Labour Code also, in principle, constitute effective working time, giving rise to the maintenance of remuneration (Labour Code, L.6321-6).

Like the case law of the CJEU, French law treats periods of vocational training as 'working time', giving rise to remuneration, regardless of whether or not the training requirement results from a legal obligation.

4 Other Relevant Information

Nothing to report.

Germany

Summary

(I) Following amendments to the existing law, workers will only be allowed to enter a workplace if they carry proof that they have recovered, are vaccinated or have tested negative for COVID-19.

(II) The Federal Labour Court has held that the calculation of annual leave must take cases into account in which individual working days were fully lost due to short-time work.

(III) The Federal Labour Court has held that bicycle delivery workers are entitled to have their employer provide them with the essential work equipment they need to perform their work.

(IV) The State Labour Court did not grant injunctive relief against the election of works council of a bicycle delivery service.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

The German Bundestag and Bundesrat have passed amendments to the Infection Protection Act and other laws. The new regulations include labour law and occupational health provisions and will apply as of 24 November 2021.

In future, workers, as well as employers will only be allowed to enter a workplace if they carry proof that they have recovered, are vaccinated or have tested negative for COVID-19 ('3G certificate').

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Annual leave during short-time work

Federal Labour Court, 9 AZR 225/21, 30 November 2021

In this judgment, the Federal Labour Court has held that the calculation of annual leave in cases in which individual working days have been fully lost due to short-time work must be taken into account.

The plaintiff would have been entitled to an annual leave of 28 working days according to the employment contract had she had a six-day work week. Her three-day work week corresponded to a leave entitlement of 14 working days. Due to the loss of work caused by the corona pandemic, the defendant introduced short-time work. For this purpose, the parties entered into short-time work agreements on the basis of which the plaintiff was, inter alia, fully exempt from work duties in the months of April, May and October 2020, and only worked on a total of five days in the months of November and December 2020.

On the basis of the short-time absence from work, the defendant recalculated the employee's leave, which amounted to an annual leave for 2020 as a total of 11.5 working days. Contrary to the plaintiff's claim, the Court held that the work days lost

due to the individually agreed short-time work were not to be equated with periods of actual work, neither under national law nor under Union law.

The decision is currently only available as a press release.

2.2 Employer's obligation to provide work equipment

Federal Labour Court, 5 AZR 334/21, 10 November 2021

The Federal Labour Court has held that bicycle delivery workers who deliver food and beverages and receive their orders via a smartphone app are entitled to have the employer provide them with the essential work equipment they need to perform their work.

According to the Court, this includes a bicycle and a suitable internet-enabled mobile phone. Deviations from this principle can be agreed on between the parties concerned. If such deviations are included in the employer's general terms and conditions, they are only effective, however, if the employee receives appropriate financial compensation for using his or her own bicycle and mobile phone.

The decision is currently only available as a press release.

2.3 Workers' representation

State Labour Court Berlin-Brandenburg, 13 TaBVGa 1534/21, 23 November 2021

In this decision, the Court has held that a works council election can only be suspended by a court if the election committee was clearly not in office when the election was initiated or if the deficiencies in the election procedure to be established would have led to an election being null and void. In all other cases, the employer must refer to the election contestation procedure, during which the elected works council remains in office until the procedure is completed.

The interim relief proceedings concerned the upcoming works council election at a bicycle delivery service. The employer had demanded that the election committee cancel the works council election. The employer was of the opinion that the election committee had not been properly formed and that there were considerable deficiencies in the election procedure.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

According to the Court, Article 2(1) of Directive 2003/88/EC must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained fire fighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, does not, in principle, constitute 'working time' within the meaning of that provision.

There is no evidence of any decisions of a higher court on a comparable set of facts.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

According to the CJEU, Article 2(1) of Directive 2003/88/EC must be interpreted as meaning that the period during which a worker attends vocational training required by

his or her employer, which takes place outside his or her usual place of work at the premises of the training services provider, during which he or she does not perform his or her regular duties, constitutes 'working time' within the meaning of that provision.

The decision corresponds to the legal situation in Germany according to which further training ordered by the employer is to be considered working time.

4 Other Relevant Information

4.1 Political programme in the area of labour law

The SPD, the Greens and the FDP have presented their coalition agreement, which also includes labour law policies.

The principle of the 8-hour day in the Working Hours Act shall be maintained. However, within the framework of an evaluation clause, it will allow for workers to organise their working time more flexibly on the basis of collective agreements under certain conditions and within deadlines to be observed. The coalition partners also want to introduce a limited possibility to deviate from the current regulations of the Working Hours Act with regard to the maximum daily working hours if collective agreements or works agreements based on collective agreements provide for this. The paper further reads as follows:

> *"In the dialogue with the social partners, we are examining the need for adaptation in view of the case law of the European Court of Justice on working time law. Flexible working time models (e.g. trust-based working time) must continue to be possible".*

Employees 'in suitable jobs' will be given a right to discuss mobile working and home office. Employers may only object to the employee's request if operational concerns to the contrary exist. This means that a refusal must not be irrelevant or arbitrary. However, 'there must be room to deviate from collective bargaining and company regulations'.

The parties also aim to increase the statutory minimum wage in a one-off adjustment to EUR 12 per hour. Following this, the independent Minimum Wage Commission will decide on any further steps. The paper further reads as follows:

> *"We support the EU Commission's proposal for a directive on appropriate poverty-proof minimum wages to strengthen the collective bargaining system. In doing so, we advocate—while respecting the European order of competences as well as different systems and traditions of industrial relations in the member states—binding minimum standards in the negotiations, as will apply in Germany with the new Minimum Wage Act after it is passed."*

The parties further plan to abolish the possibility of linking fixed-term contracts to budgetary means in the public service. To avoid chain fixed-term contracts, such contracts with the same employer will be limited to a maximum of six years. Only in very limited exceptions will it be possible to exceed this maximum duration.

As regards temporary agency work and posting, the parties state the following:

> *"With regard to the Act on Temporary Agency Work, within the scope of European case law, we will examine whether and which legal changes need to be made, taking into account the evaluation of the law. We will improve the protection of workers in case of cross-border postings and will reduce bureaucratic hurdles."*

As for platform work, the parties state that they

> *"constructively support the EU Commission's initiative to improve working conditions on platforms".*

Finally, the parties intend to strengthen collective bargaining and to 'further develop' workers' co-determination, not least on the board level:

> *"Germany occupies a globally significant position in corporate co-determination. We will preserve the existing national regulations. We want to prevent abusive circumvention of the co-determination law. The Federal Government will work to ensure that corporate co-determination is further developed (…)".*

Greece

Summary

A new ministerial decision is expected to define the minimum amount that employers will have to pay to their employees to cover the costs related to teleworking.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Teleworking

Pursuant to Law 4808/2021 (Article 67), the employer bears the cost for equipment, maintenance and telecommunications incurred by the employee as a result of teleworking.

The Ministry of Labour and Social Affairs has announced that at the beginning of December, it will issue a ministerial order which will set the minimum amount employers will have to pay to teleworkers to cover these costs. Specifically, they will have to pay EUR 13 per day for teleworking to cover the cost of home use, EUR 10 per day to cover the cost of telecommunications and EUR 5 per day to cover the cost of equipment maintenance. This amount is not considered part of the employee's salary and from the company's perspective, it qualifies as a deductible expense. Therefore, the employer does not pay any tax or insurance contributions on these costs.

The ministerial decision is pending and will be published in the Government Gazette.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

This judgement is in line with the Court's case law and clarifies the concept of employee readiness. After having emphasised that the obligation to remain at the workplace is a crucial element (e.g. case C-14/04, *Dellas and Others*), it has taken into account the employee's obligation to respond within a short period of time, even if he or she is not at the workplace (C-518/15, *Matzak*). Finally, the Court stated that it had to proceed with an overall assessment of all the facts, including the consequences of the response time limit, particularly whether the constraints imposed on that worker during that period are such as to affect his or her ability to freely manage the time during which his or her professional services are not required and to devote that time to his or her own interests (C-580/19, *Stadt Offenbach am Main*).

The above judgement follows the same teleological approach proceeding to an overall assessment of all the facts, particularly taking the average frequency of activity during the stand-by period into account as well as the absence of obligation to participate in the entirety of the interventions.

This judgement is of relevance for Greek labour law as it clarifies the qualification of stand-by time as working time.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Greece, some lawyers argue that this period does not constitute working time as the worker does not actually perform work. However, the vocational training is undertaken at the employer's request and the worker is subject, as part of that training, to the employer's instructions. The CJEU's recognition that the period during which a worker participates in vocational training required by his or her employer, which takes place away from his or her usual place of work at the premises of the training services provider, during which he or she does not perform his or her normal duties, is to be considered working time is important.

4 Other Relevant Information

Nothing to report.

Hungary

Summary

From 01 November 2021, a new Act allows all Hungarian employers to require their employees to be vaccinated against COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination

Government Decree No. 598/2021 allows all Hungarian employers from 01 November 2021 onward to require their employees to be vaccinated against COVID-19. In other words, employers may require a COVID-19 vaccination as a condition to perform work to protect the health and safety at work of employees, depending on the basic features of the workplace and the relevant post. Government Decree No. 599/2021 contains similar measures regarding the public sector.

If the employee cannot prove within 45 days that he/she is vaccinated with at least one dose, the employer may grant him or her unpaid leave and exempt him/her from working. After one year of unpaid leave due to the lack of vaccination, the employer may terminate the employment relationship without any valid reason with immediate effect.

It appears that in practice, only few employers require vaccination in accordance with the government decree, since labour shortage is a major problem in many sectors, and employers are concerned about losing workers, since only around 62 per cent of the entire population has so far been vaccinated.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

According to Article 110-112 of the Labour Code, an employee may be required to perform stand-by duty and remain available to work beyond his or her regular daily working hours. The employer shall be entitled to designate the place where the employee shall be required to be available (i.e. to be on-call), unless the employee may choose where he or she will remain in order to be able to report for work without delay when called on by the employer (stand-by).

The second option complies with the type of stand-by time in the present judgement. The duration of stand-by duty may not exceed 168 hours, which shall be taken as the average in the event that banking of working time is used. The employee may be ordered to perform stand-by duty not more than four times a month if it covers the

weekly rest day (weekly rest period). Stand-by time is considered working time when the employer orders work to be performed.

Thus, the provisions of the Hungarian Labour Code comply with the CJEU judgement on stand-by time.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Hungarian labour law, both in the private and the public sector, mandatory vocational training is considered working time. Although there is no specific provision on mandatory vocational training in the working time provisions, this right derives from the definition of working time (Article 86(1) of the Labour Code): "'*Working time' shall mean the duration from the commencement until the end of the period prescribed for working, covering also any preparatory and finishing activities related to working.*"). It is widely followed by legal practice (Kártyás, Gábor: *Becsengetés – A munkavállaló képzése 1,* available here).

It requires the employer to allow the employees to attend training (*Kötelező-e tanulni?* Munkaadó Lapja, 15 August 2002, available here). If the venue of the training is elsewhere other than the workplace, this period is considered a derogation from the employment contract, which may not exceed 44 days per year (Article 53 of the Labour Code) (In the literature, see Halmos, Szilvia: *Tanuló vagy dolgozó? – a munka melletti tanulás variációi,* available here).

These provisions apply to public servants within the scope of Act no. 33/1992. Working time provisions in other acts on civil servants also comply with this legal position (see, in particular, Act 199 of 2011 on Civil Servants, Article 6, point 23). Thus, the provisions of the Hungarian Labour Code and other acts on public sector employment as well as judicial practice comply with the CJEU judgement on mandatory vocational training.

4 Other Relevant Information

Nothing to report.

Iceland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Icelandic legislation does not explicitly define stand-by time or does not specify whether stand-by time constitutes working time or not. However, most major collective agreements covering nearly, if not all, employees on the labour market, have provisions that provide for certain payments for employees who perform stand-by time. Such provisions generally indicate higher pay when an employee is required to respond immediately to a call, i.e. 33 per cent of hourly day-time pay, and a lower pay rate when the employee is not required to respond immediately, i.e. 16.5 per cent of hourly day-time pay. Collective agreements additionally indicate the minimum number of hours an employer must pay if the employee is called on to perform work during stand-by time.

It seems that there is no case law that specifically addresses stand-by time and whether it should be considered working time as defined in the Working Time Directive or not in Iceland. As collective agreements are also silent on this specific issue, it would be beneficial for the social partners to define stand-by time in this context in the upcoming rounds of collective bargaining next year in light of the recent case law by the CJEU on this topic.

Furthermore, when looking at the larger collective agreements, there are no general and clear constraints to interpreting the provisions on stand-by time in line with the recent CJEU case law.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Certain collective agreements, such as the collective agreement between VR and the Confederation of Icelandic Enterprise, include payment for certain courses completed during working hours and outside of working hours (see Article 1(5)). There is currently no general written rule on the Icelandic labour market as to how such a situation as described in the present case would be dealt with by Icelandic courts. However, the ruling should be in line with the general practice on the Icelandic labour market concerning vocational training required by the employer.

It is paramount for the social partners to define such aspects more clearly in the context of working time in the upcoming rounds of collective bargaining next year.

However, there are no general and clear constraints in the current legal framework that would prevent the interpretation of 'working time' in line with the ruling.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Directive 2003/88/EC is implemented in Ireland by the Organisation of Working Time Act 1997, section 2(1), which defines 'working time' as meaning "*any time that the employee is (a) at his or her place of work or at his or her employer's disposal, and (b) carrying on or performing the activities or duties of his or her work*".

The classification of 'stand-by' or 'on-call' time continues to pose problems for national courts or tribunals, particularly in the case of fire fighters. Indeed, although Ireland decided not to intervene, observations were submitted by Belgium, France, the Netherlands and Finland.

The CJEU applied the same criteria as formulated in case C-580/19, *Stadt Offenbach am Main*. In that case, the CJEU ruled that the concept of 'working time' covered the entirety of periods of stand-by time during which "*the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests*". These were matters for the referring court to assess.

In that regard, it should be noted that, unlike the position it took in case C-518/15, *Matzak*, the Council did not require the claimant to be at a particular location when he was on stand-by. He was free to engage in other activities during his stand-by time, such as taxi driving, and could decline up to 25 per cent of call-outs. These could all constitute objective factors from which it could be concluded that the claimant was in a position to manage his own time without major constraints.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The issue of whether time spent on 'off-the-job' training was 'working time' within the meaning of section 2(1) of the 1997 Act came before the Labour Court in *Fitzpatrick v Whelan* DWT0536, albeit in the context of a 'statutory apprentice'.

The Labour Court noted that the training was an integral part of the apprenticeship and that during this period, the claimant was at a place 'determined by the employer' and was carrying out the instructions of the employer. Accordingly, the time spent on off-the-job training was considered working time for the purposes of the 1997 Act.

4 Other Relevant Information

4.1 Minimum wage in the construction sector

In 2013, the Supreme Court declared the system for extending collective agreements between representative employer associations and trade unions to entire sectors of the economy to be constitutionally invalid. The vacuum created by this decision – *McGowan v Labour Court* [2013] IESC 21 – was filled by the Industrial Relations (Amendment) Act 2015. This Act empowers the Minister for Enterprise, Trade and Employment to make a 'sectoral employment order' setting minimum rates of pay, including sick pay and pension, for a specific sector of the economy. The process requires an application to be made to the Labour Court to conduct an investigation into the rates of pay and sick pay and pension provision in a sector of the economy. If the Court is satisfied with various matters, such as the applicants' representativeness, it makes a recommendation to the Minister who, after receiving parliamentary approval, issues the order.

Such an order has now been issued for the construction sector: Sectoral Employment Order (Construction Sector) 2021 (S.I. No. 598 of 2021). The unions had sought three 4 per cent increases from 01 October 2021, 2022 and 2023, whereas the employer's association sought two 1.6 per cent increases from 01 April 2022 and 2023. The Labour Court recommended two 2.8 per cent increases from 01 February 2022 and 2023. The unions had also sought a guaranteed 39-hour week in case of wet weather. The Court recommended against this claim, noting that the employers had argued that the 2015 Act did not allow the Court to set such conditions.

4.2 Pandemic Unemployment Payment

As of 23 November 2021, 57 104 persons (42.3 per cent of whom are female) were in receipt of the Pandemic Unemployment Payment (PUP). The sectors with the highest number of PUP recipients are wholesale and retail trade (9 588), accommodation and food services (8 680) and administration and support services (6 664). The number in construction has dropped from 42 333, at the end of April, to 5 748. In terms of the age profile of PUP recipients, 7.8 per cent were under 25. Additionally, 4 094 persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 203 001 persons have been medically certified for receipt of this benefit, 53.3 per cent of whom were female.

Italy

Summary

(I) The Italian legislator has specified additional rules regarding the use of COVID-19 certificates (so-called Green Pass) in the workplace.

(II) A specific derogatory regime has been introduced in the case of a transfer of an air transport company in a special administration procedure to a public company.

(III) The *Corte di Cassazione* ruled that the employer can modify the working hours of a full-time employee as long as this does not represent discrimination.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Access to the workplace

The Act of 19 November 2021 No. 165 converts the Law Decree 21 September 2021 No. 127, regarding the use of COVID-19 certificates (Green Pass) to access all workplaces into law.

The Act introduces the following modifications to the Law Decree:

- Workers can voluntarily deliver a copy of their certificate to the employer to be exempt from checks for the pass's validity period;
- If the certificate expires during working hours, the worker can continue his/her activity until the end of the shift and no fine will be imposed if, during a check, he/she has an expired certificate;
- Private employers can replace employees who do not possess a COVID-19 certificate with fixed-term employees of 10 working days, renewable several times (the Law Decree initially provided that such fixed-term contracts were renewable only once);
- In the context of temporary agency work, the responsibility for controlling the COVID-19 certificate lies with the user undertaking. The temporary work agency must inform the worker about the obligation to possess and present the certificate.

1.2 Other legislative developments

1.2.1 Equal opportunities

The Act of 05 November 2021 No. 162 modifies the Equal Opportunities Code ('*Codice delle pari opportunità*'), approved by Legislative Decree No. 198, of 11 April 2006.

The amendment provides that the national Equality Counsellor shall submit a report to Parliament every two years on the results of monitoring the application of legislation on equality and equal opportunity at work (Article 1). The first report must be submitted by 30 June 2022.

Secondly, the definition of discrimination has been modified to include any treatment or modification of the organisation of the working conditions and times which, due to sex, age, personal or family care needs, pregnancy, maternity or paternity, including adopted children, places or can place the worker in at least one of the following conditions:

a) position of disadvantage compared to other workers;

b) limitation of opportunities for participation in life or company choices;

c) limitation of access to advancement mechanisms and career progression.

Moreover, employers with over 50 employees (in the past, this number was 100) must prepare a report every 2 years. Companies with less than 50 employees can voluntarily prepare such a report (Article 3).

Finally, from 01 January 2022 onwards, private companies that will obtain a gender equality certification (attesting the policies and measures taken by employers to reduce the gap in relation to growth opportunities in the company, the equal pay, equal duties, management policies on gender differences and the protection of motherhood) are granted an exemption from the payment of social security contributions paid by the employer (Articles 4-5).

1.2.2 Professional qualifications

The Act of 08 November 2021 No. 163 introduces some enabling degrees (without state exam).

The final exam to complete the master's degrees in dentistry, pharmacy and industrial pharmacy, veterinary medicine and in psychology qualifies the graduate to immediately receive his or her licence to practice as a dentist, pharmacist, veterinarian and psychologist.

The final exam for receiving a degree in technical professions in the construction industry, in agriculture, food and forestry, and in industrial and information technology professions qualifies the graduate to immediately be licenced and practice as surveyors, agricultural technicians, agricultural experts and industrial experts.

1.2.3 Transfer of undertakings

The Act of 09 November 2021 No. 156 converts the Law Decree of 10 September 2021 No. 121 (so-called Infrastructure Decree) into law. According to this Act, the Commissioners of air transport companies in special administration procedures can transfer individual assets of the aviation branch (people and goods) to the public company set up for the exercise of the business activity in the air transport sector controlled by the Ministry of Economy (in this case, there is no company transfer and the relative protection of workers does not apply).

2 Court Rulings

2.1 Working time

Corte di Cassazione, No. 31349, 03 November 2021

In this judgement, the Court of Cassation ruled that the employer can modify the working hours of a full-time employee, as long as there is no discrimination.

For full-time employment contracts, the limits to the variation of working time envisaged for part-time contracts do not apply. Only in part-time work arrangements is the free time scheduling considered essential for the worker to carry out another job or other activities. Conversely, in full-time work, to provide a similar protection of free time scheduling would prevent the employer from organising such activities.

The Court stated that if the change in working hours depends on the legitimate transfer of the employee to another department, the employer is exercising his/her organisational power, which cannot be questioned by the judge unless there is discrimination.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

According to Italian case law, stand-by time can be active or passive, as specified in the September 2021 Flash Report and March 2021 Flash Report.

During active stand-by time, the employee must respond immediately to the employer's call and perform the required service. In case of passive stand-by time, the employee has the obligation to make him- or herself available in view of a possible need to perform work. Only the active stand-by time is part of the employee's working time.

In the present case, the stand-by time would have been considered passive because the fire fighter did not have to be at a specific place during his periods of stand-by duty, he was not required to participate in all interventions carried out by his assigned fire station, and he was permitted to carry out another professional activity that did not exceed 48 hours per week during his stand-by duty. According ot the Italian case-law, these periods of stand-by time would not be considered as working time. In this sense, the Italian case law seems to comply with the CJEU's jurisprudence.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The interpretation of the Court in the present case is followed by Italian case law.

As regards the public sector, the National Agency for Contractual Representation of Public Administration (ARAN) provides that participation in professional training courses organised or authorised by the Administration outside the workplace must be considered working time. Consequently, if the employees' attendance exceeds their working time, it must be considered overtime.

By Act No. 53, of 22 April 2021, the Italian Parliament delegated the Italian government to transpose Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, providing that:

> *"Member States shall ensure that where an employer is required by Union or national law or by collective agreements to provide training to a worker to carry out the work for which he or she is employed, such training shall be provided to the worker free of charge, shall count as working time and, where possible, shall take place during working hours"* (Article 13).

This transposition must take place by 01 August 2022.

4 Other Relevant Information

Nothing to report.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Latvian legal regulations do not allow the organisation of shift (on-call) work as discussed in the present case. According to Latvian labour law ((*Darba likums*), Official Gazette No. 105, 06 July 2001), shift work must, as a principle, be considered working time and must comply with all daily and weekly maximum limits.

Latvian labour law does not provide for the concept of 'on-call (shift) work', thus there is no possibility to determine on-call shift work without considering it as 'working time', which might not be in line with the number of recent CJEU rulings on the concept of 'working time' establishing that it is EU law which defines 'working time' within the meaning of Directive 2003/88/EC.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Latvian legal regulations do not explicitly address whether any vocational training that is required by the employer must be considered working time and whether time spent in vocational training outside regular working time must be considered working time.

According to Article 137(2) of the Labour Law (the Labour Law (*Darba likums*), Official Gazette No. 105, 06 July 2001), if an employee works and simultaneously participates in vocational training, the time spent in training must be considered working time. Under Article 74(1)(3) of the Labour Law, the time spent in vocational training is 'justified absence', entitling the employee to receive his or her average salary during that period. Both rights are only provided in case the employee participates in vocational training in accordance with the employer's instruction.

In the context of the present decision, Latvian labour law does not explicitly state that such training must be considered working time. National legal regulations also do not provide clear answers to the question whether time spent in training outside normal working time must be considered working time. Labour law does not provide an explicit answer whether training carried out in accordance with national legal regulations could be considered a training ordered by an employer.

The CJEU decision in the present case clarifies the employment conditions for employees in training and it is likely that the Latvian legislator will amend the national legal regulations accordingly.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The present judgement is in line with the previous case law, as expressed, for example, in cases C-344/19, D.*J. v Radiotelevizija Slovenija*, C-580/19, *RJ v Stadt Offenbach am Main*) and C-107/19, *XR v Dopravní podnik hl. m. Prahy, akciová společnost*. in the present case, the CJEU stated that stand-by time is considered 'working time' only if the constraints imposed on the worker during that period are of such a nature as to objectively and very significantly constrain the ability to freely manage his/her time and to devote that time to his or her own interests.

According to Article 15 of the Ordinance I to the Employment Act (*Verordnung I zum Arbeitsgesetz*, ArGV I, LR 822.101.1), stand-by time shall be deemed to be working time if it is performed in the establishment. If the stand-by time is performed outside the establishment, the time made available shall only be counted as working time to the extent that the employee is actually called on to work.

This provision was adopted from Swiss law. Since Liechtenstein is a small country, comparatively few cases come before the courts. The Liechtenstein courts generally follow the case law of the Swiss courts, in particular, the Swiss Federal Supreme Court, as regards the interpretation and application of a provision adopted from Swiss law.

In judgement 4A_94/2010 of 04 May 2010, the Swiss Federal Supreme Court decided a case involving a medical doctor employed by a hospital, who claimed that the stand-by time he performed constituted working time. The doctor's private apartment was 100 metres away from the hospital. He could stay at home during his stand-by duty but was required to be ready for work within 15 minutes.

The Swiss Federal Supreme Court stated that outside the establishment, the employee has more leisure and recreational opportunities. However, stand-by time performed outside the establishment is only to be assumed if the employee can actually make use of these opportunities. This is not the case if the employee must intervene during the stand-by time within a very short period of time, e.g. within 15 minutes after the call, and therefore has little opportunity to leave the establishment under the given circumstances and can thus also not benefit from his or her free time. The situation is different, however, if the employee can actually perform his or her stand-by duty at home, since this offers him or her various possibilities that are excluded on the company premises, in particular with regard to social contacts and leisure activities. In the present case, therefore, the stand-by time did not constitute working time.

These findings correspond with the CJEU's case law on stand-by time. All decisions are essentially based on the same evaluation criteria. In this respect, Liechtenstein's law is fully in line with the CJEU case law, including the present case.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

According to Liechtenstein law, the decisive factor whether vocational training constitutes working time is whether the employee is participating in the training voluntarily or upon his or her employer's request. Article 13(4) of Ordinance I to the Employment Act (*Verordnung I zum Arbeitsgesetz*, ArGV I, LR 822.101.1) provides that if an employee is required to undergo vocational training upon the employer's request, the training time constitutes working time. This also applies to employees who, exceptionally, are not subject to the Employment Act; this is because by ordering vocational training, the employer specifies the content of the activity which the employee must perform on the basis of the employment relationship.

The aforementioned provision of Ordinance I to the Employment Act does not distinguish whether the vocational training is performed at or outside of the employer's premises. Therefore, the vocational training ordered by the employer constitutes working time under Liechtenstein law, even if it takes place outside the employee's usual workplace, i.e. at the premises of the training services provider, and the employee does not perform his or her regular duties for the duration of the training.

Liechtenstein law thus corresponds to the CJEU present judgement.

4 Other Relevant Information

Nothing to report.

Lithuania

Summary

After the President's veto was overruled by Parliament, the law requiring unvaccinated workers to pay for compulsory regular COVID-19 testing came into effect on 01 December 2021.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Cost of COVID-19 testing

On 01 December 2021, the regulation requiring unvaccinated citizens to pay for their COVID-tests has entered into force.

Regular testing is necessary for unvaccinated people to receive their COVID-19 certificate (so-called *galimybiu pasas (*GP*),* in English: Passport of Possibilities), which allows the holder to engage in social contact activities. The certificate is also required for performing work in certain sectors. Unvaccinated employees have to cover the costs of regular COVID-19 testing (unless there are medical reasons why they cannot be vaccinated), if the employer is not willing to cover them (Article 18(8) of the Law on the Prevention and Control of Communicable Diseases in Humans -Registry of Legal Acts, 2021, No 23538).

Trade unions oppose the new legislation, but it entered into force after the Presidentonsveto was overturned by Parliament, which voted in favour of the re-adoption of the bill on 11 November 2021.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

As far as the qualification of the working time of fire fighters is concerned, the situation in Lithuania seems to differ slightly. There are three types of fire fighters in Lithuania: public servants to whom the Statute of Internal Services applies; municipal fire fighters (employees), to whom the employment legislation applies; and volunteer fire fighters.

There is a considerable difference between these three types of fire fighters. The first group enjoys the legal status of public servants, which provides for the full package of guarantees (stand-by time at home is not considered working time but is paid at a rate of 50 per cent of ordinary wages) (Article 48 of the Statute of Internal Service (Registry of Legal Acts, 2018, No 12049)).

Municipal fire fighters are entitled to another type of protection in accordance with the Labour Code. Article 118 (4) of the Labour Code establishes a notion of 'passive stand-by at home' (*pasyvus budėjimas namie*) – the employee is absent from the workplace,

but is ready to perform certain tasks or to arrive at the workplace when called on during his/her rest period. The legislator explicitly labels this time as a rest period, with the exception of the time of actual performance of work but sets out certain guarantees to offset possible inconveniences on the part of the employee. Such passive stand-by duties at home may not be assigned for more than a consecutive two-week period within a four-week period. An agreement on such a duty shall be included in the employment contract, and the employee shall be paid an additional pay in the amount of no less than 20 per cent of the base (rate) wages for each week of stand-by duty. The actual performance of activities shall be paid in the same amount as his or her actual time worked, but not exceeding 60 hours per week. An employee may not be assigned to passive stand-by duty at home after having worked for 11 consecutive and uninterrupted hours. Persons under the age of 18 years shall not be assigned to perform passive stand-by duty at home. There is neither permission nor a prohibition for fire fighters to engage in additional activities in his/her stand-by period. The obligation to arrive to the assigned fire station within 10 minutes or another time limit is also not specified. The principle of an individual or ad hoc assessment of the constraints imposed on the fire fighter during his/her stand-by time is neither developed by the legislator, nor by the courts.

Volunteer fire fighters receive their legal status sui generis, which is similar to the status based on the civil relationship type of unpaid activities (Article 18-3 of the Law on Fire Safety (State Gazette, 2002, No. 123-5518)). The work of volunteer fire fighters is not considered employment, and the time they spend carrying out activities (and stand-by time) is not considered working time. Basically, these volunteer fire fighters are only covered by social state insurance and entitled to compensation for the time spent performing their actual activities as fire fighters.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Lithuania, employment legislation clearly identifies any time spent on vocational training under the employerent on vocational training under In accordance with Article 111 of the Labour Code, working time shall refer to any period during which an employee is under the employer time shall ă D.rforms duties under an employment contract. Pursuant to Article 111 (2) of the Labour Code, working time shall in any case include, inter alia, 'time spent on vocational training under the employer to Article 11'.

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

(I) Temporary rules on short-time work schemes have extended the maximum number of reduced working hours in the context of short-time work for 2021.

(II) The optional scheme according to which employers may require their employees to demonstrate that they have been vaccinated, recovered or tested against COVID-19 will become compulsory in all workplaces from mid-January 2022.

(III) Negotiations should resume to enable cross-border commuters to continue teleworking without the application of the tax and social security law of their place of residence.

1 National Legislation

1.1 Measures to respond to COVID-19 crisis

1.1.1 COVID-19 restrictions

Some recent political announcements have been issued on the health crisis. The government just announced that it is tightening the rules to fight COVID-19 and to encourage vaccination. The relevant bill will be tabled shortly.

1.1.2 Short-time work

On 24 November 2021, Bill No. 7858, discussed in the July 2021 Flash Report, passed.

The Law provides that, as a temporary measure for the year 2021, the number of eligible hours per year is 1 714 hours instead of the standard 1 022 hours, on condition that a job retention plan is in place (*plan de maintien dans l'emploi)* accompanying a fundamental restructuring (*restructuration fondamentale)*.

This rule will apply retroactively from 01 January 2021 and end on 31 December 2021.

As a non-temporary change to the Labour Code, the limit will remain at 1 714 hours under the same condition that the company has established a job retention plan accompanying a fundamental restructuring, but with the additional condition that this plan must result from an agreement between the social partners ratified within the framework of a tripartite sectoral meeting between the social partners and the government, duly approved.

Employees who have received a notice of redundancy cannot benefit from this measure; this exception is explained by the fact that partial unemployment aims precisely at maintaining employment. However, employees who resign during a period of short-time working remain eligible for monthly settlements.

The Law furthermore completes the mandatory content of job retention plans by requiring a section intended to provide an accurate projection of the company's future development to guarantee its sustainability in the short-, medium- and long term, particularly in relation to investments to be made with a view to the company's future development. The plan can only be approved if it contains a precise timetable and if the social partners set up a monitoring committee. It must also include a detailed and quantified training programme and, in case of voluntary departures, individual external support for employees.

1.1.3 COVID-19 certificate

As announced in the October 2021 Flash Report, the government has opened up the possibility for employers to subject all or part of the company to the so-called 'COVID-check' scheme, which allows for certain distancing and protection rules to be disregarded. Employees must demonstrate that they have been vaccinated, recovered or tested.

From mid-January onwards, this scheme will become compulsory in all workplaces. Thus, compliance with distancing rules will no longer be sufficient and all employees will have to present a valid code.

To facilitate management for the employer, it will be specified that—with the employee's agreement—the employer can record his or her status (date of vaccination, date of recovery) to avoid daily controls. This change will be implemented over the next days or weeks.

1.1.4 Teleworking

Luxembourg is facing the difficulty that half of its workforce are cross-border commuters. If they exceed certain thresholds of teleworking rates, the tax and social security law of their place of residence will apply.

The derogation agreements negotiated with neighbouring countries will expire at the end of the year, but negotiations are being resumed to extend the derogation measures.

For the time being, the government does not intend to make teleworking compulsory.

1.2 Other legislative developments

1.2.1 National social dialogue

On 24 November 2021, Bill No. 7772, examined in the February 2021 Flash Report, has passed. The Law adapts the composition of the 'standing committee on labour and employment' (*comité permanent du travail et de l'emploi*) to make the rules on government representatives more flexible.

The government will be represented by the Minister of Labour and, eventually, one or more ministers depending on the issues that have to be discussed in the committee.

This committee plays an important role in the national social dialogue, especially for regular or urgent discussions between the social partners, whereas fundamental changes are discussed with the so-called 'tripartite'; the Economic and Social Council (*Conseil Economique et Social)* also aims to arrive at a consensus on certain issues.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

A similar case has not yet arisen in Luxembourg.

However, there is no doubt that the courts will take the criteria established by the Court into account, since in matters of working hours in general, and stand-by duty in particular, they follow CJEU case law to the letter.

Even if the qualification is debatable, volunteer fire fighters are not considered employees in Luxembourg. When they are on call, they have a duty, in principle, to intervene within 10 minutes (see Article 4.3.2.2. of the operational regulations).

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Luxembourg, the question whether training time imposed by the employer constitutes working time has so far not been clearly established in case law.

Under the system of continued vocational training (*formation professionnelle continue)*, which may give rise to public subsidies, the Labour Code provides that for subsidised training, half of the working hours must fall within normal working hours and are treated as 'periods of service' (i.e. working time). Although compensation is due for training hours outside normal working hours (50 per cent rest or 100 per cent pay), Article L. 542-10 (3) stipulates that these hours are not considered working time.

This article may have to be adapted in light of the present CJEU case, at least for cases of training imposed by the employer.

4 Other Relevant Information

Nothing to report.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

This ruling explores how stand-by time can be used by fire fighters (workers) in relation to their obligations to other employers. In this particular case, the CJEU held that the fire fighter's stand-by time does not constitute working time because the employee can engage in other gainful employment during their stand-by time, irrespective of the fact that the employee would have to reach the station within ten minutes, given that in any case, the employee is not required to participate in all interventions.

Such disputes have not yet been decided by the Industrial Tribunal or by the Court of Appeal. However, this ruling shall be taken into consideration should similar cases arise.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

This ruling clarifies that the employee's freedom to dispose of his or her time is the determining element in the qualification of working time, because it is this freedom that determines whether an employee can effectively rest or otherwise.

The application of the principles contained in this ruling has yet to arise in Malta. However, the implications are very clear and very interesting.

4 Other Relevant Information

Nothing to report.

Netherlands

Summary

(I) New COVID-19 support measures have been reintroduced for business affected by new restrictions.

(II) The Amsterdam Court of Appeal has ruled that the Dutch regulations providing that the employer's obligation to record working hours and the regulations on maximum working hours and minimum rest periods do not apply to employees who earn at least three times the minimum wage might not be in compliance with the EU Working Time Directive.

(III) A District Court ruled that refusing to wear a protective facemask is a gross misconduct.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 New financial support measures

The Dutch government has announced that new COVID-19-related support measures will be introduced for businesses affected by the stricter rules that have been in force since 13 November 2021. This includes the Fixed Costs Allowance (TVL), which aims to support businesses by helping them pay their fixed operating costs in the fourth quarter of 2021.

Additional support will be provided for events that cannot take place due to the new measures. In addition, support for the agricultural sector, the cultural sector and the sports sector will also be made available. The additional support amounts to approximately EUR 1.3 billion.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Working time

Amsterdam Court of Appeal, ECLI:GHAMS:NL:2021:3519, 16 November 2021

In a dispute between Uber and one of its employees (an executive assistant), the Court of Appeal raised the question whether Dutch working time rules are in line with Article 17(1)(a) of Directive 2003/88.

Article 17(1)(a) provides an exception to the obligations on working time included in the Directive, but only in the event that the duration of the working time is not measured and/or predetermined, or can be determined by the workers themselves, and in particular in the case of managing executives or other persons with autonomous decision-taking powers. Article 2:1:1(a) of the Working Hours Decree stipulates, among other things, that the employer's obligation to record working hours and the rules on maximum working hours and minimum rest periods do not apply to employees who earn at least three times the minimum wage on an annual basis.

This is a much broader exception than formulated in Article 17 (1) (a) of the Directive. The Court has not issued a final answer yet, but has given the parties the opportunity to respond to this point.

Although there are no comments yet on this decision in the literature, the Court has raised a valid point. Not every worker who earns more than three times the minimum wage has working hours that are not measured or predetermined, nor can they all be considered managing executives or as having autonomous decision-making power.

2.2 Employer's authority to issue instructions

Court of Noord-Holland, ECLI:NL:RBNHO:2021:10055, 05 November 2021

An employee of a cleaning company, Asito, refused to wear a facemask while performing work (cleaning aircrafts). The Court rescinded the contract on the basis of misconduct and ruled that the employee was not entitled to the statutory transition payment because his refusal to wear a facemask also qualified as gross misconduct.

The Court stated that the company has authority to issue reasonable regulations on the performance of work and to promote good order within the company, and that the employee is required to comply with these (Article 7:660 Dutch Civil Code). Therefore, the company was allowed to impose the obligation on its employees to wear a facemask during work, in line with the guidelines of its client Schiphol Airport and the Dutch National Institute for Public Health and the Environment applicable at the time.

The importance of the ruling lies in the judgement that the instruction to wear a facemask is part of the employer's authority to issue instructions.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Dutch working time regulations (Working Time Act and Working Time Decree) distinguishes the following three types of stand-by work:

- on-call work (*consignatie*): between two shifts or during a break, the worker needs to be available to carry out work as soon as possible when called on in case of unforeseen circumstances (Article 1.7 para. 1 under g WTA);
- stand-by work (*bereikbaarheidsdienst*): the worker is required to be available during a maximum period of 24 hours, if necessary, next to his or her regular shift, to carry out work if called upon (normal part of the job, no unforeseen circumstances) (Article 1:1 WTD), and
- stand-by work on site (*aanwezigheidsdienst*): similar to stand-by work, but the worker must be available at the work premises (Article 1:1 WTD).

The entire stand-by work shift in the third category has been considered working time since 2006.

The first two shifts are similar to the stand-by duty addressed in the present CJEU case. The second category (stand-by work) is only used for certain medical professions and can only be agreed upon in a collective labour agreement. On-call work can be applied in a broader manner. Article 5:9 WTA provides rules on on-call work. When an actual call takes place and the worker has to perform work activities, that time is considered working time from the moment the call comes in until the work shift ends. A period without a call is not considered working time. Furthermore, Article 5:9 WTA provides limitations to the frequency and duration of on-call work.

As reported in September 2021 Flash Report and March 2021 Flash Report, it is contested in literature whether this is sufficient to comply with Directive 2003/88 (W.L. Roozendaal, '*Arbeidstijdregulering en oproeparbeid*'. HvJ EU 21 februari 2018, C-518/15

(Stad Nijvel/Rudy Matzak), *Arbeidsrechtelijke Annotaties* 2019 (13) 1. (not available online via open-access)).

The present case might slightly lessen the concern since under the circumstances described in the present ruling, the fact that a stand-by period without a call is not considered working time is justified.

So far, there have been no reactions to these decisions in the academic or societal debate.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In the Netherlands, periods of mandatory vocational training fall within the meaning of working time as described in Article 1:7, under k, Working Hours Act. This is in line with the ruling of the CJEU and Article 2(1) of Directive 2003/88. Additionally, the employer will have to compensate the employee for the time spent at the training by paying him or her wages as specified in Article 7:610 Dutch Civil Code.

It is possible to deviate from the Working Hours Act by means of a collective labour agreement. Therefore, an employee might not be (fully) compensated for mandatory vocational training if such an agreement is applicable. However, the question whether the employee is entitled to remuneration during mandatory vocational training falls within the remit of national law. The CJEU determined that remuneration, which was also an important element in the present case, falls outside the scope of the Directive.

4 Other Relevant Information

4.1 Transparent and predictable working conditions

The Dutch Council of Ministers has approved the implementation of Directive EU 2019/1152 on transparent and predictable employment conditions.

New legislation is needed to achieve the implementation. The proposed bill that aims to do so will modify several national laws, including Book 7 of the Dutch Civil Code. The process for the bill to pass has been initiated and the aim is for the new legislation to enter into force on 01 August 2022.

Norway

Summary

(I) New restrictions have been introduced in response to the rising rates of COVID-19 infections.

(II) A temporary compensation scheme for self-employed persons to mitigate the effect of the COVID-19 crisis has been extended until 01 February 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 restrictions

The final step of the government's reopening plan was enacted on 25 September 2021 (see further September 2021 Flash Report). However, the infection rates began increasing again from mid-October, and the increase has continued in November.

Vaccination rates in Norway are high. By the end of October, 87.7 per cent of the population above 18 years old were fully vaccinated (see updated statistics here). The vaccine has been offered to children aged 16 to 17 since August. Children 12 to 15 have been offered one dose of the vaccine since the beginning of September. Furthermore, from October, persons above the age of 65 years have been offered a third vaccination dose – a 'booster dose'.

Due to the increasing infection rates, new restrictions have been introduced in some municipalities. For the time being, the government is mainly relying on restrictions decided at the municipal level. However, as of 12 November 2021, some national measures have been introduced, most importantly:

- Allowing municipalities to introduce a requirement to hold a COVID-19 certificate;
- Plans to offer all persons above the age of 18 years a third vaccination dose; a 'booster dose';
- Stricter rules on testing;
- New rules for unvaccinated health personnel.

To limit and delay the spread of the omicron variant of the virus, the government has introduced additional national measures from 29 November 2021, most importantly:

- Longer periods of isolation for those who test positive and where there is reason to believe that they have been infected with the omicron variant;
- Stricter rules on quarantine and testing for household members and close contacts of persons who are believed to have been infected by the omicron variant.

The government has also introduced further national measures aimed at maintaining control over the pandemic from 30 November 2021, most importantly:

- Stricter rules on testing, isolation and quarantine;
- Recommendation to wear facemasks when in contact with health and care services;
- Recommendation to wear facemasks in public transport, taxis, shops and malls when social distancing is not possible;
- Recommendation to regularly test school pupils in areas with increasing infection rates and a high workload in health and care services;

- Recommendation to municipalities with increasing infection rates and a high workload in health and care services to consider encouraging working from home.

The updated national measures can be found here.

The advice against non-essential travel abroad was already removed for countries in the EEA, Schengen and the UK and other countries considered safe. From 01 October, the remaining global advice against non-essential travel has also been removed. However, there may still be advice against travel to specific countries. Updated travel advice can be found here.

After the reopening of society, the plan was to remove restrictions on entry to Norway in three phases, starting from 25 September 2021. Changes were, however, introduced to the entry restrictions for several countries and areas in October, and further restrictions will apply from 29 November 2021. Since then, quarantine has been introduced for travellers from France, Spain, Portugal and some areas in Sweden and Finland. The quarantine only applies to travellers who do not have a valid COVID-19 certificate. More information about the current entry rules can be found here.

The unemployment rate rose slightly from December to March and then started to decline. The decline was significant in the spring and continued during the summer and fall. By the end of October, there were 121 200 unemployed persons, amounting to 4.3 per cent of the workforce (see the statistics here).

1.1.2 Relief measures

The employment and labour law measures introduced in 2020 to mitigate the effect of the COVID-19 crisis have been described in previous Flash Reports. The new government that took office in October suggested that several employment measures to mitigate the effect of the COVID-19 crisis would be extended (see October 2021 Flash Report).

In November, one of the suggested measures was extended.

A compensation scheme for self-employed persons who lost income due to the COVID-19 pandemic was extended to 01 February 2022 by the temporary Act LOV-2021-11-21-141.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The Norwegian regulations on stand-by time have been discussed in previous Flash Reports, see in particular the comments in the March 2021 Flash Report and in the September 2021 Flash Report.

As explained here, the Norwegian regulations on stand-by time take account of, and may well be aligned with, the definition of working time in EU law. This ruling may

therefore affect the interpretation and application of these regulations specifically, and the definition of working time more generally. Apart from that, the ruling is not expected to have any significant implications for Norwegian law.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The working time regulations in the Working Environment Act (WEA) chapter 10 build on mutually exclusive definitions of working time and rest periods, cf. section 10-1. The definition of working time is interpreted in accordance with the definition in Directive 2003/88/EC and the case law of the EFTA court and the CJEU, see, for example, HR-2018-1036-A.

Norwegian law does not include general statutory regulations on vocational training comparable to the regulations examined in the present case, and there are no general discussions concerning the circumstances under which time spent on vocational training should be classified as working time.

However, if the employer instructs the employee to undertake vocational training, as in the present case, the training would presumably be regarded as part of the employee's obligations in the employment relationship. Consequently, as a general point of departure, time spent on vocational training instructed by the employer would be classified as working time.

Based on this, the ruling is likely to have a clarifying effect on the interpretation and application of the definition of working time as regards vocational training instructed by the employer.

There are, however, some regulations on n other types of training worth mentioning in light of this ruling. First, the WEA stipulates that the employer shall provide training related to the work environment. Section 4-2 sets general requirements that employees shall be provided the necessary training to enable them to familiarise themselves with systems used in planning and in the performance of work, and requires the employer to ensure the necessary development of competences in reorganisation processes. According to Section 3-2, the employer must provide the necessary training to ensure safety in the workplace. Although it is not expressly stated, the underlying premise must be that this type of training is conducted as an integral part of the rights and obligations within the scope of the employment relationship. Time spent on this type of training would therefore presumably be classified as working time, cf. section 10-1.

Second, WEA section 12-11 stipulates a right to educational leave. When certain conditions are met, the employee is entitled to full or partial leave for up to three years to attend organised training courses, i.a. 'vocational studies', which include 'all types of continuing education and training of relevance for the labour market'. Such leave is granted based on an application from the employee, and pay is not a statutory requirement. As long as the training is conducted while on leave, time spent on such training will presumably not be classified as working time as far as the regulations on maximum working hours and minimum rest periods are concerned, cf. section 10-1.

4 Other Relevant Information

Nothing to report.

Poland

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In Poland, stand-by time is regulated in Article 151(5) of the Labour Code. According to §1, an employer may require an employee to remain on call outside regular working hours to perform the work determined in the employment contract at the work premises or at another place designated by the employer. Under §2, stand-by time is not considered working time if, during the stand-by shift, the employee does not perform work. The time spent on stand-by duty may not violate the employee's right to rest, as referred to in Articles 132 and 133 LC (i.e. daily and weekly uninterrupted rest periods, as required by Directive 2003/88). According to §3, for stand-by duty, except for an on-call shift performed at home, the employee is entitled to time off corresponding to the duration of the on-call shift, and if time off cannot be granted, he or she will be remunerated in accordance with his or her personal remuneration grade based on an hourly or monthly rate, and if this component of remuneration was not established when setting the remuneration conditions, then he or she shall receive 60 per cent of remuneration.

The abovementioned Article 151(5) § 2 LC expressly introduces the statutory time limits of stand-by periods. Stand-by time may not violate the daily rest periods of 11 hours (Article 132 § 1 LC), and may not violate the weekly rest period of 35 hours (Article 133 § 1 LC). In other words, the stand-by system that would require the employee to be available for 24-hours, as was the case in the present case, would violate the statutory provisions on rest periods. Therefore, it would be inadmissible.

There are no specific provisions on additional employment. There is no general prohibition of additional employment, with the exception of certain groups that are prohibited by statute to undertake additional paid activities (e.g. some civil servants). As a rule, an employee is free to take up additional paid activities, provided that it does not affect the performance of his/her duties at the employer, and provided that he or she does not violate the ban on competition.

It seems that if an employee were expressly permitted by the employer to perform a professional activity on his or her own account during his or her stand-by duty (which, in practice, might imply additional employment), such a period could not be regarded as 'working time'. In such a situation, the employee would not remain at the disposal of the employer, as required by Article 128 LC, to determine the existence of 'working time' (see also the analysis of the next case below). The requirement that an employee would be required to respond rapidly to an emergency call does not affect this conclusion.

It appears that Polish law does not need to be amended as a consequence of the ruling in the present case.

3.1 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In Poland, working time is defined in Article 128 §1 of the Labour Code as the time when the employee remains at the employer's disposal at the work premises, or at any other place designated as the place of work performance. There is no definition of 'rest period'.

The regulations on employee training are very concise and only refer to certain aspects. Only the health and safety training has been explicitly regulated in the Labour Code provisions.

Article 237(3) §2 LC provides that the employer must provide health and safety training at work for all employees before allowing them to commence working and must provide periodic training in this area. This training is not required if the employee is returning to work in the same position he or she occupied with a given employer directly before concluding a subsequent employment contract with his or her current employer. Article 237(3) §3 LC provides that the training referred to in §2 should take place during working hours and at the employer's expense. In other words, health and safety training constitutes a component of working time. If such a training is conducted outside normal working hours, it should be regarded as working time. The employee has the right to remuneration and—if applicable—to overtime bonus.

Article 94 LC refers to the employer's basic duties. According to section 1, the employer is required to make new employees familiar with the scope of their duties, the manner of performing work in their particular positions and their basic rights. It is not regulated in what way the employer is to fulfil these duties. Employee training can make the employee familiar with 'the manner of performing work'. In practice, such trainings are usually conducted during working hours.

However, there are no regulations that refer to vocational training in particular. If a mandatory training were organised outside working hours at the employer's request, such a period would not be considered working time under Article 128 §1 LC.

Therefore, it appears that the Polish regulations on working time are not fully compatible with Article 2(1) of Directive 2003/88, as interpreted by the CJEU in the present case. A provision that mandatory vocational training at the employer's request is to be considered working time should be introduced.

4 Other Relevant Information

4.1 Information on vaccination status of employees

Despite previous announcements, there have been no developments on the government's draft on employer's rights to obtain information whether their employees are vaccinated or have recovered from COVID-19. The draft has not entered the legislative process (for the analysis of the draft, see the August 2021 Flash Report and September 2021 Flash Report).

In November 2021, there were media reports that another draft on this issue would be submitted by the group of deputies of the ruling party 'Law and Justice'. The new law would give employers the right to request their employees to present their vaccination certificate, and—if appropriate—to modify the functioning of the establishment, e.g. to assign an unvaccinated employee the tasks that would not require contact with other employees or third persons. In health care institutions, the employer would be entitled to order employee vaccination. The media reports are available here.

However, the draft has not been made public, and it has not been the subject of any legislative proceeding.

Portugal

Summary

(I) The government has declared a state of emergency from 01 December 2021 to 20 March 2022.

(II) Some restrictive measures have been reintroduced, such as the recommendation of teleworking (which will be mandatory between 02 and 09 January 2022), where possible. Amendments to the teleworking regime will enter into force over the next months.

(III) Between 02 and 09 January 2022, an exceptional and temporary regime of justified absence from work due to the suspension of school activities will apply.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

By Resolution of the Council of Ministers No. 157/2021, of 27 November, the government has declared a state of emergency in the Portuguese mainland territory until 20 March 2022, considering the development of the epidemiological situation in Portugal in recent weeks, and reintroduces some restrictions that had already been removed. Concerning employment-related matters, teleworking is recommended as of 01 December 2021, whenever it is compatible with the nature of the functions to be performed by the employee. During the period between 02 and 09 January 2022, teleworking will be mandatory if the functions can be performed under this regime.

1.1.2 Teleworking

On 27 November 2021, Decree Law No. 104/2021 was published, which includes amendments to the measures adopted within the context of the COVID-19 pandemic. Among others, this decree extends the application of Decree Law No. 79-A/2020, of 01 October, as subsequently amended, which establishes an exceptional regime of reorganisation of work and minimisation of the risks of contagion within employment relationships (see October 2021 Flash Report), until 31 March 2021.

New rules on teleworking are expected to enter into force soon. On 05 November 2021, the Portuguese Parliament approved Decree No. 201/XIV, which introduces amendments to the teleworking regime and other matters regulated under the Portuguese Labour Code. However, this new regulation is awaiting publication in the Official Gazette and will only enter into force on the first day of the month following its publication.

1.1.3 Care leave

In addition, this Act suspends school activities during the period between 02 and 09 January 2022 and, consequently, determines that absence from work to take care of a child under the age of 12 years, or, regardless of age, of a child with a disability or chronic disease, are considered justified during this period.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The present case concerned the interpretation of Article 2 of Directive 2003/88/CE, of the European Parliament and of the Council, of 04 November 2003, related to certain aspects of organisation of working time (hereinafter referred to as 'Directive 2003/88').

In line with Directive 2003/88, Portuguese labour law only provides for the concepts of 'working time' and 'rest period'.

According to Article 197 (1) of the Portuguese Labour Code, approved by Law No. 7/2009, of 12 February, as subsequently amended (hereinafter referred to as 'PLC'), 'working time' is any period during which the worker carries out his or her work-related activity or remains available to perform such activity. Apart from this core content, the concept of working time also includes some situations of inactivity, which the law describes as interruptions and breaks, listed in paragraph 2 of the above mentioned Article 197 of PLC.

The 'rest period' is understood as every period that is not considered as working time (Article 199 PLC). Thus, under Portuguese law, the concepts of 'working time' and 'rest period' are—as in EU law—mutually exclusive, which means that every period not considered to be working time falls into the concept of rest period. An intermediate category between working time and rest period (*tertium genus*) is not provided for in Portuguese law.

Based on this legal framework, Portuguese case law treats stand-by time as either working time or a rest period, depending on whether the worker must remain at his/her workplace during the stand-by period, as well as depending on the constraints imposed on the worker due to this regime.

This argumentation was developed by the Portuguese courts following the guidelines of the CJEU's case law on this issue, namely in cases C-202/98, *SIMAP* and C-151/02, *Jaeger.*

As regard stand-by time, Portuguese case law has ruled that if the worker remains at the workplace (or another place determined by the employer) and is available to work, this period must be considered working time; on the contrary, if the worker only has to be available for work if he/she is called on but can remain at his/her home or other location chosen by him/her, it is assumed that the worker can manage his/her own interests, despite certain limitations; thus, such a period does not, as a rule, fall within the concept of working time (for example, see *i)* ruling of Coimbra Appeal Court of 8 November 2007, *ii)* ruling of the Supreme Court of 19 November 2008, *iii)* ruling of Lisbon Appeal Court of 17 December 2014 and *iv)* ruling of Lisbon Appeal Court of 13 January 2016).

As a result, Portuguese case law has considered that, except when otherwise agreed between the parties or if a different rule is established in a collective agreement, the worker is only entitled to be paid for stand-by time when it falls into the concept of working time. In other cases, the employer only has to pay the remuneration corresponding to the work effectively performed during the stand-by time (if any).

Taking the above into account, Portuguese case law on the classification of stand-by time follows settled CJEU case law and is compatible with the interpretation of Article 2 of Directive 2003/88 contained in the present ruling.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

Under Portuguese law, 'working time' is defined as any period during which the worker carries out the activity or remains available to perform his or her activity (Article 197 (1) of PLC). Vocational training falls under the concept of 'working time' for the purposes of that provision in the PLC, even if it takes place outside the employer's premises and if the worker does not perform his or her regular activity during that period.

Concerning remuneration for this period, Article 226(3)(d) of the PLC states that any vocational training carried out outside the timetable which does not exceed two daily hours does not qualify as overtime work and does not have to be paid as such (only in accordance with the employee's regular hourly rate).

4 Other Relevant Information

Nothing to report.

Romania

Summary

(I) A new Act provides that the employer's decision on the conclusion, performance, modification, suspension or termination of an employment contract can be challenged before court within 45 days.

(II) A decision of the Constitutional Court states that police officers have the right to a lawyer during disciplinary proceedings.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1. Labour disputes

To put an end to a legislative parallelism that has existed for over the last 10 years between the limitation periods for labour law actions established by the Labour Code and the Law on Social Dialogue, Law No. 269/2021 for the amendment of the Law on Social Dialogue No. 62/2011 and Law No. 53/2003 – Labour Code (published in the Official Gazette of Romania No. 1076 of 10 November 2021) was adopted. The new law amends the Labour Code and provides that:

> *"the decisions regarding the conclusion, performance, modification, suspension or termination of the employment contract may be challenged within 45 calendar days from the date on which the interested party became aware of the ordered measure*" (Article 268 (1) letter a) of the Labour Code).

It is worth noting that actions challenging disciplinary sanctions (including disciplinary dismissals) can still be brought within a derogatory period of 30 days from the written communication of the sanction.

2 Court Rulings

2.1 Right to defence in disciplinary investigations

Constitutional Court, No. 548/2021, 14 September 2021

In this decision, published in the Official Gazette of Romania No. 1015 of 25 October 2021, the Constitutional Court ruled on the provisions regulating disciplinary investigations of police officers.

In Romania, prior to applying any disciplinary sanction, employers must carry out an investigation to obtain as much information as can reasonably be acquired about their employee's alleged misconduct. While in the case of the employee, the Labour Code provides for the right to be assisted by a lawyer during this disciplinary investigation procedure, Law No. 360/2002 on the Status of the Police Officer did not provide for such a right.

The Constitutional Court was notified on this issue. In this judgement, the Constitutional Court demonstrated that according to the Constitution, the right to defence is guaranteed, and the fundamental rule should also be applied in the context of a disciplinary meeting. The Court noted that on the issue of disciplinary liability of police officers, contrary to the jurisprudence developed by the European Court of Human

Rights, Romanian legislation does not ensure observance of the right to defence of the police officer during the disciplinary investigation.

In view of the above, the Constitutional Court found that the legal provisions according to which the police officer has the right to only be assisted by another police officer during the disciplinary investigation, elected by him/her or appointed by the National Police Corps, violates the right to be assisted by a lawyer in disciplinary proceedings, as part of the constitutional right of defence. These provisions are therefore unconstitutional, and police officers, just like employees, have the right to be assisted by a lawyer in disciplinary proceedings.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

Romanian courts, when qualifying a certain time interval as working time or as a rest period, carry out an overall assessment of all the facts of the case. For example, they analyse whether the worker is required to respond to any request from the employer and how severe the sanctions are if he/she fails to do so (see Bucharest Court of Appeal, Civil Decision No. 2671/2019).

Consequently, faced with a situation similar to that specified in the present case, it is reasonable to presume that Romanian courts would also choose to take all elements of the case into account to determine whether the interval in question constitutes working time or a rest period.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The CJEU's decision in the present case will presumably have a significant impact on Romanian law, both in terms of jurisprudential guidance and in the current practice of companies.

According to the Romanian Labour Code, the employer has the obligation to ensure, at its expense, the professional training of employees at least once every 2 or 3 years, depending on the size of the company. If the employer fails to comply with the obligation to ensure the participation of an employee in vocational training and does not cover the expenses, the employee is entitled to paid leave for vocational training.

So far, almost unanimously, the courts have distinguished between 'work' and 'vocational training', and have not qualified the period of vocational training at the initiative of the employer as working time. In particular when the vocational training took place after working hours, the courts consistently held that the period of vocational training did not have the legal status of overtime.

For example, it was stated that:

> *"during training courses, workers do not perform work or tasks that correspond to their duties but exercise their right to participate in vocational training programmes according to the Labour Code and Government Ordinance No. 129/2000 on adult vocational training (…). Thus, even if the vocational training takes place outside the normal working hours, employees will not be considered to be working overtime, as overtime is defined as any period in which employees perform work, are at the employer's disposal and perform their duties and responsibilities in accordance with the provisions of the employment contract. (…) In conclusion, employees are only entitled to the rights established by the Labour Code for overtime when they perform work outside their regular working*

hours, not when they participate in vocational training courses. Consequently, the applicant's participation in a training course cannot be regarded as overtime" (Decision No. 107/2014 of 13/01/2014, Prahova Court - Civil Section I).

Similarly, it has been shown that:

"Article 120 of Law 53/2003 defines overtime work as work performed outside regular working hours. Participation in a vocational training course does not fall under the scope of the definition of 'work'" (Decision No. 328/2019 of 11/04/2019, Vaslui Tribunal – Civil Section).

In another case, the disciplinary sanction applied to an employee for refusing to participate in a professional training course for the ambulance rescue profession was upheld, even though he was scheduled for training on the only days off during that month.

"The applicant's professional development is essential (…), and the employer has the obligation to ensure the participation of employees in vocational training programmes."

As a result,

"the fact that those days were the only free days of the month does not constitute an objective impediment to participate, as long as such courses are not organised every month to repeatedly affect the applicant's rest time (…). A possible rescheduling of professional training can only be approved if the employee proves the existence of an objective impediment to participate on the set date. In the present case, the fact that those days were the applicant's only days off of the month cannot be regarded as an objective circumstance capable of causing the employer to order a rescheduling" (Decision No. 841/2018 of 13/11/2018 Bistrița Năsăud Tribunal - Civil Section I (lege5.ro)).

"The applicant's (voluntary) participation in such courses outside working hours cannot be considered overtime work, but as part of the training agreement".

"Although the classes took place during the afternoon, they partially overlapped with the work schedule of the store where the employee worked. Considering that the employer paid the employee's salary rights in full, the applicant's claim for additional remuneration for the hours i he attended the mentioned course is unfounded and to be rejected as such" (Decision No. 367/2016 of 28/09/2016, Bucharest Court of Appeal - Section VII for cases on labour disputes and social insurance).

"When employees participate in professional training courses, they do not perform work or tasks that correspond to their duties but exercise their right to participate in professional training programmes enshrined in the Labour Code and Government Ordinance No. 129/2000 on vocational training for adults. Consequently, the employee would only have been entitled the rights established by the Labour Code for overtime if he had performed work outside his normal working hours, not in the present situation, in which he attended professional training courses" (Decision No. 5077/2015 of 15/12/2015, Bucharest Court of Appeal - Section VII for cases regarding labour disputes and social insurance).

This practice of the courts will have to change following the CJEU's decision during the disciplinary investigation.

Moreover, the qualification of the training period required by the employer as working time will determine a wide range of other consequences:

- Overtime is compensated by paid leave or a salary increase that cannot be less than 75 per cent of the basic salary (Article 123 of the Labour Code). Overtime compensation is not left for free negotiation by the parties but is regulated by

minimum legal norms. As a result, the employer will have to pay for the training courses and also pay the employee who attends them;

- In Romania, the weekly rest period is 48 consecutive hours (Article 137 (1) of the Labour Code), therefore more extensive than that provided in the Working Time Directive. The treatment of vocational training as working time implies that the training cannot take place on weekly rest days, for example, on weekends;
- On working days, vocational training cannot be carried out for more than 4 hours. In Romania, the minimum daily rest period is 12 hours, therefore longer than that provided in Article 3 of the Working Time Directive;
- Moreover, after 12 hours of work, the employee is entitled to a rest period of 24 hours (Article 115 (2) of the Labour Code). Therefore, if the employee were to take a 4-hour training course on a working day after working hours, he/she would not be admitted to work the next day;
- Part-time employees cannot work overtime; overtime in their case is considered undeclared work, and the employer who requests a part-time employee to work outside their work schedule may be fined (Article 151 of the Labour Code and Article 250 (1)(e)(3) of the Labour Code). As a result, a part-time employee will not be able to participate a vocational training programme after the end of his/her working hours.

According to the analysis of these consequences, it follows that the employer will find it quite difficult to organise an activity to ensure the professional training of employees.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

(I) A state of emergency was declared with effect from 25 November 2021, and new restrictions have been imposed in connection with the third COVID-19 wave.

(II) A new Act requires employees to hold a valid COVID-19 certificate or undertake regular testing to access the workplace.

(III) A new Act provides for the termination of a manager's contract without providing a reason.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 restrictions

With the Resolution of the Government of the Slovak Republic No. 695 of 24 November 2021, the government has declared a state of emergency for a period of 90 days, with effect from 25 November 2021.

The resolution imposes new restrictions to freedom of movement, imposes a new curfew, and recommends the performance of work from home to the extent possible.

1.1.2 COVID-19 certificate

On 12 November 2021, the National Council of the Slovak Republic (Parliament) approved Act No. 412/2021 Coll. amending certain Acts in connection with the third wave of the COVID-19 pandemic.

The Labour Code has been amended within this Act, in addition to other Acts, in particular:

- Act No. 73/1998 Coll. on civil service members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police;
- Act No. 281/2015 Coll. on civil service of professional soldiers;
- Act No. 67/2020 Coll. on certain extraordinary measures in financial areas in connection with the spread of the dangerous contagious disease COVID-19.

The major change is the new obligation requiring employees to possess a COVID-19 certificate (of vaccination, recovery or negative COVID-19 test) to enter the workplace.

According to the new paragraph 6 of Article 250b of the Labour Code if—during the effect of a measure to prevent the outbreak and spread of a communicable disease or a measure to contain a public health threat ordered by a competent public health authority issued pursuant to a special regulation governing temporary conditional entry to the workplace by an appropriate document—the employee has not submitted a COVID-19 certificate to his/her employer or has rejected the possibility of free testing offered by the employer, it constitutes an obstacle to work on the part of the employee without wage compensation, unless the employer agrees otherwise.

This Act entered into force on 15 November 2021.

1.2 Other legislative developments

1.2.1 Dismissal of managers

On 07 October 2021, the National Council of the Slovak Republic approved the Act amending Act No. 55/2017 Coll. on Civil Service and on Amendments to Certain Acts, as amended, and Amending Certain Acts. The President returned the Act to the National Council of the Slovak Republic. The National Council renegotiated and again approved this Act on 23 November 2021.

The main reason the President did not sign the law originally approved was the possibility of dismissing managers without providing a reason. This original proposal was re-approved on 23 November 2021, according to which

> *"The Secretary-General may call off from the position of manager, whom he [or she] directly manages, even without providing a reason, with the consent of the statutory body, unless a special regulation provides otherwise"* (Article 61, new paragraph 5 of the Act).

The Secretary General is the chief executive officer of all civil servants in the relevant service office; this does not apply to managers in a public function in a service office, which is a ministry or other central state administrative body (Article 17(1) of the Act). The Secretary General is authorised to act in the relevant service office in relation to civil service (Article 17(2) of the Act).

In Part II of the Act, Act No. 73/1998 Coll. on civil service members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police was amended. A new paragraph was added:

> *"If required by an important interest of the service, the Minister may transfer, without giving a reason to a superior to another position in the same place of civil service and, if this is not possible, transfer the superior to another position to another place of civil service, or to another service office, if (...) not provided otherwise"* (Article 35, new paragraph 2 of the Act).

This Act, which has not yet been published, shall enter into force on the day of its promulgation.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In general, the legal regulation in Slovakia is in line with the Directive.

The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll'), as amended. The provisions of the Labour Code are binding for all employers in the private and public sectors. Employment relationships in the civil service are currently regulated by six Acts.

As regards fire fighters, the main legal source is Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps. This Act regulates the civil service and legal relationships that relate to the establishment, changes and termination of the civil service of members of the Fire and Rescue Service and members of the Mountain Rescue Service (Article 1

paragraph 2 of the Act). The fact that the Working Time Directive was transposed into this Act is also stated in its Annex No. 4 to Act No. 315/2001 Coll.

According to Article 12 (6) of this Act, the Labour Code only applies to the legal relationships of members in the performance of civil service if this Act explicitly provides for it. According to Article 193 of the Act, Article 85 of the Labour Code shall also apply to the legal relationships of members of the Fire Fighting and Rescue Corps.

According to Article 85(1) of Act No. 315/2001 Coll. on the Fire Fighting and Rescue Corps' service time of the member is the time period during which he or she performs the civil service and is available to the service office.

According to Article 92 of Act No. 315/2001 Coll., the service office shall inform the member who is on stand-by duty in the civil service about the place of performance of the civil service, which immediately follows the performance of civil service pursuant to Article 86 paragraph 2 within the framework of the service time schedule.

Moreover, to perform the necessary tasks the service office may, in justified cases, request the member on stand-by to perform outside his or her service schedule shall be carried out:

- at the place of performance of the civil service;
- at the place of residence or at another agreed place;
- with the possibility of using mobile means of connection.

A member who performs an official activity connected with the protection of the interests of the State performs special tasks to ensure the necessary readiness of the Corps, is required, due to his or her inclusion in the plan for indicating levels of readiness, to report to his or her superior where he or she will stay during the time outside the civil service and be ready to arrive when he or she receives the specified signal at the specified time at the designated place to perform his or her tasks. An appeal against a staff order for inclusion in the notification and transport plan or for exclusion from the notification and transport plan shall not have suspensory effect.

There is no provision that stand-by time at the workplace is fully counted as working time. As regards compensation for stand-by time, however, there is no entitlement to it for the time during which work was performed. This time is considered performance of overtime. The amount of compensation for stand-by time is determined in Article 122 of Act No. 315/2001 Coll.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In general, the legal regulation in Slovakia is in line with the Directive. It is not as detailed as the judgement. The main legal source is the Labour Code (Act No. 311/2001 Collection of Laws – 'Coll'), as amended.

According to Article 153 of the Labour Code, an employer shall support employees in deepening and increasing their skills and qualifications. An employer shall discuss measures aimed at enhancing employees' qualifications with employee representatives.

According to Article 154(3) of the Labour Code, an employee is required to continuously deepen his or her qualifications for the performance of work agreed in the employment contract. The deepening of qualifications also includes its maintenance and renewal. The employer is entitled to require the employee to participate in further training to enhance his or her qualifications. Participation in education shall be considered as the performance of work for which an employee shall be entitled to wage.

It is also worth mentioning that according to Article 144a(1)(g) of the Labour Code, the performance of work shall be deemed to also include the period that a young employee spends in vocational training within the system of theorical or practical training.

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) As additional restrictions aiming to contain the spread of COVID-19 have been introduced in response to the Omicron variant, the government has proposed the so-called Tenth Package of Measures to mitigate the negative impact of COVID-19, which is expected to be enacted in December 2021.

(II) The rules on personal protective equipment used by workers at work and the rules on minimum requirements for medical care of crew on board ships have been amended, transposing EU Directives 2019/1832 and 2019/1834.

(III) An increase of wages for healthcare and social care professions (between 4 per cent and 25 per cent) has been agreed between the government and trade unions representing healthcare and social care workers.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

Various measures aiming to contain the spread of COVID-19 virus infections continued to be applied during November 2021 (the recovered-vaccinated-tested (RVT) requirement as a general rule for all activities, for all employees and self-employed and persons working on another basis, for all users of services or activities, with very few exceptions; stricter supervision of the RVT requirement; facemasks, limited gathering of people; etc.). A summary overview of all valid measures have been published on the government's website.

As a response to variant B.1.1.529 (*omicron*), additional restrictions have been introduced, including a mandatory ten-day quarantine.

The most recent changes are published in the Ordinance amending the interim measures for the prevention and control of the infectious disease COVID-19 and the Ordinance amending the conditions for entry into the Republic of Slovenia due to the containment and control of the infectious disease COVID-19.

The government has prepared the so-called Tenth Package of Measures to mitigate the negative impact of COVID-19 (PKP10). On 18 November 2021, the government adopted the Proposal for Act on Additional Measures and sent it to the National Assembly for adoption. The text of the draft law can be found here. The government's proposal for a new law has entered an urgent legislative procedure and the law is expected to be enacted in December 2021.

The proposed measures include, for example, a solidarity allowance for vulnerable groups and a partial reimbursement of income losses of self-employed persons during quarantine and inability to work due to childcare responsibilities .

1.2 Other legislative developments

1.2.1 Occupational safety and health

On the basis of the Safety and Health at Work Act ('*Zakon o varnosti in zdravju pri delu (ZVZD-1)*', OJ RS No 43/2011), the Minister of Labour, Family, Social Affairs and Equal Opportunities has issued:

- Amendments to the rules on personal protective equipment used by workers at work (*'Pravilnik spremembah in dopolnitvah Pravilnika o osebni varovalni opremi,*

ki jo delavci uporabljajo pri delu', OJ RS No. 181/2021, 19 November 2021, pp. 10493-10515), transposing Commission Directive 2019/1832 of 24 October 2019 amending Annexes I, II and III to Council Directive 89/656/EEC as regards purely technical adjustments.

The deadline for transposition was 20 November 2021 and the respective amendments to the rules on personal protective equipment entered into force on 20 November 2021.

- Amendments to the rules on minimum requirements for medical care of crew on board ship *('Pravilnik o spremembah in dopolnitvah Pravilnika o minimalnih zahtevah pri zagotavljanju zdravstvene oskrbe posadke na ladjah',* OJ RS No 181/2021, 19 November 2021, pp. 10516-10532), transposing Commission Directive (EU) 2019/1834 of 24 October 2019 amending Annexes II and IV to Council Directive 92/29/EEC as regards purely technical adaptations.

  The deadline for transposition of Directive 2019/1834 was 20 November 2021 and the respective amendments to the rules entered into force on 20 November 2021.

2 Court Rulings

2.1 Discrimination and harassment at work

Supreme Court, No. VIII Ips 14/2021, 06 July 2021

This judgement concerned the amount of compensation paid to a worker following termination of the employment contract, which was a consequence of discriminatory treatment and harassment at work. The claimant referred to EU anti-discrimination law, claiming that compensation must be high enough to have a dissuasive effect (and that the awarded compensation was too low, i.e. not dissuasive) and asked the Court to stay the proceedings and refer the question to the CJEU for a preliminary ruling.

In its reasoning, the Court extensively refers to EU law, in particular Directives 2000/78 and 2006/54 as well as Directive 2000/43, and to CJEU case law dealing with compensation in cases of discrimination (see, in particular, paras. 16 to 22), and explains why reference for a preliminary ruling is not necessary.

The Court explained that the transposition of the relevant provisions of EU law on 'effective, proportionate and dissuasive compensation' in the Slovenian labour legislation (i.e. Employment Relationships Act, in Slovenian: *Zakon o delovnih razmerjih (ZDR-1)*) or the notion of dissuasiveness, as understood by EU law through the interpretation of the CJEU, does not represent a special and independent basis or criterion for assessing compensation for non-pecuniary damage which would require more than full compensation for non-pecuniary damage for victims of discrimination and harassment. Thus, despite a slightly different wording contained in the ZDR-1 with regard to the amount of monetary compensation in case of discrimination or harassment at work, the regulation in the ZDR-1 nevertheless remains within the scope of the framework of classical compensation law and follows the rules concerning the assessment of compensation under the civil law (the Obligations Code). Despite the intention indicated in the explanatory memorandum to the first draft law on Employment Relationships (where preventive and punitive functions of compensation in case of discrimination and harassment are also mentioned, which would mean a derogation from civil law principles as regards the amount of compensation), the legislator, however, had not enacted such a system and did not go beyond the requirements of the relevant EU law.

The Court further explained that the text of the Employment Relationships Act is clear and that this Act has not introduced any special rules as regards compensation, and that these rules, therefore, remain within the framework of classical tort law (full

compensation, but not any additional amount above that as a punitive function). According to the Court, the legislator has also not introduced any specific criteria that could be taken into account in the deterrent function of compensation. The Court furthermore asserted that the existing legal regulation as described above follows the requirements of EU law as well.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The CJEU judgement in this case is of relevance for Slovenian law. Slovenian labour legislation does not define in detail the concept of working time. According to the Employment Relationships Act (*Zakon o delovnih razmerjih* (ZDR-1)), "*working time shall mean the effective working hours and breaks according to Article 154 of this Act (30 minutes per day for full-time work) and the time of justified absences from work in accordance with the law and collective agreement and/or a general act*" (Article 142, para. 1) and "*effective working hours shall be the hours during which a worker carries out his work, which means that he is at the employer's disposal and fulfils his work obligations under the employment contract*" (Article 142, para. 2).

In addition to the Employment Relationships Act, the Fire Service Act (*Zakon o gasilstvu (ZGas*)) also regulates certain aspects of working time of fire fighters. The Fire Service Act contains provisions on stand-by/on-call time (see, in particular, Articles 14.a to 14.c). It defines instances when the stand-by/on-call duty can be imposed on the worker (Article 14.a, ZGas). It does not contain detailed rules which would limit stand-by/on-call time, its frequency and duration.

According to Article 14.c, paragraph 2 of the Fire Services Act, on-call duty spent at home ('*pripravljenost za delo na domu*') is not considered part of working time; only the periods during which a person has actually performed work is considered working time and must be taken into account as part of regular weekly and monthly working hours or overtime work.

As can be seen from the above, the legal rules are fairly general and do not regulate the issue at stake in detail. Therefore, the national courts must further specify the meaning of these rather general provisions and interpret them in the light of the relevant CJEU case law. There is no case law yet that specifically deals with the on-call duty of fire fighters. The guidance provided by the CJEU in the present case in this respect is therefore also of relevance for the future development of Slovenian case law on this matter.

It is worth mentioning that Slovenian courts refer to the relevant CJEU case law (see, for example, the decision of the Supreme Court, No. VIII Ips 147/2018, 30 March 2021). It can be expected that the present judgement will also be taken into account by Slovenian labour courts when dealing with the same or similar issues.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

This case is of no particular relevance for Slovenian law.

The periods during which a worker participates in vocational training required by the employer, and he or she therefore does not perform his or her regular duties, is considered working time according to Slovenian labour law rules, even if the training takes place outside the employee's usual workplace. The relevant factor is whether such training was required by the employer (as part of the worker's duties, training is necessary for maintaining the required skills for performing the work). If a worker was

referred to vocational training by the employer and this was considered an obligation, then the time spent on training must be considered working time. According to the Employment Relationships Act (ZDR-1),

> *"workers have the right to and the obligation of continuous education, training or further training in accordance with the requirements of the working process with the purpose of maintaining and/or improving the skills to perform the work under the employment contract, to retain employment and increase employability" (Article 170, paragraph 1).*

Article 170, paragraph 2 of the ZDR-1 stipulates:

> *"Employers shall be required to provide education, training or further training of workers if the needs of the working process require this or if such training may prevent termination of the employment contract for reasons of incompetence or for business reasons. In accordance with the needs of education, training and further training of workers, the employer shall have the right to refer the worker for education, training and further training, and the worker shall have the right to apply for education, training and further training himself."*

According to Article 170, paragraph 4 of the ZDR-1,

> *"if an employer refers a worker for education, training or further training for reasons referred to in paragraph 2 of this Article, the costs of such education, training and further training shall be borne by the employer".*

4 Other Relevant Information

4.1 Collective bargaining in the private sector

The new Collective Agreement for the Agriculture and Food Processing Industry (*'Kolektivna pogodba za kmetijstvo in živilsko industrijo Slovenije')* concluded by the social partners on 18 November 2021 was published in the Official Journal on 30 November 2021 (OJ RS 186/2021, 30 November 2021, pp. 10988-10997).

4.2 Collective bargaining for healthcare and social care professions

On 18 November 2021, the government and trade unions representing healthcare and social care workers concluded an agreement on emergency measures for salaries in the healthcare and social protection sector and continuation of negotiations (*'Dogovor o nujnih ukrepih na področju plač v dejavnosti zdravstva in socialnega varstva in nadaljevanju pogajanj'*, OJ RS No 181/2021, 19 November 2021, pp. 10595-10613).

On the same day, the Annex to the Collective Agreement for the Health Care and Social Protection Sector (*'Aneks h Kolektivni pogodbi za dejavnost zdravstva in socialnega varstva Slovenije*', OJ RS No 181/2021, 19 November 2021, pp. 10614 et subseq.,) and the Annex to the Collective Agreement for Persons Employed in Healthcare (*'Aneks h Kolektivni pogodbi za zaposlene v zdravstveni negi'*, OJ RS No 181/2021, 19 November 2021, pp. 10631 et subseq.,) have been concluded.

Around 35 000 healthcare and social care workers will get a pay raise of approximately 4 per cent to 25 per cent, with the biggest increase going to hospital nurses.

4.3 Wage trends

According to the report on wage trends for September 2021 (*'Poročilo o gibanju plač za september 2021'*, OJ RS No 184, 26 November 2021, p. 10840), the average monthly gross salary in September 2021 amounted to EUR 1 872.92 and the average monthly net salary amounted to EUR 1 210.46.

Spain

Summary

(I) Spain has amended the list of countries to which temporary restrictions for non-essential travel apply.

(II) Directive 2019/1833, which includes SARS.CoV-2 as a biological agent, has been fully transposed into Spanish legislation.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Freedom of movement

Council Recommendation (EU) 2020/912 of 30 June 2020 established temporary restrictions to non-essential travel into the EU for third-country individuals. The list of countries has changed depending on the incidence rate of COVID-19. Spain approved an Order of 19 November 2021 to amend the Order of 17 July 2021 to implement that Council recommendation and has amended it where necessary.

1.2 Other legislative developments

1.2.1 Health and safety at work

Royal Decree 664/1997, of 12 May, transposed Directive 90/679/EEC on the protection of workers in Spain from risks related to exposure to biological agents at work. Directive (EU) 2019/1833 added a large number of biological agents, including SARS-CoV and MERS-CoV. Given that SARS-CoV-2, which has caused the COVID-19 outbreak, is very similar to SARS-CoV and MERS-CoV, the European Commission considered that it should urgently be added to Annex III of Directive 2000/54/EC, to ensure continuous and adequate protection of the health and safety of workers. Spain implemented the mandate in December 2020, and this was considered the first step in the transposition of Directive 2019/1833.

Nearly one year later, the transposition of that Directive is complete. That is, the list of biological agents mentioned in Royal Decree 664/1997 has been updated to fully match that of Directive 2019/1833.

1.2.2 Work of foreigners (audio-visual industry)

According to Spanish law, the entry and residence of foreigners in Spain requires obtaining the relevant permits. This procedure has been simplified for audio-visual workers. With the aim of making Spain an attractive destination for such activities (e.g. filming movies or TV shows), the procedure for granting permits to artists, technicians and other professionals in the audio-visual sector has become more flexible and easier. If such workers remain in Spain for less than 90 days, they will not need a permit, only a visa.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

This case is very similar to C-518/15, *Matzak,* C-344/19, *D.J. v Radiotelevizija Slovenija* and C-580/19, *RJ v Stadt Offenbach am Main*. In those rulings, the Court stated that Article 2 of Directive 2003/88 must be interpreted as meaning that the stand-by time a worker spends at home with the duty to respond to calls from his/her employer within a very restricted period of time, thus significantly limiting the worker's opportunities to pursue other activities, must be regarded as 'working time'. A case-by case analysis must be carried out.

The Spanish legal framework on stand-by time has not been modified in Spain in recent years, not even following the *Matzak* ruling. As a general rule, stand-by time periods are not considered working time when the worker is not present at the employer's premises, although the worker is usually entitled to a salary supplement.

These CJEU rulings will be implemented through case law and the Supreme Court has followed the *Matzak* doctrine several times in its case-by-case analyses (see March 2021 Flash Report). The Supreme Court has stated that stand-by time is not working time when the worker:

- has a reasonable time to respond (30 minutes at least);
- has the ability to choose the place where to spend that time;
- can respond by phone or computer to some of the calls, reducing the average frequency of the calls that force him/her to physically move to the undertaking/client premises.

It appears that the present ruling does not require a change in the criteria of the Spanish Supreme Court, which seem to be fully compatible with CJEU case law.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

The question dealt with in the present case is not an issue in Spain. According to Article 23 (d) of the Labour Code, the undertaking must provide the worker with the necessary training to adapt to changes in the job, and the time spent on training shall be considered effective working time.

The Supreme Court has also stated that the time spent on mandatory vocational training shall be considered working time, and should preferably be carried out within ordinary working hours (for instance, see Supreme Court, decision 979/2017, 11 December 2017). This would not be the case when vocational training is not mandatory.

4 Other Relevant Information

4.1 Unemployment

Unemployment has continued to decrease for the eighth consecutive month. There are currently 3 257 068 unemployed people in Spain. Despite not being impressive (the reduction only involved 724 unemployed people), it is the first reduction in the number of unemployed in an October since 1975.

4.2 Youth employment

Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 established the Recovery and Resilience Facility, and within that framework, the Spanish government approved the Recovery, Transformation and Resilience Plan in April 2021.

This is an ambitious Plan that requires actions in the fields of employment and labour law. This Order of November 2021 is a preliminary step, aiming to improve employment opportunities for young researchers. The objective is to provide grants to organisations (e.g. universities or research centres) to cover the labour and social security costs of the young researchers they recruit.

Sweden

Summary

Sweden has introduced new COVID-19 restrictions, and vaccination certificates are required for public gatherings indoors.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 COVID-19 certificate

Sweden has imposed new COVID-19 restrictions. From 01 December 2021, vaccination certificates are required for public gatherings indoors.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

In this judgement, the CJEU has clarified that stand-by working time in voluntary work is not considered working time within the meaning of the Working Time Directive. Since the CJEU case C-518/15, 21 February 2018, *Matzak* ruling, it has been somewhat unclear whether voluntary work was subject to the Working Time Directive.

As there are a lot of organised activities carried out on a voluntary basis in Sweden, such an interpretation would risk undermining these organisations. Examples of such activities in Sweden are rural part-time fire stations, the Swedish Sea Rescue Society, sports organisations and work conducted for religious organisations.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

In the present case, the CJEU clarified that training conducted on the employer's initiative was to be considered working time.

In Sweden, it has long been established that training and education on the employer's initiative counts as working time.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

(I) The government is going to introduce a COVID-19 vaccination as a condition of deployment for all frontline health and social care workers.

(II) There is a new decision working out the implications of the new status of 'retained EU law' as developed in the EU (Withdrawal) Act 2018 to provide continuity between EU law and the new post-Brexit status for the UK.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Vaccination against COVID-19

The government has announced the introduction of the COVID-19 vaccination as a condition of deployment for all frontline health and social care workers. Care home staff are already subject to this obligation.

The requirements will come into force in the spring, subject to the passage of the regulations through Parliament. There will be a 12-week grace period between the regulations being made and coming into force to allow those who have not yet been vaccinated to have both doses.

Enforcement would begin from 01 April 2022, subject to parliamentary approval.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Stand-by time

CJEU case C-214/20, 11 November 2021, Dublin City Council

The issue of working time and what constitutes working time in the UK is vexed. The UK has also followed Court of Justice decisions on what constitutes working time. However, the effect of these decisions is negated by the fact that the UK makes extensive use of the opt-out provided in Article 22(1) of Directive 2003/88.

In respect of fire fighters, 90 per cent of the UK is covered by on-call fire fighters. There are over 14 000 on-call fire fighters in England protecting small towns and rural communities, and they are responsible for operating 60 per cent of all fire engines. It appears that on-call time is not paid as working time, but there is a retainer:

> *"Availability means how many hours you agree to be on-call and when those hours are (during the day and/or evenings and/or weekends). You will not be working for the agreed number of on-call hours, but the fire and rescue service will pay you to be 'available '. You can go about your normal life at home or work, but if you get an emergency call requesting your assistance, you must be able to drop what you are doing and get to your local community fire station within a*

> *specified time. Staff at your local on-call community fire station will be able to provide you with a detailed explanation of on-call availability."*

This appears to be compatible with the decision of the CJEU in the present case.

The most recent decision on on-call time, *Tomlinson-Blake*, [2021] UKSC 8, decided by the Supreme Court on 19 March 2021, concerned the minimum wage legislation, not working time, but the question was raised whether the hours during a sleep-in shift counted as work for the purposes of the minimum wage legislation. The sleep-in shift ran from 10 pm to 7 am and was paid at a flat rate of GBP 22.35, plus one hour's pay of GBP 6.70 (GBP 29.05 in total). No specific tasks were allocated during the sleep-in shift. However, the claimant had to keep a 'listening ear' out during the night in case her support was needed, and she was expected to intervene where required or respond to requests for help. That need to intervene was found to be real and infrequent – six times over the preceding 16 months. Absent such interventions, she was entitled to sleep throughout the shift. Where her sleep was disturbed and she needed to provide night-time support, the first hour was not additionally remunerated, while any further hours were paid in full.

The Supreme Court (Lady Arden) concluded that the meaning of the sleep-in provisions in the 1999 regulations and the 2015 regulations is that if the worker is permitted to sleep during the shift and is only required to respond to emergencies, the hours in question are not included in the National Minimum Wage (calculation for time work or salaried hours work, unless the worker is awake for the purpose of working (paras. 44-47). She was influenced by the recommendations of the Low Pay Commission, a statutory body that was set up by the 1998 Act and whose membership is widely drawn from both sides of industry, and those with relevant knowledge and expertise. The government is bound by the 1998 Act to implement the Low Pay Committee's recommendations about the national minimum wage (NMW) on matters referred to it, which require regulation unless it provides reasons to Parliament for not doing so. The government accepted the Committee's recommendation on sleep-in shifts in its first report (paras. 12-13). That recommendation was that sleep-in workers should receive an allowance and not the national minimum wage, unless they are awake for the purposes of working, and that recommendation was repeated in later reports of the LPC (paras. 48-50).

The ruling was not well received by those protesting the rights of low-paid workers, but it appears to be correct in terms of the law.

3.2 Working time

CJEU case C-909/19, 28 October 2021, Unitatea Administrativ Teritorială D.

As above, the UK has followed the CJEU case law but makes extensive use of the opt-out clause. In respect of the vocational training decision, it has been suggested that this goes further than regulation 2(1) of the Working Time Regulations 1998 (SI 1998/1833) (WTR), which:

> *"expressly excludes time spent training from the definition of 'working time' where the immediate provider is an educational institution or a person whose main business is the provision of training, and the training is provided on a course run by that institution or person".* (Practical Law current awareness alert, 8 November 2021).

4 Other Relevant Information

4.1 Status of retained EU law

There will be a constant drip feed of decisions working out the implications of the new status of 'retained EU law' as developed in the EU (Withdrawal) Act 2018 to provide continuity between EU law and the new post-Brexit status for the UK.

In November, the case concerned the general principles of law. In the decision of the High Court, Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049, of 16 November 2021, the High Court (Judge Keyser) stated:

> *"A convenient starting point for consideration of these arguments is the definitions in section 6 of the 2018 Act. To paraphrase: 'retained EU law' is anything that continues to be part of domestic law by virtue of (for present purposes) section 4 of the 2018 Act. Thus it is domestic law. By virtue of section 6(3) of the 2018 Act, any question as to the meaning or effect of EU retained law is to be decided in accordance with any 'retained case law' (whether of the CJEU or the domestic courts) and any 'retained general principles of EU law' (general principles of EU law existing as at 31 December 2020) so far as they relate to retained EU law that is preserved in domestic law by (here) section 4 of the 2018 Act and is not otherwise excluded. Accordingly, 'retained EU case law' and 'retained general principles of EU law' constitute interpretative rules for domestic law that is 'retained EU law' but are not per se 'retained EU law', though the definitions do not preclude them being so. (I should not have thought that section 6(3), by giving retained general principles of EU law an interpretative authority, makes them part of domestic law; the contrary seems indicated by their strictly interpretative function in specific cases. Given that limited function, the answer to this rather Dworkinesque question may not much matter.)"*

Judge Keyser continues that

> *"In my view, Schedule 1, para 2, to the 2018 Act makes no provision for what is part of domestic law. It simply provides that general principles of EU law that were first recognised as such after 2020 are not part of domestic law; though the provision necessarily implies that general principles of EU law are capable of being part of domestic law."*

4.2 Gig economy workforce

According to TUC research, it is estimated that 4.4 million people work for gig economy platforms at least once a week in England and Wales. The number has tripled over the last five years.

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