



Jackye Elombo & Shaohui Zhang | EURALEX LAW FIRM (Photo : Blink Blink)

5 key points on expatriation

With over 170 nationalities, Luxembourg is one of the world's most multicultural and cosmopolitan countries, it is in central Europe and is close to its largest cities.

The presence of international companies in Luxembourg has led to many migrations. Further, Luxembourg ranked 2nd in 2023 among the top 10 countries globally for attracting and retaining talent, an area that is constantly being improved. It reinforces its attractiveness via incentive tax and social benefits, as well as flexible short- and long-term mobility arrangements.

Employment information (e.g., legal working hours, employment contracts, categories of workers, contracts and working conditions) is generally available online. However, circumstances may differ, exceptions may exist, and the implementation of rules and procedures may change from one context to another.

When setting up a business, operating a branch or a subsidiary, especially where a need for human resources and expertise of highly qualified managers and experts in the employer's sector requests intra-corporate transfer of staffs due to business needs or for organisational reasons, it is highly recommended to seek legal advice, particularly in expatriation situations of third-countries nationals, although basic information in this regard is easily accessible.

Here are 5 key considerations for successful expatriations.

1. Framing the choice areas of the expatriation

Freedom of choice is the watchword in contractual relations.

From an employment standpoint, the parties may choose the type of mobility arrangement, the workplace, the salary package and even the applicable law.

However, the limits to the free movement of workers and migration rules circumscribe the employee's choice, since the employer is *prima facie* responsible for ensuring that the foreign employee holds a work permit.

The Court of Appeal recently¹ reminded that “employers are **not only obliged to check** whether a third-country national has a residence permit or even a work authorization at the time of recruitment, **but also to ensure** that the person's administrative situation is in order **throughout the period of employment**”.

In the context of irregularities, the employment relationship will have to be terminated, without prejudicing the employees' protective rights. Needless to say, not only employers will be **subject to administrative fines**² **but to criminal sanctions**³ in addition.

Further, the type of contract depends on the conditions, form, and duration of the migration. The contractual arrangements have different legal conditions and consequences which can prove disastrous if the situation is not clear from the outset.

In practice, there is a certain tendency to multiply contractual arrangements in cases of employee mobility, most of which consider the migration at a given point in time. A "local contract" is often drawn up followed by several addendums.

An employer who wishes to terminate an assignment prior to its contractual term, for example after the mission has been completed, could be liable for damages if the contractual arrangements do not clearly refer to the assignment.

In a recent appeal decision⁴, the Court ruled that the mere fact that the [local] employment contract states that it is concluded for a limited period is not sufficient to establish that the parties agreed that the employee was engaged only to carry out a specific assignment abroad.

It is therefore essential to bear in mind and anticipate these key points involved in expatriation beforehand.

2. Anticipating the administrative preliminary stages

Working in Luxembourg and employing expatriate workers requires the **completion of formalities with local authorities** such as the Employment Agency (the vacancy declaration to be made before hiring), the Ministry of Foreign and European Affairs (the visa authorization and work permit), the Tax administrations (the tax card) and, in certain cases, the Labour Inspectorate.

From a social security standpoint, especially with the new ways of working (including telework) it is sometimes up to the migrant employee to **undertake certain procedures** (such as for the continued insurance or for the coverage certificates), particularly **in the country of origin**.

To avoid situations where social security cover is compromised or creates extranational obligations for the employers, it is also advisable to **check coordination rules and bi-national agreements**⁵, to

¹ Court of Appeal, 27 April 2023, n° CAL-2022-00205.

² Employers risk being punished with an administrative fine of up to EUR 10,000 for each offence (Article L.572-4, 1st paragraph, and L.574-4 Labour Code).

³ Employers are subject to imprisonment of between eight days and one year and/or a fine of between 2,501 and 125,000 euros (Article L.572-5 and L.574-5 Labour Code).

⁴ Court of Appeal, 18 June 2020, n° CAL-2019-00066. It is worth mentioning that in this specific case, neither the [local] employment contract concluded between the employee and the Luxembourg company nor the amendment to the original contract by which the employment contract was transferred to the Luxembourg employer contained any reference to an expatriation assignment or to a specific assignment of limited duration which the employee was to carry out.

⁵ It is worth mentioning that Luxembourg has entered several [bilateral agreements](#) with third-party countries, such as China, India, Korea, Morocco, Tunisia and Turkey.

clarify which party is responsible for which obligation and to anticipate the consequences of migration in terms of social rights.

Employers must especially ensure, depending on the nationality of the migrant employee, the employee's level of qualification, that the formalities relating to the worker's residence are carried out before the employment relationship begins.

Expatriate workers and those who employ them will be well advised to carefully **understand the requirements, the burden distribution and to prepare** for these preliminary steps.

3. Assuming and discussing mobility costs

Employees with specialist skills and relevant experience are often sought.

Luxembourg offers interesting opportunities for highly qualified professionals, particularly in the fields of finance, technology, research, engineering, and law.

The available **incentive schemes and new mobility system** ⁶, to facilitate the arrival of foreign workers, in particular from third (i.e., non-EU) countries, depend on whether the employer has temporary and urgent needs for human resources and expertise of highly qualified employees.

In each case experts' employees and their hiring companies must meet specific requirements.

The case of expatriated managers to Luxembourg by most of the Chinese State-Owned Enterprises (SOEs) set up in Luxembourg is an excellent illustration. On one hand, Chinese SOEs have strong interests to expatriate their China based highly qualified managers to Luxembourg in order to vehicle their group investment policy and know-how in the EU market development. On the other hand, China based highly qualified managers have no competitive interests to be expatriated abroad, and even having accepted to be expatriated to Luxembourg, they wish to keep their original working relationship and basic social securities in China.

To meet the above constraints, it is advisable to design and to propose tailor-made solution to each case by articulating among posted worker, transferred worker, secondment, inter-corporate transfer and finally local employee with a package of incentive schemes.

Depending on applicable schemes, **employers will often pay all or part** of the ancillary costs associated with the expatriation, regardless of the form the salary package takes.

In any event, employers must comply with **strict Luxembourg rules** about compensation, paid leave, safety at workplace, and various facets of working conditions.

4. Complying with Luxembourg laws and work conditions

International group companies may transfer or relocate some of their employees to Luxembourg locations or branches for support or to manage a function to optimize available skills.

In such cases, employment agreements may include provisions (including foreign law provisions) which differ from the Labour Code without necessarily being null and void.

⁶ e.g., impatriate regime, non-EU seasonal workers, new investors to Luxembourg, or temporary intra-company transfers.

Employment relationships must respect the Labour imperative law provisions, and, in specific professional sectors, collective agreements which are binding, and apply automatically to employment relationships, even if not referred to in the employment contract.

Any clause that aims at restricting the rights provided by Luxembourg imperative provisions would be invalid. Luxembourg Courts will therefore analyze whether each and/or every clause(s) inspired or governed by a foreign law should be declared null and void. Ultimately, it may consider that the foreign law is less favorable to the Employee and decide that Luxembourg law should apply.

The risk of transposing Labour law rules from one country to another is very high, particularly within groups of companies with a global corporate culture.

For instance, third-country companies whose governing laws may provide for objective reasons for termination without notice⁷, different economic compensation rules (less favorable than Luxembourg ones), as well as cancellation of the employment contract (which is not expressly provided) and different length of record keeping, should proceed to a comparison of the most protective labour rules, including data protection guidelines, and pay a particular attention to compliance with the mandatory rules of Luxembourg law.

5. Anticipating the end of the expatriation

The law sometimes provides for mandatory expatriation time limits, so continuing the employment relationship after the end of the initial migration period can have serious consequences.

For example, international transfer of employees often triggers the risk for employees of losing the benefits acquired with the first employer (such as seniority).

To avoid this risk and preserve employees' acquired rights, the doctrine and case law consider that the successive transfers and changes of employer within a group do not affect *stricto sensu* the continuity of the employment contract.

It is therefore important to think at the outset of the relationship about clearly defining the type, duration, and terms of the contract or assignment.

In the event of a secondment or intra-group transfer, is the contract with the company of origin terminated or suspended? Is the employee's reintegration planned on his return?

All these questions need to be examined and resolved before the employment relationship begins.

Our experts in employment law and investment project would be happy to assist you in setting up successful and compliant expatriation.

Jackye Elombo & Shaohui Zhang



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⁷ The appraisal of the notion of "for cause" is purely factual and entirely lies with the courts, which consider the employee's professional behaviour, level of education, social situation, and any other element relevant for the appraisal of his responsibility.