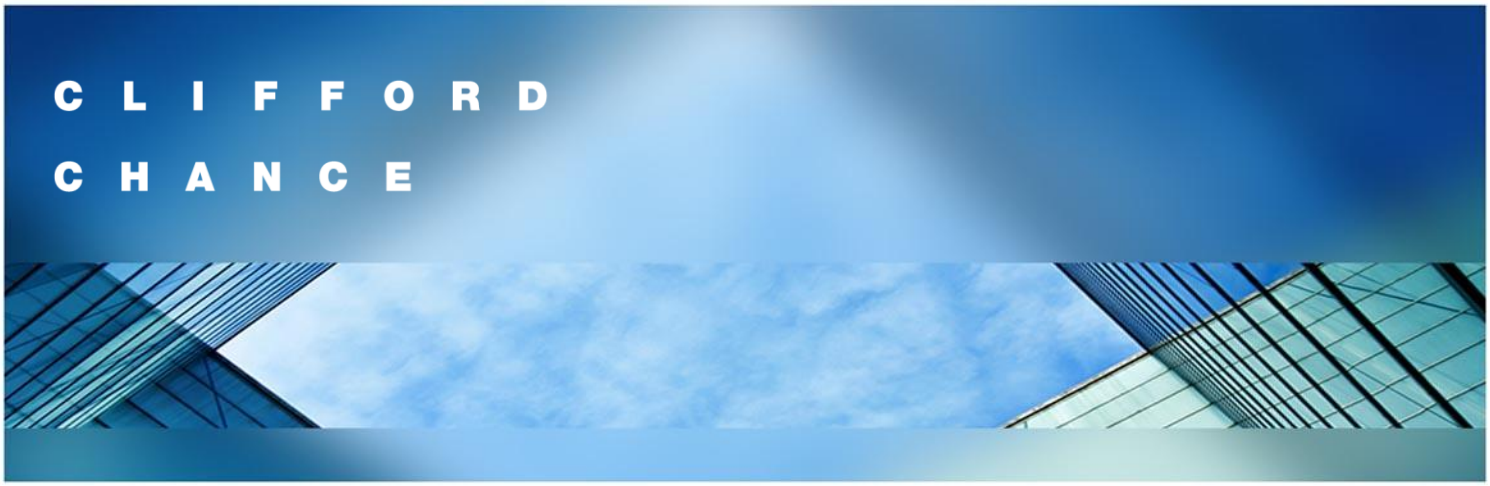

AUTUMN EMPLOYMENT HOT TOPICS

The end of the summer season and the return to work of most employees is an excellent opportunity for HR managers to take stock of new developments in employment law, which may involve adaptations in the company.

Key issues

- The legal framework for telework, which is now widespread and popular with employees, has been subject to recent changes, which employers must take into account in their telework arrangements.
- Two bills have recently been introduced to improve the work-life balance of parents and carers, giving them additional rights and protections of which employers need to be aware.
- The Court of Appeal has issued some interesting recent decisions of HR interest, notably in relation to senior executives, protection against dismissal during sickness absence and breach of promise to employ.

ARE YOUR TELEWORK ARRANGEMENTS READY?

This topic kept many HR managers busy before the summer break considering the many developments in this regard during the months of June and July, including: the end of the temporary tax derogation agreements concluded between Luxembourg and its bordering countries, the sudden and unforeseen introduction of a transition period until the end of 2022 concerning the determination of the applicable social security legislation in case of work performed by employees in their foreign country of residence, the entry into force, on 1 July 2022, of the CSSF Circular 21/769 (as amended by Circular CSSF 22/804) and the regulatory obligations it implies in relation to telework.

These changes raise many HR issues which need to be addressed on a case-by-case basis, such as: How to calculate, for tax and social security purposes, the number of working days performed in the foreign country of residence? What of Belgian cross-border workers and the increase in the tax tolerance threshold, which has been confirmed by legislation in Luxembourg but not yet in Belgium? How to maintain a strong central administration at head office when the structure is composed of a small number of employees who intend to telework?

At a time when employees are returning to work with, for many of them, the will to continue working partly from home, are your telework arrangements (policies and employment contracts/addenda) ready, updated and compliant?

WHAT NEW EMPLOYMENT DEVELOPMENTS ARE EXPECTED?

Several bills of specific interest to HR are currently under discussion. In addition to the bills relating to respect for the right to disconnect, protection against moral harassment at work and protection of whistle-blowers (more developments regarding those bills are to be found in our client briefing of January 2022), other legislative employment developments are to be expected, among which the two following bills aiming to improve employees' work and private life balance:

Bill n°8016 of 2 June 2022 concerning the work-life balance of parents and carers, transposing Directive (EU) 2019/1158.

This bill provides in particular:

- Two new statutory extraordinary leaves:
  - one day over a twelve-month period of employment for reasons of force majeure linked to urgent family reasons in the event of illness or accident of a family member making the immediate presence of the employee indispensable
  - five days over a twelve-month period of employment to provide personal care or assistance to a member of the employee's family or household requiring considerable care or help for a serious medical condition.
- The increase of employees' rights and protection in relation to statutory extraordinary leave (not only those two above), including:
  - the taking into account of the extraordinary leave periods for employment rights
  - the employer's obligation to maintain the employee's position (or a similar one) during such leave – therefore impacting the reorganisation and position elimination measures that the employer could implement – and to provide the same remuneration and other benefits when the employee returns
  - the prohibition on dismissing employees for having requested or taken extraordinary leave, and on any detrimental measures or reprisals for such reasons. The concrete impact of this provision will probably be limited since, for the moment, even if this restriction is not expressly provided for in law, requesting or taking extraordinary leave cannot constitute a valid, real and serious reason for dismissal or justification for any detrimental measure.
- The employer's obligation to justify in writing its decision to refuse an employee's request for "fractioned" parental leave (whereas, for the moment, the employer is only required to justify this decision during the meeting with the employee following such refusal).
- Before postponing the dates requested by an employee for a full-time second parental leave, the employer must suggest to the employee, to the extent possible, to take a part time or a fractioned parental leave. In case of postponement of the full-time second parental leave, the employer must justify its decision in writing.
- The employee's right to a meeting with the employer to request flexible working arrangements for family reasons (e.g., remote working arrangements, flexible working schedules, reduced working hours), for a set period which cannot exceed one year, if they meet certain conditions. Employers can refuse such flexible working arrangements but must justify their decision in writing.

  Employees requesting flexible working arrangements benefit from certain employment rights and protections: their position (or a similar one) must be maintained, they must receive the same benefits when the temporary arrangements end and they cannot be validly dismissed for having requested or benefited from flexible working arrangements.

Bill n°8017 of 2 June 2022 amending the legal provisions on paternity and adoption leave.

This bill notably foresees:

- the possibility, in case of the birth of a child, for the person recognised as the "second parent" equivalent to the father (in same-sex couples) to take the paternity leave;
- a modification of the consequences if the employee does not inform the employer of the paternity or adoption leave in a timely manner (i.e. at least two months before the start of the leave): such leave is no longer reduced to two days on the employer's decision, but it must be taken all at once and immediately after the birth of the child unless the employer and the employee agree on a flexible solution (taking the leave in full or in fractions, at a later date).

These bills are likely to be voted upon in the coming months, but the exact dates are not known yet.

Another important bill, Bill n°8070, was tabled very recently (on 7 September 2022) and aims at transposing Directive 2019/152 of 20 June 2019 on transparent and predictable working conditions in the EU. This bill notably provides for an extension of the compulsory information to be provided to employees regarding employment terms, rules limiting the trial period in fixed-term employment contracts, restrictions on the use of exclusivity clauses, etc. This bill is, for the moment, at an early stage of the legislative process and is subject to change.

ARE YOU AWARE OF THESE RECENT COURT DECISIONS OF HR INTEREST?

The Court of Appeal issued some interesting decisions on HR matters before the summer break, in particular:

- **Senior executives ("*cadres supérieurs*")**: when an employee challenges their status as a senior executive (e.g., in the context of legal proceedings for the payment of compensation for overtime, or for benefits under the applicable collective bargaining agreement), it is, in principle, incumbent on the employer to prove that the employee fulfils the criteria set out in the Labour Code to define senior executives. However, when an employee expressly accepts the status of senior executive (e.g., in the employment contract or in an addendum), the employee has the burden to prove that such statutory criteria are not met.[1]

  Recommendations: it is important to clarify in employment contracts the senior executive status of employees.

- **Sickness absence and protection against dismissal**: in the event of sickness absence, an employee is protected against dismissal if the following two information requirements are met: the employer was informed on the first day of the absence and the employee has submitted to the employer a medical certificate by the third day of that absence at the latest (in accordance with the statutory provisions). The Court specified that the deposit of the medical certificate in the

[1] Court of Appeal, 19 May 2022, n°CAL-2020-00770 and 2 June 2022, n°CAL-2018-00309

employer's mailbox implies a presumption of receipt on the next day; indeed, it is the responsibility of a normally prudent and diligent employer to empty the mailbox daily[2].

Recommendations: employers are advised, before triggering the dismissal procedure, to duly verify that the employee concerned is not protected against dismissal, notably in the case of sickness absence.

- **Promise of employment**: the employer is bound by the promise of employment delivered to and accepted by an employee. Offering different employment terms in the employment contract may qualify as a breach by the employer of the promise of employment which, after the employee's acceptance, is to be considered as an unlawful termination of the employment relationship. The employee has the burden to prove that the promise of employment was breached.[3]

  Recommendations: employment negotiations (including the drafting of offers and promises) must be conducted very carefully to avoid being bound by employment terms the employer would later wish to change or retract.

[2] Court of Appeal, 2 June 2022, n°CAL-2021-00310
[3] Court of Appeal, 2 June 2022, n°CAL-2020-00280

CLIFFORD
CHANCE

CONTACTS

Albert Moro
Partner

T +352 48 50 50 1
E albert.moro
@cliffordchance.com

John Ted
Senior Associate

T +352 48 50 50 1
E john.ted
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 10 boulevard G.D. Charlotte, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg