



Employment law and Mobility of Workforce

The employer's liability for personal injury in the workplace - The Netherlands

Damage suffered by the Employee

In Article 7:658 of the **Dutch Civil Code (BW)** it is stipulated that the employer has to provide a safe working environment for his employees. In this respect, the employer has to take such measures as may reasonably be deemed necessary to prevent the employee from suffering damage in the course of his work.

The obligation refers to the organisation and maintenance of the places in which he works, and the implements and tools with which he works. Furthermore, it also includes instructions that the employer is to give to the employee.

This above obligation is an obligation of best intents; the employer has to take those measures that may reasonably be deemed necessary. The obligation does not contain an absolute guarantee for the employee.

If the employer fails in the performance of his aforementioned obligations, he shall be liable to the employee for any damage which the employee suffers in the course of his work, unless the employer can prove that the damage is a result of the intent or deliberate recklessness of the employee.

The latter is hardly ever the case. 'Recklessness' requires that the employee was aware of the recklessness of his behaviour immediately before he showed that behaviour. Furthermore, the empirical fact that the employee is performing his specific duties every day, which makes him become less careful as is desirable in preventing accidents, has to be considered.

In order to have any claim for compensation for damages the employee has to state and prove that he suffered damages *in the course of his work*. Because the employer's liability has a close connection with the employer's authority over the workplace and his power to give instructions to the employee it has no bearing on injuries and damages suffered by the employee at home and during leisure activities.

The employee may also bring a claim against the employer under Article 7:611 BW, which requires that an employer should act as a "good employer". This may especially be a solution if an accident has occurred in relation to the work of the employee, but not actually in the course of his work. From a procedural point of view, however, Article 7:611 BW is less favourable for the employee because this article does not contain a reversal of the burden of proof when it comes to the employer's shortcoming. Furthermore, Article 7:611 BW provides the court with the opportunity to take the employee's own fault into account also.

Article 7:658 is mandatory law. The employer and the employee can not deviate from the rules set by it to the detriment of the employee.

Damage suffered by the Employer

Article 7:661 BW refers to damage suffered by the employer and caused by the employee. If the employee causes damages to his employer in the course of his work, he is only liable for the damage if the damage was a result of his intent or deliberate recklessness.

If the employee causes damages to a third party in the course of his work, he will be liable for the damage. However, on the basis of Article 6:170 BW the employer will then be liable too. The article contains a risk liability for the employer. The third party who suffered damage may recover his damage from the employer. The employer may only take recourse against the employee if the damage was a result of the employee's intent or deliberate recklessness.

Derogation from this article is possible, but only by written contract. The contract will only be valid if the employee is insured against these risks.

Conclusion

Dutch law concerning accidents at work contains a far-reaching protection of the employee. The employer has a comprehensive liability for providing a safe workplace for the employee. If the employee suffers damage in the course of his work, he may recover damages from the employer on the basis of Article 7:658 BW.

Moreover, the employee is also protected when he causes damage to the employer in the course of his work. Only if the damage is caused by intent or if the employee was reckless is the employee liable. These rules also apply when the employee causes damage to a third party. The employer is liable for the damage of the third party, unless the damage is caused by intent or if the employee was reckless.

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Joop Werner

Spain

Article 42.1 of the **Spanish Occupational Risk Prevention Act** (Law 31/95, of 8 November) establishes the following:

“The non-fulfilment by employers of their obligations in matters of occupational risk prevention will give rise to administrative liabilities, as well as, where applicable, to criminal liabilities and civil liabilities for damages and loss which may arise from such non-fulfilment”.

Liabilities and criminal sanctions

Article 316 of the **Spanish Criminal Code** creates criminal liability for a “risk offence” in relation to worker rights if the following is established:

“Those who, being legally obliged to do so, act in infringement of occupational risk prevention norms by failing to provide the necessary means for workers to carry out their activity with the appropriate health and safety measures and thus seriously endanger the lives, health or physical well-being of those workers, will be punished with prison sentences of six months to three years and a fine of six to twelve months”.

The daily rate of the aforementioned fine fluctuates between a minimum of 2 euros and a maximum of 400 euros, in accordance with the personal circumstances of each offender.

When this offence is committed through serious recklessness it is punishable by the lower level sanction.

Civil liability

Civil liability can be separated into two sub-types:

1. Civil liability deriving from a criminal judgment
2. Civil liability deriving from a work accident but in which no criminal liability has been identified.

The decisions of the Supreme Court acknowledge the right to compensation on establishing extra-contractual liability, even where no criminal or administrative liability has been identified. This is pursuant to the provisions of Articles 1902 and 1903 of the **Civil Code** where it is stated:

- Article 1902: “Whosoever through an action or omission causes damage to another through fault or negligence is obliged to repair the damage caused”
- Article 1903. “The obligation imposed by the foregoing article is demandable not only for one’s own acts or omissions but also for the acts and omissions of those persons for whom one is liable... Owners of companies are likewise liable in respect of the damage caused by its employees during the exercise of their duties”.

Therefore the conditions for civil liability to exist in respect of damage caused by work accidents are as follows:

- Existence of harm to worker
- Action or omission leading to the non-fulfilment of health and safety obligations
- Fault or negligence on the part of the company, excluding cases of *force majeure* and exclusive fault of the victim
- A causal relation between company behaviour and the damage suffered.

Administrative liability

Generally the various liabilities which may be incurred by the employer in matters of risk prevention are as follows:

- Liability arising from infringements established in the **Labour Risk Prevention Act**, which may result in the suspension or closure of the work place
- A surcharge on financial Social Security provisions, established in Article 123 of the **General Social Security Act**, whereby all financial provisions arising from a work accident may be increased according to the severity of the incident, from 30 to 50%. The infringing company would of course be responsible for paying the surcharge. Such liability can not be subject to an insurance policy and any agreement or contract made to cover, compensate or transfer liability will be deemed to be fully null and void
- An increase in work accident and professional illness premiums of up to 20%, as established in Article 108.3 of the **General Social Security Act**
- The non-fulfilment of an Order to stop work by the Works’ Inspection will imply the direct liability of the employer in respect of the corresponding provisions should an accident occur
- Failure by the employer to carry out obligatory medical check-ups on his workers implies the direct liability of the employer for all consequences, both financial or health-related, arising from the professional illnesses contracted by the worker
- Specific liabilities, including:
 - ‘The joint and several liability established for the principal company in relation to the non-fulfilment of contractors and sub-contractors performing work or services corresponding to their own activity and which they do at their own work places’.
 - ‘The liability for fulfilment of health and safety conditions at the work place, as well as obligations to inform on the part of the user companies in respect of workers assigned by temporary employment agencies. However, temporary employment agencies are liable for the fulfilment of obligations relating to the training and monitoring of the workers’ health’.

Compatibility between different liabilities

- Concurrence of criminal and administrative liability

In application of the general principle of “*non bis in idem*”, Article 42.4 of the **Prevention Act** establishes that “when identity is detected of subject, event and grounds, the same events cannot be sanctioned twice through criminal and administrative procedures”.

In cases where administrative infringements might constitute an offence, the Labour Authorities will send the appropriate report on such events to the Public Prosecutor, pending the administrative procedure until the Legal Authorities hand down a final judgment or decision bringing an end to the proceedings.

If the existence of criminal liability is detected, an administrative sanction cannot be imposed for the same events.

If the existence of an offence is not detected, the Labour Authorities will continue with the sanctioning file based upon the declared facts proven by the courts.

- Concurrence of civil and administrative liability

Civil liabilities are compatible with those demandable through administrative or criminal proceedings. Article 42.3 of the **Prevention Act** states:

“Administrative liabilities arising from sanctioning proceedings will be compatible with compensation for damages and loss caused, and for financial Social Security System provision surcharges”.

Transfer of Undertakings Law

Article 44 of the **Workers’ Statute** regulates the succession of companies and states that a change in ownership of a company or work centre does not in itself terminate the labour relationship, as the new employer replaces the former in his rights, labour and Social Security obligations, including undertakings for pensions and in general all obligations regarding complementary social protection the assigning employer might have acquired.

In transfers which take place through *inter vivos* acts, both assignor and assignee are jointly and severally liable for the labour obligations arisen prior to the transfer and which have not been met, for three years.

Both assignor and assignee will also be jointly and severally liable for the obligations arising subsequent to the transfer, when the assignment is declared an offence.

Both assignor and assignee must inform the legal representatives of the workers affected by the succession of companies of the following points:

- The envisaged date of transfer
- The reasons for transfer
- The legal, financial and social consequences of the transfer for the workers
- The foreseen measures necessary in respect of the workers.

In cases of merger and de-merger, the assignor and assignee must provide the appropriate information, as well as publishing the call for any general meeting.

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Israel

In Israel reference to the issue of liability for personal injuries can be found in two specific, important legal fields:

1. The settlement under the **National Security Law (Consolidated Version) 1995**. This requires mandatory insurance which relates to, among other things, work-related injuries or occupational disease.

The State of Israel maintains a national security system under the **National Security Law** which grants employees various rights relating to their employment status, as well as other rights granted to all citizens or inhabitants of Israel, regardless of their status as employees.

According to the **National Security Law**, an employer *must* insure his employee in this field. Each month, both the employer and the employees pay a certain percentage of the employee's salary to the Institute of National Security ("the Institute") and those payments are the source of future payments to the employees.

On this issue, the above mentioned law deals specifically with "Work Injury", which is a work accident or an occupational disease.

"Work Accident" is defined as "*an accident which occurred in the course and in consequence of his work with his employer or on his behalf, or – in the case of a self-employed person – in the course and in consequence of the pursuit of his occupation*".

"Occupational Disease" is defined as "*a disease designated as an occupational disease by regulations...., and contracted, while it was designated as an occupational disease, in consequence of his work with his employer or on his behalf, or – in the case of a self-employed person – in consequence of the pursuit of his occupation*".

Suffering a work injury will entitle the employee to several benefits. These benefits include:

- o **Benefits in kind:** Suffering a work injury entitles an insured person to medical care, convalescence, medical rehabilitation and vocational rehabilitation
- o **Injury allowance:** If an insured person is incapacitated for his work and for other suitable work as a result of a work injury, and provided he is not currently working and is in need of medical care, medical rehabilitation or convalescence, the Institute shall pay to him an injury allowance for the period during which he is incapacitated (up to a maximum of 13 weeks in relation to the same injury). The employer has a duty to pay for the first day of such an absence, and to return payments if granted to the employee by the Institute for the first period (12 days)
- o **Pension or grant to working invalid:** An insured person whose working capacity has been impaired due to a work injury, and as a result he is incapable of performing work which a person of his age and sex is capable of performing, is entitled, under the terms of the law, to receive a pension or grant (when the period of injury allowance has ended).

In addition to the above, there are also benefits for dependents of work injury victims under the terms of the law.

2. The employer's duty to keep a safe environment at the work place, as referred to in the **Work Safety Ordinance (New Version) 1970** and **Labour Inspection (Organisation) Law 1954**.

These laws stipulate ground rules for safeguarding employee welfare, safety and health in the work place, with specific reference to machines and any other manufacture facilities.

Health: The rules concern health precautions in relation to cleaning, overcrowding, ventilation, lighting and temperature, sanitary conveniences and medical supervision.

Safety: There are general rules in relation to machinery, parts requiring fencing, access to unfenced machinery and safety of access and passage.

Welfare of employed persons: In relation to welfare the rules concern the provision of drinking water, washing facilities, safekeeping of clothing and first aid.

In general, failure to follow the law's requirements is considered to be a criminal offence.

The provisions of this section shall not derogate from responsibility under any other law.

The **Labour Inspection (Organisation) Law** operates the Safety and Hygienic Institute which enforces the safety rules. Various duties are imposed, including the duty of the employer to provide those working in the factory with information and training required to prevent work accidents and occupational diseases. On certain terms there shall be a safety committee consisting of both the employer's and the employee's representatives' safety officer.

In addition to the above specific arrangements, an employer might find himself liable under the general law of '**damages law**', particularly in negligence (paragraph 35) or breach of statutory duty (paragraph 63), as settled in the *Torts Ordinance*.

Liability may also arise where a person does not follow his statutory duty and that duty was intended for third party welfare or protection, and the misconduct causes damage under the protective law. The safety laws may be considered to be such a protective law.

It is important to note that in a damages claim the rights and benefits rendered to the employee by the Social Security will be deducted from the compensation if ruled by court.



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Cyprus

The employer's duty to provide a safe system of work for his employees has its roots in the common law.

Indeed, the common law has from early times imposed a duty on the employer to ensure that his employees shall not suffer injury either in consequence of his negligence or through his failure to properly superintend and control the undertaking in which he and they are mutually engaged.

A breach of this duty which causes personal injury has always given the employee a right of action for repayment.

In Cyprus, the employee's protection and safety at work is further provided for in the Constitution.

The employer's breach of duty is brought before the courts as a civil wrong, under the **Civil Wrongs Law**, Cap. 148.

Accordingly, in case of a breach of the employer's duty of care, the issue is decided in the context of negligence as is defined in section 51 of the **Civil Wrongs Act**, which encodes Common Law principles.

An aspect of the employer's duty is the non-exposure of employees to unnecessary risk. "*Unnecessary risk*", is defined in the case law, as "*any risk which is reasonably foreseeable or which the employer would have foreseen had he taken all reasonable measures to that effect*". Nevertheless, the measures which the employer should take ought not to be disproportionate, in terms of convenience and expense, to the risk involved.

The law further imposes a duty on the employee, to take all reasonable care in performing his work, and thereby not expose his employer to the consequences of his negligence. This principle is based on the wider doctrine of contributory negligence.

The Supreme Court of Cyprus has established various aspects regarding the employer's duty of care for safety at work.

These duties are summarised as follows:

1. *To provide competent staff:*

The employer will be held liable if a member of his staff is unqualified and as a result another employee suffers injury. Furthermore, liability to the employer is also recognised in situations where an employee assaults another and the employer fails to take any measures to prevent that assault, provided he had knowledge of or ought to have known of the threat of assault posed.

2. *To supply adequate materials such as proper machinery, appliances etc where necessary:*



An employer has the duty to supply to his employees adequate machinery, appliances, safety helmets and goggles as well as instructions and persistence on the employees to use such materials.

3. *To institute and maintain a proper and safe supervision where necessary:*

It is the duty of the employer to devise a suitable system of work, to give instructions as to the manner of performing work, especially to trainees or inexperienced staff and to supervise their work.

4. *To provide safe system of work:*

Safe system of work has been interpreted by the courts as incorporating also a safe place of work. However, it is not required for the employer to devise a system of work that is devoid of all risks.

Where the employer's duty of care has been breached, the employee's redress rests in an action for negligence, as mentioned above. In this case, the onus of proving the employer's negligence rests on the employee.

In 1989 the **Law for the Compulsory Insurance of the Employers Liability** 174/1989 came into force. Under this statute all employers are required to insure against liability in respect of any injury or disease of their employees arising out of their employment.

Failure of an employer to comply with this provision constitutes an offence punishable with imprisonment not exceeding 12 months or a fine not exceeding £1000 or both penalties.

In 1996 the **Safety and Health at Work Law** 89/1996 came into force.

The main aim of the above statute is the enforcement of measures for the promotion of the health and safety of individuals at the place of work and any other individuals that might be affected by activities at the place of work. Failure of any person to comply with the duties imposed by the law or the regulations issued under the law, is punishable with a fine not exceeding ten thousand pounds or imprisonment not exceeding two years, or both penalties.

The most important institutional developments relating to health and safety at work have been:

- The creation of the Pancyprian Safety and Health Council, under the provisions of section 5 of the Law 89 of 1996, which advises the Minister of Labour and Social Insurance on policy-making in the field of occupational safety and health
- The establishment of the Cyprus Safety and Health Association which contributes to the protection and promotion of safety and health at work and the prevention of risks concerning the public in general
- The creation of the institution of Workplace Officers and Safety Committees, introduced by the Law 89 of 1996.



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France

Definition of inexcusable fault

In the case of an accident at work or occupational illness, the victim is entitled to compensation. The Act of 9 April 1898 set up a system of lump-sum compensation for lost professional income.

According to the aforementioned Act, in order to receive an increased pension and compensation for the whole prejudice, the victim must prove inexcusable fault, the definition of which has been worked out chiefly by case law.

Legal principle

According to Article L.452-1 of the **French Social Security Code**, the victim is entitled to additional compensation only in cases of inexcusable fault on the part of the employer.

Article L. 452-1 of the **Social Security Code** reads as follows:

"When the accident [at work] is due to inexcusable fault on the part of the employer or of such persons as the employer has for purposes of management, the victim or his or her successors are entitled to additional compensation in the conditions set out in the following articles".

'Inexcusable fault' is not defined in any code and has evolved by case law.

Case Law: The evolution of the concept of inexcusable fault

Inexcusable fault was established by case law first in 1941 and then in 1980 (Court of Cassation, all divisions, 15 July 1941 and Court of Cassation, plenary assembly, 18 July 1980):

"A fault of exceptional seriousness deriving from an act or voluntary omission, from the fact that the person at fault must have been aware of the danger that it might entail and from a lack of any justifying reasons".

The "asbestos" rulings of 28 February 2002 (Court of Cassation, labour division, 28 February 2002) redefined inexcusable fault and laid on the employer an obligation to achieve safety; at that point, several decisions seemed to hint at the beginnings of a softening in the appreciation of the employer's awareness of the danger, notably as regards the required proof of causality between fault and prejudice.

"Under the employment contract binding the employer to the employee, the employer has an obligation to achieve safety, notably as regards occupational illnesses contracted by the employee because of products made or used by the company; defaulting on this obligation amounts to inexcusable fault as defined in article L.452-1 of the Social Security Code when the employer was or should have been aware of the danger to which the employee was exposed and the employee did not take the necessary steps to protect the employee therefrom".

This definition was immediately applied to accidents at work (Court of Cassation, labour division, 11 April 2002).

The inexcusable fault of the employer is now characterised by the employer not fulfilling his obligation of safety towards the employee when

two conditions are met simultaneously: being aware of the danger **and** not taking the necessary steps to protect the employee.

Awareness of the danger

The Court of Cassation has always held that the fact that the employer had or should have been aware of the danger which the employee was in was a prerequisite of inexcusable fault.

The appreciation of the awareness of the danger is a matter for the discretionary powers of the judges ruling on the merits. The judges will determine the danger that the employer was or should have been aware of in view of his knowledge, experience and professional obligations.

According to case law, awareness of the danger results from a lack of any risk reasonably foreseeable by the employer or from carelessness or negligence leading to elementary safety steps not being taken or certain practices violating safety instructions being tolerated (Court of Cassation, labour division, 28 March 2002, no. 00-11.627).

Fault as a necessary but not necessarily decisive cause of the accident

The inexcusable fault committed by the employer does not need to have been the decisive cause of the accident suffered by the employee: it need only be a necessary cause thereof for the employer to be held liable, even where other faults contributed to the prejudice (Court of Cassation, labour division, 31 October 2002, no. 00-18.359).

In a ruling dated 22 February 2007 (no. 05613.771, *Gérard G. et al. vs Jean-Jacques*, Juris-Data no. 2007-037472) the second civil division of the Court of Cassation adopted an extensive definition of the concept of an accident at work and accepted the possibility for an employee suffering from a psychological disorder relating to their work to allege inexcusable fault on the part of the employer.

In that particular case an employee had tried to take his own life at home whilst on sick leave for anxiety/depression, apparently as a result of harassment. Although the Court of Cassation did not use that particular term, it appears in the ruling of the Court of Appeal and the account of the events hardly leaves any room for doubt. Nevertheless, this decision has a broader scope and pertains more generally to all aspects of mental suffering at work.



Proof of inexcusable fault

Principles

There is no presumption of inexcusable fault. It is up to the victim or his or her successors to prove it.

However, there are two exceptions to this principle: the **French Labour Law Code** provides for a presumption of inexcusable fault on the part of the employer for fixed-term and temporary employment contracts and in situations presenting serious and imminent danger (article L.231-8 of the **French Labour Law Code**).

Application

This presumption does not apply where the accident suffered by the employee is the result of gross fault on his or her part (Court of Cassation, labour division, 31 October 2002, no. 01-20.197, *Grenier vs Carnaud Metalbox*).

It is a rebuttable presumption: it can be overcome if the employer introduces contrary evidence (Court of Cassation, labour division, 29 June 2000, no. 99-10.589, *Duvernois vs Les Cartonneries de l'Andelle*).

Incidence of a criminal dispute

The victim can be compensated for the prejudice sustained on the grounds of inexcusable fault on the part of the employer, even if the latter has not been found guilty of criminal negligence (Court of Cassation, labour division, 12 July 2001).

However, a guilty verdict against the employer before a criminal court does not automatically entail acceptance of inexcusable fault. However, it does characterise in the eyes of the judges the employer's awareness of the danger and therefore such acceptance (Court of Cassations, 2nd civil division, 16 September 2003).



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Italy

In Italy the issue of work-related personal injury has to be regarded under two different profiles:

1. The first profile concerns the obligation of the employer to provide for a safe working environment.

The protection of employees' health is a specific obligation on the employer, as laid down in general terms in Article 2087 of the **Civil Code** (specifying that the employer is required to eliminate the risks present in the workplace in light of existing technical knowledge, or at least to reduce them to a minimum) and Article 9 of the **Workers' Statute**.

Under these provisions:

- o Employers must adopt all necessary measures to protect the physical, mental and moral well-being of their employees
- o Reciprocally, the employees, through their representatives, enjoy particular information and consultation rights concerning the application of such measures and promote their study, development and implementation.

The whole system of precautionary measures that the employer is required to adopt in favour of employees' health has been revisited by the **Legislative Decree No. 626/1994**, which implemented eight EC Directives on safety matters.

Under the new system:

- o The important role of information, participation and prevention culture has been introduced as the main element of novelty
- o Failure to observe the obligations imposed on the employer is also made a criminal offence.

The main provisions of **Legislative Decree No. 626/1994** relate to the organisation of detailed procedures to improve health and safety in the workplace. In particular, the employer is required to:

- o Organise within the enterprise a protective and preventive service responsible for identifying risk factors and for their elimination or reduction to a minimum
- o Provide for a number of medical screenings, ensuring a doctor is responsible for the regular assessment and certification of employees' physical fitness to perform the tasks assigned to them
- o Provide for the appointment of a workforce representative on matters of health and safety (so called safety representative) and ensure he is provided with specific training.

2. The second profile concerns the obligation of the employer to fulfil law requirements for the purpose of protecting the workers against the consequences of accidents at work and industrial diseases (these are the provisions of law on the matter of compulsory insurance for workers).

The employer has the obligation to provide compulsory social insurance managed by INAIL (National Institute for Industrial Accident Insurance), which covers cases of both:

- o Accidents at work (accidents occurred to employees during the performance of their work activities which result in death or incapacity for work lasting more than 3 days)
- o Industrial diseases (illness contracted during the performance of work activities and caused by it, which results in a permanent reduction of more than 10 per cent of working capacity).

If the above conditions apply, the employee is entitled to receive the financial benefits provided by law: INAIL provides for health services and financial benefits (60% of pay, raising to 75% should the duration of incapacity for work exceed 90 days).

From the point of view of the employer:

1. **The contribution mechanism:** The employer has a direct contribution duty (for the main part of the contribution), and an indirect contribution duty (for the lesser part of the contribution). The obligation to pay is on the employer, who deducts the amount due from the salary of the employee.
2. **Civil liability of the employer:** The INAIL compulsory insurance sets the employer free from the obligation of any damage compensation in favour of the employee for the consequences of the occurred accident or disease. Exceptions are provided (where the employer must instead pay a damage compensation) in the case of a criminal decision ascertaining that the accident occurred due to employer's negligence, or accident / professional disease not included in insurance provisions.



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The website can be found at www.plg.eu.com and offers a range of information about PLG and its members, together with up-to-date bulletins on legal issues.

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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of Employment law and Mobility of Workforce which are of general interest to all of our clients. It is jointly written and produced by PLG's Employment law and Mobility of Workforce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Employment law and Mobility of Workforce News. Further information is available on all topics but nothing in PLG Employment law and Mobility of Workforce News is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

Readers having suggestions for further articles or general comments on this Newsletter or requiring legal advice and assistance on any particular problem should refer directly to the appropriate PLG practitioner in the relevant country or contact the PLG Secretariat at the above address.

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