

COMPARATIVE LABOR LAW DOSSIER TEMPORARY EMPLOYMENT CONTRACTS IN LUXEMBOURG

Christian Deprez
Collaborateur de recherche-Droit Luxembourgeois
Université du Luxembourg

Introduction

In 2010, temporary contracts represent 9.2% of the total number of contracts, (4.8% directly concluded with the employer, and 3.5% through agencies). This rate has increased during the period 2006-2010 of two percentage points.

The fields where temporary contracts are the most widespread are administrative services and support, education, services activities in general, healthcare and building sector.¹

1. Is it possible to subscribe temporary employment contracts in Luxembourg? What is the principle that governs temporary work?

It is, in fact, possible to hire employees using temporary employment contracts in Luxembourg. However, as such contracts derogate from the general principle of employment contract of permanent duration as the general form of employment relations, the use of a temporary employment contract is only permitted under certain conditions and with certain limitations².

The rules authorizing temporary employment contracts rise to the level of public policy provisions; thus, they are mandatory and cannot be modified, even through mutual agreement of the parties.³

In Luxembourg, temporary employment is only contemplated in two specific situations:⁴

¹ Source: <http://www.statistiques.public.lu/catalogue-publications/bulletin-Statec/2012/PDF-Bulletin2-2012.pdf> p.26 and following

² Regarding temporary employment: some specific legal regimes exist also, (i.e. employment contracts for artists, academics etc.), but those contracts are the exception and are mentioned in the current footnote but will remain out of the scope of this report, as it deals with the general applicable rules regarding the temporary contracts in Luxembourg.

³ Art. L. 010-1 7. 8. of the Luxembourg Labor Code

⁴ Some specific cases exist also: one can mention for example the temporary lending of staff upon authorization of the Ministry of Employment, from a company to another, but this will not be taken into account in this report since first, the material scope is very limited and second, because it does not imply

1. An employer enters into a fixed-term employment contract directly with the employee; or
2. An enterprise asks a third party (i.e., an employment agency) to temporarily make one or more members of its staff available to him. Only specific employment agencies (*'les entreprises de travail temporaire'*) are authorized⁵ to make staff available to such enterprise for a limited period, and the provision thereof must be undertaken pursuant to a so-called mission contract (*"contrat de mission"*). Thus, the employer is the agency, and the enterprise using the services of the agency's employee is the "using enterprise" (*"entreprise utilisatrice"*).

2. Which temporary employment contracts exist in Luxembourg? In which cases can these temporary employment contracts be used and what is their legal regulation?

- Temporary employment contracts are contemplated by Luxembourg's Labor Code but collective bargaining agreements may also regulate an enterprise's use of short-term employment through authorized agencies.⁶

Regardless of which of the two authorized temporary employment arrangements is used, the employer may only use short-term employment contracts for a specific and temporary task (*"tâche précise et non durable"*)⁷ such as temporarily replacing an existing employee, seasonal activities, an exceptional one-time increase in workload. In addition, this framework contemplates the recruitment of specific categories of workers (e.g., disabled persons, recently-released prisoners⁸), or recruitment intended to help unemployed persons reenter the workforce⁹, or provide professional training.

that the staff lent by the providing company is hired temporarily. One can mention also the apprenticeship / the vocational training contract, but they are performed in the framework of a general and theoretical education.

⁵ Art. L. 131-1 & 2 of the Luxembourg Labor Code

⁶ Art. L. 122-1 and following (short-term employment contract with the enterprise itself) and L. 131-1 and following of the Labor Code + collective bargaining agreements related to short-term contracts with an authorized agency, enforced by Grand-Ducal Decree dated 23th October 2011 (short-term contract with an authorized agency).

⁷ Art. L. 122-1 (short-term employment contract with the enterprise itself) and L. 131-1 (short-term employment contract with an authorized agency) of the Labor Code.

⁸ Art. L. 122-1 8, which encompasses specific categories of job seekers.

⁹ Art. L. 122-1 9 of the Labor Code

- Moreover, regardless of the type of authorized temporary arrangement, short-term employment contracts must comply with all other regulations that apply to every standard employment contract,¹⁰ including provisions establishing the form thereof and mandatory information to be included therein.

Finally, every short-term employment contract must satisfy certain additional formal requirements specifically adapted to them. For example, it must include a statement that it is for a defined period, justifications for using a fixed-term contract, and specify its precise duration (including end date) as well as any trial period.¹¹

A failure to state, within the contract, the limited duration of the employment or the temporary task which is the object thereof, results in said contract being irrefutably deemed to be an employment contract for an unspecified duration,¹² subject to all employee rights and benefits attributable thereto.

If, on the one hand, the short-term employment contract is entered into directly with the enterprise, it may be extended twice for a maximum aggregate extension of 24 months.¹³ If, on the other hand, the short time contract is entered into with an authorized agency, it can also be extended twice, but the maximum aggregate extension period is reduced to 12 months.¹⁴

If either type of contract is extended more than twice, or the extended duration exceeds the applicable maximum aggregate extension period, the contract automatically and irrefutably converts to an employment contract for an unspecified duration, subject to all employee rights and benefits attributable thereto. The final employer in such cases will depend on the nature of the original contract. If the original employment contract was a direct contract between the worker and the enterprise, the enterprise becomes the long-term employer; if, however, the original employment contract was between the worker and the authorized agency, the end user becomes the long-term employer.¹⁵

¹⁰ Art. L 122-10 of the Labor Code

¹¹ Art. L. 121-4 and L. 122.2 of the Labor Code

¹² Art. L. 122-2 of the Labor Code

¹³ Art. L.122-4 of the Labor Code

¹⁴ Art. L. 131-8 of the Labor Code

¹⁵ Art. L. 131-10 & L.122-6 of the Labor Code

3. Does the legal regulation in Luxembourg recognize temporary workers a preferential right to occupy a permanent job in the company?

In short, there is no preferential right granted to a temporary worker to occupy a permanent position in the enterprise.

4. Does the legal system in Luxembourg allow differences in the working conditions of permanent and temporary workers? Does the reality in the labor market fulfill this regulation?

When the temporary employment contract is entered into directly with the enterprise, temporary workers and permanent employees are equally entitled to all legal and collective bargaining provisions,¹⁶ once any applicable trial period has passed (there is no obligatory trial period under the law). After any such trial period, the parties to the employment contract have the right to performance thereof until its defined term expires.¹⁷ If one party breaches his duty to continue, that party will be liable to the other for breach of contract and must pay a specific penalty to the other for compensation. However, such temporary employment contracts may be terminated early in case of force majeure, by mutual agreement of the parties, or following serious misconduct (“*faute grave*”) by one of the parties.

When an agency provides its staff to an enterprise pursuant to a mission contract, a legal relationship, although not an employment relationship, automatically comes into effect between the enterprise and the temporary worker, which legal relationship grants the temporary worker certain rights and imposes certain duties on the enterprise that may be enforced judicially, and that are very close to the ones granted to the employees of the end user:

- Trade union rights: Although the worker is not entitled to all the rights of a trade union member (e.g., the worker cannot become a representative of the trade union in the enterprise), the worker may benefit from the services offered to trade union members (e.g., obtain advice regarding rights within and without the enterprise).
- Inclusion in the enterprise’s staff calculations: The enterprise must count temporary workers, even if supplied by an agency, when calculating the number of its employees, which prevents the enterprise from artificially reducing its numbers to avoid surpassing thresholds that affect its social obligations.

¹⁶ Art. L. 122-10 of the Labor Code

¹⁷ Art. L. 122-13 of the Labor Code

- The use all enterprise facilities: The worker has the right to use the enterprise's facilities (e.g., canteens, parking facilities) on the same terms and conditions as long-term employees.
- Benefit of all occupational health, safety, and welfare rules, including hygienic standards, protective gear, etc.
- Vacation and holiday benefits are to be computed on a *pro rata temporis* basis while the temporary worker works at the enterprise.
- Benefits arising from seniority: a temporary worker benefits from any privileges associated with seniority.
- Equal compensation: a temporary worker has the right to the same compensation as a long-term employee in the same role with the same qualifications would receive or that which is established in any applicable collective bargaining agreement.

5. What is the role of Temporary Employment Agencies in regard to temporary work?

As previously mentioned, only authorized temporary employment agencies may provide temporary workers to fulfill a requesting enterprise's needs (and then only pursuant to a valid mission contract), which agencies are expected to respond to in a timely and flexible manner. Only such agencies may assume responsibility for certain aspects of the recruitment and candidate selection process and, in the capacity of employer, handle the necessary administrative procedures with respect to the temporary workers while the mission contract remains in effect.

6. Which is the legal regulation regarding the expiry of temporary employment contracts? Specifically, does the legal regulation recognize compensations to workers for the expiry of the temporary employment contract?

No additional compensation is provided to temporary workers at the stated expiration of the temporary employment contract. If, however, a temporary employment contract is terminated by the end user¹⁸ prior to its stated expiration date, the temporary worker is entitled to an amount equal to the compensation he/she would have received if the contract had expired in accordance with its terms, except that such compensation cannot

¹⁸ On the other side, if the contract is terminated by the employee, the employer can ask a compensation amount corresponding to the prejudice actually suffered, up to the same ceiling.

never exceed the amount he/she would have received after the expiration of the termination notice period of an employment contract for an unspecified duration.¹⁹

7. Which consequences arise from the breach of the legal regulation of temporary employment contracts?

Any infringement of the regulation of the “mission contract” (*contrat de mission*) determines the recognition of the existence of an employment contract of permanent duration between the end user and the agency worker (Article l. 131-8, 133-2 Cd. Tr.).

In case of any infringement, the agency and the end user are jointly responsible for payment in wages, indemnities, fiscal and social contributions (Article l. 133-3 Cd, Tr.).

8. Does the legal regulation of temporary employment contracts include provisions designed to prevent fraud on temporary work?

Because the regulations relating to temporary employment rise to the level of public policy, the parties to temporary employment contracts may not modify or derogate from such regulatory protections by mutual agreement. Moreover, as the sanction for a violation of such regulatory protections (e.g., failure to comply with formal contract requirements, unlawful termination, unequal treatment) is the irrefutable assumption of a long-term employment contract, the potential imposition thereof might, to a certain extent, be considered a provision designed to prevent fraud on temporary workers.

9. What is the role of collective bargaining in Luxembourg in regard to temporary employment contracts?

Temporary employment contracts may benefit from the benefits of one or more collective bargaining agreements.

For any particular temporary employment contract, there might be a collective bargaining agreement that applies to the specific contract because it affects the specific employer, be it the enterprise or the authorized agency. In principle, if the contract is made directly with the enterprise, no distinction can be made between the enterprise’s long- and short-term employees; thus, any collective bargaining agreement applicable to that enterprise will also apply.

Moreover, there is a specific collective bargaining agreement²⁰ that applies to temporary workers employed by an authorized agency. In its preamble, it states:

¹⁹ Art. L-131-16.

“This collective labor agreement aims to ensure the coordination of the work conditions, the safeguard of social peace at the enterprise and professional levels, as well as ensuring the action of the social partners against unfair competition and illegal employment, provided that the collective agreement is declared generally binding accordance with the legal provisions relating thereto”.

²⁰ See note 4.