Flash Reports on Labour Law December 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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Executive Summary

National level developments

In December 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 related to the advent of the omicron variant of COVID-19, many countries still have measures in place in December 2021 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 **Cyprus**, the **Czech Republic**, **Hungary**, **Italy**, **Portugal**, **Slovakia**, **Sweden** and the **United Kingdom**. Additionally, **Cyprus** and **Slovakia** also reintroduced travel bans or temporary restrictions for non-essential travel.

Teleworking is once again mandatory in **Portugal** and strongly recommended in **Sweden**. Employers in **Greece** may now require employees to telework without having to agree to changes to their contract of employment. In **Belgium**, the temporary collective bargaining agreement on teleworking was extended until 31 March 2022.

Legislative: developments are still related to the requirement for 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: in **Luxembourg**, COVID-19 certificates will become mandatory in all workplaces. Conversely, in **Italy**, a 'reinforced Green Pass', which can only be obtained by those who have been vaccinated or have recovered from a previous infection, was introduced. Similarly, in the **Netherlands**, a bill proposal that would make it possible to allow a Digital COVID Certificate to be based only on vaccination or recovery (2G) is currently being discussed.

Mandatory vaccination of some or all categories of workers are being introduced in some countries. In the **Czech Republic**, a vaccination mandate was issued, while the measures concerning the mandatory testing of employees were amended. Likewise, in **Finland**, a proposal entailing the mandatory vaccination of healthcare and social welfare personnel to protect patients and clients was approved, with a similar measure being extended in **Italy**. Finally, in **Poland**, a draft law that would give employers the right to obtain information on the employees' vaccination status was submitted to Parliament.

More case law relating to employees who do not adhere to COVID-19 rules emerged, as in **Estonia**, the Supreme Court held that interim relief for unvaccinated workers during court proceedings is not justified. Furthermore, in **Slovenia**, the Constitutional Court decided that rules imposing the RV (recovered or vaccinated) requirement on State public administration employees were unconstitutional, as they were not adopted in conformity with the statutory requirements for the determination of the vaccination of employees.

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 countries such as **Greece**, **Denmark**, **Slovenia** and **Slovakia**.

Previously enacted COVID-19 support measures for businesses have been reintroduced in the **Netherlands** and in **Norway**.

In **Belgium**, the days of work interruption due to temporary unemployment because of the pandemic were temporarily equated to days actually worked in the context of the law on employees' annual leave.

Leave entitlements and social security

In **Austria**, the legislative instruments introduced to ease the situation of employees with care obligations and unvaccinated pregnant employees were extended, while special care benefits for parents in the event of school closures were amended in **Portugal**. In the **Czech Republic**, the range of persons for whom the entitlement for nursing allowance arises was widened.

In **Belgium**, workers who fall ill with COVID-19 can now rely on the social security system's allowances for occupational diseases. In the **Czech Republic**, an act introducing an extraordinary allowance for employees who have been ordered to quarantine and one introducing a compensation bonus entered into effect. In **Estonia**, the sick leave compensation scheme entailing more favourable conditions for workers has been extended for one year.

Measure to ensure the performance of essential work

In **Denmark**, pensioners and retirees are now financially encouraged to take on extra work associated with COVID-19.

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

Topic	Countries
COVID-19 restrictions	CY CZ HU IT PT SK SE UK
Mandatory vaccination against COVID-19	CZ EE IT FI PL SI
Measures for workers	BE EL DK SI SK
Teleworking	BE EL PT SE
Mandatory COVID-19 certificate or testing at the workplace	CZ IT LU NL
Care leave	AT CZ PT
Sick leave	BE CZ EE
Measures for businesses	NL NO
Short-time work	SK
Pension benefits	DK

Other developments

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

Teleworking

In **Greece**, a new Ministerial Decision sets the minimum monthly costs that must be covered by employers in case of teleworking.

In **Hungary**, the provisions of the Labour Code and the Labour Safety Act on teleworking were amended. Similarly, in **Portugal**, new legislation regulates the modalities of teleworking, cases in which employees have the right to teleworking and the rights and duties of both parties involved, also introducing a new obligation for employers to refrain from contacting employees during their rest period.

In **Italy**, the Ministry of Labour and the social partners signed a National Protocol on smart working in the private sector.

Working time

In **Belgium**, according to the Court of Cassation, as the law does not stipulate any remuneration for stand-by duty, a volunteer firefighter is only entitled to the relative remuneration stipulated in the regulations of the town where he/she works.

In **Poland**, an amendment to the Law on Working Time of Drivers that aims to implement Directive 2020/1057 has been submitted to Parliament.

In **Sweden**, the Labour Court held that not allowing an employee to take minimum rest period was not a breach of the collective agreement.

Seafarers' work

In **Italy**, the government implemented Directive (EU) 2019/1159 on the mutual recognition of seafarers' certificates.

In **Liechtenstein**, the government issued a decision according to which Directive (EU) 2015/1794 on seafarers is to be incorporated into the EEA Agreement.

Fixed-term work

In **Cyprus**, temporary political appointees to the President and ministers are now excluded from benefiting from the remedies contained in Directive 1999/70/EC on fixed-term work.

In **Spain**, the types of fixed-term contracts have been amended with the aim of reducing the rates of fixed-term work, both in the private and in the public sector.

Work-life balance

In **Estonia**, where Directive (EU) 2019/1158 was transposed, workers now have the right to request flexible working arrangements for care purposes and enjoy additional protection upon dismissal.

In **France**, a law provides for a new parental leave to care for children suffering from a chronic pathology or cancer.

Occupational safety and health

In **Croatia**, the Minister of Labour has issued a regulation on training in occupational health and safety.

In **Spain**, a Royal Decree transposing Directive 2019/1832 updated the minimum health and safety requirements for the use by workers of personal protective equipment in the workplace.

Transfer of undertaking

In **Norway**, the Supreme Court held that the time limit for instituting legal proceedings in a dispute concerning dismissal in connection with a transfer of an undertaking runs from the time of the transfer.

In **Portugal**, two Courts of Appeal ruled on the concept of transfers of undertakings under the Labour Code.

Atypical work

In **Spain**, the Supreme Court ruled that the use of temporary work agencies to fill permanent jobs amounts to a situation of illegal assignment of workers.

In the **Netherlands**, the Court of Appeal also ruled that the collective labour agreement for road haulage applies to Deliveroo riders. Furthermore, it held that Deliveroo is subject to the decision for obligatory affiliation with the industry-wide pension fund for road haulage.

Workers' participation

In **Finland**, the new Act on Cooperation in Undertakings will enter into force 01 January 2022.

In **Slovenia**, the composition of the councils of public education institutions has been modified and the number of the elected workers' representatives lowered.

Other developments

In **Belgium**, according to the Constitutional Court, the requirement to use licensed dockers does not conflict with the constitutional prohibition of discrimination in connection with the legal freedom of trade and industry.

In **Croatia**, the Minister of Labour issued a regulation prescribing the form and content of a statement on the posting of workers to Croatia. Furthermore, a Decision on Workers' Benefits, which transposed Directive (EU) 2019/878, was implemented into Croatian law.

In the **Netherlands**, the Supreme Court ruled on the legal position of volunteers with respect to liability for workplace accidents.

In **Portugal**, a general regime for the protection of whistleblowers that transposes Directive 2019/1937 on the protection of persons who report breaches of EU law has been approved.

Table 2: Other major developments

Topic	Countries
Minimum wage	EE EL HR HU IE PT RO
Teleworking	EL HU IT LU PT
Working time	BE PL SE
Workers' representation	FI SI
Collective agreements	ES SI
Transfer of undertaking	NO PT
Fixed-term work	CY ES
Work-life balance	EE FR
Seafarers' work	IT LI
Occupational health and safety	HR ES
Temporary agency work	ES
Subcontracting	ES
Whistleblowers	PT
Dockworkers	BE
Paid leave	FR
Volunteer work	NL
Social security coordination	NL
Platform work	NL

Implications of CJEU Rulings

Paid annual leave

This Flash Report analyses the implications of a CJEU ruling on the amount of remuneration due to a worker who, being incapacitated for work due to illness, exercises his or her right to paid annual leave.

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In the present case, the CJEU held that according to Article 7(1) of the Working Time Directive, a worker who has been incapacitated for work due to illness and takes paid annual leave during the period of incapacity for work has a right to the same leave remuneration that he/she would have received if he/she had been working, and not to the lower remuneration he or she received during the incapacity for work due to illness.

A large majority of national reports indicate that their national legislation or established case law follow the principle established in this ruling, as the employee's illness or incapacity for work during the reference period prior to commencing annual leave is not relevant to determine the amount of annual leave remuneration. However, some reports emphasised that this ruling could guide the interpretation of existing national provisions (e.g. **Croatia**, **Denmark** and **Malta**).

Some national reports indicate that their national legislation and case law is not in line with the CJEU's judgment.

In **Hungary**, if the employee is incapacitated for work during the last six calendar months prior to annual paid leave, the employee may receive lower pay, with the difference paid from performance-based wages and wage supplements, which will not be paid to the employee during the period of incapacity for work.

In **Iceland**, full pay for sickness for an indefinite period is not guaranteed; as such, Icelandic law does not ensure full annual leave remuneration for those who have not earned their full salary due to sickness during the reference period.

Similarly, as a result of the regulations in both **Norway** and **Sweden**, a sick employee would receive significantly less pay during a period of annual leave than he/she would have received if it had not been for the period of sick leave.

Finally, some reports underline the potential impact of this ruling in terms of care leave benefits.

In **Spain**, this could be relevant in relation to the social security benefit earned in case of a reduction of working time due to the illness of a child, as the remuneration is paid proportionally to the working hours worked by the employee. Similarly, in **Latvia**, labour law does not explicitly envisage the obligation to provide a parent who is on part-time child-care leave his or her full pay during his or her annual leave.

Austria

Summary

The legislative instruments reintroduced in October 2021 to ease the situation of employees with care obligations and unvaccinated pregnant employees have been extended until the end of March 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Care leave

As described in detail in the October 2021 Flash Report, funded paid leave for parents and employees with care obligations was reintroduced retroactively as of 01 September 2021 and until 31 December 2021.

The National Assembly passed further amendments on 16 December 2021: funded paid leave for parents and employees with care obligations has now been extended until 31 March 2022 (*Arbeitsvertragsrechts-Anpassungsgesetz*, Änderung, 430/BNR). It was also clarified that parents may agree with their respective employers on funded paid leave for up to three weeks during lockdowns, even though schools are not partially or fully closed, if they have exhausted other legal entitlements to stay home with their children (in case schools close down, parents are—as in other cases, see the October 2021 Flash Report—entitled to paid funded leave).

The Federal Assembly passed the amendment on 21 December 2021. It entered into force on 01 January and may be extended beyond 31 March 2022 by ordinance of the Minister of Labour until 08 July 2022 at the latest.

1.1.2 Special pregnancy leave

As described in the October 2021 Flash Report, the COVID-19 paid leave for unvaccinated pregnant women who have physical contacts to others at work when no alternative employment is possible has been extended until 31 March 2022. Employers continue to be entitled to compensation for continued remuneration for that leave.

The extension passed the National Assembly on 16 December 2021, and the Federal Assembly on 21 December 2021, entering into force on 01 January 2022 (429/BNR).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In Austria, the continuation of pay is regulated in § 6 Annual Leave Act (*Urlaubsgesetz – UrlG*), which reads as follows (unofficial translation by the author):

> *"Holiday pay*
>
> *§ 6 (1) During annual leave, the employee shall retain the right to remuneration in accordance with the following provisions.*
>
> *(2) Remuneration calculated on the basis of weeks, months or longer periods shall not be reduced for the duration of the leave.*
>
> *(3) In all other cases, the employee's regular remuneration shall be paid for the duration of the leave. Regular remuneration shall be the remuneration to which the employee would have been entitled if the leave had not been taken.*
>
> *(4) In the case of piecework or piecework wages, premiums or remuneration similar to piecework or other performance-related premiums or remuneration, the holiday pay shall be calculated on the basis of the average of the last thirteen fully worked weeks, excluding work performed only exceptionally.*
>
> *(5) Collective agreements within the meaning of § 18 (4) of the Labour Constitution Act, Federal Law Gazette No. 22/1974, may determine which benefits paid by the employer are to be considered holiday pay. The method of calculating the amount of holiday pay can be regulated by collective agreement in derogation of subsections 3 and 4.*
>
> *(6) Holiday pay shall be paid in advance for the entire duration of the leave at the start of the holiday."*

Established case law on regular overtime for the calculation of holiday pay based on the employee's average remuneration pursuant to § 6 (4) UrlG holds that typically, 13 weeks are the relevant observation period. Only if for special reasons (e.g. illness, holidays, seasonal differences, etc.) this period is not sufficient for the assessment, a longer observation period more in line with the idea of continuity must be used (recently, Supreme Court of 20 April 2020, 9 ObA 5/20f). This must also apply the other way around, i.e. for periods of reduced pay due to incapacity for work as sick pay may be reduced to 50 per cent of the wage after 8 weeks of sickness per year. This period is increased depending on the employee's time of service.

This understanding of calculating holiday pay is also explicitly stated in the literature (e.g. in the most influential commentary on labour law legislation *Reissner*, in ZellKomm 3rd ed 2018 § 6 UrlG recital 14): when calculating holiday pay, only 'fully worked weeks' are to be taken into account. Periods of short-time work or shorter working hours for other reasons (e.g. sickness, other reasons for not working) are therefore not included in the calculation period.

It can therefore be concluded that although not yet explicitly stated in Austrian legislation or in case law, it is in line with the CJEU's ruling in *Staatsecretaris van Financiën*, as the approach to the calculation of holiday pay in this decision corresponds to the existing interpretation on overtime.

Another aspect of the Austrian Annual Leave Act may also be interesting in this context: it is explicitly prohibited to agree on the use of annual leave for reasons that result in the continuation of pay. § 4 (2) UrlG provides as follows:

> *"For periods during which an employee is prevented from performing work for one of the reasons specified in section 2 of the Continuation of Remuneration Act 1974, Federal Law Gazette No. 399 (incapacity for work due to sickness and*

accidents), during which he/she is entitled to care leave or during which he/she is otherwise entitled to continued payment of remuneration in the event of not working, the commencement of annual leave may not be agreed if these circumstances were already known when the agreement was concluded. If this nevertheless happens, the period of inability to work shall not be regarded as annual leave."

4 Other Relevant Information

Nothing to report.

Belgium

Summary

(I) Workers who fall ill with COVID-19 are now entitled to social security allowances for occupational diseases.

(II) The temporary collective bargaining agreement on teleworking was extended until 31 March 2022.

(III) The days of work interruption due to temporary unemployment because of the pandemic were temporarily equated to days actually worked in the context of the law on employees' annual leave.

(IV) According to the Constitutional Court, the requirement of using licensed dockers does not conflict with the constitutional prohibition of discrimination in connection with the legal freedom of trade and industry.

(V) According to the Court of Cassation, as Belgian law does not stipulate any remuneration for stand-by duty, a volunteer firefighter is only entitled to the remuneration stipulated in the regulations of the town where he/she works.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Occupational disease

For healthcare workers who are at a significantly higher risk of infection with the coronavirus, COVID-19 has long been recognised as an occupational disease. This means that these workers are entitled to compensation at the expense of the Federal Agency for Occupational Risks (FEDRIS) if they are affected by the disease.

This was also the case for workers in critical sectors and essential services who worked during the period from 18 March to 17 May 2020, provided the illness was diagnosed during the period from 20 March 2020 to 31 May 2020.

For these two categories of workers, there is/was an irrefutable presumption that the illness was caused by the exercise of their profession.

An employee who does not belong to one of these categories of workers can also obtain recognition that his or her COVID-19 illness is an occupational disease but will have to provide proof that he/she contracted this disease in the course of his/her professional activities and not in other circumstances. This proof is difficult to provide.

For this reason, a Royal Decree has recently been enacted allowing private sector employees (who do not work in the healthcare sector), who have contracted COVID-19 following an outbreak of the SARS-CoV-2 virus at work, to more easily obtain compensation for an occupational disease from FEDRIS: the Royal Decree of 09 December 2021 amending the Royal Decree of 28 March 1969 establishing the list of occupational diseases giving rise to compensation and laying down the criteria which exposure to the occupational risk must meet for some of these diseases, see Moniteur belge of 17 December 2021.

This compensation aims to reimburse the damage suffered. It is therefore of particular interest for employees who have suffered loss of wages, of salary or who want a reimbursement of the patient fee for certain medical care services, such as the costs of hospitalisation or examination by a specialised doctor. Such recognition may also be interesting for the employer of the respective employee as he or she can obtain reimbursement from FEDRIS of the guaranteed salary paid in case of the worker's incapacity for work.

An employee infected with COVID-19 will be compensated by FEDRIS if the following conditions are met:

- there are at least 5 confirmed cases within a period of 14 days within a well-defined group of people sharing the same workplace and of which the affected worker is a member (these 5 people do not all have to be workers);
- a confirmed case is defined as a person, with or without symptoms, who has a confirmed case of the virus based on a molecular or antigen test;
- the working conditions have made it easier to transmit the virus (e.g. difficult to keep a distance);
- there is an epidemiological link between the confirmed cases (in other words, the infected people must have crossed paths).

The new regulation will take effect retroactively from 18 May 2020. An application for recognition can therefore also be submitted for a past infection, provided that a positive test was taken after 17 May 2020.The measure remained in effect until 31 December 2021, but can be extended by the government, which is likely.

1.1.2 Teleworking

At the beginning of this year, the National Labour Council concluded CBA No. 149 on recommended or mandatory teleworking in the face of the corona crisis on 26 January 2021 (see January 2021 Flash Report).

CBA No. 149 is a supplementary cross-industry CBA. CBA No. 149 only applies to teleworking in an enterprise when:

- if teleworking has been made compulsory or recommended by government agencies to prevent the spread of the coronavirus;
- the company has not, by 01 January 2021, developed a scheme of teleworking as provided for in CBA No. 85 on teleworking or of occasional teleworking or as provided for by the Law of 05 March 2017 on workable and flexible work.

CBA No. 149 was concluded for a fixed term, namely until 31 December 2021.

Due to the new wave of contamination, the social partners concluded CBA No. 149/2 in the National Labour Council on 07 December 2021 on recommended or mandatory teleworking in response to the corona crisis, which extends the validity of CBA No. 149 until 31 March 2022.

1.1.3 Paid annual leave

For the period from 01 September 2021 to 31 December 2021, the days of work interruption due to temporary unemployment as a result of the pandemic are equated to days actually worked in the context of the Law of 28 June 1971 on employees' annual leave.

The adaptation is determined by the Royal Decree of 07 December 2021 on the adaptation of the days of suspension of work due to temporary unemployment because of force majeure as a consequence of the pandemic in the system of annual leave of the employees, for the period from 01 January 2021 to 31 December 2021 (see Moniteur belge of 21 December 2021).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Dockworkers

Constitutional Court, No. 168/2021, 25 November 2021

The extent of the risks for the safety of dockers in port areas and the need to prevent occupational accidents associated with the preparation of trailers on a dock quay with a tug master, which is a specific type of port vehicle, does not, stricto sensu, differ significantly from the risks involved in loading and unloading ships. It is therefore reasonable that the controversial Belgian law on dock work of 08 June 1972 requires the use of licensed dockers for both types of dock work. That legal obligation does not conflict with the constitutional prohibition of discrimination by the law in connection with the legal freedom of trade and industry.

The Belgian Constitutional Court in its ruling of 25 November 2021, No. 168/2021, reopened the case relating to the controversial Belgian law on dock work of 08 June 1972, also called the 'Law Major' after the then-socialist Minister of Labour Louis Major, after the CJEU issued its response to the preliminary questions raised by the Constitutional Court (see CJEU cases C-407/19 and C-471/19, 11 February 2021, *Katoen Bulk Terminals NV and Middlegate Europe NV v. Belgian State*). These questions were asked following a dispute on an administrative fine. This fine was imposed on a company that operates throughout Europe for having dock work carried out by an unauthorised dockworker. In its decision of 11 February 2021, the CJEU ruled that the Belgian law on dock work of 08 June 1972 is not unlawful to the extent that it aims to ensure safety in port areas and to prevent industrial accidents. However, the determining role of the joint committee with the trade unions and employers in the recognition of port workers is not compatible with European law. The Court recognised that the rules of the 'Law Major' on the monopoly of dock work for recognised dockers may make it less attractive for companies to establish themselves in Belgium or to provide services. For that reason, it constitutes a restriction to the freedom of establishment and the freedom to provide services, guaranteed in Articles 49 and 56 TFEU. However, such a restriction can be justified. If the purpose of the law is to ensure safety in port areas or to prevent industrial accidents, it does not in itself infringe the aforementioned freedoms. These safety aspects, and especially whether they are necessary and proportionate must be assessed by the Constitutional Court and the Council of State, according to the CJEU. However, as far as the decision power of the joint committee on the administrative recognition of dock workers is concerned, the CJEU ruled that EU law precludes a regulation as applied in Belgium. The involvement of the joint committee with employers' organisations and the trade unions of dockers (employees) is neither necessary nor appropriate to achieve the objective of safety in the port.

The CJEU stated:

> "*71. Moreover, since the objective of such legislation is to ensure safety in port areas and to prevent accidents at work, the conditions for recognition of dockers must logically pertain only to whether they have the qualities and skills necessary to ensure the performance of their tasks in complete safety. 72. To that end, (…), it might be provided, as the case may be, that, in order to be recognised, dockers must have sufficient vocational training. 73. However, requiring such training to be provided or certified by one particular body in the Member State concerned, without taking into account any recognition of the workers concerned as dockers in another Member State of the European Union, or of the training which they have followed in another Member State and the professional skills which they have acquired there, is disproportionate to the aim pursued (see, to that effect, judgment of 5 February 2015, Commission v Belgium, C-317/14, EU:C:2015:63, paragraphs 27 to 29). 74 Furthermore, (…), limiting the*

> *number of dockers who may be recognised and, therefore, establishing a limited quota of such workers, to which any undertaking wishing to carry out port activities must obligatorily have recourse, assuming that it is appropriate for ensuring safety in port areas, is certainly disproportionate to the attainment of such an objective*".

A change in the Belgian legal system on the issue of the recognition of professional skilled dockers seems inevitable and will undoubtedly affect the way dockers are recognised and employed in the future.

The Belgian Constitutional Court briefly repeats the answers to the preliminary questions. Indeed, the CJEU has ruled that Articles 49 and 56 of the TFEU do not preclude national legislation under which undertakings may only use recognised dock workers to carry out port labour in port areas, provided certain conditions are met. In particular, the conditions for authorisation must be based on objective, non-discriminatory criteria which are known in advance. In addition, it must be possible for port workers from other Member States to prove that they meet equivalent requirements on the basis of those criteria and there must not be a restricted pool of port workers eligible for recognition. Since the conditions and practical arrangements for the recognition of port workers were laid down in the Royal Decree of 05 July 2004, it does not fall within the jurisdiction of the Constitutional Court to verify the compatibility of those provisions with Articles 10 and 11 of the Constitution, because the Constitutional Court can only review laws and not royal decrees against the Constitution.

The Court then examined whether the identical treatment of the loading and unloading of ships and the other activities covered by the concept of 'dock work' is compatible with the prohibition of discrimination in the law laid down in Articles 10 and 11 of the Constitution in connection with the freedom of trade and industry as guaranteed by Article II.3 of the Economic Code Law. However, the Court limits this examination to the specific activity at issue in the proceedings on the merits, namely the preparation of trailers at a dock quay for shipping using a vehicle specifically designed for that purpose. The Court concludes that from the point of view of ensuring safety in port areas, the risks associated with these activities are similar and, therefore, equal treatment of these activities is reasonably justified. Consequently, the Court considers that Articles 1 and 2 of the Law on dock work of 08 June 1972 are compatible with Articles 10 and 11 of the Constitution, in so far as they relate to the activity in the legal dispute.

2.2 Working time and remuneration

Cour de Cassation, S.20.0092.F, 15 November 2021

In a judgment of 15 November 2021, the Court of Cassation had to rule on the *Matzak* case concerning on-call duty of a volunteer fireman, Mr Matzak, from the City of Nivelles. This judgment is part of the aftermath of the CJEU's famous ruling in case C-518/15, 21 February 2018, *Ville de Nivelles v Rudy Matzak* (see February 2018 Flash Report).

After it had been established by the Appeal Labour Court of Brussels on 20 January 2020 (No. R.G. 2021/AB/592) that the stand-by duties of Mr. Matzak did indeed constitute working time, the Appeal Labour Court also had to rule on the remuneration for these stand-by duties. The Working Time Directive does not regulate the remuneration of working time, so that one has to look at national law. However, Belgian law does not contain any specific provisions in this regard either, so the City of Nivelles is free to provide for its own internal regulation. The Labour Court had ruled that the firefighter was not entitled to an allowance for stand-by duty other than the 0.71 EUR per hour of stand-by duty provided for in Article 62 of the organic rules of the fire service. The firefighter lodged an appeal in cassation against this because he believed that he was entitled to the normal 100 per cent allowance for such stand-by shifts. Indeed, the remuneration of volunteer firefighters was only regulated in Article 39 (later Art. 40) of

the organic regulations, which did not contain any specific provision for stand-by duties at home, except for officers and deputy officers. According to him, Article 62 of the regulations would only apply to regular firemen and not to volunteers. According to Mr. Matzak, his stand-by duty should be paid in accordance with the normal remuneration for volunteers, as regular and full time work. However, the Court of Cassation did not follow this reasoning and decided that the Court of Appeal had ruled correctly by awarding him, by analogy, the small remuneration for stand-by duty performed by regular firefighters.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The case concerned a Dutch tax civil servant who was partially incapacitated for work for a long time and consequently took his paid annual leave. But the CJEU's decision is more general and concerns all workers, not just civil servants. The CJEU ruled that Article7(1) of the Working Time Directive 2003/88 must be interpreted as 'precluding' national provisions under which, where a worker who is incapacitated for work due to illness exercises his right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration that he received during the period of work preceding that during which annual leave is requested, is taken into account to determine the amount of remuneration that will be paid to him in respect of his paid annual leave.

A closer reading is necessary because the guarantee of maintaining the salary during annual leave in Article 7 of the Working Time Directive is limited as the CJEU reiterated in paragraphs 26 to 28 of its ruling. The Court has stated that the term 'paid annual leave' in Article 7 means that remuneration must be maintained and that, in other words, workers must receive their 'normal' remuneration for that period of rest and that the workers must, when they exercise their right to paid annual leave, be put in a position which, as regards salary, is comparable to periods of work.

Although the judgment of the Court of Justice is already several weeks old, it has not yet led to many comments in Belgian employment law doctrine. This is surprising, because the European decision is indeed important for Belgian labour law, as there are other situations under Belgian law whereby employees are partially unfit for work because of incapacity for work, but at the same time, partially performs work for the employer. Such a mixed situation can arise from a mutual 'agreement' between the employer and employee to work part-time with a corresponding reduction in salary, for example. A common other situation is when an employee is disabled long term and receives social security benefits from his/her health insurance fund and later, with the consent of the advisory doctor of his/her health insurance fund, partly resumes work while he/she does 'not have the choice' due to his/her state of health, whether or not to resume work full-time. In such a case, the employee receives part of his/her salary and a limited disability allowance from the sickness and disability insurance (Article 100 of the Sickness and Disability Insurance Law of 14 July 1994 and Article 230 of the implementing Royal Decree of 03 July 1996; see M. Vanhegen, *De re-integratie van arbeidsongeschikte werknemers op de arbeidsmarkt*, Bruges, Die Keure, 2021, p. 263-266). The advisory doctor of the health insurance fund may only authorise a partial resumption of work if the employee has maintained a substantial incapacity for work of at least 50 per cent from a medical point of view (Article 100, §2 of the Sickness and Disability Insurance Law of 14 July 1994).

What happens if the employee takes annual leave thereafter? Could the CJEU's judgment imply that during a period of annual leave workers are entitled to their wages, called holiday pay in Belgium, calculated on the basis of the full wages to which they were entitled before the period of partial incapacity for work and partial performance of

work? An additional complication is that the holiday pay for blue collar workers performing manual labour consists of a social security benefit financed by proportional social security contributions paid by the employer of the manual workers.

The considerable generosity of the Belgian scheme for annual leave must be taken into account, which means that during annual leave, employees receive holiday pay equal to 1.92 times their normal wage, i.e. almost 'double their pay' (Articles 14 and 38 of the Royal Decree of Annual Leave of 30 March 1967). This is much higher protection than offered by Article 7 of the WTD.

The consequences of the judgment for Belgian law thus appear to be more limited because, in cases of partial resumption of work in the event of incapacity for work on the part of the worker, he/she will receive holiday pay or a salary at least equal to 100 per cent of his/her full salary in the event of full-time work, but less than double the holiday pay.

It is also not clear whether the CJEU ruling may be extended to situations in which the employee in a reintegration process as a result of incapacity for work receives partial wages from his/her employer and, in addition, social security benefits from his/her health insurance fund, in particular under sickness and invalidity insurance.

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 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Bulgarian labour legislation provides that an employee, who due to disease or employment injury is unable to execute the work assigned thereto, but who can carry out other suitable work or the same work under adjusted conditions without any risk to his or her health, shall be considered an 'occupational rehabilitee', and be transferred to another post or shall perform the same work duties under suitable conditions in accordance with the recommendations of the health authorities (Article 314 of the Labour Code). Such employees shall receive remuneration for the work performed. An employee who has a permanently reduced working capacity of less than 50 per cent and who is an occupational rehabilitee for a determined period and receives a lower remuneration for his or her new work duties than that he or she received for his or her previous work, shall be entitled to financial compensation for the difference between the original and current remuneration in accordance with a separate law (Article 47 of the Social Insurance Code). This means that the employer does not pay for the employee's incapacity for work. During paid annual leave, the employer pays the remuneration for the work being performed at the time the leave is taken.

In case the employee's reduced working capacity exceeds 50 per cent (invalidity), he or she is entitled to an invalidity pension and receives it together with his or her labour remuneration, including during paid annual leave.

4 Other Relevant Information

Nothing to report.

Croatia

Summary

(I) The Minister of Labour has issued a regulation on training in occupational health and safety, as well as on the form and content of a statement on the posting of workers to Croatia.

(II) The Governor of the Croatian National Bank has issued an Amendment to the Decision on Workers' Benefits, which transposed Directive (EU) 2019/878 into Croatian law.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Occupational health and safety

The Minister of Labour has issued the Regulation on Training in Occupational Health and Safety and Taking the Professional Exam (Official Gazette No. 142/2021, available here). This Regulation, according to Article 1(1), prescribes the following:

- training workers to work in a safe manner;
- training and advanced training of the employer or his authorised representative and training and advanced training of the commissioner of workers for safety at work;
- manner, conditions, and programme for taking the professional exam for occupational safety experts and coordinators of occupational safety, forms of continuous training and professional development, keeping records of issued certificates and decisions and establishing the register of training and advanced training in occupational safety and health.

1.2.2 Posting of workers

Based on the Act on the Posting of Workers to the Republic of Croatia and Cross-Border Enforcement of Decisions on Fines (Official Gazette No. 128/2020), the Minister of Labour has issued the Regulation on Form and Content of Statement on Posting of Workers (Official Gazette No. 144/2021). It will come into force on 01 March 2022, and will repeal the previous regulation of the same name. Its purpose is to transpose Directive 2014/67/EU into Croatian legislation. More precisely, it prescribes the form, content and the manner of submitting a statement on the posting of workers to the Republic of Croatia, notifications of changes in data and information on the need to extend the period of posting of workers.

1.2.3 Employee benefits

Based on Article 100(4) of the Credit Institutions Act (Official Gazette 159/2013, 19/2015, 102/2015, 15/2018, 70/2019, 47/2020 and 146/2020) and Article 43(2)(10) of the Croatian National Bank Act (Official Gazette 75/2008, 54/2013 and 47/2020), the Governor of the Croatian National Bank has issued the Amendment to the Decision on

Workers' Benefits (Official Gazette No. 145/2021). The Decision on Workers' Benefits has transposed Directive (EU) 2019/878 into Croatian law.

The amendment, among others, refers to the definitions of the following notions: variable benefits, employee retention bonuses, severance pay, identified employee, prudential consolidation and the gender pay gap. It specifies the obligation of credit institutions in case of a gender pay gap, etc.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The rights of civil servants in Croatia are regulated by the Civil Servants Act of 2005 (last amended in 2019). Since this Act does not regulate their right to annual leave, the provisions of the Labour Act of 2014 (last amended in 2019) apply (based on Article 4(2) of the Civil Servants Act). Article 81 of the Labour Act states that "*during annual leave the worker is entitled to remuneration in the amount defined by collective agreement, working regulations or employment contract, which may not be less than his average monthly remuneration over the previous three months (including any benefits in cash or in-kind representing compensation for work)*". This, or any other provision of the Labour Act, does not provide any details on the calculation of salary compensation during annual leave in case the worker was on sick leave prior to taking annual leave and was entitled to reduced salary compensation during sick leave. However, in a similar situation, the Ministry of Labour in its Opinion of 18 October 2020 stated that "*…if a worker in the three months preceding the use of annual leave did not work and earn a salary but was entitled to salary compensation (for example, due to maternity leave), we are of the opinion that the worker should receive salary compensation in accordance with the amount of salary which she would have received if she had worked.*"

It can be concluded that since Article 81 of the Labour Act is not precise enough, there are two possibilities, namely to either read this provision in line with the CJEU's judgment in this case or to amend it in line with it, i.e. to prescribe that entitlement to paid annual leave must be determined by reference to the periods of actual work without account being taken of the fact that the amount of that remuneration was reduced on account of a situation of incapacity for work due to illness.

4 Other Relevant Information

4.1 Seasonal workers

According to the Decision on the Minimum Daily Pay Amount of Seasonal Worker in Agriculture for 2022 (Official Gazette No. 130/2021), the minimum net daily pay for seasonal workers in agriculture amounts to HRK 101.73 (EUR 13.5).

4.2 National Plan for Work, Occupational Health and Safety and Employment

The Government of the Republic of Croatia has adopted the Decision on the Adoption of the National Plan for Work, Occupational Health and Safety and Employment for the

Period from 2021 to 2027 and the Action Plan for its Implementation for the Period from 2021 to 2024 (Official Gazette No. 131/2021).

4.3 Minimum wage

The Minister of Labour has issued the Amendment to the Decision on the Establishment of the Expert Commission for Monitoring and Analysing the Changes of the Minimum Wage (Official Gazette No. 136/2021) and broadened their tasks. So far, their tasks related to continuous monitoring and studying minimum wage trends in the broader context of social policy, employment policy, the fight against the grey economy and the tax burden on labour and the employer, and they have the obligation to give the Minister a reasoned recommendation of the minimum wage for the calendar year no later than 01 September of the current year, provided that it may be in an absolute amount or a certain range. The added tasks relate to analysis of the possible impact of minimum wage growth on the economy, employment, labour productivity, living standards and other areas of life and work and, accordingly, to provide recommendations and guidelines for further development of the minimum wage, and analysis of the impact of changes in relevant regulations on the movement of wages and the minimum wage in the Republic of Croatia.

Cyprus

Summary

(I) A surge in COVID-19 infections has resulted in the government adopting tougher restrictive measures.

(II) Temporary political appointees to the President and to ministers are excluded from benefiting from the remedies contained in Directive 1999/70/EC on fixed-term work.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictive measures

In December 2021 there was a surge in COVID-19 infections, resulting in tougher restrictive measures. According to a government decree dated 02 December, passengers aged 12 years and older must undergo a PCR test upon arrival in Cyprus. New measures to curtail the spread of the virus were issued by the Council of Ministers:

- from 06 December until 10 January 2022, all passengers, without exception, entering the Republic of Cyprus through airports must undergo a mandatory PCR test. The cost of EUR 15 will be borne by the passenger;
- From Monday 06 December until 31 December 2021, 20 per cent of staff of each company or organisation in the service sector, excluding essential services as defined in the Decree, shall telework. This percentage includes employees who, due to sickness or a declaration as being a close contact of a confirmed COVID-19 case, are self-isolating and working from home, and persons who have taken annual leave;
- From Monday, 06 December until 28 February 2022, all presentations of army reserve soldiers and national guards shall be suspended;
- From Monday, 06 December to 10 January 2022, all Christmas or other events inside and outside shopping centres shall be suspended;
- Any other events to be held by municipalities, communities and places of religious worship will be allowed, provided that local authorities and the organisers take responsibility for observing the health protocols and the Decree. In case of non-compliance with the protocols, the events will be suspended;
- The recommendation for all school excursions to not be carried out by private parties. School excursions have already been suspended by previous decisions.

More restrictive measures were introduced as the surge continued and given that the omicron variant is more contagious. On 13 December, the Council of Ministers decided to impose the following measures:

- As of 16 December 2021, vaccinations against COVID-19 for children aged 5-11 years will be introduced, with vaccinations being carried out at maternity and welfare centres of the Ministry of Health in all districts;
- From 15 December 2021 to 15 January 2022, vaccinated individuals who are declared close contacts of a confirmed positive COVID-19 case shall be required to undergo rapid antigen tests within 72 hours and on the 7th day, a PCR laboratory test at a public health clinic. Individuals who have received the booster/3rd dose of the vaccine are excluded;

- As of 15 December 2021, the mandatory isolation of persons whose sequencing of positive samples is linked to the '*omicron'* strain of the virus or any possible future mutation, at locations designated by the Ministry of Health. The contacts of the specific cases must remain in self-isolation, regardless of their vaccination coverage, in accordance with the Ministry of Health's protocol;
- The review on 15 January 2022 of the previous decision of the Council of Ministers to abolish the SafePass for individuals who do not receive the booster/3rd dose of the vaccine against COVID-19, after 6+1 months. In the case of individuals, where a period of 7 months has elapsed from the second dose of vaccination for the two-dose vaccine and for the single dose vaccine, these individuals must undergo a 72-hour PCR laboratory test or a 48-hour rapid antigen test for Safe Pass purposes;
- As of 15 December 2021, exemption from the possession of a mandatory SafePass through the CovScan Cyprus application of individuals who have proof and a Medical Council certificate that they cannot be vaccinated. These individuals must present the special card issued by the Ministry of Health and at the same time, a rapid laboratory test or PCR test on a weekly basis with a negative result;
- From 15 December 2021 until 31 January 2022, admission to social events, such as weddings, christenings and catering areas within hotels, may only be allowed for persons who have received at least one dose of the vaccine, that they hold a negative PCR laboratory test or a rapid antigen test. The Council of Ministers' previous decision shall also apply to the following areas: closed and outdoor stadiums, theatres, cinemas, showrooms, music dance centres, entertainment centres and catering establishments;
- Unless the health protocols for Christmas events organised by companies, organisations and associations, indoors and outdoors, shall be cancelled;
- As of 15 December 2021, passengers arriving in the Republic of Cyprus are required to undergo a rapid antigen test within 72 hours from their date of arrival. The rapid antigen test will be provided free of charge through the sampling points of the Ministry of Health, by presenting the boarding pass and proof of identification (identity, passport). Individuals who received the booster/3rd dose of the vaccine are excluded;
- From 15 December 2021, the reduction of the period to 5 months and two weeks instead of 6 months for the administration of the booster/3rd dose of the vaccine.

On 21 December, additional measures were announced by the Council of Ministers:

- The re-opening of schools after the Christmas holidays on 10 January and upon the students' return, all students, teachers and other school staff must present a negative 48-hour rapid antigen test;
- Extension of all other provisions of the Decree in force until 15 January 2022;
- As of 22 December 2021, all employees, who have completed their COVID-19 vaccination scheme with the two doses of the two dose vaccines and with the one dose of the single-dose vaccine, or those who hold a certificate of recovery (180-day duration) are required to present a negative rapid antigen test, valid for 7 days, to enter their workplace. Individuals who have received the booster/3rd dose of the vaccine are excluded. In case of a transmission chain at the workplace, all staff members will be subject to a test without exception;
- As of 22 December 2021, before visiting other private homes for Christmas celebrations, all citizens are recommended to undergo a rapid antigen test with a negative result. Individuals who have received at least two doses of the vaccine may carry out a self-test, while individuals who have not received a single dose of the vaccine are recommended to carry out 48-hour rapid antigen tests. It is

reminded that the maximum number of people in a house is 20, including residents and underage children;

- The reduction of the duration of the COVID-19 disease certificate from 6 months (180 days) to 3 months (90 days) with effect from 31 January 2022. A relevant announcement will be made in coming days;
- From 22 December 2021 until 06 January 2022, in view of the Christmas holidays, children aged 12-17 will be able to enter catering establishments (including catering areas in shopping centres and hotels), theatres, amphitheatres, cinemas, performance spaces, closed and outdoor stadiums, weddings and christenings upon presentation of a negative laboratory rapid test valid for 72 hours, provided that they are accompanied by a parent/guardian who has completed his/her vaccination scheme (two doses for the two-dose vaccines and one dose for the single-dose vaccine). It is clarified that if 7 months have elapsed since the parents' vaccination and they have not received a booster dose of the vaccine, they will be allowed to enter the above areas accompanied by their children;
- For visitors and employees in day-care facilities for vulnerable groups and day centres housed in the same premises with senior people's homes and other closed care and accommodation structures for the elderly and for vulnerable groups, the same measures in force for senior people's homes and closed structures apply, following the instructions of the Ministry of Health and the Deputy Ministry of Social Welfare. In other words, persons aged 6 to 11 years are required to possess a negative test result not older than 7 days or a certificate of recovery from the COVID-19 disease, and persons aged 12 years or over must hold a negative 72-hour test result, or a certificate stating the completion of their vaccination scheme, or a certificate of recovery from the COVID-19 disease of 180 days.

1.2 Other legislative developments

1.2.1 Fixed-term work

During the budget deliberations, the opposition parties tabled an amendment to the law relating to rights of temporarily appointed persons in government posts as political appointees, such as journalists, consultants, advisors to the President and ministers, etc. which excludes them from enjoying the application of Directive 1999/70/EC, providing the conversion of temporary contracts into contracts of indefinite duration.

The amendment was successful, and provides that consultants and associates who, due to their employment, have for any reason been transformed into employees of indefinite or fixed-term duration, regardless of the provisions of Law 70 (I)/2016 or any other law, their employment is terminated at the latest upon the expiration of the term of office of the government or the resignation of the President of the Republic, the ministers, deputy ministers, the government representative or the resignation of the President of the House of Representatives, as the case may be.

The amendment also provides that in case a civil servant or employee of a public law organisation or a permanent employee in the public service or a public law organisation is appointed to the position of consultant/associate, then this appointment is governed by the provisions of Law 47(I)/2017 or Law 99(I)/2019, as the case may be. Such persons will continue to receive the same salary and be subject to the same cuts, reductions and/or contributions, as in their organic position, without being granted any other remuneration or allowance due to the appointment to the position of consultant/associate.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 9 December 2021, Staatsecretaris van Financiën

This ruling is unlikely to have any considerable impact in Cypriot labour law.

Article 8(1) of the law purporting to transpose the Working Time Directive copies verbatim the wording of Article 7(1) of the Directive, stating that all employees are entitled to annual leave with pay of at least four weeks in accordance with the conditions provided by law or collective agreements and/or the practice of acquiring the right and the granting of leave. However, the duration of leave is specifically regulated to include the period of absence of a worker due to accident or illness, which is explicitly regulated by the relevant Law on Paid Leave: Article 5(3)(a) of the Cypriot Law on Paid Leave provides that the temporary absence of an employee from work due to an accident or illness is considered working time for the purposes of this paragraph. Moreover, the law provides that collective agreements or customs or a ministerial decree may entitle paid leave over and above the statutory minimum provided. Article 5(1) declares that it is understood that when an employee is entitled by law, custom, collective agreement or otherwise to a period of leave longer than the days provided for in this subparagraph, then the number of days thereafter replaces the days provided for in this article, law, custom, collective agreement or whatever remains in force. Article 5 (2) declares that the Minister may by decree increase the number of days of leave provided in subsection (1).

4 Other Relevant Information

4.1 Discrimination of unvaccinated people

In December, the Commissioner for Administration (Ombudsman) and the Human Rights Committee of the Cyprus Bar Association upheld that any restrictions for unvaccinated people to accessing services is 'discriminatory' and 'disproportionate', are contrary to human rights law, the EU acquis and the national Constitution. The Court's decisions on the matter took a different view, upholding that the State has a duty to safeguard public health during the pandemic based on a proper evaluation of the dangers to others and society as a whole, as demonstrated by scientific knowledge in the current conjuncture. The Ombudsman's position relied on the law establishing the Equality Body, arguing that the decision of the Cyprus University of Technology to exclude unvaccinated students from the classroom and offer them online teaching instead amounted to discrimination on the ground of belief in access to education. The same argument can be extended to the lecturers and the union of the CUT, who have also complained to the Ombudsman pertaining to their right to work. However, the Ombudsman did not consider the lecturers' complaint as they also applied to the Court.

It is questionable whether every opinion held by a person, such as the opinion against COVID-19 vaccinations, meets the definition of 'belief' as envisaged in Directive 78/2000/EC on which the national law relied. The ECtHR authority cited in the Ombudsman's report (case of Campbell and Cosans v. the United Kingdom, Application No. 7511/76; 7743/76. The case was referred to in p. 55 of the Ombudsman's report) is irrelevant for the current subject matter, and the context of the pandemic differs immensely from the 1970s, which is the period examined by the ECtHR ruling. It is highly questionable whether the decision not to be vaccinated qualifies as a reason to be protected by the ECHR.

There has been considerable debate about the definition of belief as there is no agreement amongst scholars whether the belief must be genuine, serious and somehow resemble a philosophical system. Moreover, citing the case of Arya v London Borough of Waltham Forest, Edge and Vickers note: *"[Belief] must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others"* (Peter Edge and Lucy Vickers, Review of equality and human rights law relating to religion or belief, Equality and Human Rights Commission Research report 97, RESEARCH REPORT #94, p. 17).

Major religions and organised churches, including the Christian Orthodox Church of Cyprus support vaccination, but some individual bishops have opposed it. In Cyprus, no one has so far claimed that they are antivaxxers for religious reasons; rather they might claim that it derives from their 'belief'. Legal experts on religious discrimination strongly doubt that anti-vaccination would be a legally protected ground for belief.

The Ombudsman cites an FRA report stating that: "*The risk of discrimination between vaccinated/immunised persons and those who have not been vaccinated, when they exercise individual freedoms or access certain services, should be mitigated. Negative tests should also allow people to exercise the same rights and freedoms as vaccination certificate holders*."

However, at the time that the FRA opinion was issued (May 2021), the main concern was to safeguard equality of access in the vaccination rollout; the concern to protect unvaccinated persons stemmed from the principal position of equality of access to the vaccine. The FRA report referred to EU Parliament statements (European Parliament on 29 April 2021, P9_TA(2021)0145) and the Committee on Bioethics as follows (DH-BIO (2021), 'Statement on human rights considerations relevant to the 'vaccine pass' and similar documents', p. 3.): "*The principle of equitable access to healthcare laid down in Article 3 of the Oviedo Convention [requires that] particular attention must be paid to individuals in vulnerable situations and to the exacerbation of inequalities within such groups due to the public health crisis, including in their access to vaccination*".

The FRA report referred to the need to 'mitigate' the future risk of discrimination, implying that the matter is a question of degree and fact, to be evaluated and measured with a view to the principle of proportionality in the context of the specific situation of the current pandemic; it is not cast in stone.

The question of rights during the pandemic is crucial, as scholars attempt to consider the appropriate balance between the rights of different groups of people, society as a whole, and the nature and limits to emergency powers to curtail the disease. Alan Greene (Alan Greene (2020) Emergency Powers in a Time of Pandemic, Bristol University Press, Bristol), for instance, rightly distinguishes between derogable and non-derogable rights (those rights that can and those that cannot be restricted by emergency powers). But the issue of discrimination of unvaccinated persons is only triggered if it is connected to persons who do not have access to vaccinations, not for those who refuse to be vaccinated – this is the only context which may be thought of or imagined as potentially discriminatory. Therefore, Greene (2020, 109) considers that in a work situation, an employer may reasonably refuse to employ an unvaccinated person, unless the lack of a vaccination is attributable to health reasons, but even then, the use of immunity grounds may be a reasonable reason to refuse employment:

> "*It is, in principle, feasible to imagine that a potential employer would ask a person for their immunity certificate during a job interview. The employer may then choose not to hire the person on the basis that they may get sick or may have to self-isolate in the future, thus making themselves unavailable for work.*
>
> *Further, while this may seem rational, the fact that a person does not have immunity may become a way of discrimination by proxy for other protected characteristics. Some people, for example, may not be able to get a vaccine for health reasons, such as a disability that is protected under equality legislation.*

> *But a potential employer could then use the immunity grounds to refuse to employ them"*.

In line with the above reasoning, the Slovenian Equality Body rejected a complaint of discrimination by a group of unvaccinated employees in the tourist sector in that they were asked to undergo testing before going to work (48-hour rapid test or 72-hour PCR test). The Equality Body concluded that the unvaccinated status is not a protected grounds of discrimination in light of the fact that vaccines were available at the time to the entire population, free of charge and without restrictions, the only exception to the rule being those persons who cannot get vaccinated for health reasons (Republic of Slovenia, Advocate of the Principle of Equality (2021), Assessment of discriminatory character of the Ordinance Temporarily Prohibiting the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia and the Decree on the Implementation of Screening Programmes for the Early Detection of SARS-CoV-2 Virus Infection (Article 38 of the Protection Against Discrimination Act – 'ZVarD', 18 August 2021, Ref. 050-27/2021/6)).

In fact, discrimination experts consider that the Safepass requirements, which in turn produce restrictions for those who intentionally remain unvaccinated (note that there is unlimited access to vaccinations in Cyprus) are not discriminatory, but whether COVID passes are ethically justified ('Why COVID passes are not discriminatory (in the way you think they are)', The Conversation, 12 November 2021).

Czech Republic

Summary

(I) The government has extended the emergency measures adopted to contain the spread of the omicron variant, introducing a vaccine mandate and amending the measures concerning the mandatory testing of employees.

(II) An act introducing an extraordinary allowance for employees who have been ordered to quarantine, an act introducing a compensation bonus and an act widening the range of persons for whom the entitlement for nursing allowance arises, entered into effect.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

The Resolution of the Government No. 1121 of 06 December 2021 has been adopted and entered into effect on 07 December 2021, amending Resolution No. 1084 of 26 November 2021 (see the November 2021 Flash Report).

The text of the Resolution is available here.

The amending Resolution extends the effect of the amended Resolution (see the November 2021 Flash Report), with the aim of containing the spread of the new omicron variant of COVID-19.

1.1.2 Mandatory vaccination

The Decree of the Ministry of Health No. 466/2021 Coll., amending Decree No. 537/2006 Coll., on vaccination against infectious diseases, was adopted on 07 December 2021 and entered into effect on 11 December 2021. This Governmental Decree responds to the COVID-19 crisis by means of the mandatory vaccination for certain groups.

The text of the Decree is available here.

The Decree regulates mandatory vaccination against COVID-19, however, only for certain groups. These are:

- medical personnel, including students of medicine, students of other health-related schools and employees of health institutions;
- social workers;
- firemen (including volunteers)
- soldiers (including reserves);
- police officers;
- customs officers; and
- people over 60 years of age.

Persons who met the above criteria prior to the effect of the Decree shall be vaccinated before 28 February 2022. From 01 March 2022, the Decree applies to anyone who meets the criteria.

1.1.3 Mandatory testing of employees

The government has amended the rules on mandatory testing of employees. An extraordinary measure of the Ministry of Health No. MZDR 42085/2021-3/MIN/KAN of 13 December has been adopted with effect as of 20 December 2021, amending the extraordinary measure of the Ministry of Health No. MZDR 42085/2021-1/MIN/KAN of 20 November (see the November 2021 Flash Report).

The text of the new extraordinary measure is available here.

The change consists of simplifying the process in case the employee tests positive and alleviates some pressure from general practitioners. Now, employees shall undergo a control test (RT-PCR) without the need to contact their GP. Additionally, employers shall now provide their employees who test positive during the screening with a confirmation about the positive result (the form for this confirmation is available within the measure).

1.1.4 Extraordinary quarantine allowance

Act No. 518/2021 Coll., on an extraordinary allowance for employees who have been ordered to quarantine, has been published and enters into effect on 23 December 2021 (see also the November 2021 Flash Report).

The Act is available here.

The authors of the Act aim to motivate employees to duly report their infections or exposure to infection and to quarantine.

1.1.5 Compensation bonus

Act No. 519/2021 Coll., on a compensation bonus for 2022, has been published and entered into effect on 24 December 2021. Similarly to last year, the Act introduces a compensation bonus in connection with the COVID-19 pandemic (see also the November 2021 Flash Report).

The Act is available here.

1.1.5 Care leave

Act No. 520/2021 Coll., on further amendments to the provision of nursing allowance in connection with the extraordinary measures against the COVID-19 epidemic, has been published and entered into effect on 23 December 2021. The Act widens the range of persons for whom entitlement to nursing allowance arises.

The Act is available here.

1.2 Other legislative developments

1.2.1 Foreign subsistence expenses

Due to changes in the exchange rates of foreign currencies and/or prices abroad, the minimum rates of foreign subsistence expenses (in case of business trips abroad) have been amended accordingly. This change occurs on a regular basis.

Decree No. 462/2021 Coll., on the setting of minimum rates of foreign subsistence expenses for 2022, has been adopted and published. The Decree will enter into effect on 01 January 2022.

The Decree is available here.

The minimum rates of foreign subsistence expenses (payments to employees for business trips abroad) have been reviewed and amended.

1.2.2 Adjustment of compensation payments

The annual valorisation of the above compensation is a change that occurs on a regular basis.

Government Regulation No. 508/2021, on adjustment of compensation provided for the loss of earnings after the end of a period of temporary incapacity for work caused by a work accident and/or occupational disease and on an adjustment of compensation of survivors pursuant to labour law regulations, has been published and will enter into effect on 01 January 2021.

The Regulation is available here.

The Regulation governs the calculation of the following types of compensation:

- compensation for loss of earnings after the end of a period of temporary incapacity for work caused by a work accident and/or by an occupational disease;
- compensation of survivors (provided to the eligible survivors of employees).

The amount of compensation is calculated based on the amount of average earnings. For the purposes of the calculation, the rate of valorisation of the average earnings is adjusted regularly – the amount of average earnings is now to be increased by 1.3 per cent and by CZK 300.

The above only applies to claims that arose before 01 January 2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In the Czech Republic, employees who take paid annual leave receive compensation of their salary. The compensation amounts to the employee's *average earnings* which are stipulated in Section 351 et seq. of the Labour Code. These are calculated from the employee's (1) gross salary over a reference period, and from (2) the time worked within the reference period. The reference period is (with a few exceptions) a period of three calendar months preceding the month in which the leave is taken.

First, the gross salary only consists of the salary and its components; therefore, amounts such as compensation of salary, severance pay, premium for stand-by, etc. are not part of the average earnings calculation.

Second, only the time for which the employee receives a salary is considered as time worked. Therefore, time periods, such as temporary incapacity for work, are not considered as time worked, as employees receive compensation of salary instead of their regular salary. On the other hand, time periods in which an employee does not perform work but is entitled to his or her salary are considered as time worked – the only case (in the private sector) where this applies is the case of an account of working hours; the account is rarely used, however.

It is thus apparent that entitlement to compensation of salary for paid annual leave of an employee who is temporarily incapacitated for work is unaffected thereby.

Lastly, average earnings only apply if the employee has worked no less than 21 days during the reference period. Otherwise, *probable earnings* are used instead. When

determining probable earnings, the employer shall primarily base them on the gross salary the employee actually earned during the reference period; if this method proves to be insufficient or is not objective, or if the employee received no salary (e.g. in case of incapacity for work for the entire period), the employer shall base them on the gross salary the employee would likely receive. Even though the Labour Code sets no specific procedure for determining probable earnings, it obliges the employer to take into account the usual amount of the various components of the employee's salary, or the salary of employees performing the same work or work of equal value, as well as the non-entitlement components of the salary.

With regard to the above, Czech law is in line with the CJEU ruling as it does not base the calculation of remuneration of an employee who takes paid annual leave on the fact that the employee is/was incapacitated for work due to injury or illness.

4 Other Relevant Information

4.1 Average salary in the national economy

Communication of the Ministry of Labour and Social Affairs No. 494/2021, on the announcement of the amount of average salary in the national economy for the 1st and 3rd quarter of 2021 for the purposes of the Labour Code, has been adopted and published.

The Communication is available here.

The Ministry has communicated that the average salary in the national economy for the 1st and 3rd quarter of 2021 was CZK 37 047 (i.e. approx. EUR 1 476.37). This number is used for the purposes of calculation pursuant to the Labour Code.

Similarly, the Communication of the Ministry of Labour and Social Affairs No. 495/2021, on the announcement of the amount of average salary in the national economy for the 1st and 3rd quarter of 2021 for the purposes of the Act on Employment, has been adopted and published.

The Communication is available here.

The Ministry has communicated that the average salary in the national economy for the 1st and 3rd quarter of 2021 was CZK 37 047 (i.e. approx. EUR 1 476.37). This number is used for the purposes of calculation pursuant to the Act on Employment.

Both communications are issued periodically and are used in various labour law-related calculations.

Denmark

Summary

A new tripartite agreement extends the relief schemes of wage compensation. Pensioners and retirees are now also financially encouraged to take on extra work related to COVID-19.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

In light of the new restrictions, including the closing of certain businesses, a tri-partite agreement was agreed to provide financial aid and security to employees and businesses. The parties to the agreement are the government, the Danish Confederation of Trade Unions (FH) and the Danish Employers' Confederation (DA). The agreement consists of three measures. The tri-partite agreement of 10 December 2021 is available here.

First, it consists of the extension of the distribution of work scheme. The scheme allows employees to share the work duties of a given post, while spending the rest of their time attending State-funded upskilling courses or remotely from home, whilst receiving part-time unemployment benefits ('*dagpenge*'). Employers are only required to pay salaries for the actual work performed. The employee receives unemployment benefits at a higher rate, as well as the option of (free) upskilling courses during the hours he or she does not work. The rules on the division of work requires a legislative basis, and the Danish Parliament adopted legislation on the matter in December (Act No. 2529 of 21 December 2021). Companies may choose to use the scheme for distribution of work between 01 January 2022 and 31 March 2022.

Secondly, the extension of the State-funded wage compensation scheme for companies, which are prohibited from operating and are thus forced to send home their employees. The State covers 75 per cent of the monthly salary expenses for salaried employees ('*funktionærer*') and 90 per cent of salary expenses for other workers, capped at DKK 30 000 (approx. EUR 4 000) per month for employees who do not work whilst at home. The company must pay the employee his or her full salary and cannot terminate any employees for economic reasons during this period.

Finally, similarly to a scheme that was in force last winter, companies severely inflicted by the restrictions—although not forced to shut down—may also seek wage compensation. The scheme covers companies that must send home 30 per cent of their employees, or who must send home 50 or more employees. The scheme will apply until 31 January 2022.

The press release of 20 December 2021 by the Ministry of Employment is available here.

1.1.2 Pension benefits

Usually, the pension benefits of pensioners, who receive public benefits and whose additional income exceeds certain thresholds, are offset against the amount of income that exceeds the threshold.

Similar to the temporary scheme in 2021, any additional income from COVID-19 work will not be offset against public pension benefits in 2022. The measure represents part of a greater effort to strengthen the Danish health care sector during an extraordinarily difficult winter. Pensioners or retirees, who perform additional work at the hospital, do not have to be concerned about being 'punished' financially.

Extra income, which is paid out between 01 January 2022 to 31 December 2022, and which can be attributed to COVID-19-related work, will not be offset against public pension benefits. The scheme covers recipients of both disability pension benefits ('*førtidspension*'), senior pension benefits (seniorpension) and State retirement pension benefits ('*folkepension'*). What is new is that the scheme also covers recipients of early retirement benefits ('*efterløn'*). It also applies to any additional income earned by the pensioner's spouse, which may otherwise be offset against the pensioner's pension benefits.

Act (L 101) of 21 December 2021 is available here.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The case concerned the level of remuneration during paid annual leave, when the employee's remuneration is reduced due to incapacity for work because of illness. The Court found that the Working Time Directive 2003/88/EC, Article 7, precludes national provisions and practices under which a reduction in remuneration due to incapacity for work is taken into account to determine the amount of remuneration that will be paid to him or her in respect of the paid annual leave. The CJEU case may be described as a natural extension of its prior case law on the right to pay during annual leave. The Court had regard to the purpose of paid annual leave and emphasised that incapacity for work due to illness is not foreseeable and is beyond the control of the worker.

In Denmark, the Working Time Directive 2003/88/EC is implemented in three different statutory acts as well as in collective agreements. The right to paid annual leave is implemented in the Danish Holiday Act. According to Article 4 of that Act, an employee accrues the right to five weeks of paid leave per year.

Under the Holiday Act, there are two types of payments during annual leave – either the employee is entitled to his or her salary during the leave period, cf. Section 16(1), or the employee receives a holiday allowance of 12.5 per cent of the salary during his or her leave, cf. Section 16(2). Salary received during a leave period according to Section 16 (1) is 'ordinary and expected salary' at the time of leave, cf. Section 17(1). The Holiday Act does not address reductions of salaries during annual paid leave due to sickness.

Income during sick leave is either sick leave benefits regulated by the Sick Leave Benefit Act, or a salary, if a legal basis provides for salaries during sick leave. The legal basis for payment of a salary during sick leave is found in the Salaried Employees Act and some collective agreements.

The interaction between sickness and annual leave has been discussed in detail in connection with the new Holiday Act in force since 01 October 2020, the rules are provided in Section 12(1)-(5). Sickness is considered a legal obstacle to taking annual leave. Hence, a person is either on sick leave or on annual paid leave.

If an employee gets sick before the beginning of his or her annual leave, the annual leave will be postponed to a later time. The annual leave days/weeks are not used in this case as long as the person is ill. The person will instead receive either sick leave benefits or his/her salary during sickness, if a legal basis provides therefor. Annual leave can then be taken at a later time instead, and the right to remuneration during the annual leave is unaffected by the sick leave period.

If an employee falls ill during his or her annual leave, the system differs according to the number of sick days. As mentioned, the Danish Holiday Act provides a right to 5 weeks of paid annual leave, which is 5 additional working days of paid annual leave compared to the Working Time Directive's mandatory 4 weeks of paid annual leave. The 5 additional working days of paid annual leave are governed by the Danish regulation only, whereas the 4 weeks of annual paid leave must in addition follow the *EU acquis* according to Article 7 in the Working Time Directive. This gives a more nuanced system for compensation for illnesses presenting themselves after an annual leave period has started.

Up to 5 (accumulated) sick days during paid annual leave (the 'Danish' annual leave days) do not interrupt or postpone the employee's holidays. If the employee receives a salary during his or her paid annual leave, the salary payment is not interrupted or reduced. If the employee receives holiday compensation it is also not interrupted or reduced. The employee must simply accept that he or she might be ill up to 5 days per year during his or her annual leave period.

Any sick days after the first 5 sick days during paid annual leave interrupts the annual leave and the employee has a right to change his or her status to sick leave instead of annual leave. In this case, the annual leave is interrupted and postponed in accordance with the number of days/period the employee is ill. During periods of sickness, the employee is on sick leave and receives sick leave benefits (or salaries during sick leave). These days/periods of illness do not use the paid annual leave days, which are then postponed, and can be taken at a later time in the holiday year.

The new CJEU ruling sets limits as to the interpretation of this provision, including any derogations from these rules in collective agreements, which may be allowed under the Holiday Act, Section 3(3).

It follows explicitly from the Holiday Act, Section 3(3), that any derogation in collective agreements must be in line with the EU Directive on Working Time.

In other words, the CJEU's interpretation in the new ruling does not conflict with existing Danish regulation or case law.

The Holiday Act, L 230 of 12 February 2021 is available here.

The preparatory works for the Holiday Act, where paragraph *Til § 12* discusses the rules on sick leave periods and compensation holidays, are available here.

4 Other Relevant Information

4.1 COVID-19 update

COVID-19 infection rates have increased rapidly in Denmark during December due to the spread of the new omicron COVID variant. Further restrictions have been reintroduced during December. As of 10 December, nightlife and discos were shut down, indoor concerts were limited to 50 standing guests, alcohol is not served between 12 p.m. to 5 a.m., and employees in the public and private sector were encouraged to primarily work from home. Children in public school were sent home from 15 December 2021 to 04 January 2022. As of 19 December—lasting until 16 January 2022—further restrictions were introduced, including the shutting down of museums, cinemas, conference halls, amusement parks, etc., the enhanced use of face masks and social distancing requirements in shops.

The vaccination rates have increased to 81.8 per cent for the first vaccine and 77.9 per cent are fully vaccinated. 47.8 per cent of the population have now been re-vaccinated (third dose).

Estonia

Summary

(I) The sick leave compensation scheme entailing more favourable conditions for the worker has been extended for one year.

(II) Workers now have the right to request flexible working arrangements for care purposes and enjoy additional protection upon dismissal.

(III) According to the Supreme Court, an employment contract is deemed to have been entered into if an employee commences work. The Supreme Court also held that interim relief for unvaccinated workers during court proceedings is not justified.

(IV) Minimum wage has been increased.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Sick leave compensation

On 08 December 2021, the Estonian Parliament passed an amendment to the law (Act to Amend Laws, available in Estonian here), which will continue to provide compensation for employees who have been issued incapacity for work certificates on more favourable terms until the end of 2022, related to the spread of the COVID-19 virus. This means that sickness benefits will continue to be paid by the employer from the second day of illness until the fifth day of illness and subsequently by the Estonian Health Insurance Fund from the sixth day of illness onwards. Thus, the current system, according to which only the first day of illness is not compensated, will continue until the end of 2022.

The reason for continuing this amendment introduced last year is the fact that earlier reimbursement of sick days allowed people to remain at home without the onset of initial symptoms of the disease and without a significant loss of income.

1.2 Other legislative developments

1.2.1 Work-life balance

The Estonian Parliament adopted amendments to the Act Amending the Employment Contracts Act and Related Acts on 08 December 2021. The purpose of the amendments is to transpose Directive (EU) 2019/1158 of the European Parliament and of the Council specifying the right of workers and officials with a duty to provide care to request flexible working conditions. Some of the amendments have also been included in the Gender Equality Act (available in English here and in Estonian here).

At the same time, the right to apply for flexible working time and employment conditions is not only necessary to meet family responsibilities, but also emphasises, for example, that an employee may have a duty to care for a person who needs intensive care or support due to a serious health problem. The concept of carer is also defined on the basis of Article 3 (4) of the Directive. It is recognised that the prohibition of discrimination in relation to the raising of a child (and not only of a child up to the age of 8 years, but more generally) already exists in Estonian legislation. If the employer cannot provide for flexible working conditions, he or she must provide a written explanation to the employee within 15 days.

Additional protection is also provided for employees and officials with care responsibilities in the event of termination of employment or dismissal.

The amendments will enter into force on 01 April 2022.

2 Court Rulings

2.1 Conclusion of employment contract

Supreme Court, Decision No. 2-20-5834, 06 December 2021

On 06 December 2021, the Civil Chamber of the Estonian Supreme Court (*Riigikohus*) issued Decision No. 2-20-5834, which has implications for Estonian labour law. The judgment confirms the prevailing practice of labour disputes that taking up employment is equivalent to concluding an employment contract. The Supreme Court's decision is available in Estonian here.

The employment contract may take the form of an exchange of letters of intent in writing, orally or otherwise. Thereby, the parties' statements of intent may be direct or indirect. An indirect declaration of intent may be the employment of an employee (Article 11 of the decision).

The Employment Contracts Act does not provide for the possibility of employing an applicant to assess his or her suitability for probationary work, which can only be expected in exchange for remuneration. The suitability of a person wishing to work can be assessed upon application; among other things, the employer can formulate the job requirements and the criteria for assessing compliance with these. Until the conclusion of the employment contract, the parties may hold negotiations that allow the employer to verify the applicant's job skills. Practical tests, etc. aimed at determining an individual's work skills should at least generally be limited to establishing a short-term work situation in the presence of the employer. Pre-contractual negotiations should be limited to the initial identification of the jobseeker's skills and should not change into gaining employment (Article 14-15 of the decision).

If the applicant seeks to perform any tasks normally performed under an employment relationship during the pre-contractual negotiations, it must be presumed that the parties have entered into an employment contract. The employer can refute the presumption of concluding an employment contract, proving, among other things, that the individual only performed work to become acquainted with the organisation of work or the potential responsibilities related to the work and did not perform actual work tasks or orders. The employer may also prove that the individual performed work knowingly and had agreed to have his or her job skills verified, followed by the employer's decision whether or not to enter into an employment contract. To this end, the employer should, as a general rule, also prove that he/she informed the applicant in advance how long the preliminary assessment of work skills will take and when the employer will notify him or her whether an employment contract will be concluded (Article 16).

2.2 Unvaccinated workers

Supreme Court, ruling No. 3-21-2241, 25 November 2021

On 25 November 2021, the Administrative Chamber of the Supreme Court issued court ruling No. 3-21-2241 (available in Estonian here), which dealt with an application for preliminary legal protection of unvaccinated employees who challenged their dismissal.

By an order of 31 August 2021, the Commander of the Defence Forces required all employees of the Defence Forces to submit a certificate within two weeks that they had been vaccinated against COVID-19 (first dose), had completed their vaccination course or had recovered from the disease.

The claimants (officials) lodged a complaint requesting the Defence Forces from being prohibited from issuing an administrative act terminating their employment on the grounds that the claimants had not submitted the certificate specified in the order of

the Commander of the Defence Forces of 31 August 2021. Together with the complaint, the claimants lodged an application for Interim Relief seeking a prohibition on terminations of their employment during the proceedings.

On 04 October 2021, the Defence Forces released the officials from service. The Court made a preliminary assessment prior to resolving the dispute in the main proceedings, not applying for Interim Relief.

The Court considered that the national defence and public health interest in the present case outweighed the claimants' interest. Although the complaint is clearly not viable, its expected prospects for success are rather meagre.

The requirement laid down in the Directive cannot be regarded as a direct obligation to be vaccinated, but the decision's effect was equivalent to an obligation to be vaccinated (reference: judgment of the Grand Chamber of the European Court of Human Rights in Cases 47621/13 and Vavřička and Others v. The Czech Republic, paras. 259-260; Thevenon v. France).

It was pointed out that the indirect requirement for vaccination also interferes with a person's physical integrity. Physical integrity is primarily protected in the context of privacy (Article 26 of the Constitution; Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Judgment of the Grand Chamber of the Court of Justice, Case No. 25358/12, *Paradiso and Campanelli v. Italy*, para. 159).

However, the Court found that the proportionality of the indirect vaccination requirement imposed by the Defence Forces (suitability, necessity and moderation in relation to a legitimate aim) should be further examined by the courts in the further proceedings, but the Chamber has no serious doubts at this stage. The vaccination requirement at issue is likely to be necessary because less stringent measures to reduce the risk of COVID-19 are currently not as effective.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In Estonia, if an employee is temporarily incapacitated for work, as determined by a doctor and is consequently issued an incapacity for work certificate, the employee is completely relieved of his/her duties to perform work.

In addition to duration of service, the duration of temporary incapacity for work, duration of paid annual leave (except for the duration of child care leave and holiday without pay granted under agreement of the parties), any periods the employee has the right, subject to law, to refuse to perform work in the case specified in subsection 19 (3) of the Employment Contracts Act (hereinafter ECA) (including a temporary status of incapacity for work for the purposes of the Health Insurance Act or sick leave - experts), and other periods agreed upon between the parties shall be included in the calculation of duration of service as the basis for the right to be granted annual leave (Employment Contract Act or ECA § 69 (2)).

If the temporary incapacity for work is immediately followed by paid annual leave, an employee must be entitled to receive holiday pay in accordance with the regulation of the conditions and procedure for payment of average wages (ECA § 70 (1); § 29 (8)). Pursuant to § 2 (2, 3) and § 4 (3-5) of the Government of the Republic Regulation No. 91 of 11 June 2009, the calculation of holiday pay is based on the employee's average daily wage on the basis of his or her last six months' salary.

If the employee has not been paid for six months due to refusal to work, the average salary shall be calculated on the basis of the applicable salary in the month when the necessity to calculate the salary arises (salary agreed in the employment contract).

In view of the above, a temporary incapacity for work immediately preceding a holiday does not affect (i.e. does not reduce) the amount of holiday pay.

It should be noted that no partial sick leave option exists in Estonia (except in special cases concerning a pregnant employee and an employee who has the right to pregnancy and maternity leave, i.e. for employees who have special rights).

Based on the above, Estonian law follows the principle set out in the Court's judgment in the CJEU case that a temporary incapacity for work may not reduce the amount of an employee's paid leave.

4 Other Relevant Information

4.1 Minimum wage

The government has approved the minimum wage of EUR 654 and the minimum hourly wage of EUR 3.86 for 2022. That is, the minimum wage has reached 40 per cent of the average wage. The minimum wage increased by 12 per cent. The adjustment to the minimum wage is available in Estonian here.

The minimum wage is based on the collective agreement concluded between the Estonian Trade Union Confederation and the Estonian Employers' Confederation on 08 October 2021, by which the central social partner organisations agreed to increase the minimum wage in 2022.

An increase in the minimum wage will lead to an increase in wages and salaries in the private and public sectors. There will also be an increase in the number of benefits related to the minimum wage, such as an increase in parental benefit and maternity leave pay. An increase in the minimum wage may also lead to an increase in benefits and allowances paid by local governments, but it may also affect the prices of services provided, such as the nursery fee, if the local government links these to the minimum wage.

Finland

Summary

(I) A government proposal entailing the mandatory vaccination of healthcare and social welfare personnel to protect patients and clients was approved.

(II) The new Act on Cooperation in undertakings will enter into force on 01 January 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination

The government has proposed (Government Proposal No. 230/2021) a new temporary Section 48a for the Communicable Diseases Act (1227/2016). According to the proposed Section, healthcare and social welfare service providers, i.e. employers, could be required to ensure that their employees do not pose a risk of transmitting COVID-19 to the persons they are caring for. The Section would provide that employees with inadequate vaccination coverage against COVID-19 could only work with clients and patients under exceptional circumstances. The proposed Section would also apply to public officials and officeholders. If a person has a medical reason and cannot be vaccinated against COVID-19, he or she can work if he or she presents proof of a negative COVID-19 test taken no more than 72 hours prior to working. Employers would have the right to process health data on their employees' COVID-19 vaccination coverage or their recovery from COVID-19. The data should be stored for as long as necessary to carry out the supervision of healthcare and social welfare services, but for no longer than three years from the date on which the assessment on the status of the employee in question was made.

If the employee does not meet the statutory requirements, the employer would primarily need to offer the employee equivalent work in accordance with the employment contract, or if this is not possible, other suitable work. If no suitable work is available or if the employee refuses to accept it, the employer is not obligated to pay the employee a salary for the period during which the employee could not work, unless otherwise agreed. The proposed legislative amendment would involve a transition period of one month to ensure that employers can properly organise their services and to give unvaccinated employees an opportunity to get vaccinated. The employers right to process data would enter into force immediately.

On 30 December 2021, the bill was approved by the President and the legislative amendment will enter into force on 01 January 2022. It will be in force until 31 December 2022.

1.2 Other legislative developments

1.2.1 Cooperation in undertakings

On 30 December 2021, the President approved a bill for the new Cooperation Act. The Cooperation Act (1333/2021) will enter into force on 01 January 2022. It replaces the Act on Cooperation within Undertakings and in part the Act on Personnel Representation in the Administration of Undertakings. As regards the contents of the new Act on Cooperation, three elements are emphasised. The employer and employee representative should engage in a continuous dialogue to develop the work community.

In addition, there are specific provisions on change negotiations and personnel representation in the administration of undertakings.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

According to Section 9 of Chapter 3 of the Annual Holidays Act (162/2005), an employee has the right to receive at least his or her regular or average pay for the time of his or her annual holiday, as laid down in this Act. Accordingly, for example, Section 10 of Chapter 3 provides that an employee whose pay has been agreed on a weekly basis or on the basis of a longer period also has the right to receive this amount for the period of his/her annual holiday.

4 Other Relevant Information

4.1 Work-life balance

A tripartite working group appointed by the Ministry of Economic Affairs and Employment has made a proposal for legislative amendments on the implementation of the Work-life Balance Directive and the Finnish family leave reform. The group has also evaluated the labour legislation in terms of the government's objectives to improve gender equality at work and in families. The group submitted its report to the Ministry on 14 December 2021: it includes a dissenting opinion and a supplementary statement.

The Directive will be implemented alongside the family leave reform. The reform aims to increase gender equality both in the daily lives of families and in work life. The purpose is to improve the position of women in the labour market when family leave is divided more equally between the two parents.

The working group noted that part-time work is already possible under the labour legislation. The implementation of family leave reform and the Work-life Balance Directive will further improve the opportunities to part-time work for parents with small children.

The working group had differing views on the question whether provisions banning discrimination on grounds of pregnancy and family leave should be included in the Employment Contracts Act (55/2001). The group did not propose any such amendments to the Act.

4.2 Working conditions

The purpose of the amendments proposed by the working group of the Ministry of Economic Affairs and Employment is to make working conditions more predictable and to improve the position of those employed under a variable hours contract. This was achieved with the implementation of the EU Directive on Transparent and Predictable Working Conditions and the government's decision to improve the status of employees in temporary employment and on so-called zero-hours contracts. The proposed amendments would implement the Directive on Transparent and Predictable Working Conditions. They also relate to the achievement of the Government Programme's objective of more stable working hours in variable hours contracts.

The Ministry of Economic Affairs and Employment has requested comments on the working group's report to be submitted by 21 January 2022. The report includes a joint statement by the Confederation of Finnish Industries EK, the Local Government and County Employers KT, and the Commission for Church Employers. In addition, it includes a statement by the Federation of Finnish Enterprises, and a joint supplementary statement by the Central Organisation of Finnish Trade Unions (SAK), the Finnish Confederation of Professionals (STTK) and Confederation of Unions for Professional and Managerial Staff in Finland (Akava). Also, appended to the report is a supplementary statement by the Finnish Confederation of Professionals (STTK) on the provision for the stabilisation of variable working hours.

The legislation to be amended would include the Employment Contracts Act and the Working Hours Act (872/2019). The proposed amendments are scheduled to enter into force on 01 August 2022. Although the existing legislation already widely covers the Directive's requirements, implementation of the Directive will require some changes in matters such as written information on working conditions, training offered to employees and shift planning in variable hours working arrangements.

According to the working group's proposal, the employer's duty to provide written information of the conditions of employment would be extended to cover shorter employment relationships than is currently the case. Matters to be covered would be extended to the employee's right to training, arrangements for overtime work and overtime compensation, and social security.

In addition, in cases where an employer is obligated by law or a collective agreement to offer training to an employee, provisions would be laid down to make this training free of charge to the employee. In addition, the time spent on training should be counted as working time and, where possible, training should be provided during regular work shifts.

In the future, the employer should, at the request of an employee who is working on a fixed-term or part-time basis, provide a written and well-grounded response to the employee's request to extend his or her regular working hours specified in the employment contract or the duration of the employment contract.

The amendments proposed to the Working Hours Act relate to variable working hours arrangements. The Act would lay down provisions on situations in which the employee's consent is required for assigning a work shift. In addition, when a work shift is cancelled 48 hours before the start of the shift, the employee would have to be paid a reasonable compensation for any inconvenience caused by the cancellation, unless such compensation would otherwise be paid based on law or an agreement.

The working group's report also includes proposed amendments based on the Government Programme, according to which legislative measures will be taken to ensure more stable working hours for persons on variable hours contracts.

According to the working group, the employer's obligation to review the conditions for variable working hours would be strengthened. The employer would be required to assess, at least every 12 months, whether the working hours specified in the employment contract were in line with the actual hours worked. If the actual hours worked during the review period and the employer's need for labour indicate that the number of minimum working hours could be increased, the employer should offer the employee an agreement to change the working hours to correspond to the results of the review. In practice, this would mean an increase in the number of minimum working hours.

France

Summary

(I) A law provides for a new parental leave to care for children suffering from a chronic pathology or cancer.

(II) The Court of Cassation ruled on the illegality and inadmissibility of video surveillance evidence and on paid leave in the context of an invalid dismissal.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Care leave

The Act of 17 December 2021 (Act No. 2021-1678 of 17 December 2021) for the care of children suffering from a chronic pathology or cancer stipulates that the employee may, with validation, be entitled to leave in the event of his or her child suffers from a chronic pathology that requires therapeutic training or if the child is diagnosed with cancer (Labour Code, Article L. 3142-1, 5 modified).

This is a new valid reason for absence from work to the benefit of employees: the law extends the leave that is already in case a child is diagnosed with a chronic pathology or cancer.

The purpose of this measure is to complete the various already existing leaves, which do not guarantee parents an immediate right of absence once the illness is diagnosed.

A decree must specify the list of chronic pathologies that fall within the scope of this text. The duration of leave the employee may take is at least two days (amended French Labour Code, Article L. 3142-4).

A collective agreement or, failing that, a branch agreement or convention may extend the duration of such leave beyond two days.

This leave comes at the employer's expense (just like any other family-related leave), it does not entail any reduction in pay and is considered effective working time for the determination of the duration of the employ's annual paid leave (French Labour Code, Article L. 3142-2).

As a reminder, this new leave is only related to the 'announcement' (diagnosis) of the chronic pathology or cancer in a child.

Thereafter, the employee can, if necessary, take leaves provided for in the Labour Code for family caregivers, and in particular parental presence leave.

2 Court Rulings

2.1 Video surveillance evidence

Labour Division of the Court of Cassation, 10 November 2021, No. 20-12.263

In the present case, the employee of a pharmacy was dismissed for serious misconduct due to irregularities in the operation of the cash registers, such as the entry of quantities of products lower than those actually sold or the sale of products at a price lower than

the selling price. To obtain proof of these facts, the employer took recourse to the recordings of the pharmacy's video surveillance system, which is in principle set up to ensure the safety of goods and persons and declared as such to the CNIL.

In principle, since the entry into force of the RGPD (General Data Protection Regulation) on 25 May 2018, the installation of a video surveillance system must be shared with the CNIL (National Commission for Information Technology and Civil Liberties) if this video surveillance concerns employees handling money (CNIL, Deliberation No. 2018-327, 11 October 2018).

The employee challenged her dismissal before the Court of First Instance, arguing that since the video surveillance system at issue was also intended to monitor the employees' activities but was not declared as such to the CNIL, it should be subject to the formality of informing the employees in advance and consulting the works council. According to the employee, these formalities had not been met, so that the evidence obtained through this system had to be considered illicit and consequently inadmissible.

The Court of Appeal decided that the aforementioned formalities were not necessary for the evidence to be admissible, since the surveillance system's primary purpose o was not to monitor the activity of employees, but to ensure the safety of goods and persons in an establishment that is open to the public and is at a high risk of robbery or theft.

In its decision of 10 November 2021, the Court of Cassation considered that it does not matter that the video surveillance system was not initially intended to monitor the activity of employees, only the actual use made of it by the employer. Thus, according to the Court, as soon as the activity of staff is monitored by means of a video surveillance system, in principle intended to ensure the safety of goods and persons, the formalities of informing the employees and consulting the works council (now the social and economic committee) in advance are required if the employer intends to use these recordings for disciplinary purposes. If these formalities are not met, the evidence obtained from these recordings is illegal.

Nevertheless, if the Court of Appeal's decision is overturned on this point, it does not mean that the employer could not rely on these elements of fact. For the Social Division of the Court of Cassation, the illegality of a piece of evidence does not necessarily entail its rejection in the proceedings, so that the trial judge must carry out a proportionality review by balancing the right to respect the employee's personal life and the right to evidence.

The Court of Cassation referred the case back to the Court of Appeal to leave this proportionality review to the trial judge.

2.2 Paid leave and invalid dismissal

Labour Division of the Court of Cassation, 01 December 2021, No. 19-24.766,

In the present case, an employee who had suffered a work-related accident was dismissed for professional inadequacy without having been given a follow-up visit and was still covered by the legal protection related to this accident at the time of his dismissal.

In principle, during the period of suspension of the employment contract following an accident at work or an occupational disease, the employer may only terminate the contract if he/she can justify a serious fault on the part of the employee, or if he/she is unable to maintain the contractual relationship for a reason unrelated to the accident or disease (French Labour Code, Article L. 1226-9).

The judges of the Court of Appeal granted the employee's request for reinstatement after having found that the dismissal was null and void in cases not authorised by the Labour Code (Article L. 1226-13). The Court also granted an eviction indemnity corresponding to the wages lost between the dismissal and the reinstatement, after

deducting the replacement income received during this period. On the other hand, the Court ruled that since the eviction period did not entitle the employee to days of leave, he could not benefit from the compensatory indemnity for paid leave corresponding to this period.

This decision applied in accordance with the case law previously applicable, which excluded any possibility for the employee to actually benefit from paid leave days for the eviction period (Court of Cassation, Social Chamber, 11 May 2018, No. 15-19.731; Cass. Soc., 30 January 2019, No. 16-25.672) or to obtain compensation for paid leave during this period (Court of Cassation, Social Chamber, 28 November 2018, No. 17-19.004).

In its ruling of 01 December 2021, the Social Chamber of the Court of Cassation reversed this case law. Although the acquisition of paid leave is legally subject to the performance of actual work according to the provisions of Article L.3141-3 of the Labour Code, the Social Chamber stated that "there is reason to judge from now on that, except when the employee has held another job during the eviction period between the date of the dismissal, which is null and void, and the date of reinstatement in his job, he can claim his paid leave rights for this period".

Thus, in this case, the eviction period entitled the employee to the acquisition of paid annual leave, so that the employee was entitled to claim a compensatory indemnity for the paid leave corresponding to this period.

To justify this reversal of case law, the Social Chamber relied on the principle established by the Court of Justice of the European Union on 25 June 2020, according to which:

> "*Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 must be interpreted as precluding national case law according to which a worker who has been unlawfully dismissed and then reinstated in his job is not entitled to paid annual leave for the period between the date of dismissal and the date of reinstatement on the ground that, during that period, the worker did not carry out any actual work in the service of the employer. The Social Chamber has taken up the position of the CJEU in an identical manner, in particular with regard to the reservation formulated concerning the exercise of another job during the period of eviction*".

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Under French law, sick leave has the effect of suspending the employment contract. The employee no longer performs his or her work and is therefore not entitled to payment of his or her salary (Court of Cassation, Social Chamber, 13 March, 2013, No. 11-22.285). The social security organisations will then pay daily allowances to compensate for this absence of salary. These allowances do not entitle the employee to paid leave.

Indeed, the amount of paid annual leave allowance is set under French law according to the effective work remuneration or adapted accordingly (French Labour Code, Article L. 3141-24). If the period of incapacity for work due to an employment-related illness is considered effective working time entitling the employee to paid leave calculated on the basis of his or her regular remuneration, this is not the case for incapacity for work due to a non-employment-related illness (French Labour Code, Article L. 3141-5).

Thus, sick leave due to a non-employment-related illness is not considered a period of actual working time and therefore does not give rise to a right to paid leave.

In French law, the reasoning behind paid leave is binary:

- Either the working time is effective or adapted as such and entitles the employee to paid annual leave calculated on the basis of his or her regular remuneration;
- Or the working time is neither effective nor considered as such and does not entitle the employee to paid leave.

Under French law, remuneration for paid leave is therefore always calculated on the basis of the employee's regular remuneration, provided that the leave was earned as a result of effective working time or working time treated as such.

4 Other Relevant Information

Nothing to report.

Germany

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

It should be noted that in its request for a preliminary ruling of 17 June 2020 – 10 AZR 210/19 (A) note 46, the Federal Labour Court referred to the corresponding proceedings before the CJEU (in connection with the fact that according to the CJEU's case law, no incentives may be created to waive the minimum annual leave).

The impact of the decision on the legal situation in Germany is likely to be minimal: if an employee has been ill over a longer period and is immediately granted leave following his/her recovery, (s)he receives holiday pay per day of leave in the amount of pay (s)he would have earned if (s)he had returned to work after six weeks of sick leave, which is the duration of continued payment in the event of illness (see Gallner, in: Müller-Glöge a. o. (eds.), *Erfurter Kommentar zum Arbeitsrecht* 22nd ed 2022, § 11 BUrlG note 25).

4 Other Relevant Information

Nothing to report.

Greece

Summary

(I) A Ministerial Decision provides for the continuation of the work contract suspension mechanism.

(II) Employers may require employees to telework without having to agree to changes to their contract of employment, but they must carry the relative costs.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Contract suspension

Ministerial Decision 10412/2021 provides for the continuation of the work contract suspension mechanism in, amongst others, the field of cultural activities for one more month until the end of January 2022. The mechanism termed 'Co-operation' is also applicable until 31 March 2022 for workers who were hired before 30 October 2021.

Finally, employers may require employees to telework (work remotely) without having to agree to changes to their contract of employment.

1.2 Other legislative developments

1.2.1 Teleworking

Pursuant to Law 4808/2021 (Article 67), the employer shall carry the cost of equipment, maintenance and telecommunications incurred so the employee can telework. Ministerial Decision 98490/3 of December 2021 set the minimum monthly costs that must be covered by employers in case of teleworking as follows: a) EUR 13 per month for use of the employee's home office; b) EUR 10 per month for telecommunications costs, unless the employer directly covers such costs based on a separate agreement with the provider of internet and telecommunication services; c) EUR 5 per month for equipment maintenance costs (unless such equipment is provided by the employer).

In cases where teleworking is provided for less than 22 days per month, only 1/22 of the above amounts are due for each day of teleworking.

This sum is not subject to taxation or social security contributions, as it constitutes a tax-deductible expense.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

This judgment has no implications for Greece taking into account that Greek law does not provide that at the end of an initial period of incapacity for work, the employee shall receive only part of the amount of his/her remuneration if the incapacity persists.

4 Other Relevant Information

4.1 Minimum wage

Pursuant to a Ministerial Decision, the minimum salary in the private sector, which was previously set at EUR 650 per month, will be increased by 2 per cent from 01 January 2022, raising the minimum monthly wage to EUR 663.

Hungary

Summary

(I) The state of emergency has been extended until 01 June 2022.

(II) The provisions of the Labour Code and the Labour Safety Act on teleworking have been amended.

(III) Government Decree No. 703/221 published the minimum wage for 2022.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 State of emergency

The state of emergency has been extended until 01 June 2022 (formerly extended to 01 January 2022). This means that all laws that were passed during and as a consequence of the state of emergency remain in force.

1.2 Other legislative developments

1.2.1 Teleworking

Act 130 of 2021 on certain rules concerning the state of emergency (henceforth Act) was published in the Official Journal on 17 December 2021. The Act amends the rules of the Labour Code and the Labour Safety Act in relation to teleworking, and replaces the transitional rules on teleworking in Government Decree 487/2020. According to the Act, the amended provisions of the Labour Code (Article 196) will come into force on the date determined in the individual decision of the Prime Minister. The amended provisions of the Labour Safety Act will enter into force at the end of the state of emergency.

Act 93 of 1993 on labour safety in Hungarian is in English (in force since 2018) here.

The former provisions of the Labour Code on teleworking in Article 196-197, which will be replaced by the new provisions, state:

> *"87. Teleworking*
>
> *Section 196*
> *(1) 'Teleworking' shall mean activities performed on a regular basis at a place other than the employer's premises, using IT equipment, where the end product is delivered by way of electronic means.*
> *(2) In the employment contract, the parties shall agree on the employee's employment by means of teleworking.*
> *(3) In addition to what is contained in Section 46, the employer shall inform the employee:*
> *a) about inspections conducted by the employer;*
> *b) about any restrictions regarding the use of IT equipment or electronic devices; and*
> *c) concerning the department to which the employee's work is in fact connected.*
> *(4) The employer shall provide all information provided to other employees to persons employed in teleworking.*
> *(5) The employer shall provide access to the employee for entering its premises and to communicate with other employees.*
>
> *Section 197*

> *(1) Unless otherwise agreed, the employer's right of instruction is limited solely to the definition of duties to be discharged by the employee. […]*
> *(4) Unless there is an agreement to the contrary, the employer shall determine the type of inspection and the shortest period of time between the notification and commencement of the inspection if conducted in a property designated as the place of work. The inspection may not bring unreasonable hardship on the employee or on any other person who is also using the property designated as the place of work.*
> *(5) In the absence of an agreement to the contrary, the employee's working arrangements shall be flexible."*

The amended provisions introduced by the Act (with comments after each subsection) are as follows:

> *Article 196*
>
> *"(1) In case of teleworking', the employee performs work in part or entirely at a place other than the employer's premises."*

This means that it is no longer dependent on the condition that the employee uses IT equipment, and that the end product is delivered by way of electronic means. Hence, any work may be performed through teleworking from now on. In addition, any work will be considered teleworking if it is performed in part or entirely at a place other than the employer's premises. This is an extremely broad scope, including when work is partly performed at the client's premises. This provision may need further interpretation by case law and scholars.

> *"(2) In the employment contract, the parties shall agree on the employee's employment by means of teleworking."*

Subsection (2) remained unchanged. Hence, the parties must agree on teleworking in the employment contract.

> *"(3) If not agreed otherwise by the parties of the employment contract, in the case of teleworking:*
> *a) the right of the employer to give instructions is restricted to define the work to be performed;*
> *b) the employer has the right to monitor/control work using IT (electronic) technologies;*
> *c) the employee works at the employer's premises on a maximum of one-third of working days per year;*
>
> *d) the employer shall provide access to the employee to enter its premises and to communicate with other employees."*

These are partly new provisions (point b and c), and partly repeating former provisions (point a and d).

> *"(4) If the employer practices the right to monitor the performance of work that is carried out through teleworking, the inspection may not imply unreasonable hardship for the employee or for any other person who also uses the property designated as the place of work."*

This subsection in effect repeats the former Article 197(4).

> *"(5) The employer shall also provide all information provided to other employees to persons employed in teleworking."*

This repeats former Article 196(4).

The new provisions no longer state (unlike the former ones) that the employee's working arrangements shall be flexible in the absence of an agreement to the contrary. Therefore, the parties must agree on a flexible working time arrangement. This may require the amendment of former teleworking contracts.

1.2.2 Occupational health and safety

The main new provisions on teleworking in Article 86/A-C of the Labour Safety Act, replacing former Article 86/A, distinguish between teleworking with and without IT use. In case IT is used in the performance of work, the employer shall inform the employee in writing about the rules of health and safety at work, and the employee shall choose the place of work in accordance with these rules. The employer may practice the right to monitor the performance of work through IT, unless the parties agree otherwise. In cases of teleworking without the use of IT, the parties shall agree in writing on the place of work. In this case, work may be performed at a place formally accepted by the employer in light of health and safety rules. The employee can modify the conditions of work with prior consent from his/her employer.

The employer or his/her representative is required to regularly check the employee's working conditions and compliance with health and safety standards and may enter the place of work to check the employee's working conditions.

1.2.3 Minimum wage

Government Decree No. 703/221 states:

- the minimum wage (HUF 200 000 HUF, approx. EUR 543); and
- the guaranteed wage minimum (HUF 260 000, approx. EUR 706)

for 2022 (entry into force on 01 January 2022). This is an increase of the minimum wage for workers with at least a secondary education.

This is a remarkable (around 20 per cent) increase compared to the roughly 4 per cent increase in the (non-election) year of 2021.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Article 115 (1) and (2)e) of the Labour Code prescribes, that:

> *"(1) Employees are entitled to paid annual leave based on the time spent at work, comprising vested vacation time and extra vacation time.*
>
> *(2) In the application of Subsection (1), time spent at work shall include:*
>
> *a) any duration of exemption from work as scheduled;*
>
> *b) any duration of paid leave;*
>
> *c) any duration of maternity leave;*
>
> *d) the first six months of leave of absence without pay to care for a child (Section 128);*
>
> *e) any duration of incapacity for work."*

Thus, the duration of incapacity for work is included in time spent at work for calculating annual paid leave days.

Article 148 (1) of the Labour Code contains the rules on calculating absentee pay, which is the renumeration to be paid during annual paid leave:

> *"(1) The amount of absentee pay shall be calculated:*
>
> *a) based on the base wage (Section 136) or fixed supplement (Section 145) in effect at the time when due,*
>
> *b) based on:*
>
> *ba) the performance-based wage (Section 150),*
>
> *bb) the wage supplement (Section 151),*
>
> *paid for the last six calendar months (relevant period) before the time due."*

Consequently, if the employee is incapacitated for work during the last six calendar months before his or her annual paid leave (or part of this period), the employee may receive lower absentee pay than those who work during this entire period. The difference may come from performance-based wages and wage supplements, which are not paid to the employee during a period of incapacity for work.

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 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Collective agreements and Act No. 30/1987 on Annual Paid Leave include the rules that apply to the Icelandic labour market on annual paid leave.

Minimum paid leave according to the act is two days for each month worked over a reference period which runs from May to April of each year, amounting to 24 days of leave annually, see Article 3(1) of the Act. However, collective agreements often stipulate more days of annual leave, often in connection with the duration of service in a certain profession or for a certain undertaking.

Article 7 of the Act includes rules on remuneration for annual paid leave. The remuneration is determined by taking a certain percentage of the employee's total salary, namely 10.17 per cent for the minimum leave. The same rule is included in at least the larger collective agreements on the Icelandic labour market (see Article 4.1 of the collective agreements of VR and SA and SGS and SA).

Collective agreements and Act No. 19/1979 on the Rights of Workers to Notice and to Salary due to Sickness and Accidents include the main rules that apply to remuneration when an employee is on sick leave.

In general, an employee shall receive his/her full salary for a certain period, followed by a period during which the employee receives a salary for daytime work only. The length of these periods differs depending on collective agreement, in particular as regards public and private sector agreements, with the periods overall being longer in the public sector. If an employee is still sick once the given sickness period is over, the employee's trade union pays him/her sickness benefits followed by payments of the Icelandic Health Insurance.

By analysing the interplay between rules on annual paid leave and sickness leave, two factors are noted. Firstly, Icelandic labour law does not guarantee employees full pay for sickness leave for an indefinite period, and secondly, an employee's remuneration for annual leave is determined by the salary he or she has earned during the reference period.

On reading the applicable legislation and collective agreements, it would therefore appear that Icelandic law does not guarantee full remuneration to those who have not earned their full salary during the reference period due to sickness. Considering CJEU case C-217/20, it would in any case be beneficial to introduce the appropriate changes to Act No. 30/1987 and collective agreements to reflect the rule enshrined in the case.

4 Other Relevant Information

Nothing to report.

Ireland

Summary

Nothing to report.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Minimum rates of pay in the electrical contracting sector

In 2013, the Supreme Court declared constitutionally invalid the system for extending collective agreements between representative employer associations and trade unions to entire sectors of the economy. 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' fixing 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, sick pay and pension provision in a sector of the economy. If the Court is satisfied of various matters, such as the representativeness of the applicants, it makes a recommendation to the Minister who, after receiving parliamentary approval, makes the order.

Such an order has now been made in respect of the electrical contracting sector: Sectoral Employment Order (Electrical Contracting Sector) 2021 (S.I. No. 703 of 2021). The union had sought two increases of 2.7 per cent and 3.6 per cent, whereas the main employer associations sought two increases of 2.3 per cent and 1.6 per cent. The Labour Court recommended two 2.8 per cent increases from 01 February 2022 and 2023. The union had also sought a guaranteed 39-hour week and payment for travel time. The Court recommended against these claims, noting that the employers had argued that the 2015 Act did not allow the Court to set such conditions.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

As Advocate General Hogan points out in his Opinion, this decision will have consequences for EU Member States, such as Ireland, where there is currently no 'state-mandated' provision for paid sick leave. Civil and public servants, however, are entitled to full pay for three months and half pay for a further three months: see Public Service Management (Sick Leave) Regulations 2014 (S.I. No. 124 0f 2014 as amended by S.I. No. 384 of 2015). Unlike the Netherlands, however, the provisions of the sick leave entitlements for civil and public servants specifically prevent such workers from taking annual leave in place of sick leave: see Department of Public Expenditure and Reform Circular 05/2018, para. 5.1. As was recognised by the CJEU in case C-350/06, 20

January 2009, *Schultz-Hoff* (paras. 28 and 29), this is not precluded by Article 7.1 of the Working Time Directive, provided the worker in question has the opportunity to exercise his or her right to paid annual leave during another period.

It is now well established that workers who are absent on sick leave are to be treated the same way as regards their annual paid leave entitlements, as those who have actually worked during that period. Consequently, it comes as no surprise that the CJEU, in this case, endorsed the Opinion of the Advocate General that Article 7 precluded national provisions or practices whereby the amount of a worker's remuneration during annual leave taken while the worker is on sick leave, is paid at the level of remuneration—here 70 per cent—which he or she would receive during such leave.

4 Other Relevant Information

4.1 COVID-related benefits

As of 23 December 2021, 57 603 persons (40.8 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 (9 604), accommodation and food services (8,969) and administration and support services (6 738). The number in construction has dropped from 42 333, at the end of April, to 5 914. In terms of the age profile of PUP recipients, 8.6 per cent were under 25 years old. Additionally, 8 237 persons were in receipt of the COVID-19 Enhanced Illness Benefit. In total to date, 231 699 persons have been medically certified for receipt of this benefit, 53.1 per cent of whom were female (see here).

4.2 Collective redundancies

The Department of Enterprise, Trade and Employment has published an Information Handbook on Rights and Remedies available to Employees facing a Collective Redundancy Situation.

Italy

Summary

(I) The Italian legislator has extended the state of emergency and the obligation to vaccinate, also introducing the 'reinforced Green Pass', which can only be issued to those who have been vaccinated or have recovered from a previous COVID-19 infection.

(II) The government has transposed Directive (EU) 2019/1159 on the mutual recognition of seafarers' certificates.

(III) The Court of Cassation referred a question to the Constitutional Court on the existence of a legitimate expectation in a public employee who receives undue remuneration.

(IV) The Ministry of Labour and the social partners have signed a National Protocol on smart working in the private sector.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Mandatory vaccination

The Law Decree 26 November No. 172 provides some measures to contain the pandemic emergency resulting from COVID-19.

- As of 15 December 2021, completion of the vaccination obligation includes the third dose of the vaccine.
- Healthcare professionals are required to have a third booster dose. For them, the vaccination is an essential requirement for the exercise of their profession, unless a health risk has been established due to a documented clinical condition, which exempts or defers the vaccine. The local professional association will invite the worker who did not get the booster to submit the necessary documentation within 5 days, proving that he or she has received the vaccine, the certificate of exemption or postponement, or present his or her vaccination request, to be received within a maximum of 20 days. Persistent non-fulfilment of the vaccination obligation will result in the suspension from employment, without disciplinary consequences and with the right to retain the employment relationship, but with the loss of the right to pay or to any other emoluments. For health professionals, who are enrolled in the local professional register for the first time, the fulfilment of the vaccination obligation is a requirement for registration.
- The vaccination obligation has been extended to the following categories of workers: staff employed in schools and training institutions, members of the defence, security and rescue services and local police, employees of the Department of Penitentiary Administration, as well as adults and minors who are imprisoned. The same rules apply to these workers as for healthcare personnel. In schools, principals will be able to replace suspended teachers through the assignment of fixed-term contracts, which are terminated by law when the replaced workers, having fulfilled the vaccination obligation, regains the right to perform work.
- A 'reinforced Green Pass' has been introduced for those who have been vaccinated or have recovered from a previous COVID-19 infection. From 06 December 2021 to 15 January 2022, the reinforced Green Pass is required to access cinemas, theatres, stadiums and sports halls, bars, and restaurants

indoors, parties, discos and public ceremonies. The basic Green Pass, i.e. the certificate that can be obtained with a negative swab, remains valid to access the workplace outside those sectors and areas to which the vaccination obligation does not apply.

Furthermore, the Act of 03 December 2021 No. 205 converts the Law Decree of 8 October 2021 No. 139 into law, establishing rules on the maximum occupancy of theatres, cinemas, stadiums and on the use of the 'Green Pass' certificate in workplaces.

1.1.2 State of emergency

The Law Decree of 24 December 2021 No. 221 extends the national state of emergency and provides for further measures to contain the spread of the COVID-19 epidemic.

According to Article 1, the state of emergency is extended to 31 March 2022 (the state of emergency was declared for the first time on 31 January 2020 and has subsequently been extended several times).

According to Article 3, from 01 February 2022, the Green Pass will be valid for 6 months (now it is valid for 9 months).

From 25 December 2021 to 31 January 2022, the use of masks is mandatory (even outdoors) throughout the country (Article 4). Until the end of the state of emergency, to attend any show or sporting event, both indoors and outdoors, it is mandatory to wear an FFP2 mask. If the show or sporting event takes place indoors, it is prohibited to consume any food or drinks. Until the end of the state of emergency, the Green Pass is also required to eat or drink at the counter in bars and restaurants (Article 5).

Until 31 January 2022, discos and dance halls will be closed and outdoor parties and concerts, which might attract crowds, are prohibited (Article 6).

1.1.3 COVID-19 certificate

The Law Decree of 30 December 2021 No. 229 provides for new measures regarding the extension of the reinforced Green Pass (which can only be obtained if the full vaccination cycle is completed or following recovery) and quarantine for the vaccinated.

From 10 January 2022 until the end of the state of emergency, the 'reinforced Green Pass' is required for the following activities: hotels and accommodation facilities; parties after civil or religious ceremonies; festivals and fairs; convention centres; outdoor catering services; ski lifts; swimming pools and wellness centres, even outdoors; team sports outdoors; cultural centres, social and recreational centres for outdoor activities.

The reinforced Green Pass is also required for the use of all means of transport, including local or regional public transport.

The Decree provides that the precautionary quarantine does not apply to those who have had close contact with subjects who are confirmed positive for COVID-19 in the 120 days from the completion of the primary course of vaccination or from recovery as well as after the booster vaccination.

1.2 Other legislative developments

1.2.1 Seafarers' work

On 30 November 2021 Legislative Decree 8 November 2021 No. 194 was published in the Official Journal of the Italian Republic.

The Decree implements Directive (EU) 2019/1159 of the European Parliament and of the Council of 20 June 2019, amending Directive 2008/106/EC on the minimum level of

training of seafarers and repealing Directive 2005/45/EC on the mutual recognition of the seafarers' certificates issued by the Member States.

1.2.2 Disability

The Act of 22 December 2021 No. 227 contains the 'Delegation to the Government in matters of disability'.

Within 20 months of this delegation, the government must adopt one or more legislative decrees for the revision and reorganisation of the provisions on disability, in implementation of Articles 2, 3, 31 and 38 of the Italian Constitution and in compliance with the provisions of the Convention of the United Nations on the Rights of Persons with Disabilities. The government will have to, formally and substantively, coordinate the regulations in force, including the transposition and implementation of European legislation, introducing the appropriate changes to ensure and improve the legislation's legal, logical and systematic consistency, simplify the regulatory language and identify the rules to be repealed. Among other things, the government will have to provide a definition of 'disability' consistent with Article 1, para. 2 of the United Nations Convention on the Rights of Persons with Disabilities.

1.2.3 Budget Law

On 30 December, the Italian Parliament approved the State budget for the financial year 2022 and the multi-year budget for the period 2022–2024.

The Budget Law contains several provisions on social security and pensions, as well as on tax matters. An initial summary of its most relevant provisions on employment relationships is provided below. Detailed comments will be presented in the upcoming January 2022 Flash Report.

It states that:

- employers who employ more than 250 employees and who need to close a plant with at least 50 layoffs, must, at least 90 days in advance, notify the unions, the regions concerned, the Ministries of Labour and Economic Development and Anpal (national agency for employment policies). The company will then have to draw up a plan (lasting a maximum of one year) to limit the effects of the closure on workers. In case of non-compliance, penalties are foreseen;
- the requirements for applying *Cassa Integrazione* have been reduced and will also apply to home workers. The *Cassa Integrazione straordinaria* applies to all employers with over 15 employees in any economic sector;
- working mothers are entitled to a 50 per cent reduction of social security contributions payable by them upon returning to their workplace after taking compulsory maternity leave and for a maximum period of one year. This provision is experimental and is only valid for the year 2022;
- the *Cassa Integrazione* for Alitalia Sai and Cityliner employees in extraordinary administration are extended until 31 December 2023.

2 Court Rulings

2.1 Undue remuneration

Corte di Cassazione, 14 December 2021, No. 40004

The question of constitutional legitimacy of Article 2033 of the Civil Code in contrast to Articles 11 and 117 of the Constitution in relation to Article 1 of Protocol 1 of the European Convention on Human Rights is not manifestly unfounded.

The Court submitted a question on the constitutional legitimacy of Article 2033 of the Civil Code to the Constitutional Court as regards the part which does not allow access, to establish its proportionality in relation to the opposing interests of the parties (Article 1 of Protocol 1 of the ECHR), the existence of the legitimate expectation of the public employee who receives undue remuneration in multiple situations, such as a payment made spontaneously by the PA and by mistake, the appearance of the legitimacy of the payment title, the duration of the payments, the absence of the restitution reserve, the good faith of the recipient; all of which are associated with the assessment of the economic condition of the employee at the time of the order for reimbursement.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Italian law (Italian Constitution, Article 36; Legislative Decree 66/2003, Article 10) recognises the right to paid annual leave, but does not regulate its calculation. This is the responsibility of collective bargaining or individual bargaining, if more favourable.

In the public sector, collective bargaining ('*Funzioni centrali*') provides that all standard and recurring elements of remuneration must be paid during leave.

There is thus no relationship between the reduction of sickness indemnity following a prolonged sick leave and the calculation of the salary due during a subsequent annual leave period.

Consequently, this particular situation cannot arise in Italy.

4 Other Relevant Information

4.1 Teleworking

On 07 December 2021, the Ministry of Labour, trade unions and employers' associations signed a National Protocol on smart working in the private sector.

The key points of the Protocol are:

- Smart working is voluntary, and the conclusion of an individual agreement is required, without prejudice to the right of withdrawal. Furthermore, any refusal by the worker to join or carry out his/her work in an agile manner does not allow for dismissal for just cause or justified reason, nor is it relevant at the disciplinary level;
- A written agreement between the worker and employer must specify the duration of smart working, the alternation between the periods of work within and outside the company premises, the places possibly excluded for performing work outside the company premises, the methods of exercising managerial power by the employer and conduct that may give rise to the application of disciplinary sanctions, the rest periods, the forms and methods of control of work performance outside the company premises, and the procedures for exercising trade union rights;
- Disconnection must be possible during which the worker may not be requested to work;
- The working tools must be provided by the employer;
- The smart worker has the right to protection against accidents at work and occupational diseases.

Latvia

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

First, Latvian law does not allow part-time sick leave. Either a worker is incapacitated for work due to his/her state of health or he/she is able to (fully) work. Second, according to Latvian labour law (Labour Law (*Darba likums*), Official Gazette No. 105, 6 July 2001, available here in Latvian) pay during annual leave must, in principle, correspond to the employee's average pay rate over the preceding 6 months. Article 75 of the Labour Law provides the legal regulation for the calculation of average pay for numerous purposes, including for the calculation of pay during annual leave. Article 75 also explicitly provides that if a worker has been partially absent during the period that is considered for the calculation of pay for annual leave, only pay for days actually worked must be taken into account. This means that the calculation of pay during annual leave only reflects the pay received for actual work performed (days and pay per day) (see also Commentaries on the Labour Law, Latvian Free Trade Union Confederation, 2020, pp. 197-199, available here in Latvian).

In addition, sick leave allowance is provided by the statutory social insurance system and is not dependent on the employer and calculation of pay. At the same time, the situation contrary to the finding of the CJEU in the present case might arise with regard to child care leave, which according to the statutory social security law may be taken as part-time leave. In this respect, labour law does not explicitly envisage the obligation to provide pay to a recent parent who is on part-time child care leave during his or her annual leave in full (i.e. as though she/he has had worked full time). This means that the CJEU decision has indirect implications for Latvian labour law.

4 Other Relevant Information

Nothing to report.

Liechtenstein

Summary

The Liechtenstein government has issued a decision according to which Directive (EU) 2015/1794 on seafarers is to be incorporated into the EEA Agreement.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The present case concerned Dutch law. As the Netherlands government noted, the employee in question received the amount of remuneration during his paid annual leave which corresponds to the amount paid to him during the reference period. However, that remuneration was lower than that which he would have received had he not been incapacitated for work due to illness during that period (cf C-217/20 No. 38). According to the case law of the CJEU, since the incapacity for work due to illness is, as a rule, not foreseeable and beyond the control of the worker concerned, it is necessary to consider, in relation to the right to paid annual leave, that workers who are partially incapacitated for work due to illness during the reference period are treated the same way as those who have actually worked during that period. Accordingly, entitlement to paid annual leave in such a case must, in principle, be determined by reference to the periods of actual work completed under the employment contract, without account being taken of the fact that the amount of that remuneration was reduced on account of a situation of incapacity for work due to illness (C-217/20 No. 39).

According to section 1173a Article 33(1) of the Civil Code *(Allgemeines bürgerliches Gesetzbuch*, LR 210), the employer shall pay the employee his or her *entire* salary due for annual leave. 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, when it comes to the interpretation and application of a provision adopted from Swiss law.

In judgment BGE 134 III 399 (4A_300/2007 of 06 May 2008) No. 3.2.4.2, the Swiss Federal Supreme Court decided that the employee is entitled to the amount he would have earned if he had worked during the period in question. Therefore, such a case as came before the CJEU on the basis of Dutch law cannot arise under Liechtenstein law. In this respect, it can be said that Liechtenstein law is fully in line with the case law of the CJEU.

4 Other Relevant Information

4.1 Seafarers' work

The government has issued Decision No. 258/2018 of the EEA Joint Committee amending Annex XVIII to the EEA Agreement (see Liechtenstein *Landesgesetzblatt* No. 382 of 03 December 2021). According to this Decision, the following Directive is to be incorporated into the EEA Agreement: Directive (EU) 2015/1794 of the European Parliament and of the Council of 06 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers (text with EEA relevance).

Lithuania

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The CJEU's judgment has no major implications for Lithuania because of the differences in the system of remuneration as far as workers who are 'partially incapacitated for work on a long-term basis due to illness' are concerned. There is no such phenomenon as 'partial incapacity' in the performance of work under Lithuanian law. If the employee or public servant cannot work due to illness, he/she will not work but will receive sick leave benefits for the first 2 days from his/her employer and from the State Social Insurance Fund for the remainder of his or her sick leave, not from the employer. For the calculation of the amount or remuneration paid to the employee during his/her annual leave, the factual received amount for the period of the preceding three months will be divided into hours/days of work. The established average hourly (daily) wage is used for the calculation of the remuneration for the period of annual leave (Rules on the Calculation of the Average Salary of an Employee, approved by Decree No. 496 of 21 June 2017 of the Government of the Republic of Lithuania. Registry of Legal Acts, 2017, No. 10853).

4 Other Relevant Information

Nothing to report.

Luxembourg

Summary

COVID-19 certificates will become mandatory in all workplaces from 15 January 2022.

1 National Legislation

1.1 Measures to respond to COVID-19 crisis

1.1.1 COVID-19 certificate

According to a Law of 16 December, from 15 January 2022, in all workplaces (with the exception of teleworking), employees will have to prove that they have either been vaccinated (complete scheme), recovered or tested. Self-tests will no longer be accepted, and the validity of PCR tests will be limited to 48 hours; this test will have to cover the entire time the employee is in the company. In practice, unvaccinated (and non-recovered) employees will therefore have to undergo several tests per week. Employees must, in principle, carry out the tests at their own expense outside working hours.

The employer is responsible for organising checks at the entrance to the workplace. He/she must check not only the certificate but also the identity of the employee.

If the employee is not able to present a certificate or refuses to do so, he or she may not enter the workplace. The employee is entitled to take annual leave if he or she has sufficient leave days. In case the employee does not have sufficient leave days or if the employee does not want to take leave, he/she will automatically lose the part of his/her remuneration that corresponds to the hours he/she does not work. On the other hand, the employee's absence does not constitute a disciplinary offence and cannot therefore give rise to a disciplinary sanction, in particular a dismissal. Dismissal on the grounds that the employee is unwilling or unable to submit a certificate is void.

A complex set of provisions neutralises the employee's absence from the social security system; the employee retains his/her insurance period and is entitled to health benefits.

To facilitate checks, the employer may retain a list of vaccinated or reinstated employees; the list may only contain the employee's name and the date of validity of his/her certificate. Entry in the list is purely voluntary. The list may not be retained beyond the period of application of this special legislation.

This new regime is the result of an agreement between the government, employers and trade unions.

1.1.2 Relief measures for the unemployed

According to Article L.523-1 (2) of the Labour Code, unemployed persons may be temporarily assigned to a 'temporarily compensated occupation' (*occupation temporaire indemnisée*) giving rise to an additional income on top of their unemployment benefit. If they are under 50 years of age, the duration of this type of occupation is limited to 6 months.

However, in the context of the fight against the pandemic, many people have been assigned to work, such as distributing antigen tests, checking QR codes at the entrance to administration offices or tracing contact cases. For this reason, a new draft (*Projet de loi n° 7931 portant dérogation temporaire à l'article L. 523-1 du Code du travail*, available here) stipulates that tasks related to the fight against COVID-19 will not be included within the 6-month limit. It is presumed that this provision will be retroactively applied as of 01 October 2021 and end on 30 June 2022.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

It is relatively rare in Luxembourg for an employee who is incapacitated for work to take leave while he or she is ill. However, the problem addressed by the CJEU may arise for leave taken shortly after a period of illness, as well as for employees who are on half-time sick leave (*mi-temps thérapeutique*).

During annual leave, the employee is entitled to an allowance calculated on the basis of the average salary over the last three months (Article L. 233-14 of the Labour Code). If the remuneration is subject to significant variations, in particular because it is fixed according to turnover, the average is calculated over 12 months.

During his/her illness, the employee is initially covered by the employer. He/she receives compensation corresponding to 100 per cent of his/her normal salary, calculated so this compensation reflects the salary he/she would usually have received as closely as possible (Article L. 121-6(3) of the Labour Code). However, no account is taken of non-periodic benefits, such as bonuses or overtime.

In a second phase, the employee is covered by the National Health Fund (*Caisse Nationale de Santé)*. This sickness benefit is also calculated, in principle, on the basis of the contributory wage (Article 9 of the Social Security Code). In short, account is taken of the highest basic salary over the last three months, as well as supplements and accessories paid during the last 12 months.

Thus, the problem raised in C-217/20 cannot, in principle, arise, as employees receive compensation that corresponds to their regular salary, or compensation that is at least "economically equivalent" to it.

The only case in which a problem could arise is that of employees who are dependent on the National Health Fund and who receive an income exceeding the ceiling for contributions (five times the social minimum wage). For these employees, the cash sickness benefit paid by the National Health Fund is also capped accordingly. However it is not company practice to calculate holiday pay in this case on the basis of the cash benefit paid by the Fund over the last months, but the full salary will be used as a reference. In practice, these employees receive their holiday pay calculated on the basis of their full normal salary. In any case, to the author's knowledge, there is no case law on the subject.

Civil servants are entitled to leave for health reasons (Article 28-3 of the General Statute for State Employees). Their absence counts as working time; consequently, they continue to receive their full salary. The same applies to recreation leave. The issue decided by the CJEU cannot therefore arise.

4 Other Relevant Information

4.1 Teleworking

Due to the high number of cross-border workers in Luxembourg, teleworking causes difficulties concerning the applicable tax and social security law.

Concerning social security, derogatory agreements have been negotiated until 30 June 2022. Thus, Luxembourg's social security regime remains applicable even if more than 25 per cent of working time is spent in the country of residence.

Concerning tax law, the derogatory agreements with France, Belgium and Germany have been re-concluded until 31 March 2022.

Malta

Summary

Nothing to report.

1 National Legislation

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

This ruling has serious implications for Maltese legislation, but it is submitted that the judgment itself must be examined in detail.

The Annual Leave National Standard Order 2018 (Subsidiary Legislation 452.115) states, *inter alia,* the following (Regulation 6):

> *"Annual leave shall continue to accrue in favour of an employee during the period when he is on sick leave or injury leave in terms of the Act, orders or regulations issued thereunder:*
>
> *Provided that notwithstanding anything to the contrary stated in any law, order or regulation, any balance of annual leave unavailed of by the end of the calendar year shall be automatically transferred to the next calendar year when it has not been possible for the employee to avail himself of such leave during the same year when the sickness or injury leave commenced."*

This is an important regulation and clarifies that even if an employee cannot take annual leave during a given period of, say, sickness, the employee shall still have the right to take his/her annual leave which would have accrued during the period of sickness.

Another important regulation in this context is the following:

> *"Notwithstanding anything to the contrary stated in any law, order or regulation, any period of pre-arranged leave coinciding with a period of maternity, sickness or injury leave shall be considered as not having been availed of but shall be availed of after the return to work or shall be carried on to the subsequent year if such leave could not be availed of during the same year when the maternity, sickness or injury leave commenced."*

Taken together, these regulations mean the following:

- An employee is entitled to transfer his/her annual leave to the following year should he/she be unable to take annual leave in any particular year due to sickness or injury; and
- Should an employee be (say) sick when he/she should have been on annual leave, then his/her annual leave is cancelled, as it were, and the employee would then have the right to defer his/her annual leave to another date.

What Maltese law does not specify is whether an employee who is on prolonged sick leave can take annual leave. Employees have a minimum of full-pay sick leave entitlement (depending on the sector they work in) which is usually followed by a period of sick leave on half pay (if so agreed in a collective agreement or an individual employment agreement), followed by a period of unpaid leave.

Maltese law seems to presuppose that no employee would request annual leave whilst on (say) half-pay or no-pay sick leave (following the designated full-pay sick leave period). This ruling could change this presupposition entirely. Maltese law does not prohibit this, it is merely silent on this topic. Hence, there is definitely a serious implication for Malta in this sense and it is submitted that this ruling supplements Maltese law on the subject.

4 Other Relevant Information

4.1 COVID-19 update

Currently, there is a heated debate about the impact of COVID-19 and vaccinations in the workplace. Malta has not yet introduced a vaccine mandate or compulsory vaccination for certain workers. However, on 17 January 2022, access to public services such as restaurants, theatres, cinemas, gyms, spas and other commercial and/or public services will be exclusively open to all individuals who have been triple vaccinated.

Malta has seen thousands of cases of COVID since December and even though it has managed to contain the spread well until early December, the number of positive COVID-19 cases soared when omicron reached Maltese shores.

At one point, there was a positivity rate of almost 17 per cent.

The move to a semi-lockdown for unvaccinated persons has been praised by many quarters but has also brought about huge lacunae in the law. For example, why is an employer not empowered to force vaccination on his/her workforce but an individual cannot go to an open-air theatre unless he or she is vaccinated (where masks are worn at all times anyway)? Furthermore, quarantine leave issues have literally created mayhem. At the time of writing (early January 2022), a rough estimate states that there are around 50 000 individuals in quarantine in Malta. That is 21 per cent of the population of the Maltese islands. Businesses have been ground to a halt. Restaurants are having to close, factories are clamouring to find alternative workers, professional firms are closed and most personal service providers (beauty industry, medical services, personal treatments, etc.) are either closed or moribund due to the fact that so many of their employees are on quarantine leave.

The quarantine leave regime is, in itself, being sorely abused by employees. Currently, simply put, an employee has the right to special leave termed 'quarantine leave' which is an addition over and above to his or her actual annual leave allowance. An employee who claims that he or she has been or has come into contact with a COVID-19 positive case has the obligation to isolate him-/herself but then there is no proof that this was indeed the case and yet, he/she can technically claim quarantine leave.

It is submitted that more clarity is needed in Malta from a legislative point of view on quarantine, employee rights with respect to quarantine leave and all matters that are currently beleaguering employment and employment relationships in Malta.

Regulation 4(f) of the Minimum Special Leave Entitlement Regulations 2008 (S.L. 452.101) is available here.

Netherlands

Summary

(I) The COVID-19 support measures have been extended.

(II) The Supreme Court has ruled on the legal position of volunteers with respect to liability for workplace accidents. The Court of Appeal has ruled on the applicability of compulsory industry-wide supplementary pension for foreign employees.

(III) The Court of Appeal has ruled that the collective labour agreement for road haulage applies to Deliveroo riders. Furthermore, it held that Deliveroo is subject to the decision for obligatory affiliation with the industry-wide pension fund for road haulage.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures

The Dutch government has decided to extend the 'NOW' support measures to ease the effects of the new lockdown, which will last until at least 14 January 2022. Employers can also apply for NOW support for the months of January, February and March so that they can continue to pay their staff. This NOW 6 is at a comparable level to the NOW 5 subsidy that employers can apply for. The full terms and conditions will be announced in January 2022. The NOW 6, like the previous schemes, also reimburses the salaries of employees with a flexible contract.

Additionally, other COVID-19 support measures have been extended (and adapted) as well. Special support measures have been introduced for the cultural sector and for amateur sports. As regards the more general support measures, the conditions for support for self-employed persons have become more generous. For example, no asset test is carried out and the support can be applied for with retroactive effect. These more favourable conditions will be in place until March 2022. The conditions of the existing TVP support measures will remain the same in the first quarter of 2022. Businesses can use the TVL if they lose more than 30 per cent in turnover.

1.1.2 COVID-19 certificate

On 22 November 2021, a bill proposal was filed regarding the use of the digital COVID certificate at the workplace. This bill proposal would make it possible to use the digital COVID certificate (QR-code) at the workplace and when visiting certain locations if this is necessary with a view to reducing the transmission of COVID-19. This measure could apply to employees, as well as to self-employed persons and volunteers. According to page 21 of the explanatory document that accompanied the bill proposal, the consequences of not presenting the QR-code when asked could include a change of work activities, a stop of the payment of wages or termination of the employment contract as an ultimate measure.

During December, several meetings on this proposal took place. It has been put on the agenda of Parliament for 05 January, when the proposal will be discussed further. On that same date, another bill proposal will be discussed which concerns a related topic: the use of the '2G' measure. This bill proposal, if adopted, would make it possible to allow a digital COVID certificate to be based on vaccination or recovery (2G) only. In other words, a negative COVID test would not grant the individual a valid digital COVID certificate. This would only apply to certain activities in sectors that are explicitly mentioned in the law (culture, events, catering, non-essential services).

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Volunteer work

Supreme Court, ECLI:NL:HR:2021:1953, 24 December 2021

A foundation was established in a town to foster community spirit. The foundation consists of volunteers only. One of the volunteers fell out of a Christmas tree when climbing up a tree to attach a string to help saw the tree. The volunteer was injured and the Court of Appeal's Hertogenbosch determined that the foundation was liable for the damages by reason of a wrongful act (Article 6:162 Dutch Civil Code, general contract law) with a reduction of 25 per cent because of 'own fault'. The Court of Appeal rejected the volunteer's perspective that the foundation's liability is based on Article 7:658 (4) DCC. Article 7:658 DCC regulates the employer's liability for workplace accidents and occupational diseases. The fourth section of this article extends the personal scope to those people who work for another person in the course of that person's profession or business, but without having an employee agreement (e.g. solo self-employed). In 2017, the Supreme Court ruled that this could also include volunteers (Supreme Court 15 December 2017, ECLI:NL:HR:2017:3142).

The Supreme Court upheld the Court of Appeal's decision to not apply Article 7:358 (4) DCC. It based its decision on Article 81 of the Judiciary (Organisation) Act. This means that the Supreme Court does not have to explain its judgment because it was not necessary to answer questions that are relevant for the uniformity or development of law. Although it seemed that this recent judgment is a change from the 2017 outcome, it is not. When reading the decision of the Court of Appeal, it becomes clear that the Court accepts the applicability of Article 7:658 (4) DCC on volunteers in general but concludes—based on the facts and circumstances of this particular case—that the conditions were not met. Most importantly, there was no agreement whatsoever between the volunteer and the foundation (anyone who wanted to help was invited, there was no obligation enforceable by law whatsoever to join) and the foundation did not act as a business or profession).

In conclusion, this Supreme Court decision does not change the legal position of volunteers in the Netherlands.

2.2 Platform work

Court of Appeal Amsterdam, 200.266.920/01, 21 December 2021

In two separate decisions, the Court of Appeal upheld two decisions of the Amsterdam District Court on the classification of Deliveroo as a road haulage company.

The first decision (ECLI:NL:GHAMS:3978) upholds the Amsterdam District Court's decision of 15 January 2019 (ECLI:NL:RBAMS:2019:210). The trade union FNV initiated the proceedings and stated that Deliveroo is a road haulage company and must therefore apply the collective agreement for road haulage that has been declared binding for the entire industry. In this first case, the Court of Appeal ruled that Deliveroo falls under the scope of the CLA Road Haulage and confirmed that Deliveroo is not a technology company.

The second case was initiated by the industry-wide pension fund for road haulage (decision of the Amsterdam District Court: ECLI:NL:RBAMS:2019:6292). In this case, the Court of Appeal upheld the decision in the first instance: Deliveroo is not a technology company, but a transport company. In this case, Deliveroo put forward that

the system of compulsory industry-wide pension funds is in contravention of European law, more specifically in terms of the freedom of establishment and the freedom to provide services. With reference to the CJEU decision *Albany*, *Drijvende Bokken* and *Brentjes*, the Court of Appeal has set aside this standpoint: it is acknowledged by the CJEU that this system is not in contravention of European law.

For completeness' sake: in 2019, FNV also initiated proceedings to establish that Deliveroo riders are employees and not self-employed workers. The Amsterdam District Court and later the Amsterdam Court of Appeal ruled that Deliveroo riders indeed classify as employees (ECLI:NL:RBAMS:2019:198 and ECLI:NL:GHAMS:2021:392).

2.3 Coordination of social security

Court of Appeal Arnhem-Leeuwarden, ECLI:NL:GHARL:2021:11015, 11021, 11023, 11029, 30 November 2021

On 30 November 2021, the Arnhem-Leeuwarden Court of Appeal delivered four similar judgments on employees of foreign companies working in the meat processing industry (ECLI:NL:GHARL:2021:11015, 11021, 11023, 11029). The companies (4 Luxembourgian companies and 1 Slovakian company) concluded service agreements with meat processing companies in various EU Member States. The service agreements state that the companies will make staff available from various EU Member States. Employees of the companies are working in the Netherlands. The compulsory industry-wide pension fund for the meat industry claims that the companies have to pay the premiums for the employees' pension. This concerns supplementary old age pension, not the Dutch state pension. The companies state that (i) based on the A1 form, the employees fall under the social security system of Luxembourg (or Slovakia), (ii) Luxembourgian (or Slovakian) law applies because the employees are working from Luxembourg (or Slovakia), and (iii) the assignments are temporary and therefore it is a case of posting of workers.

In all cases, the Court of Appeal ruled that the pension premiums are in fact due. First, supplementary old age pension does not fall within the scope of the regulation on the coordination of social security. The industry-wide pension insurance is agreed upon by the social partners and therefore has a contractual basis, not a legal basis. The A1 forms are therefore not relevant for this insurance. Secondly, the Court establishes that although a choice is made in the employment contracts to apply Luxembourgian law, Article 8 of Regulation 593/2008 stipulates that provisions that cannot be derogated from of the country's law in which the employee habitually carries out the work, are also applicable. The Court rules that in this case, The Netherlands is the country in which the work is habitually performed. Despite what the companies claim, the CJEU case C-29/10, 15 March 2011, *Koelzsch* does not apply in this case, because, different than in *Koelzsch*, the work is not performed in more than one country. Article 8 (4) of the Regulation does not support the companies either; there is no closer connection to Luxembourg (or Slovakia). All connections with Luxembourg (Slovakia) are administrative and follow from the fact that the companies are based there. The employees neither have Luxembourgian (Slovakian) nationality, do not live there and do not return there after the assignment. Finally, the Court ruled that this was not a case of posting in the meaning of Regulation 593/2008, given that the conclusion is that The Netherlands is the country in which the work is habitually performed.

To conclude: Dutch provisions that cannot be derogated from apply, despite the choice of law, and the compulsory industry-wide pension scheme is part thereof. The supplementary pension scheme does not fall under the scope of Regulation 593/2008.

These rulings seem in line with European law, there are no academic or societal comments so far.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In this Dutch case, the CJEU ruled that if a worker is incapacitated for work due to illness and takes paid annual leave during this period of incapacity, the remuneration that must be paid is the remuneration the worker would have received if he/she was actually working and not the lower remuneration that is due during incapacity for work due to illness.

The Dutch legislation on paid annual leave (Article 7:639 Dutch Civil Code) does not explicitly state this, but existing case law already follows the line that has now been confirmed by the CJEU. See, for example: Rotterdam District court 07 March 2014, ECLI:NL:RBROT:2014:3470; North-Holland District Court 18 January 2018, ECLI:NL:RBNHO:2018:2766 and the Central Appeals Tribunal (for the public service and social security matters) 22 November 2017, ECLI:NL:CRVB:2017:4017.

The CJEU case dealt with a public servant. The regulation on this point was similar to that for employees in the private sector, and since 01 January 2020, civil servants fall under the Civil Code (a few exceptions left aside). See the February 2020 Flash Report for details.

In short, this CJEU decision will not have any implications for Dutch legislation or practice.

4 Other Relevant Information

4.1 Integration in the labour market

Although many Dutch employers are struggling to fill vacancies, people with a migration background often have problems finding an internship or job. To offer this group equal opportunities on the labour market, 21 Dutch organisations have launched the Work Agenda Further Integration in the Labour Market (VIA) together with the State Secretary of Social Affairs and Employment. The VIA consists of three themes; 'more (cultural) diversity at work', 'more chance of a first job or internship for young people with a migration background' and 'job guidance'. In the next few years, several programmes will start which are aimed at structural improvements in the labour market positions of people with a migrant background.

Norway

Summary

(I) Several labour law and employment schemes to mitigate the effect of the COVID-19 crisis have been extended or reintroduced.

(II) The Norwegian Supreme Court has held that the time limit for instituting legal proceedings in a dispute on dismissal in connection with the transfer of an undertaking runs from the time of the transfer.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for workers

The final step of the government's reopening plan was enacted on 25 September (see further the September 2021 Flash Report). However, the infection rates started to increase again from mid-October, and has continued in November and December. Due to the increasing infection rates, new local and national restrictions were introduced in November (see further the November 2021 Flash Report). Due to even higher infection rates and rapidly increasing hospital admissions at the beginning of December, the government decided to impose stricter national infection control measures as of 14 December, most importantly:

- National ban on serving alcohol at restaurants, etc.;
- Requirement to wear a face mask when it is not possible to keep a 1-metre distance on public transport, at shopping centres, hairdressers, libraries and museums;
- Closing of amusement parks;
- Online teaching at colleges and universities;
- Yellow level at kindergartens, primary and lower secondary schools (some restrictions), red level at upper secondary schools (several restrictions);
- Employers are required to ensure that employees work from home if this is feasible and does not have a negative impact on services that are important and necessary for the business;
- Limitations on the number of participants at events;
- Recommendation of a maximum of 10 guests in addition to the people of the given household, a maximum of 20 guests on one occasion between Christmas and New Year.

More details on the measures can be found here. The new measures entered into effect on 15 December at 12 a.m. and will remain in effect for four weeks.

The recommendation against non-essential travel abroad was removed earlier this year for countries in the EEA, Schengen and the UK and other countries considered safe. From 01 October 2021, the recommendation against non-essential travel for the remainder of the world was removed. However, recommendations against travel to specific countries may still be in place. 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. Phase 1 began on 25 September 2021 (see further the September 2021 Flash Report). There were, however, changes in the entry restrictions for several countries and regions during October and November. Since then, quarantine for visitors

from several countries and regions in Europe and beyond has been introduced. More information about the current entry rules can be found here.

Vaccination rates are high. By the end of December, 89 per cent of the population above the age of 18 years are fully vaccinated (see updated statistics here). The vaccine has been offered to children aged 16 to 17 years since August. Children aged 12 to 15 years have been offered one dose of the vaccine since the beginning of September. Furthermore, from October, persons above 65 years, people in risk groups and health care personnel have been offered a third vaccination dose – a 'booster dose'. In December, persons under 65 years old were offered the third dose, and the plan is that everyone shall be offered the third dose by the end of February.

The unemployment rate rose slightly from December 2020 to March 2021 and then started to decline. The decline was significant in the spring and continued during the summer and fall. By mid-December, there were 115 100 unemployed people, which amounts to 4.1 per cent of the workforce (see the statistics here).

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 has suggested that several measures will be extended (see further the October and November 2021 Flash Reports).

In December, and in connection with the stricter national infection control measures, a number of corona-related labour law and employment schemes were extended until the end of February, most importantly:

- A compensation scheme for self-employed persons who lost income due to the COVID-19 pandemic;
- Extension of the period of exemption from the wage obligation during temporary lay-offs;
- Entitlement to unemployment benefits for unemployed and temporarily laid off employees, regardless of how long they have received the benefit;
- Increased unemployment benefit rate of 80 per cent compensation for the part of the unemployment benefit that is less than 3 times the basic amount (*Grunnbeløpet*);
- Double quota of care allowance days ('sick child days'), giving each family at least 40 days of care allowance available for 2022.

Some corona-related labour law and employment schemes were reintroduced, most importantly:

- Relaxed requirements for entitlement to unemployment benefits.

More details on the different schemes can be found here.

1.2 Other legislative developments

1.2.1 Private pension schemes

The obligation for employers to offer private pension schemes to employees has been extended, as the requirement for an employee to work at least 20 per cent to be entitled to be part of the pension scheme has been removed. An employee will now have right to a pension based on, simply said, all income, regardless of the amount. Furthermore, the age limit to be part of the pension scheme has been reduced from 20 to 13 years. More details on these changes can be found here.

2 Court Rulings

2.1 Transfer of undertakings

Supreme Court, HR-2021-2554-A, 21 December 2021

The case concerned the calculation of the time limits for instituting legal proceedings in a dispute concerning dismissal in connection with a transfer of an undertaking.

Directive 2001/23/EC of 12 March 2001 on transfers of undertakings is implemented in Chapter 16 of the Working Environment Act 2005. Section 16-4 regulates protection against dismissal. The provision states that the procedural regulation in Chapter 17 of the Working Environment Act 'shall apply correspondingly in so far as they are appropriate' in a dispute of dismissal in connection with a transfer of undertaking. According to Section 17-4 of the Act, the time limit for instituting legal proceedings is eight weeks in a dispute on the legality of a dismissal, however, it is six months if the employee only claims compensation. The provision furthermore states that the time limit shall run from the conclusion of negotiations, and if no negotiations are conducted, from the date of the dismissal, cf. Section 17-4 second paragraph and Section 17-3 second paragraph.

The question in the case before the Supreme Court was whether the latter rule—the time limit calculated from the date of dismissal—also applied in a case of dismissal in connection with a transfer of undertaking, or whether the time—the date—of the transfer of undertaking should be decisive for the time limit. The Supreme Court concluded that the time limit for instituting legal proceedings in these cases shall run from the time of the transfer of undertaking.

The Supreme Court pointed out that the rules in Chapter 17 of the Act only apply 'in so far as they are appropriate', and that the Act thus allows the provisions on time limits for instituting legal proceedings to be adapted to the special considerations and needs that apply to transfer of undertakings. The Supreme Court referred to, among others, the purpose of the Working Environment Act to ensure sound conditions of employment, cf. Section 1-1 letter b) of the Act. The Court pointed out that in cases of transfers of undertakings, it could often be difficult for an employee to assess at the time of the dismissal whether the relevant change in the undertaking was a transfer of undertaking according to the Act. With regard to Directive 2001/EC, the Court stated that it is up to the individual State how procedural rules, such as time limits for legal action, are designed, as long as they are interpreted and applied in accordance with the principle of equivalence and effectiveness in EU/EEA law, but that this principle also supported the conclusion that the date of transfer should be decisive for the calculation of the time limit for instituting legal proceedings.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Sickness benefits are regulated in the National Insurance Act of 1997 Chapter 8. An employee who meets the respective requirements has the right to sickness benefit from the employer for the first 16 calendar days of his or her sick leave, and subsequently from the Norwegian Labour and Welfare Service (NAV) for a period of a maximum of 52 weeks (including the first 16 days). Holiday pay is regulated in Section 10 of the Holiday Act of 1988, and the principle is that holiday pay is calculated on the basis of wages paid in the qualifying year (the year preceding the holiday). The main rule is that an employee is entitled to holiday pay from his/her employer amounting to 10.2 per cent of the basis on which the holiday pay is calculated.

This also applies to sickness benefits paid by the employer (16 calendar days), cf. Section 10 paragraph 4. However, an employee is not entitled to sickness benefits

exceeding 6 G (G = Grunnbeløp, basic amount), neither from his/her employer nor from NAV, cf. Section 8-10 of the National Insurance Act. Now the limit is NOK 628 296. However, some employers are required either by an individual or the collective agreement to pay sickness benefits exceeding this limit. An employee is also entitled to holiday pay on the basis of sickness benefits paid by NAV, but only for up to 48 days each year, cf. the Holiday Act Section 10 paragraph 3 and the National Insurance Act Section 8-33. The time limit is the same when the employee has a *partial* sick note (a sick note can be graded down to 20 per cent of work). The employee will in that case have the right to holiday pay on the basis of the income for the time worked.

Hence, the Norwegian regulations imply that an employee who is on sick leave, either fully or partially, for more than 48 days (including the first 16 calendar days) will receive a lower remuneration than he or she would have received had he or she not been incapacitated for work due to illness during that period. An employee who is partially incapacitated (or fully) for work due to illness during the reference period for the calculation of holiday pay is not treated equally as those who actually worked during that period. Consequently, this could be problematic in light of the decision in CJEU case 2-217/20 and the Court's remarks in paragraph 38-41, in particular.

4 Other Relevant Information

Nothing to report.

Poland

Summary

(I) A draft law that would give employers the right to obtain information on their employees' vaccination status was submitted to Parliament.

(II) An amendment to the Law on Working Time of Drivers that aims to implement Directive 2020/1057 has been submitted to Parliament.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Disclosure of vaccination status

On 14 December 2021, the draft of the amendment to the Law of 02 March 2021, the Law on specific measures to prevent, mitigate and fight COVID-19, other infectious diseases and crisis situations caused by them (consolidated text: Journal of Laws 2020, item 1842, with further amendments), was submitted to Parliament by a group of deputies.

According to the draft:

- during the pandemic, employees and civil law contractors are entitled to free-of-charge SARS-CoV-2 diagnostic tests. The tests are financed from public funds, their number may be limited;
- employers can request their employees and civil law contractors to inform him/her of a negative diagnostic test taken within the last 48 hours. The employees and civil law contractors who have been vaccinated against COVID-19 or who have recovered from SARS-CoV-2 are not required to provide such information;
- if an employee or civil law contractor refuses to provide the abovementioned information, the employer shall treat them as individuals who cannot produce a negative result of the diagnostic test, have not been vaccinated or have not recovered from COVID-19.

The employer would be entitled to take the following actions against those employees or civil law contractors who have not been vaccinated or have not recovered from COVID-19:

- to modify the operation at the workplace or another location where work is performed, including the mode of work performance of civil law contractors;
- to modify the system or organisation of working time;
- to order an employee or civil law contractor to perform work at another location than stipulated in the contract in the same town; or to assign such an employee or civil law contractor another type of work, if the remuneration is not reduced;
- the abovementioned employer's measures do not constitute a violation of the principle of equal treatment in employment.

The head of a healthcare institution would be entitled to introduce mandatory vaccinations for employees or civil law contractors if there is no medical contraindication against vaccination.

Moreover, entrepreneurs who carry out commercial activities will not be subject to limitations introduced due to the pandemic, if the services are provided by employees

or civil law contractors who have presented a negative test, who have been vaccinated, or have recovered from COVID-19, and if the recipients also meet these requirements

Information on the legislative process can be found here.

The abovementioned draft differs from the previous announcements on this issue (see the August, September and November 2021 Flash Reports). The major difference is that—according to the current proposal—the employer would not have the right to dismiss a non-vaccinated worker or to grant him/her unpaid leave. The essence of the current draft is that it would allow employers to get information of their employees' vaccination status and to modify his/her employment conditions, if appropriate.

1.2 Other legislative developments

1.2.1 Working time in the road transport sector

On 15 December 2021, the Law on the Amendment to the Law on Road Transport and to the Law on Working Time of Drivers was enacted by the *Sejm* (the lower chamber of Parliament). The draft was submitted by the government on 08 December. The amendment pertains to various aspects of road transport operations. Some of the provisions refer to the working time of truck drivers.

The aim of the amendment is to implement Directive 2020/1057, which lays down specific rules with respect to Directive 96/71 and Directive 2014/67 for the posting of drivers in the road transport sector and amending Directive 2006/22 as regards the enforcement requirements and Regulation 1024/2021 (the mobility package). Apart from this, there will also be new provisions on the working time in road transport that aim to clarify some aspects of national law.

With regard to the status of drivers, the amendment provides that:

- where the work is performed at night, the driver's working time cannot exceed 10 hours between two subsequent daily rest periods, or between the daily and weekly rest period;
- the driver who performs tasks within the framework of international road transport does not conduct a business trip in the meaning of the Labour Code;
- the conditions of drivers' remuneration cannot stipulate such components the amount of which would depend upon the distance of the journey, speed of the journey, or quantity of cargo, if the application of such components would negatively affect road safety or would encourage the violation of Regulation 561/2006;
- the driver is entitled to a rest break that is not shorter than 30 minutes if his/her combined daily driving time is between 6 to 8 hours, and that is not shorter than 45 minutes in case the combined daily driving time exceeds 8 hours. The rest break cannot be used before he or she starts working or after completing the daily driving time. The abovementioned rest breaks can be divided into shorter periods with each lasting at least 15 minutes, which should be used during the times of driving the vehicle according to the driver's timetable. The driver retains the right to remuneration during these periods of rest break.

The Law of 16 April 2004 on the working time of drivers (consolidated text: Journal of Laws 2019, item 1412) can be found here.

Information on the legislative process can be found here.

As the next step, the draft will be subject to the legislation process in the Senate (higher chamber of Parliament). The new law is expected to take effect in one month, after its promulgation in the Journal of Laws.

There is a high likelihood that the amendment will take effect before the transposition deadline of the Directive 2020/1057, i.e. 02 February 2022.

With regard to the provisions on business trips, it should be noted that the new rules clarify the problem of the remuneration of drivers. In practice, there were cases in which truck drivers were considered employees who conduct business trips. Consequently, their remuneration predominantly consisted of a lump sum, which de facto constituted a reimbursement of the costs of living. The amendment provides *expressis verbis* that truck drivers are not conducting business trips. This modification is correct since truck drivers are mobile employees, and do not incidentally perform tasks outside the location stipulated in their employment contract. The amendment should contribute to the improvement of the situation of truck drivers with regard to their remuneration.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In Poland, paid annual leave is regulated in Section VI of the Labour Code (Article 128 and following).

The remuneration for the period of annual leave is subject to Article 172 LC. According to this provision, the employee shall receive the remuneration which he/she would have received if he/she had worked during that period for the duration of annual leave. The varying components of remuneration should be calculated on the basis of the average remuneration of the three months preceding the beginning of the leave; in case of substantial differences in the amounts of remuneration, the abovementioned period may be extended by up to 12 months.

Thus, the employee shall be granted the remuneration for the period of annual leave 'which he/she would have received if he/she had worked during this period'. The employee's illness or incapacity for work during the reference period prior to commencing annual leave is irrelevant for determining the amount of holiday remuneration. Therefore, Polish law is compatible with Directive 2003/88 as interpreted by the CJEU in the present case.

4 Other Relevant Information

Nothing to report.

Portugal

Summary

(I) The government has approved some amendments to the measures adopted within the context of the COVID-19 pandemic.

(II) New legislation regulates the modalities of teleworking, cases in which employees have the right to provide teleworking and the rights and duties of both parties involved, as well as introducing a new obligation for employers to refrain from contacting employees during their rest period.

(III) The statutory minimum wage for the year 2022 has been updated.

(IV) A general regime for the protection of whistleblowers that transposes Directive 2019/1937 on the protection of persons who report breaches of EU law has been approved.

(V) Two Courts of Appeal ruled on the concept of transfers of undertakings under the Portuguese Labour Code.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Care leave

Decree Law No. 119-B/2021, of 23 December, amends the measures adopted within the context of the COVID-19 pandemic. As regards employment-related matters, this decree extends the exceptional support for families to employees who are absent from work to provide the necessary care for a child under the age of 12 years or, regardless of age, for a child with a disability or chronical illness, due to closure of schools and non-academic activities in the period between 27 and 31 December 2021. This exceptional support had already been extended for the period between 02 and 09 January 2022 (see the November 2021 Flash Report).

1.1.2 Emergency measures

Resolution of the Council of Ministers No. 181-A/2021, of 23 December establishes some measures within the context of the COVID-19 pandemic, amending Resolution No. 157/2021, of 27 November (see the November 2021 Flash Report). Among others, this resolution has adopted the following measures: (i) the limitation of certain economic activities during the period between 25 December 2021 and 09 January 2022; and (ii) mandatory teleworking for the period between 25 December 2021 and 09 January 2022, if these functions can be performed under this regime.

1.2 Other legislative developments

1.2.1 Teleworking

Law No. 83/2021, of 06 December defines a new regulation for teleworking, which will become effective from 01 January 2022, amending, among others, the Portuguese Labour Code. This Law significantly develops the regulation of various aspects of teleworking, seeking to adapt the regime to the demands and needs resulting from the experience of remote working during the pandemic.

In particular, Law No. 83/2021 introduces the following changes to the teleworking regime:

- Teleworking may be agreed (i) for an indefinite period of time, in which case any party may withdraw from the teleworking agreement by written communication to the other party with a 60-day prior notice or (ii) for a definite period of up to six months, automatically renewable for the same period if neither party withdraws from the agreement up to 15 days before the beginning of each renewal;
- Teleworking may be implemented on a permanent basis or in alternation with periods of physical presence at the company's premises;
- As a rule, the teleworking regime shall be agreed in writing between the employer and employee and must regulate certain issues set forth in the law. However, provided that the employer has the resources and means to do so and the activity is compatible with teleworking, the following employees are entitled to provide work under the teleworking regime: (a) employees who are victims of domestic violence under circumstances that would entitle them to a transfer of the workplace; (b) employees with a child up to the age of 3 years; (c) except in the case of micro-enterprises, employees with a child up to the age of 8 years, when both parents are in a position to provide teleworking and do so in successive periods of the same duration within a maximum of 12 months, in a single-parent family or in a family where only one parent is able to telework. In these cases, the employer cannot oppose the employee's request to telework;
- The employer is responsible for providing the equipment and programmes required for teleworking;
- One of the most relevant innovations of this Law relates to the payment of expenses for teleworking. Pursuant to this Law, the employer is responsible for the additional expenses incurred by the employee for the acquisition and use of the equipment and programmes required for teleworking, including the additional cost of electricity and internet access with adequate speed, as well as expenses related to the maintenance of this equipment and these systems. For the purposes of this Law, additional expenses are considered to be those corresponding to the acquisition of goods and services that the employee did not have before concluding the teleworking agreement, as well as those that exceed the expenses borne by the employee in the same month of the last year prior to the conclusion of the teleworking agreement;
- This new Law also establishes the rights and obligations of employers and employees applicable to the case of teleworking;
- The teleworker is entitled to the same rights and obligations as a regular worker in the same professional category or function, namely concerning professional training, promotions, limits to the duration of work, rest periods, including paid annual leave, protection of occupational health and safety, protection in case of work accidents and occupational diseases, and access to information of work representatives. The teleworker has the right to receive at least the same remuneration he/she would receive if he/she were present at the employer's premises, with the same professional category and identical functions;
- The new Law establishes specific obligations for the occupational health and safety of teleworkers, such as the obligation of the employer to submit employees to health examinations before the implementation of teleworking and, subsequently, to annual health examinations for evaluating their aptitude to perform their activity.

This Law also establishes a new obligation for the employer to refrain from contacting any employee (and not only the teleworker) during his/her rest periods, except in cases of force majeure.

1.2.2 Minimum wage

On 07 December 2021, Decree Law No. 109-B/2021 was published (a summary of this decree in plain English (without legal value) is available at DRE.), which approved the statutory minimum wage for the year 2022. According to this decree, the statutory minimum wage applicable in the territory of the Portuguese mainland will be EUR 705 as of 01 January 2022. This Decree Law also creates a measure of exceptional support for compensating employers for the increase in the minimum wage. This support corresponds to a lump sum to be paid to employers for employees who, in December 2021, received remuneration corresponding to the statutory minimum wage in force in 2021 or a remuneration that is higher than the latter but lower than the amount of the statutory minimum wage defined for 2022.

1.2.3 Retirement pension

Ordinance No. 307/2021, of 17 December 2021, reduces the standard age for entitlement to the retirement pension of Portugal's general social security system to 66 years and 4 months in 2023.

1.2.4 Whistleblowers

On 20 December 2021, Law No. 93/2021 was also published, establishing the general regime for the protection of whistleblowers and transposing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of EU law (Directive 2019/1937). This Law creates an obligation for legal persons (including private companies, the State and other legal persons governed by public law) employing 50 or more employees and, regardless of the number of employees, to entities that are within the scope of the EU acts referred to in part i.B and ii of the Annex to Directive 2019/1937, to implement internal reporting channels. The internal reporting channels allow for the secure submission and tracking of reports to ensure the completeness, integrity and conservation of the report, confidentiality of the identity or anonymity of the whistleblower and confidentiality of the identity of any third parties mentioned in the report, and to prevent unauthorised access. The internal reporting channels should allow for the presentation of reports, in writing or verbally, by employees, anonymously or with identification of the whistleblower. Such internal reporting channels may be operated internally, by professionals appointed for that purpose, or externally, for purposes of receipt of reports. This Law also defines the procedure for the presentation of reports and the subsequent actions to follow-up the reports. The identity of the whistleblower and the information that directly and indirectly allows the identity of the whistleblower to be deducted, are confidential, access being made available to the same restricted persons responsible for receiving or following up the reports. Such identity can only be disclosed to comply with a legal obligation or a judicial decision. This law also establishes some measures for the protection of whistleblowers, such as the prohibition of retaliation. The following acts, when committed within two years of the report or public disclosure, shall be presumed to have been motivated by such report or public disclosure, except if proven otherwise: (i) change of working conditions (e.g. functions, schedule, workplace, remuneration); (ii) suspension of the employment contract; (iii) negative performance evaluation; (iv) non-conversion of a term employment contract into a permanent employment contract, when there is a legitimate expectation for such a conversion; (v) non-renewal of a term employment contract; (vi) dismissal; (vii) inclusion in a list that may lead to the whistleblower not being able to find future employment in the respective sector or industry; (viii) termination of a service agreement. Law No. 93/2021 will enter into force 180 days after its publication.

2 Court Rulings

2.1 Transfer of undertaking

Coimbra Court of Appeal, no. 6/20.3T8LMG.C1, 17 November 2021 and Lisbon Court of Appeal, No. 18771/20.6T8LSB.L1-4, 24 November 2021

In the first ruling, a private security company had performed security services for a client in the latter's premises between 01 May 2017 and 31 October 2019. As of 01 November 2019, the security services were provided by another private security company at the client's premises, with recourse to its own employees and using its own means and equipment. The question raised in the present case was whether this situation falls within the concept of a transfer of undertaking for purposes of the application of the regime foreseen in Articles 285 *et seq.* of the Portuguese Labour Code, which transposed Directive 2001/23/EC, of 12 March, and, consequently, whether the employment contracts of the employees, who performed the security services for the client, should be deemed as having been automatically transferred to the new provider.

In this case, the Coimbra Court of Appeal held that:

> *"The complexity and technical, material and professional training requirements of this private security activity, which are essential for the exercise of the activity, under the terms resulting from the respective legal framework and reflected in the facts proven in the case, do not, in our view, allow this activity to be equated with others exclusively based on manpower/'human capital', e.g. cleaning services for offices and private homes".*

The Court also mentioned that *"in case of succession of undertakings providing private security services at a certain location belonging to the same third-party entity, there does not necessarily have to be a transfer of business".* In the present situation, the Court considered that there was no proof that this group of workers formed an organised group that conferred, on their own, the activity developed, and that it was autonomous therein. Therefore, the Court concluded that no transfer of undertaking for the purposes of Article 285 of the Portuguese Labour Code had taken place.

The second ruling also concerned a situation of replacement of a company that provided security services for the client in its own premises. In the present case, the Lisbon Court of Appeal held that although no tangible means were transferred from the first provider to the second one, a desk, chair and computer were taken over by the latter. The Court recalled the CJEU's case law according to which:

> *"Article 1 (1) (a) of Council Directive 2001/23/EC must be interpreted as meaning that, where a contracting entity has terminated the contract concluded with one undertaking for the provision of security services at its facilities, then concluded a new contract for the supply of those same services with another undertaking, which refuses to take on the employees of the first undertaking, that situation falls within the concept of a 'transfer of an undertaking [or] business' within the meaning of that provision, when the equipment essential to the performance of those services has been taken over by the second undertaking"* (Ruling of 19 October 2017).

According to the Lisbon Court of Appeal, the referred equipment is essential for the activity performed by security guards and began to be used by the new security guard under the same terms as the previous one had used it. In addition, the Court considered that the employee did not perform the activity of security guard independently but together with the other employees. Therefore, the Lisbon Court of Appeal ruled that the employee performed the surveillance activity in an organised and lasting manner, through his own unit together with other employees, and that the equipment used by the previous security guard was taken over by the new one, so that it can be concluded that there was a partial transfer of the establishment, the new provider being required

to reinstate the employee and pay him the remunerations due since his dismissal until the final court decision.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The CJEU case C-217/20 concerned the interpretation of Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (hereinafter referred to as 'Directive 2003/88'), according to which Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.

According to the CJEU's case law, the 'paid annual leave' referred to in Article 7(1) of Directive 2003/88 means that for the duration of annual leave, remuneration must be maintained or, in other words, workers must receive their regular remuneration for that period of rest. Therefore, workers must, when they exercise their right to paid annual leave, be put in a position which, in terms of salary, is comparable to periods of work. In addition, the CJEU considers that as regards entitlement to paid annual leave, workers who are absent from work due to sick leave during the reference period are to be treated in the same way as those who have actually worked during that period. This means that the right of a worker to paid annual leave cannot be restricted on the ground that the worker could not fulfil his/her obligation to work during the reference period due to illness.

Pursuant to Portuguese law, a worker is entitled to a paid annual leave of at least 22 working days (Article 238 (1) of Portuguese Labour Code). According to Article 264 (1) of Portuguese Labour Code, *"the remuneration of annual leave corresponds to the pay the employee would have received if he were effectively working"*. Portuguese scholars usually interpret this provision as meaning that the employee is entitled to receive, during his or her annual leave, the standard remuneration of the period immediately prior to the beginning of the annual leave period. Considering the above, if the employee has faced a temporary situation of inactivity and, as a result thereof, he/she has received a lower remuneration, this circumstance should not affect the amount of the remuneration due to the employee during his/her annual leave period taken after such a situation of inactivity. Under Portuguese law, absences from work due to illness are not remunerated by the employer, provided that the employee is covered by the social security system which grants protection in case of illness. This notwithstanding, if the employee takes annual leave after a period of incapacity for work due to illness, he/she will be entitled to receive his/her regular remuneration during the annual leave period. Therefore, Portuguese labour law is in line with European law and the interpretation arising from the CJEU's ruling referred to above.

4 Other Relevant Information

Nothing to report.

Romania

Summary

The employer cannot pay an employee minimum wage for more than 2 years. The collection and non-payment of social contributions will be penalised.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

Nothing to report.

1.2 Other legislative developments

1.2.1 Employee remuneration

Government Emergency Ordinance No. 130/2021 on fiscal-budgetary measures, published in the Official Gazette No. 1202 of 18 December 2021, amends several normative acts, including the Labour Code.

According to the new piece of legislation, employees can be paid the legal minimum wage for a maximum of 24 months from the time the employment contract is concluded. Thereafter, the employer must increase the employee's salary.

The text was only reluctantly accepted because it contains a number of ambiguities. First, it does not specify how high the salary increase should be, and the question arises whether this increase could be insignificant or derisory. Secondly, a change in salary can only be agreed bilaterally through an addendum to the employment contract. As a result, the employee could oppose the offer made by the employer, making it impossible for the latter to fulfil his/her legal obligation.

At the request of some employers' organisations, the normative act was amended by Government Emergency Ordinance No. 142/2021, published in the Official Gazette No. 1249 of 30 December 2021, which added that the period of 24 months is calculated for ongoing contracts, not from the conclusion of the employment contract, but from 01 January 2022.

According to Government Emergency Ordinance No. 130/2021, the collection and non-payment of taxes and social contributions due on salaries/ incomes will be penalised, punishable by imprisonment from 1 to 5 years or by a fine. Until now, it was only a misdemeanour. According to the Ordinance, the amendment was made to strengthen the public budget and to prevent the risk that employees may be deprived of constitutional rights such as the right to health care, the right to a pension, unemployment benefits or other forms of social insurance.

1.2.2 Citizens working abroad

Law No. 156/2000 on the protection of Romanian citizens working abroad was amended by Law No. 296/2021 regarding approval of Government Emergency Ordinance No. 33/2021, published in the Official Gazette No. 1183 of 14 December 2021. The new law replaces the phrase 'state of destination' with the phrase 'state of reception' and establishes a number of additional obligations for employment agents.

According to the explanatory memorandum (available here), the amendments aim at tackling undeclared work, increasing the protection of workers and supporting fair competition.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

Initially, Article 145 (2) of the Labour Code provided that annual leave is granted in proportion to actual time worked. This provision was removed in 2015 in line with CJEU case law. The explanatory memorandum of Law No. 12/2015 (available here) makes express reference to CJEU cases C-350/06 and C-520/06, 20 January 2009, *Schultz-Hoff and others*; C–282/10, 24 January 2012, *Dominguez*; C-78/11, 21 June 2012, *ANGED*; C-214/10, 22 November 2011, *KHS*.

Currently, Article 145 of the Labour Code stipulates that when calculating the duration of annual leave, the periods in which the contract was suspended due to temporary incapacity for work, maternity leave and childcare leave are included.

The annual leave allowance reflects the daily average of the employee's salary rights, which consist of the employee's basic salary, the allowances and permanent increases over the last 3 months prior to the annual leave. Yet according to Article 150 (1) of the Labour Code, annual leave allowance may not be less than the basic salary and permanent increases due for the respective period provided in the employment contract. By establishing this minimum limit, the Romanian legislator, as a general rule, eliminated the possibility of the annual leave allowance from being affected by a potential previous period of sick leave.

Hence, Romanian legislation is consistent with the interpretation in this case of Article 7 (1) of the Working Time Directive.

4 Other Relevant Information

Nothing to report.

Slovakia

Summary

(I) Several measures related to COVID-19 have been issued, restricting the freedom of movement and residence in the territory of the Slovak Republic. An Act regulating the State-supported shortened work scheme (*kurzarbeit*) was also adopted.

(II) A decision of the Constitutional Court concerned a new reason for notice by the employer in the Labour Code.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Economic mobilisation

Regulation of the Government of the Slovak Republic No. 459/2021 Coll. of 01 December 2021 on the implementation of economic mobilisation measures in relation to a declared state of emergency to fight against COVID-19.

The subject of the regulation is the implementation of the necessary measures of economic mobilisation at the time of a declared state of emergency in accordance with Article 5 paragraphs 1, 2 and 4 of Constitutional Act No. 227/2002 Coll. on the security of the State during a time of war, state of war, extraordinary state and state of emergency, as amended.

The government has ordered the implementation of economic mobilisation measures pursuant to Article 5 letter r) of Act No. 179/2011 Coll. on economic mobilisation and on the amendment of Act No. 387/2002 Coll. on State management in crisis situations outside the time of war and state of war, as amended, and its financing at the time of the declared state of emergency to ensure a solution for the mitigation of the spread of COVID-19 in the Slovak Republic. The district office has the power to issue an order for the work duty to a natural person according to the needs of designated subjects of economic mobilisation, implementing government-imposed measures of economic mobilisation (Government Regulation No. 183/2021 Coll., as amended).

The Regulation of Government No. 459/2021 Coll. entered into force on 03 December 2021.

1.1.2 Short-time work scheme

On 04 May 2021, the National Council of the Slovak Republic (Parliament) adopted Act No. 215/2021 Coll. on support in time of shortened work and amending certain Acts. This Act also amends 8 Acts in Part II of the Act, which also amends the Labour Code (Act No. 311/2001 Coll., as amended).

According to Article 1 in Part I of the Act, this Act regulates the provision of support during shortened work for the partial reimbursement of the employer's costs to reimburse the employees' wages for the duration of the external factor, as a result of which the employer's activities are restricted.

According to Article 2 letter c/ in Part I of the Act for the purposes of this Act, an external factor is a factor of a temporary nature which the employer cannot influence or prevent and which has a negative effect on the allocation of work to employees by the employer, in particular in extraordinary situations, exceptional states or in a state of emergency, an exceptional circumstance or force majeure; time of war and the state of war. Seasonality of the performed activity, restructuring, planned shutdown or reconstruction are not considered external factors.

In Part II of the Act, new provisions of the Labour Code regulate certain rules related to support during shortened work, such as provisions on obstacles at work and on the average earning of the employee.

Part I and Part II (amendment of the Labour Code) are to take effect on 01 January 2022.

On 03 December 2021, the National Council adopted Act No. 480/2021 Coll. amending Act No. 215/2021 Coll. on support in time of shortened work and amending certain Acts. The start of support during period of shortened work has been postponed by 2 months. In the Act, the words '01 January 2022' have been replaced by the words '01 March 2022'.

From the perspective of job retention and faster recovery of economic activity after the third wave of the COVID-19 pandemic, there was an urgent need to provide effective financial assistance for groups that do not meet the conditions for support during periods of shortened work until 01 January 2022. With a view to maintaining the continuity of the assistance provided, as well as to prevent serious economic damage, the entry into force of the Act on support during periods of shortened work has been postponed to 01 March 2022. The provision of assistance for the months of January and February 2022 will be ensured by continuing the project to support the maintenance of employment under Article 54 paragraph 1 letter e) of Act No. 5/2004 Coll. on employment services (initial assistance).

Act No. 480/2021 Coll. entered into force on 16 December 2021.

1.1.3. Restrictions on freedom of movement and residence

The Resolution of the Government of the Slovak Republic No. 735 of 08 December 2021 on the proposal to update the measures according to Article 5 paragraph 4 of the Constitutional Act No. 227/2002 Coll. on the security of the state in a time of war, state of war, extraordinary state and state of emergency, as amended.

The government, inter alia, restricts the freedom of movement and residence in the territory of the Slovak Republic with effect from 10 December 2021 with a curfew from 10 December 2021 from 05.00 until 01.00 the following day, until recall, but no later than 09 January 2022.

This restriction does not apply, *inter alia*:

- from 5 am until 8 pm for travel to and from the place of employment of an employee of a school or educational facility, if this individual holds a certificate from the employer specifying the working hours and place of work;
- for travel to and from the place of employment of an employee other than an employee of a school or educational facility who, by reason of the nature of his or her work, cannot work remotely, if this individual holds a certificate from the employer specifying the working hours and place of work and for the return journey, and the pursuit of a business or other similar activity which cannot be performed remotely.

The Resolution of Government No. 735/2021 of 08 December 2021 entered into force on 08 December 2021. It was published in the Collection of Laws – No. 465/2021 Coll.

The Resolution of the Government of the Slovak Republic No. 772 of 14 December 2021 to the proposal to update the measures pursuant to Article 5 paragraph 4 of the Constitutional Act No. 227/2002 Coll. on State security in a time of war, state of war, extraordinary state and emergency state, as amended.

The government, inter alia, restricts the freedom of movement and residence in the territory of the Slovak Republic with effect from 17 December 2021 by curfew from 17

December 2021 from 8 pm until 5 am of the following day, until recall, but no later than 09 January 2022.

This restriction does not apply, *inter alia*, for travel to and from the place of employment of an employee who, by reason of the nature of his or her work, cannot work remotely, if this person holds a certificate from the employer specifying the working hours and place of work and for the return journey, and the pursuit of a business or other similar activity that cannot be performed remotely.

The Resolution of Government No. 772 of 14 December 2021 entered into force on 14 December 2021. It was published in the Collection of Laws – No. 476/2021 Coll.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

2.1 Notice period

Constitutional Court, No. k. PL. ÚS 12 / 2021-79, 15 December 2021

On 04 February 2021, Parliament adopted Act No. 76/2021 Coll. amending Act No. 311/2001 Coll. - Labour Code as amended (and some other Acts).

This amendment supplements Article 63 paragraph 1 of Labour Code with a new letter f), according to which the employer may give notice to an employee if 'the employee has reached the age of 65 and the age determined for entitlement to a retirement pension'. Both conditions had to be met at the same time.

This new provision was to enter into force on 01 January 2022. However, the Constitutional Court, on a proposal from a group of deputies opposing this measure, suspended the amendment in Article 63 paragraph 1 of the Labour Code by its decision of 15 December 2021, and the original wording of the Labour Code remains in force.

However, the decision of the Constitutional Court is not yet final. A final decision is expected whether notice given to the employee tied to reaching a specific age is in accordance with the Constitution or not.

The Constitutional Court's resolution has been published in the Collection of Laws - No. 539/2021 Coll..

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The main legal source in this regard is the Labour Code (Act No. 311/2001 Coll.) as amended. The provisions of the Labour Code are binding for all employers in the private (business) sector and in the public service.

There are separate acts for civil servants who are considered to have a service relationship. The judgment involved an employee of a tax office. Hence, reference should also be made to Act No. 35/2019 Coll. on Financial Administration and on Amendments to Certain Acts, which regulates the civil service of employees of tax offices.

According to Article 116 paragraph 1 of the Labour Code, employees shall be entitled to wage compensation in the amount of their average earnings for the period during which

they take paid annual leave. Employees shall be entitled to wage compensation at the rate of their average earnings for the part of paid annual leave in excess of four weeks of the basic scope of paid annual leave they were unable to take before the end of the following calendar year (Article 116 paragraph 2 of the LC).

Average earnings for labour law purposes shall be ascertained by the employer based on the wages paid to the employee for payment within a reference period, and for the period the employee worked within that period (Article 134 paragraph 1 of the LC). The reference period shall be the calendar quarter preceding that for which the average earnings are ascertained. Average earnings shall be ascertained on the first day of the calendar month following the reference period and shall be used for the entire quarter-year, unless otherwise stipulated in this Act (Article 134 paragraph 2 of the LC).

According to Article 116 paragraph 3 of the Labour Code, if an employee did not work at least 21 days or 168 hours during the reference period, his or her probable earnings shall be used instead of his/her average earnings. Probable earnings shall be ascertained from wages the employee has earned since the beginning of the reference period, or from wages he or she would have been paid. If an employee's average earnings are lower than the minimum wage to which the employee would be entitled in the calendar month in which the calculation of his or her average earnings is made, his or her average earnings shall be increased to a sum corresponding to this minimum wage (Article 134 paragraph 5 of the LC).

Details on the determination of average earnings or probable earnings can be agreed with employee representatives (Article 134 paragraph 10 of the LC).

Act No. 35/2019 Coll. on Financial Administration and on Amendments to Certain Acts also regulates civil service and legal relationships related to the establishment, changes and termination of civil service relationships of members of the financial administration services, including tax offices.

Regarding the use of paid annual leave, the legal regulation is similar to that in the Labour Code. However, employees' financial claims are regulated differently. According to Article 149 paragraph 1 of the Act, a member of the financial administration services is entitled to a service salary for the period of paid annual leave (what constitutes a service salary is regulated in Article 159 paragraph 1 of the Act.)

A member of the financial administration services shall be entitled to compensation for paid annual leave that has not been used only if he/she has not been able to take it due to the termination of service (Article 149 paragraph 2 of the Act). For paid annual leave or a share thereof which the member of the financial administration services could not use due to the termination of his or her civil service relationship, he or she shall be entitled to compensation in the amount of his/her last service salary corresponding to the unexhausted basic length of paid annual leave. The last service salary is considered to be the service salary he or she received in the calendar month in which he/she was last able to take paid annual leave (Article 149 paragraph 3 of the Act).

(This Act transposes the legally binding acts of the European Union listed in Annex No. 5. Point 4 also mentions Directive 2003/88/EC of the European Parliament and of the Council of 04 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19.)

4 Other Relevant Information

Nothing to report.

Slovenia

Summary

(I) The tenth package of measures to mitigate the negative impact of COVID-19 was adopted, also containing measures on annual leave and overtime work, which depart from the general labour law rules.

(II) The composition of the councils of public education institutions has been modified and the number of elected workers' representatives lowered.

(III) The Constitutional Court has decided that the provisions introducing the possibility to dismiss a worker who has fulfilled the prescribed conditions for statutory old-age pension were unconstitutional.

(IV) The Constitutional Court has decided that rules imposing the RV (recovered or vaccinated) requirement on State public administration employees were unconstitutional, as they were not adopted in conformity with the statutory requirements for the determination of the vaccination of employees.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for workers

Various measures aiming to contain the spread of COVID-19 virus infections continued to apply during December 2021. A summary overview of all valid measures are published in English on the government website.

The National Assembly has adopted the so-called 10th package of measures to mitigate the negative impact of COVID-19 (PKP10): the 'Act on Additional Measures to Stop the Spread and Mitigate, Control, Recover and Eliminate the Consequences of COVID-19' (*'Zakon o dodatnih ukrepih za preprečevanje širjenja, omilitev, obvladovanje, okrevanje in odpravo posledic COVID-19 (ZDUPŠOP)*', Official Journal of the Republic of Slovenia (OJ RS) No. 206/2021, 29 December 2021, pp. 13375-13389; see also here). The ZDUPŠOP was adopted by the National Assembly on 27 December 2021, published on 29 December 2021 and entered into force on 30 December 2021. Many measures introduced by previous PKPs or other acts have been extended, either by this Act or by government decrees; some measures have been extended until the end of March, some until the end of June 2022, and others until the end of 2022, etc.

The ZDUPŠOP includes various measures aimed at supporting the economy (vouchers have been extended, partial reimbursement of lost income, etc.) and in the field of healthcare (the temporary redeployment measure has been extended, financing of telemedicine, the possibility of leave of absence due to sickness without a physician's certificate, co-financing of personal protective equipment and rapid antigen self-tests, etc.).

From the labour law perspective, it is worth noting that Article 33 of the ZDUPŠOP regulates the employer's obligation to inform the labour inspectorate in case of home/teleworking, and Article 34 of the ZDUPŠOP, which states that annual leave for 2020 can be used until 01 April 2022 and annual leave for 2021 until the end of 2022.

Furthermore, Article 35 of the ZDUPŠOP contains special rules that depart from the general labour law rules on overtime work, daily and weekly rest periods (as long as Slovenia is 'dark-red' on the ECDC map) in relation to COVID-19, exceptionally, under the prescribed conditions, a worker is required to work overtime irrespective of the limitations prescribed by general labour law rules, whereby the maximum is temporarily, as an exception, set at 20 hours of overtime work per week and 80 hours per month.

With the consent of the worker, overtime work may even exceed these (exceptional) maximum rates. The yearly maximum is exceptionally set at 480 hours of overtime work.

The measures also include a solidarity allowance for vulnerable groups (Articles 67 et subseq. of the ZDUPŠOP), and partial reimbursement for lost income of self-employed persons during quarantine or inability to work due to childcare responsibilities. The ZDUPŠOP also introduces the possibility to increase the salaries of medical doctors above that prescribed by the legislation regulating salaries in the public sector (Article 48). Retroactively, wage supplements for directors in the public fire service sector were introduced for the period of the COVID-19 epidemic (formally declared, from 19 October 2020 to 15 June 2021) – in the amount of 65 per cent of their basic salary for 50 per cent of their working time (Article 49 of the ZDUPŠOP). Wage supplements paid to workers during the COVID-19 epidemic have, for certain categories of workers, been excluded from taxation (Article 55 of the ZDUPŠOP). The ZDUPŠOP also introduces rules on State liability and compensation in relation to COVID-19 vaccination and medical treatment (Articles 70 et subseq.). Special (loosened) rules on temporary fixed-term employment in the education sector have been introduced (Article 78 of the ZDUPŠOP).

1.2 Other legislative developments

1.2.1 Workers' participation in public education institutions

The Organisation and Financing of Education Act ('*Zakon o organizaciji in financiranju vzgoje in izobraževanja (ZOFVI)'*, OJ RS No 12/96 et subseq.) has been amended. The composition of the councils of public education institutions (primary and secondary schools, kindergartens, etc.), regulated in Article 46 of the ZOFVI, has been modified and the number/share of workers' representatives reduced.

Before the amendments, the councils were composed of three representatives of the founder, five worker representatives and three parent representatives. Special rules applied in public vocational or technical schools, high schools and public residence halls for students: the council was composed of three representatives of the founder, five staff representatives, three parent representatives and two student representatives).

After the amendments, the councils in public education institutions shall be composed of three representatives of the founder, three worker representatives and three parent representatives. In public vocational or technical schools, high schools and public residence halls for students, the council shall be composed of three representatives of the founder, three staff representatives, two parent representatives and one student representative. See the amended Article 46 of the ZOFVI (OJ RS 207/2021, 30 December 2021, p. 13393).

The amendment has been strongly criticised by the trade unions (see, for example, SVIZ) and academic circles (see, for example, the Educational Research Institute).

1.2.2 Secondment to international organisations

The new Act on Secondment of Personnel to International Civilian Missions and International Organisations ('*Zakon o napotitvi oseb v mednarodne civilne misije in mednarodne organizacije (ZNOMCMO-1)'*, OJ RS No 204/2021, 28 December 2021, pp. 13044-13051) replaces the previous act. It regulates the selection procedure (internal call, pubic announcement, selection committees, etc.), annex to the contract of employment, special rules on working time, annual leave, holidays, remuneration and various supplements, termination, right to return to the previous post, special rules on fixed-term employment for the replacement, short-term missions, contract work for the mission, etc.

1.2.3 Employment of foreign nationals

On the basis of Article 17 of the Employment, Self-employment and Work of Foreigners Act (OJ RS No 47/15 et subseq.), the Minister of Labour, Family, Social Affairs and Equal Opportunities issued amendments to the 'Order determining the occupations in which the employment of foreigners is not linked to the labour market' (*'Odredba o določitvi poklicev, v katerih zaposlitev tujca ni vezana na trg dela'*, OJ RS No. 200/20, 29 December 2020, No 100/2021, 24 June 2021, and No 204/2021, 28 December 2021).

The Order concerns the employment of foreign nationals for whom a permit is required and defines the occupations for which consent for a single permit or written authorisation for employment purposes shall be granted without verification of compliance with the condition that there are no suitable unemployed persons in the register of unemployed persons. In addition to the existing occupations (welder, heavy truck driver, toolmaker, electrician, carpenter, cook, electromechanical technician, bricklayer – see the December 2020 Flash Report and June 2021 Flash Report), the amendments (p. 13112) added the following occupations: plumbers, gas installation workers, workers in foundries, wood turners, butchers, and nurses.

1.2.4 Long-term Care Act

After years of discussions and unsuccessful attempts, the Long-term Care Act (*'Zakon o dolgotrani oskrbi (ZDOsk)'*, OJ RS No 196/2021, 17 December 2021) has been adopted by the National Assembly, however, the actual application of most of its provisions has been postponed and financing—the issue which was the most problematic aspect in all of the previous efforts and the reason previous attempts were unsuccessful –has not been regulated by this act, but only announced and postponed. The adopted act (as well as the procedure, i.e. a total absence of social dialogue, etc.) has been strongly criticised by important stakeholders, the trade unions (see here) and the pensioners' associations and similar (see, for example, open letter of the association Srebrna nit: see here and here).

2 Court Rulings

2.1 Dismissal

Constitutional Court, *ECLI:SI:USRS:2021:U.I.16.21, 18 February 2021*

In February 2021, the Constitutional Court of the Republic of Slovenia (decision No. U-I-16/21) stayed the implementation of legal provisions that introduced the possibility for employers to dismiss without a valid reason/ justification a worker who has met the prescribed conditions for statutory old-age pension (see the February 2021, December 2020 and January 2021 Flash Reports).

On 17 December 2021, the Constitutional Court made public its decision on the merits (delivered on 18 November 2021; No. U-I-16/21 and 27/21, 18 November 2021, published in OJ RS No. 202/2021, 24 December 2021, pp. 12779-12784) that the challenged provisions were inconsistent with the Constitution.

In assessing the challenged legislation, the Constitutional Court emphasised that there must be a valid reason for termination of an employment contract at the initiative of the employer, related to the ability or conduct of the employee or the operational needs of the company justifying termination. In its reasoning, the Constitutional Court referred to ILO Convention No. 158 and to Article 24 of the Revised European Social Charter, both binding for Slovenia.

2.2 Recovered-vaccinated requirement

Constitutional Court, No U-I-210/21, 06 December 2021

In September 2021, the Constitutional Court stayed the government's rules imposing the RV requirement (recovered or vaccinated) on all employees of the State public administration (see the September 2021 Flash Report).

The case concerned Article 10a of the Ordinance on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement to Contain the Spread of Infection with the SARS-CoV-2 Virus ('*Odlok o načinu izpolnjevanja pogoja prebolevnosti, cepljenja in testiranja za zajezitev širjenja okužb z virusom SARS-CoV-2'*, OJ RS No. 147/21, 14 September 2021 et subseq, hereinafter: 'the Ordinance').

On 06 December 2021, the Constitutional Court made public its decision on the merits (delivered on 29 November 2021; No. U-I-210/21, 29 November 2021, published in OJ RS No. 191/2021, 6 December 2021 pp. 11619-11623) that the challenged provision was inconsistent with the Constitution.

The Constitutional Court established that Article 10a of the Ordinance, which determined that employees in the bodies of the State administration must meet the recovered-vaccinated requirement (i.e. RV requirement) to perform tasks at one's workplace at the premises of the employer or at the premises of another body of the State administration, was a condition under labour law to perform work in the State administration and thus the situation was essentially comparable to situations wherein a vaccination is determined as a condition under labour law to perform various types of work and professions. The legal basis for regulating such a vaccination is Article 22 in conjunction with Article 25 of the Communicable Diseases Act ('*Zakon o nalezljivih boleznih (ZNB)'*, OJ RS Nos 69/95 et subseq.), which regulates different types of (mandatory) vaccinations. The Constitutional Court assessed that the challenged measure, which the government adopted through the Ordinance, and which applied to employees of the State administration, was not adopted in conformity with the statutory requirements, i.e. conditions, for the determination of the vaccination of employees. In its decision, the Constitutional Court did not adopt a position as to whether the assessed measure—had it been ordered based on the appropriate statutory basis—would be constitutionally admissible from the viewpoint of the principle of proportionality and the principle of equality before the law. Hence, the decision of the Constitutional Court does not entail that the vaccination of employees as a condition for performing certain activities or professions is [necessarily] a disproportionate measure.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The CJEU judgment in the present case is of no particular relevance for Slovenian law. According to the Employment Relationships Act ('Zakon o delovnih razmerjih (ZDR-1)', OJ RS No. 21/13 et subseq.), the remuneration (wage compensation) during annual leave is not reduced if a worker was incapacitated for work due to illness (and therefore received lower remuneration/wage compensation) prior to taking annual leave, because the basis for the calculation of remuneration/wage compensation during incapacity due to illness is taken into account when calculating the amount of payment during annual leave, and not the actually received reduced amounts.

According to Article 137, paragraph 2, an employer is required to pay wage compensation in cases of absence from work due to, *inter alia*, annual leave. According to Article 137, paragraph 7 of the ZDR-1,

> *"(u)nless otherwise provided by this Act, another Act or a regulation issued on its basis [footnote: There are no such special rules for annual leave], a worker*

shall be entitled to wage compensation in the amount of his average monthly wage for full-time work during the past three months or during the period he worked in the three months prior to the start of absence. If during the period of employment in the past three months the worker did not work and received wage compensation for the entire period, the basis for this compensation shall be equal to the basis for wage compensation in the past three months prior to the start of absence. If during the entire period of the past three months the worker did not receive at least one monthly salary, he shall be entitled to wage compensation in the amount of the basic salary laid down in the employment contract."

Article 137, paragraph 7 also states that "*(t)he amount of wage compensation may not exceed the amount of pay that the worker would have received if he had worked during that period*".

In addition to wage compensation paid during annual leave which replaces the regular remuneration of a worker (as described in the previous paragraph), every worker who has a right to annual leave is entitled to the so-called 'pay for annual leave' (*regres za letni dopust*), which is paid to all workers once per year (until 01 July of the current calendar year, and, exceptionally, until 01 November at the latest) in the amount of at least one minimum wage (Article 131 of the ZDR-1). If the worker is entitled to a proportional part of annual leave, they shall be entitled to a proportional part of the pay for annual leave.

4 Other Relevant Information

4.1 Collective bargaining

The '*SNS Koordinacija novinarskih sindikatov RTV Slovenija'* (Coordination of the RTV Slovenija Trade Unions) acceded to the already concluded Collective Agreement of the Public Institution RTV Slovenia ('*Kolektivna pogodba javnega zavoda RTV Slovenija'*, OJ RS No 69/08, 45/18, 101/20 in 115/21, OJ RS No. 205/2021, 29 December 2021, p. 13301).

The new Collective Agreement for Postal and Courier Services ('*Kolektivna pogodba za poštne in kurirske dejavnosti*') has been concluded and published in the OJ RS No. 202/2021, 24.12.2021, pp. 12850-12861), as well as the new Collective Agreement on Road Passenger Transport in Slovenia ('*Kolektivna pogodba za cestni potniški promet Slovenije*', OJ RS No. 192/2021, 07 December 2021, pp. 11996-12004) and the new Collective agreement for insurance services sector ('*Kolektivna pogodba za zavarovalstvo*', OJ RS No. 192/2021, 07 December 2021, pp. 12005-12013).

Annexes to various collective agreements have been concluded: in electricity industry – wage increase of 1.1 per cent ('*Aneks št. 2 h Kolektivni pogodbi elektrogospodarstva Slovenije'*, OJ RS No 204/2021, 28 December 2021, p. 13143); in the public institution RTV Slovenija – rules as regards collective redundancies ('*Aneks št 13 h Kolektivni pogodbi javnega zavoda RTV Slovenija*', OJ RS No. 204/2021, 28 December 2021, pp. 13143-13144); in the graphics sector – increased amounts of minimum wages and certain other payments ('*Aneks 4 h Kolektivni pogodbi grafične dejavnosti*', OJ RS 196/2021, 17 December 2021, p. 12414).

Spain

Summary

(I) A labour law reform and the Budget Law have been approved, introducing many significant changes. Most notably, the types of fixed-term contracts have been amended with the aim of reducing the rates of fixed-term work, both in the private and in the public sector. Collective bargaining rules have also been amended to improve the protection of workers in certain situations.

(II) A Royal Decree transposing Directive 2019/1832 has updated the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace.

(III) The Supreme Court ruled that the use of temporary work agencies to fill permanent jobs amounts to a situation of illegal assignment of workers.

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 reform

Following months of negotiations, the government and the most representative unions and business organisations have reached a deal and a new labour reform has been adopted. The government sought a more ambitious reform, but the final deal has two main objectives: 1) Reducing the fixed-term employment rates; 2) Balancing bargaining power between employers and workers in collective bargaining.

It is worth noting that the entry into force of some of these amendments (e.g. those concerning fixed-term employment contracts) has been delayed for three months (30 March 2022). More information is available here.

1.2.2 Reform of employment contracts

The regulations on fixed-term contracts have been modified considerably. Firstly, the former 'apprenticeship contract' and 'internship contract' have both been included in a single category called 'training contract'. This new category consists of two types: a traineeship programme (similar to the former apprenticeship contract) and work aimed at acquiring professional skills that correspond to the level of studies already completed (similar to the former internship contract).

The former 'apprenticeship contract' was age limited (25 years as a general rule), but this limitation has now been eliminated, with the exception of some vocational training programmes, where a 30-year age limitation has been introduced. In addition, this contract allows for the work to be carried out alongside university studies (this was not possible before, but might lead to some amendments in the configuration of university degrees). The other relevant feature is the reduction of the maximum duration of the contract, which is set to two years (it used to be three years). The minimum duration is three months (it used to be one year), and the objective is to obtain the relevant degree. The working time may not exceed 65 per cent during the first year (75 per cent according to the previous regulations) and 85 per cent during the second year to allow the individual to study and obtain the relevant degree. The wage is determined through

collective bargaining (respecting the minimum wage), but it cannot be lower than 60 per cent during the first year and lower than 75 per cent in the second year compared to what a worker with an ordinary employment contract would earn.

New deadlines apply to the new 'training contract' aimed at individuals who already possess a degree and who want to gain professional experience and skills. In accordance with the former regulations, such contracts were only permissible within the first five years after the end of the relevant studies (seven in the case of disabled persons). Now, this reference period has been limited to three years (five in the case of disabled persons). The maximum duration of the contract has been set to one year (it used to be two years).

There is an obligation to include a training plan in both contract types to guarantee fulfilment of the objectives.

To conclude fixed-term employment contracts, Spanish law requires the existence of an objective reason justifying the temporal nature of the employment relationship. Fixed-term work is thus linked to the 'principle of causality', because the employer cannot freely choose to enter into a permanent or temporary employment relationship. The conclusion of a temporary contract is only possible when an objective reason exists. The employer bears the burden of proof regarding the existence of an objective reason. Such objective reasons are described in Article 15 of the Labour Code. Until this reform, those objective reasons were:

a) The existence of specific independent work or a specific independent service within the company's activity (*contrato por obra o servicio determinado*);

b) A temporary business or organisational need (*contrato eventual*); and

c) The substitution of an absent worker or temporary coverage of a vacant post (*contrato de interinidad*).

The reform has eliminated the first reason (a), so there are only two grounds justifying the conclusion of a fixed-term employment contract: 'due to circumstances of production' and 'substitution of a worker'.

Hence, concluding a fixed-term employment contract to carry out an assignment or for a specific service is no longer possible, even in the construction sector. A new permanent contract has been introduced for this sector referred to as 'permanent contract assigned to a building site'. If the specific construction site to which the worker is assigned is completed, the undertaking must offer the worker the option of 'relocation' to another site (with a prior training period if necessary). Only when relocation is not possible does the law allow for the termination of the contract with a right to severance payment.

The new fixed-term employment contract 'due to circumstances of production' covers two sub-types. The first one is similar or equivalent to the former (b), with minor amendments. The maximum duration is set to six months, but the collective agreement can extend it up to 12 months.

The second subtype is entirely new. The first subtype is aimed at 'unexpected' circumstances of production. However, this second subtype allows the employer to use this contract to meet 'occasional' and 'foreseeable' situations (e.g. Christmas sales). Undertakings may only use this form of contract for a maximum of 90 days within a calendar year, 'regardless of the number of workers needed to deal with the specific circumstances on each of these days, which must be duly identified in the contract'. These 90 days may not be 90 days in a row and workers' representatives must be informed in the last quarter of the year about the use the undertaking intends to make of such contracts in the following year.

As a general rule, subcontracting is not considered a valid circumstance of production and does not justify the conclusion of such fixed-term contracts.

As regards the conclusion of this new type of contract for the substitution of a worker, the same regulations (c) as the former ones essentially apply, with some minor amendments. The work may now already start up to 15 days before the substituted worker leaves to guarantee a successful transition. It is also possible to fill the hours left by a worker who has reduced his/her working time (as is the case related to rights reconciling family and work life).

The Labour Code also includes a limitation to successive fixed-term employment contracts. To date, a worker was deemed to be a permanent employee if he or she was employed under this type of contract for more than 24 months over a 30-month period. The amendment sets the overall period at 24 months (not 30), and the duration of employment at 18 months. To avoid fraud, the Law includes a new rule. If a post is covered during this time (18 months within a reference period of 24 months) using these employment contracts due to circumstances of production, the worker who holds the job becomes a permanent employee, even if other workers have worked for the employer during that period and regardless of the duration he/she has been working for the undertaking.

A fixed-term employment contract may no longer seem valid for these purposes, but a permanent seasonal contract could be concluded. Such contracts have existed for years, but their use was usually limited to agricultural activities or the catering and hotel industry. This amendment aims to assign this contract type a greater role, because it is a permanent contract, even if the worker does not work the entire year. Article 16 of the Labour Code, for example, stipulates that this contract type should be used in undertakings whose workload depends on subcontracting. The contract does not terminate after the end of one subcontracted assignment, but the worker has the right to be called on if the undertaking finds a new subcontractor and takes up another assignment. Collective bargaining will play a decisive role in the development of this contract type in the near future.

1.2.3 Subcontracting

As regards subcontracting, and in particular multi-service companies, there has been a social debate in recent years in Spain. They have intensified because they are used to reduce labour costs by negotiating collective agreements for the entire multiservice undertaking with less favourable conditions, particularly as regards wages, than those provided by the sectoral or company level collective agreements applicable to the client business. Following this reform, Article 42 of the Labour Code refers to the collective agreement of the main undertaking's activity (or the sector's collective agreement to which the subcontractor belongs, which is useful in cleaning or security services), and not specifically to the subcontractor's collective agreement (undertaking level), which seems to resolve this particular issue.

1.2.4 Internal flexibility

As reported in previous Flash Reports (from the March 2020 to the June 2020 Flash Reports), the government has approved numerous measures to protect workers and undertakings against the pandemic's negative effects. The main purpose was to prevent a huge loss of jobs. The government has provided financial assistance for undertakings, i.e. rather than terminating work contracts, less harmful measures have been adopted, such as the suspension of employment contracts, the reduction of working hours or changes in working conditions. Affected workers are entitled to unemployment benefits.

These measures have been successful, hence adapted rules have been included in the Labour Code, but these are not COVID-related, but have a more general scope. They seek to provide employers with more legal instruments to cope with difficult situations by offering alternatives to the termination of employment contracts. Vocational training

for the workers during such periods is also encouraged (Additional Provision 26ª of the Labour Code).

1.2.5 Collective bargaining

The second key purpose of the labour reform is to balance the bargaining power between employers and workers in collective bargaining. Two measures can be highlighted:

1. The undertaking's collective agreement will no longer have priority over the sectoral one as regards wages. Unions have extensively criticised the priority of the undertaking's collective agreement.
2. When the collective agreement ends, the rights and duties for workers will remain in force until a new collective agreement enters into force. So far (since the labour reform of 2012), these extended effects have only lasted for one year. After one year, if no collective agreement was concluded in the sector, some workers were excluded from the scope of collective bargaining.

1.2.6 Employment in the public administration

Dismissals on objective grounds are no longer possible if the employer is a public administration.

As reported many times in the past, fixed-term employment in public administration has a problematic history in Spain, and the issue has not been resolved satisfactory. Spain's public administration has many temporary needs because its role is immense. There are numerous programmes that promote employment, or that provide for training for employment or services, all of which are of a temporary nature. There are fixed-term programmes with a specific budget and that usually employ temporary workers. The education and health sectors are public services that cannot be disrupted, and both are very demanding in terms of manpower because constant replacements are needed (substitution of civil servants who are on sick leave or maternity leave, or to fill vacancies until the job is filled by a career civil servant following completion of an open competition exam).

Therefore, interim contracts (replacement contracts) are frequent, and they can be used in two situations according to the relevant legal provisions. Firstly, when the employer needs to substitute workers who have the right to keep their jobs. These contracts end when the replaced worker returns. Secondly, the employer can hire an interim worker while the selection process is being carried out for a vacancy. Labour law specifies a maximum duration for interim contracts in the latter case (three months), but this only applies to private employers. Thus, this type of interim (replacement) contract in public administration has (had) no limit of duration and can (could) last years. There was no strict obligation for the public administration to initiate the selection process at a specific time because the Supreme Court provided for a lot of flexibility. These replacement contracts did not entail a right to severance payment when terminated.

After the ruling in CJEU case C-726/19, 03 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*, the Supreme Court modified its previous doctrine with the aim to adapt the regulations to CJEU case law and the government announced a legal reform, which was approved by Royal Decree Law 14/2021 (see also July 2021 Flash Report).

Three main regulations should be highlighted:

1. Replacement contracts cannot have a duration of more than three years unless there are exceptional reasons.

2. If the replacement contract lasts longer than three years, the worker is entitled to severance pay at the end of the contract (same amount as for dismissals on objective grounds).
3. In the case of a vacancy-based interim contract, the public administration will have the obligation to initiate the selection process once the interim worker has occupied the post for three years.

These measures are intended to comply with the requirements of EU law but appear to be more of a starting point than a definitive solution. The structure of the Spanish State is complex due to high decentralisation. The Autonomous Communities and municipalities also have powers that must be respected.

Act 20/2021 was recently passed by Parliament and includes the contents of that Royal Decree Law of July. This is a common procedure in Spain. A Royal Decree Law is approved by the government in cases of 'urgent and extraordinary need', but usually, after its approval, the text is presented as a bill in Parliament (to allow negotiations with other political parties) and becomes law, either with amendments or verbatim. In that case, there are no substantial changes compared with the Royal Decree Law, but the Law sets out more precise deadlines for the beginning of the selection process aimed to fill jobs that are currently being occupied by interim staff (31 December 2022 as the latest, but there are earlier deadlines depending on the specific case). The contents are largely the same as in the July 2021 Flash Report.

1.2.7 Budget Law

General State budget laws are not labour law acts, but usually include some relevant measures in this area related to the programming of revenues and expenditures of a public nature. The Budget Law is responsible for regulating, for example, the capacity of the public administration to hire staff and is also responsible for setting the contributions undertakings and workers must pay to the social security schemes. Law 22/2021, 28 December, addresses these two functions for 2022.

As in previous years, the Budget Law establishes the basic criteria for the remuneration of public employees (civil servants and workers with a public sector employment contract) and for the recruitment of temporary staff during 2022. The wages of public employees will increase by 2 per cent in 2022.

The Budget Law usually includes some rules concerning labour law, and on occasion even includes Labour Code reforms. This year, Additional Provisions 98 to 100 were introduced and provide funding to implement employment plans in Andalusia, Canarias and Extremadura.

On the other hand, there is a worker's right to reduce his or her working hours (with a proportional reduction in wage, compensated by a social security benefit) when there is a proven need that he or she has to care for a minor with a serious illness. This right ended when the child reached the age of 18 years but has now been extended to the age of 23 years.

1.2.8 Employment of third-country nationals

The collective management of contracts at the source is a procedure provided for in Spanish legislation on the employment of foreigners. The Ministry of Labour develops a forecast of those jobs that can be covered by foreigners in the corresponding year, in view of the situation of the national labour market. Based on this forecast, employers can manage the hiring of people who do not reside in Spain. These forecasts also make it possible to obtain employment-seeking visas for children or grandchildren of Spaniards of origin or for certain activities.

The rules for 2022 are very similar to those in previous years (see also December 2018, 2019 and 2020 Flash Report). Last year, some rules relating to COVID have been introduced in line with the guidelines published by the European Commission on 16 July 2020, with the guideline for the prevention and control of SARS-CoV-2 in agricultural undertakings coordinated by the Ministry of Health and with other guidelines adopted by different Autonomous Communities in Spain. Specifically, the undertaking must prepare a detailed contingency plan that contains a risk assessment and documents the different organisational, technical and hygiene measures adopted in compliance with the prevention and hygiene measures to face the health crisis caused by SARS-CoV-2. These rules must be respected for 2022.

The main new development for 2022 is the improvement of living conditions in accommodation for seasonal migrant workers in agriculture, following numerous complaints about how these workers lived in the accommodation provided by the employer.

1.2.9 Occupational health and safety

Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace, was amended by Commission Directive 2019/1832 of 24 October 2019, in terms of purely technical adjustments. The Directive of 1989 was transposed into Spanish law by Royal Decree 773/1997, but Directive 2019/1832 had not yet been transposed. This Royal Decree Law 1076/2021 complies with EU law and updates the scope of the risk assessment concerning the use of personal protective equipment, the non-exhaustive list of types of personal protective equipment available in relation to the risks they protect, and the non-exhaustive list of activities and sectors that may require personal protective equipment.

1.2.10 Active support to the Employment Strategy 2021-2024

The government has approved the Active Support to the Employment Strategy 2021-2024, linked to Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. One of the main objectives is to modernise the economy. In particular, some of the employment services' objectives aim to boost digitalisation-related professions and to adapt employment to climate change and the circular economy, reducing the impact of other sectors, such as tourism. However, the effects of the pandemic and the increase in unemployment rates is also taken into account.

This strategy follows the recommendations made for Spain within the framework of the European Semester (2019-2020 and 2020-2021). In this sense, the strategy seeks to ensure that employment and social services are able to provide effective support to unemployed persons, to facilitate the transition towards permanent employment, to simplify the system of incentives for hiring, to increase cooperation between the education sector and undertakings or to improve the effectiveness of policies to support research and innovation.

This is a strategy, hence more specific actions need to be taken in the near future.

1.2.11 Annual Employment Policy Plan

For the upcoming year, the Plan aims to fight job insecurity, prevent the abusive and fraudulent use of internships, include equal opportunities between women and men in all actions, give priority to the most vulnerable groups or those facing special difficulties, promote youth employment, make the operation of employment services more flexible and improve collaboration with undertakings.

1.2.12 Labour and social security inspectorate

The Plan for 2021-2023 specifies 40 objectives grouped into four basic objectives: 1) Contribute to the improvement of the quality of employment, guarantee workers' rights and fight against fraud; 2) Strengthen the inspectorate's capacity to act; 3) Modernise the inspectorate and increase its staff and qualifications; and 4) Promote international cooperation.

2 Court Rulings

2.1 Temporary agency work

Supreme Court, ECLI:ES:TS:2021:4495, 02 December 2021

Temporary work agencies, which were legalised and regulated by the Spanish Law 14/1994, conclude contracts with employees (as the 'employer') and temporarily 'lend' them to a user undertaking. User undertakings can hire manpower to deal with temporary needs without having to undergo a selection process and without themselves contracting the workers directly. The duration of a temporary work contract cannot exceed the limits determined by the general regulations on fixed-term employment contracts and is linked to the objective reasons that justify the conclusion of a fixed-term contract. Those limits are compulsory and cannot be modified by agreement between the parties or collective bargaining.

Temporary work agencies cannot be used to fill permanent jobs. This Supreme Court ruling states that if this is the case, it will be considered an illegal assignment of workers (Article 43 of the Labour Code), so the employees affected can choose to either become permanent staff of either of the undertakings involved. Besides, the undertakings involved have joint and several liability for labour law and social security responsibilities vis-à-vis the affected workers (similar effect as 'joint employers'). They also incur administrative liability for very serious misconduct.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

According to Spanish law, the employee cannot work during sick leave if s/he receives the relevant social security benefits. Therefore, there is no possibility to take annual leave during a sick leave. If an incapacity for work has been determined, the worker cannot be considered fit to work for several hours for the same employer. The worker is either fit to work or not, but there is no in-between situation.

Moreover, if the worker continues to remain on sick leave when the annual leave is to start, the annual leave is postponed. The decision to return to work, even if there is no obligation to work immediately, is not up to the worker, but to the health services. During sick leave, workers are entitled to the benefits paid by social security, not their salary. This partially differs for some civil servants because the law requires the public administration to pay certain amounts. However, the overall assessment does not change, because they cannot work during sick leave. Sick leave is not a period the employer can include in the calculation of the remuneration during annual leave.

Therefore, even if the annual leave starts right after the end of the employee's sick leave, the remuneration during the annual leave cannot be calculated based on the period of sick leave or the amounts of the benefits received.

It is unclear whether this doctrine will have an impact on situations in which the worker temporarily reduced his or her working hours (for instance, for legal guardianship

purposes), but this is a different issue and is more closely connected to the CJEU's ruling in C-385/17, 13 December 2018, *Hein*.

It could also have an impact on the above-mentioned social security benefit that a parent is entitled to in case of a reduction of working hours due to a serious illness of a child, because the remuneration is paid proportionally to the employee's working hours. If annual leave is taken immediately after this period of part-time work, a similar uncertainty could arise. There is no case law, but this CJEU ruling provides strong arguments in favour of full remuneration during annual leave.

4 Other Relevant Information

Nothing to report.

Sweden

Summary

(I) The Labour Court has dismissed a case on limitations to the right to industrial action since the Co-determination Act does not cover disputes between different trade unions.

(II) The Labour Court also held that not allowing an employee to take his minimum rest period was not a breach of the collective agreement.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Restrictive measures

Restrictions, including recommendations to work remotely, have been reinforced from 23 December 2021.

1.2 Other legislative developments

1.2.1 Equal treatment

An official inquiry on possible changes to the Swedish Discrimination Act was published on 02 December 2021 (SOU 2021:94). Proposed changes include an extension of the notion of discrimination and also includes acts without an identifiable discriminated individual. Much of the background is drawn from CJEU case C-507/18, 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*.

2 Court Rulings

2.1 Right to industrial action

Labour Court, *AD 2021 nr 69, 22 December 2021*

The Swedish Labour Court in AD 2021 No. 69 has ruled in a dispute between two trade unions on the recently updated Co-determination Act and the limitations for an employee to take part in industrial actions against an employer already bound by a collective agreement. The limitations to the right to industrial action were introduced in 2019 and have been subject to some discussions. The dispute before the Labour Court only concerned the relationship between two different trade unions, since a local trade union (Blå-Gul Fackförening) had signed a collective agreement with the employer, while the nationwide Construction Workers' Union, had initiated industrial action to force the employer to sign the branch collective agreement. The Labour Court concluded that the Co-determination Act only covers the relationship between employers and trade unions, and not that between different trade unions, and dismissed the case.

The case highlights some interesting issues that emerge from the limitations to the right to strike and the potential development of 'yellow' trade unions, signing collective agreements outside the scope of the traditional, national, and industrial relations mechanism. The last section of Section 41 d of the Co-determination Act states that an employee cannot engage in industrial action if the (second) trade union insists on applying its own collective agreement in a way that would displace the previously signed collective agreement. A collective agreement signed by a 'yellow', or perhaps less influential trade union would then function as tools to take industrial action for the 'ordinary' trade union. Since the Swedish labour market has long been de facto dominated by one major trade union (one for white collar and another for blue collar

workers) which negotiated and signed collective agreements in each sector, the problem of competing trade unions has been limited, and 'yellow' trade unions were not reported as problematic. One notable exception on the issue of competing trade unions was, however, the Swedish Labour Court's decision AD 2020 No. 66 (reported in the November 2020 Flash Report). The traditional Swedish structure might be subject to future challenges, even though the recent case, as brought before the Labour Court, did not affect the industrial relationship model.

2.2 Working time

Labour Court, AD 2021 No. 64, 08 December 2021

According to a collective agreement for train crew, the minimum rest period was 11 hours. Due to delays, an employee's rest period was shorter than prescribed in the collective agreement. The trade union argued that the employer breached the collective agreement and, indirectly, the EU Working Time Directive. The Labour Court held, however, that the employer had not breached the collective agreement. Furthermore, the Court held that the collective agreement did not supplement the statutory norms on rest periods.

It seems that the trade union could have won the case if it had argued breach of the Working Time Act instead of simply breach of the existing collective agreement.

2.3 Loss of security clearance

Labour Court, AD 2021 No. 63, 15 December 2021

An employee of the Swedish migration authority lost his security clearance due to misconduct at the workplace. As a consequence, he was no longer capable of performing his work. He rejected an offer for another position as it was not as high-skilled as the one he had. The Labour Court held, with reference to ECtHR case law (Piskin v. Turkey, application No. 33399/18), that the employer's decision to remove an employee's security clearance must be able to be questioned in court. As Swedish law offers no separate possibility to question a decision on the removal of a security clearance, the Labour Court held that it must test the security clearance decision. Consequently, the Court held that the employer's decision to terminate the employment contract was ill-founded.

The Swedish public sector's use of security clearances is very broad. It is normal that all positions at a State authority require a security clearance, regardless of what tasks are carried out by the employees. Simultaneously, there are no legal possibilities to separately question a negative decision on a security clearance. These two factors are in stark contrast to Article 6 of the ECHR (and Article 47 of the EU Charter), which implies that security clearances are used restrictively and that decisions can be questioned in court. It is likely that EU law and the ECHR will require Swedish legislation to be amended.

2.4 Equal treatment

Supreme Court, Ö 2343-18 (DO v. Braathens)*, 21 December 2021*

On 21 December 2021, the Swedish Supreme Court ruled in case Ö 2343-18 (DO v. Braathens), which earlier this year was subject to the CJEU. In April, the CJEU delivered its judgment in *case C-30/19, 15 April 2021, DO v. Braathens*, on ethnic discrimination and found that even if the defendant agreed to pay the claimed compensation without recognising the existence of an act of discrimination, it would violate the applicant's legal entitlements under Directive 2000/43/EC and Article 47 of the Charter of Fundamental Rights. The Swedish Supreme Court determined that the flight company

had made such an unconditional excuse as required by the CJEU in accordance with its judgment. The Supreme Court attached a special amendment to its decision stating that the CJEU's judgment raises issues that the Swedish legislator must investigate.

Even if the matter was not an employment law matter, the case has ignited discussions on the influence of EU law on the Swedish labour market. Despite the outcome in the present case, the conflict between Swedish traditional discrimination law and EU law is highlighted by the rare special amendment by the Supreme Court.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

The case before the CJEU concerned an employee at the tax authority in the Netherlands. Due to sickness, the employee had been incapacitated for work or full-time work and accordingly, paid 100 per cent during the first full year of absence and 70 per cent for the rest of the period. The payment during annual leave was calculated on the basis of this income, i.e. 100 per cent during the first year and 70 per cent thereafter. The CJEU concluded that the lower payment (of 70 per cent) during the employee's annual leave violated EU law on annual leave, and placed the employee in a less privileged position than he would have otherwise been in.

The Swedish Vacation Act (*Semesterlagen*) regulates both the right to leave and the right to paid leave, but is supplemented, and sometimes replaced (in part) by collective agreements. According to the Act, the days of employment, and not the number of days at work, are to be considered in the calculation of paid vacation. However, Section 17 of the Act states that long-term sick leave can only qualify for paid annual leave for 180 days per qualifying year (which normally lasts between 01 April to 31 March) and expires in full if the sick leave period exceeds one qualifying year if he or she has returned to work for less than 14 days in a row. Payment during sick leave is primarily organised through public insurance by the Swedish Public Insurance Agency (Försäkringskassan), with a complementary benefit established in collective agreements paid by the employer. The current system with a cap after 180 days, or a full qualifying period, which in this form was established by the legislative in 2010, appears to be at odds with the ruling of the CJEU and requires further analysis. Even if the sickness benefit covers the major part of the loss of income (normally, 80 per cent of the qualifying income under a certain cap), the sick employee would receive significantly less pay during his or her annual leave than he or she would have earned if he or she were working.

4 Other Relevant Information

Nothing to report.

United Kingdom

Summary

A variety of relief measures and restrictions to respond to the omicron variant have been introduced across the UK.

1 National Legislation

1.1 Measures to respond to the COVID-19 crisis

1.1.1 Relief measures for businesses and workers

A variety of changes have been introduced.

A support package is now available to businesses across the UK adversely impacted by the omicron variant. This includes one off grants for businesses in the hospitality and leisure sectors of up to 6 000 GBP; the reintroduction of the Statutory Sick Pay Rebate Scheme (SSPRS) to cover the cost of Statutory Sick Pay for COVID-related absences for SMEs; support of up to 30 million GBP to the cultural sector.

1.1.2 Restrictive measures

In England, the self-isolation period for individuals who have tested positive for COVID-19 was reduced from ten to seven days. However, individuals must receive two negative LFD results, on day six and day seven, failing which the ten day rule applies. This applied from 22 December 2021.

The Health Protection (Coronavirus, Restrictions) (Entry to Venues and Events) (2021/1416) (England) Regulations 2021 introduce the government's 'Plan B regime'. These include requiring those organising events such as football matches to take reasonable measures to ensure that they do not admit any person aged over 18 years who has not provided valid proof that they have been fully vaccinated (such as the NHS COVID pass).

The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) (No 6) Regulations 2021 (SI 2021/1415) provided that all close contacts of someone with COVID, will no longer be required to self-isolate if they are fully vaccinated, taking part in a vaccine trial or can provide evidence that they cannot be vaccinated for clinical reasons.

In Wales, SI 2021/1468 Health Protection (Coronavirus Restrictions) (No 5) (Wales) (Amendment) (No 23) Regulations 2021 place a legal duty on employees to work from home where reasonably practicable to do so and make it an offence for an employee to contravene the requirement to work from home.

The Welsh government has introduced, from 27 December 2021, a two metre social distancing rule in the workplace and one way systems/physical barriers.

SSI 2021/496 the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 6) Regulations 2021 (SSI 2021/496) introduced a one metre social distancing requirement for non-household family members and limited the number of people able to attend large events (e.g. 100 people for indoor standing events).

In England, Scotland, Wales, the Statutory Sick Pay (Medical Evidence) Regulations 2021 (SI 2021/1453) provide that an employee is not required to provide medical information in respect of the first 28 days of any spell of incapacity for work.

The Statutory Sick Pay (Medical Evidence) (Modification) Regulations (Northern Ireland) 2021 make the same change for Northern Ireland.

1.2 Other legislative developments

Nothing to report.

2 Court Rulings

Nothing to report.

3 Implications of CJEU Rulings

3.1 Paid annual leave

CJEU case C-217/20, 09 December 2021, Staatsecretaris van Financiën

In case C-217/20 the CJEU ruled: Article 7(1) of Directive 2003/88/EC had to be interpreted 'as precluding national provisions and practices under which, where a worker who is incapacitated for work due to illness exercises his or her right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration that he or she received during the period of work preceding that during which annual leave is requested, is taken into account to determine the amount of remuneration that will be paid to him or her in respect of his or her paid annual leave.'

There is no equivalent rule to that at issue in case C-217/20 in the UK (see here, for example). Regulation 16 of the Working Time Regulations covers how to calculate the worker's holiday pay:

> *"Payment in respect of periods of leave*
>
> *16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 […], at the rate of a week's pay in respect of each week of leave.*
>
> *(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) […].*
>
> *(3) The provisions referred to in paragraph (2) shall apply—*
>
> *(a)as if references to the employee were references to the worker;*
>
> *(b)as if references to the employee's contract of employment were references to the worker's contract;*
>
> *(c)as if the calculation date were the first day of the period of leave in question; F3...*
>
> *(d)as if the references to sections 227 and 228 did not apply; […]*
>
> *(i)in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or*
>
> *(ii)in any other case, 52; and*
>
> *(f)in any case where section 223(2) or 224(3) applies as if—*
>
> *(i)account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—*
>
> *(aa)where the calculation date is the last day of a week, with that week, and*

(bb)otherwise, with the last complete week before the calculation date; and

(ii)the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.]

[F5(3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections, but is the amount which fairly represents a week's pay having regard to the considerations specified in section 228(3) as if references in that section to the employee were references to the worker.

(3B) For the purposes of paragraphs (3) and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.]

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") [F6(and paragraph (1) does not confer a right under that contract)].

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period."

It cross-refers to the relevant provisions in the Employment Rights Act 1996 which, in summary, refer to the normal working hours under the contract. If the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his/her normal working hours in a week.

Note, in particular, Regulation 16(3A) of the Working Time Regulations (emphasis added):

> "*3A) In any case where applying sections 221 to 224 of the 1996 Act subject to the modifications set out in paragraph (3) gives no weeks of which account is taken, the amount of a week's pay is not to be determined by applying those sections,* but is the amount which fairly represents a week's pay *having regard to the considerations specified in Section 228(3) as if references in that section to the employee were references to the worker*."

This suggests that if following the application of the statutory rules it gives no weeks of which account is taken, then the application of ss 221-224 can be disregarded.

4 Other Relevant Information

Nothing to report.

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