

Final report 2013 4th Study Commission

The theme for the fourth commission tended to identify and analyze replacement income to which an employee is entitled when he or she is incapacitated for work due to illness or an accident and he or she can not earn an income through a professional activity, regardless of the possible reimbursement of preventive and curative health care treatments.

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The secretariat of the IAJ invited members of 4th Commission to submit their report by the 15th of July 2013 to allow the translation and the preparation of the final report during the months of July and August.

This deadline had to be postponed to August 15, 2013 because less than five reports were received by July 15, 2013.

In fact, all of the reports that were received by September 30 2013 have been utilised to prepare the synthesis report of the 4th Commission.

We finally received nineteen reports, however certain of them did not cover the scope of investigation proposed by the questionnaire.

I thank those who have responded to the questionnaire.

It must however be noted, after reviewing the national reports, that the 2013 questionnaire encompassed too wide a field of investigation which did not enable us to adequately prepare a short relevant summary report.

In the future, we should limit our approach to a more focus and less ambitious comparative review.

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Five reports have not been incorporated in the conclusions of the report because of the extreme diversity or the complexity of the systems in use in certain countries (Australia and Taiwan), because certain of these reports could not be translated in time (Georgia, Kazakhstan, Paraguay) or did not permit us to adequately summarise their positions, and because one submission failed to properly give answers to the questionnaire (Japan).

A. Conclusions

The comparison of labor law and social security systems of Austria, Belgium, Bresil, Canada, Estonia, France, Israel, Lithuania, Niger, the Netherlands, Serbia, Switzerland ,Taiwan and USA shows great similarities regarding the causes of disability subject to the granting of a replacement income in favor of the employee.

Most usually, the causes will be the inability to work resulting from the execution of the employment contract (accident at work or occupational disease) and, with the exception of Niger, the inability to work unrelated to the execution of the employment contract (accident or non occupational disability).

With the exception of Niger, none of the countries surveyed automatically excludes the hypothesis of an occupational disease in particular.

However, some of them have established a list of occupational diseases at risk of being contracting based on the position occupied, thus allowing a worker affected of such a disease not to be required to establish the causal link between the position occupied and the disease contracted.

Regarding the diseases not included in the list, it is the worker's responsibility to establish the causal link between the position occupied and the disease of which he claims to be affected.

Similarly, it is the worker's responsibility to inform the employer of his inability, regardless of the cause, in accordance with the applicable procedures of each country. Each country also has its own methods of control of disabilities depending on their origin.

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Depending on the cause of the disability, however, the countries examined do not have the same rights to income replacement in the same manner.

And distinctions appear between these countries, especially with regard to:

[1] *the debtor of compensation*

[2] *the amount of the compensation*

[3] *duration of the benefits*

[4] *protection against termination of employment*

[5] *the possible cumulation of the compensation with remuneration or other social benefits*

- [1] *the debtor of compensation*, the responsibility to compensate may fall upon an administrative authority or an insurance company of the employer ; or even upon the employer itself for the first days of compensation of the incapacity or if the responsibility of the employer on the occurrence of the work incapacity is challenged;

occupational diseases:

administrative authority: Austria (social insurance, after expiration of the employer's income replacement for at least 8 weeks (maximum after 25 years is 12 weeks), Belgium (Occupational Diseases Fund), Canada (Commission on Health and Safety at Work) , Estonia (Health Insurance Fund), France (starting on the second day of incapacity and and paid by the «Caisse Primaire d'Assurance Maladie») Israel (National Insurance), Lithuania (State Fund for Social Insurance), Netherlands (social insurance, after expiration of the employer's compensation), Niger (C.N.S.S.), Portugal (Social Security Office), Serbia (National Fund for the Health Insurance)

insurance company of the employer: Finland, Netherlands (if the employer is found to be liable), Switzerland,

employer: Austria (full income replacement by the employer for a minimum of 8 weeks ; 50% for additional 4 weeks, Belgium (14 days for blue collars and 30 days for white collars), Bresil (15 first days), Canada (first 15 days), Estonia (in case of permanent disability, the employer must pay the difference between the amount of compensation received by the employee and his average wage), France (first day of incapacity), Israel (first 14 days), Niger (the first day of compensation). Serbia (first 30 days), USA (this varies in every state).

accidents at work:

administrative authority: Austria (social insurance after expiration of the income replacement of the employer), Canada (Commission of Health and Safety at Work), Estonia (Health Insurance Fund), France (starting from the 5th day of incapacity, the first 4 days being waiting days), Israel (National Insurance), Lithuania (State Fund for social Insurance), Niger (C.N.S.S.), Portugal (Social Security Office), Serbia (National Health Insurance Fund)

insurance company of the employer: Belgium, Netherlands (if the employer is found to be liable)

employer: Austria (full income replacement by the employer for a minimum of 8 weeks ; 50% for additional 4 weeks), Belgium (14 days for blue collars and 30 days for white collars), Bresil (first 15 days), Estonia (in case of permanent disability, the employer must pay the difference between the amount of compensation received by the employee and his average wage), Israel (first 14 days), Niger (the first day of compensation), Serbia (first 30 days), USA (this varies in every state).

non occupational disabilities:

administrative authority: Austria (conditions substantially identical to the occupational disease except for the duration of the period of income replacement), Belgium (National Sickness and Invalidity Insurance Institute), Bresil (Social security), Canada (Service Canada for non-unionized workers) , Estonia (Health Insurance Fund from the 9th day to the 182nd day of incapacity), Finland (Social Insurance Institution of Finland), France (starting on the second day of incapacity, paid by the « Caisse primaire d'Assurance Maladie), Lithuania (Diseases Act and Social Insurance), Portugal (Social Security Office), Senegal, USA (disabled workers may qualify for government benefits).

insurance company of the employer: Canada (for unionized employees), Israel (after 18 to 90 days), plus fixed sum from the National insurance, Netherlands (if the employer has this type of insurance, otherwise the employer), Switzerland.

employer: Austria (conditions substantially identical to the occupational disease except for the duration of at least 6 weeks of full income replacement ; 50% for an additional 3 weeks,) Belgium (14 days for workers/blue collars and 30 days for employees/white collars), Estonia (from the 4th to the 8th day of the disability), France (first day of incapacity), Israel (maximum of 18 days per year cumulative to a maximum of 90 days)

- [2] ***the amount of the compensation***: it can guarantee the worker to reception of a compensation equivalent to his real salary, a percentage of his real salary, as a percentage of his real salary but capped or a financial package eventually influenced by the composition of the worker's family;

NB. Niger: The amount of the compensation to which the worker is entitled (in accident at work in occupational disease) is determined by the rates set by the CNSS on the scale of AW/OD.

It is not clear whether this corresponds to a package or a percentage of the actual wage or salary capped.

Senegal : it is not specified

occupational diseases

actual salary: Austria (during the first period of income replacement supported by the employer,), Estonia (for a maximum of 182 days), Finland (first 9 days, except if the collective agreement provides a better coverage :1 to 3 months), Israel (the first 14 days), Serbia.

percentage of actual salary: Austria (after the period of income replacement supported by the employer, the social insurance pays an indemnity equal to 60% of the average weekly insurable earnings of the worker), Bresil (91% of the net salary but not inferior to the minimum wage and 100% of the net salary if eligible to full pension), Canada (90% of net salary), Israel (a maximum of 75% of net salary in case of mandatory intervention of the complementary insurance), Finland (70% of the last income earned for a year), the Netherlands (70% of gross salary and 100% in case of employer's liability), USA (worker's compensation laws vary by state)

percentage of actual salary capped: Belgium (90% of earnings capped at 40,122.93 € on January 1st, 2013), France (60% of the daily salary but for no more than 151, 08 € a day from 2nd day to 29th day, 80% from the 30th day but for no more than 201, 44 € a day)

accidents at work

actual salary: Austria (during the first period of income replacment supported by the employer,), Bresil, (Estonia (for a maximum of 182 days), Finland (first 9 days, except if the collective agreement provides a better coverage :1 to 3 months), Israel (the first 14 days), Serbia.

percentage of actual salary: Austria (after the period of income replacement period supported by the employer, social insurance pays an indemnity equal to 60% of the average weekly insurable earnings of the worker), Canada (90% of net salary) Israel (a maximum of 75% of net salary in case of the required intervention of the complementary insurance which is compulsory), Finland (70% of the last income earned for a year), the Netherlands (70% of gross salary and 100% in case of the employer's liability), Switzerland (80% of net salary), USA (worker's sompensation laws vary by state)

percentage of actual salary capped: Belgium (90% of incomes capped at € 40,122.93 on January 1st, 2013) France (60% of the daily salary but for no more than 151, 08 € a day from 2nd day to 29th day, 80% from the 30th day but for no more than 201, 44 € a day),

non occupational disabilities

actual salary: Austria (during the first period of at least 6 weeks of income replacement supported by the employer), Israel (for short disability: 18 days per year, cumulative up to a maximum 90 days), Switzerland (3 weeks for employment contracts longer than three month; in those exceeding one year, the period is determined based on fairness by court decisions that have set scales)

percentage of actual salary: Austria (after the first period of compensation supported by the employer social insurance pays an indemnity equal to 60% of the average weekly insurable earnings of the worker), Bresil (91% of the net salary but not inferior to the minimum wage Estonia (70% net salary from the 9th to the 182nd day), Israel (a maximum of 75% of net salary in case the intervention of the mandatory supplementary insurance is required), the Netherlands (70% of net salary), Portugal (unspecified), Serbia (65% of net salary), USA (worker's compensation laws vary by state)

percentage of actual salary capped: Belgium (from 60% for the first 12 months to 65% after 12 months of salary, capped at € 3,354.57 on January 1st, 2013, which is € 2,012.88 monthly for workers with dependent family members) Canada (55% of salary up to a maximum of \$Can. 501 as of January 1st, 2013 for non-unionized workers)

Package: Israel (compensation is guaranteed by the National Insurance Act, marital status affects the calculation of compensation)

- [3] <i>duration of the benefits</i>

occupational diseases:

Austria (as long as the incapacity persists and no later than the expiration of the maximum benefit period of at least 8 weeks of 100% income replacement (employer) and 4 additionnal weeks of 50% income replacement (employer) and at least additionnal 6 months of social security benefits. If there is a permanent reduction of the working capacity of more than 20% employees are entitled to social security benefits until retirement), Belgium (as long as the incapacity persists), Bresil (as long as the incapacity persists), ((Estonia (182 days), France (as long as the incapacity persists), Israel (as long as the worker is disable until retirement) , Niger (unspecified) , Netherlands (the first 104 weeks from the employer and as long as the worker is disabled until retirement age from social security).

accidents:

Austria (see above), Belgium (as long as the incapacity persists), Bresil (depending on the result of the lawsuit the employee has to file), Estonia (182 days), Israel (see above), Niger (for life) , Netherlands (see above).

non occupational disabilities :

Austria (as long as the incapacity persists and no later than the expiry of the maximum benefit period, at least 6 weeks 100%, 3 weeks 50%, 6 months social insurance, Belgium (as long as the

incapacity persists until retirement age - 65 years old) , Bresil (as long as the incapacity persists), Canada (as long as the incapacity persists or until 68 years old), Estonia (182 days), France (as long as the incapacity persists), Israel (see above), Netherlands (see above).

- [4] <i>protection against termination of employment</i>

Austria

The only specific protection for the worker affected by an illness or accident consists of a relative financial protection.

In this case, the worker must obtain the payment of the income replacement supported by the employer, even after the employment contract is ended.

Belgium

Two scenarios are taken into account in Belgian law:

- [1] the case of force majeure,
- [2] incapacity to work longer than 6 months.

[1] In the first case, "force majeure" or "an event independent of the worker who could neither foresee nor avert it" which leads to the immediate ending of the employment contract if it makes the execution of it permanently impossible (for example the loss of a hand for a pianist).

Whatever is the cause of the incapacity (non occupational disease or arising from the execution of the employment contract), the employment contract ends immediately.

[2] In the second case, whatever is the cause of the incapacity (non occupational disease or arising from the execution of the employment contract), work disability terminates the employment contract after a period of 6 months starting from the first day of incapacity (Articles 58 and 78 of the Act of 3 July 1978 on employment contract).

When, after consolidation of his condition, the worker remains unable to work, the employer may also terminate the employment contract upon payment of a severance pay providing that:

- The employer is objectively or technically unable to assign the worker affected by an incapacity to another job,
- The desired assignment cannot reasonably be required from the employer for reasons duly justified.

Bresil The only protection offered is for an accident at work or an occupational disease. The protection is for 12 months starting on the day of the accident or when the occupational disease does not allow the worker to work anymore.

Canada

In terms of accident and occupational disease, the *Act Respecting Industrial Accidents and Occupational Diseases (ARIAOD)* provides the worker a right to return to work, modulated by the nature of his employment contract with the employer, when he is again able to perform his duties. While the worker bound by a contract of indefinite duration has the right to return to work, the one bound by a fixed-term contract can only get his job back before the end of his contract, and for the

remaining term of it (s. 237 *ARIAOD*). Section 32 of the *ARIAOD* also prohibits the employer from dismissing a worker who has suffered an employment injury (accident or illness) or has exercised a right conferred by this Act.

If the illness or accident is not the result of an employment injury, the *Act respecting Labour Standards (ARLS)* provides that a worker may be absent for a period of 26 weeks over a period of 12 months because of a disease, organ or tissue donation for transplant or an accident. However, he may be absent for a period of 104 weeks if he suffers serious bodily injury during or resulting directly from a crime offence that renders him unable to hold his regular position (s. 79.1 *ARLS*). To qualify for such leave, the worker must have held his employment continuously for three months. The *ARLS* provides that the absence is without pay. When the worker is able to work again, he has a right to return to work (s. 79.4 *ARLS*). The *Act respecting Labor Standards* is of public order and Section 122 prohibits an employer to dismiss a worker who exercises his right to absence due to illness or injury. The worker can complain to the Labour Standards Commission, an administrative tribunal (s. 123 *ARLS*).

Estonia

The worker is entitled to protection against termination of employment (however, this is not specified)

Finland

Employees cannot be dismissed because they are sick. But if the sickness does not allow an employee to perform his or her duties, he or she can get another type of work.

In case of total incapacity for work, they are entitled to a pension.

France

The worker who has a work disability cannot be dismissed for a reason related to his disability until a medical report declares him or her able to go back to work.

The period of suspension of the employment contract covers the period of the work stoppage itself, the training, internships rehabilitation, rehabilitation or professional training followed in accordance with the opinion of the « Commission des droits et de l'autonomie des personnes handicapées ». In case of a dismissal during the period of suspension of the employment contract for a cause related to the inability to work (it is the same situation if the worker returns to work part-time), the dismissal is null and entitles the worker to an indemnity in lieu of a notice in addition to a severance allowance.

In the event of unjustified dismissal, the judge may order the reinstatement of the worker.

Israel

The question of the dismissal of the worker affected by an incapacity to work is still debated.

Still, the dismissal may only be given for good cause and with respect of good faith.

Good faith may not be invoked by the employer in a situation of dismissal of an employee for whom he would be personally liable to pay compensation during the period of disability.

In case of permanent partial disability, the employer must take measures that are reasonably conceivable to give the worker access to his workplace.

Labor jurisdictions ensure respect for the execution of labor contracts in cases of illegal dismissal.

Lithuania

The worker is entitled to protection against termination of employment

Hypothesis of accident at work or occupational disease:

The employee is protected against dismissal during the whole rehabilitation period or until the determination of his remaining work capacity.

If the worker is not (temporarily?) able to resume his duties and cannot be assigned to another suitable position, he will receive a statutory amount of compensation until the medical condition of the worker is determined (rate of residual capacity?).

If it is determined (by whom?) that the worker is no longer (permanently?) able to resume his duties, his employment contract is terminated with payment of a termination indemnity equivalent to the average salary over the last two months of work.

Hypothesis of non occupational accident or illness:

The contract of employment will be terminated only if the employee is absent for at least 120 consecutive days (calendar or civil) or for more than 140 non-consecutive days during the last twelve months (calendar).

Niger

The worker is entitled to protection in case of sudden and abusive termination by the employer when the cause of termination is the disease. (what is the nature of this protection?)

Netherlands

The sick employee is protected against dismissal during the first 104 weeks of sickness. Employers in the Netherlands need permission from the labour authorities to be able to terminate an employment agreement. If this permission is granted, it may not be used in the event of a sick employee, unless the employee was not yet sick when the employer filed the request for permission. There are some exceptions to this general rule, for example in the event that the employer closes his business, the sick employee is not protected against dismissal. The sick employee's employment agreement may also be ended (before the expiry of the 104-week period) if the employee constantly fails to comply with the Gatekeeper Improvement Act. The Act allows for the employer first to stop salary payments to the employee and then, if the employee still fails to comply, to terminate the employment agreement. It is also possible for the employer to ask the court to terminate the employment agreement of the sick employee, because of a reorganization for example. Summary dismissal is also permitted if there is an urgent cause.

Portugal

The worker is entitled to protection against dismissal, except in cases of force majeure resulting from the total and final permanent incapacity of the worker.

In this case, the employer may terminate the contract of employment.

Serbia

Illness or long-term absence does not allow the employer to terminate the employment contract (Labor Laws).

In addition, employers are required to hire a certain number of people affected by a disability (Law on professional rehabilitation and employment of persons with disabilities).

Employers are required to provide work adapted to workers who have suffered a disability due to an accident at work or an occupational disease.

Only upon refusal of this work can the employer terminate the contract, subject to the right of the worker to exercise his rights in the courts.

Switzerland

Dismissal given during the period of protection is invalid.

This period includes for illness or accident:

- The first 30 days of incapacity during the first year of employment,
- The first 90 days from the second year until the fifth year of employment,
- And 180 days from the sixth year of employment.

In case of pregnancy, the period of protection extends to the duration of pregnancy and 16 weeks after delivery.

Taiwan

- 12.1 Under section 13 of the Act respecting labor standards, an employer may not terminate the contract of a worker who receives a salary as a result of illness, disability or injury resulting from an occupational activity, unless the employer cannot continue to operate his business due to an "act of God", a disaster or other force majeure and that prior approval was obtained from authorities.
- 12.2 Under section 23 of the Act to protect workers in case of accidents at work, an employer may not terminate an employment contract of workers who suffer from a disability, illness or accident resulting from occupational activity, unless one of the following conditions is met:
 - A. The employer's business is closed or suffered heavy losses and received approval of a competent authority.
 - B. When medical treatments of the worker are completed and a public health authority confirms that the latter has mental or physical problems that make him unable to work.
 - C. The business of the employer can not go on due to a natural disaster, incident or other "acts of God" and has obtained approval by the authorities.

USA

Most employers are required to make reasonable accommodations for disabled workers under the *Americans with disability Act* (ADA). Reasonable accommodations enable the worker to perform his « essential job functions » without imposing « undue hardship » on the operation of the business ».

- [5] <i>the possible cumulation of the compensation with remuneration or other social benefits</i>

occupational diseases:

Austria

It is possible to cumulate 50% income replacement of the employer and social security benefits.

Belgium

Compensation may be combined with those granted under all other branches of social security or under private insurance, unless otherwise required in the other regulations on the subject.

However, there are specific rules pertaining to three situations:

- In case of cumulation with a pension, the compensation is reduced to the minimal compensation, which is that of the complementary benefit;
- In case of cumulation with a compensation for accidents at work, the amount of compensation for occupational disease is limited so that the sum of the two benefits does not exceed the amount of the maximum basic salary;
- Cumulation with other type of compensation is allowed, just like the system for accidents at work.

accident at work

Austria

See above

Belgium

Compensation may be combined with those granted under all other branches of social security or under private insurance, unless otherwise required in the other regulations on the subject.

Thus, in the case of cumulation with a pension (65 years old), the compensation is reduced to the amount of the minimal compensation, that is of the complementary benefit.

Non occupational disease :

Austria

See above

Belgium:

Since the benefit of income replacement is determined by the end of any activity, there can be no competing earnings , whether in the form of:

- guaranteed earnings,
- During the period of holiday pay,
- During the period covered by termination fee,
- Or during the period covered by a full allowance of career break.

In some cases, a combination of earned income or social benefit with work incapacity benefits is authorized. However, following this combination, the amount of compensation for work incapacity will be reduced.

Finally, if, for the same prejudice, the worker is entitled to benefits under any other law, no incapacity benefit will in principle be given.

Canada

Any income received by the worker during the week compensated reduces the amount of the benefit granted (whether it be earnings, holiday pay or benefits for occupational disease or accident at work).

If the worker has exhausted the number of weeks of sickness benefit possible or receives benefits lower than the threshold for eligibility for Social Solidarity program benefits, the worker may apply to the welfare of the province .

Estonia

No remuneration for work can be earned during the period during which the compensation for temporary incapacity for work is perceived.

However, the worker will receive all social and family benefits to which he is entitled.

Israel

The work incapacity which may affect a worker can find its cause both in the execution of his employment contract and outside of said execution.

In this case he can combine both compensations.

When the incapacity does not find its cause in the execution of contract of employment, the employee will receive an income replacement indemnity from two sources, namely the compulsory private insurance and the national insurance. These benefits may also be combined.

Lithuania

The worker may not combine the compensation awarded by the State Fund for Social Insurance with other social benefits. He is required to make a choice between these benefits.

Niger

The compensation of the work incapacity or the incapacity pension can be combined with other social benefits {unspecified}.

What happens if in cases of earnings other than social benefit?

Netherlands

Social benefits are deducted from the amount of 70% of the salary that the employer must pay during the first 104 weeks.

It is possible to combine the replacement indemnity with private insurance.

Portugal

The worker can combine compensation for non occupational incapacity and compensation for accident at work or occupational disease.

The common law indemnity is however limited to the difference between his basic amount and the amount of compensation received for incapacity resulting from an accident at work or an occupational disease.

Compensation for permanent disability resulting from an occupational disease excludes any compensation for temporary or permanent incapacity already compensated as an occupational disease.

The worker may not combine compensation for common law incapacity with periodic payments that would be paid by his employer regardless of the execution of employment contract or due to retirement.

Serbia

"The combination of benefits is possible, but the question is not clear enough"

Switzerland

This indemnity may be combined, provided that the insurance supporting it did not expressly include a clause of over-compensation allowing a limit to its contribution up to 80% or 100% of the insured salary if combined with that of other insurers.

USA

This vary by state.

B. PROPOSITIONS

Both the "Common Law" system or the "Latin" one guarantee a replacement income to workers who have an inability to work, whatever if the inability arises from an occupational hazard or occurred outside the execution of the contract of employment safety at work

This social protection is achieved either by the obligation made to the employer to get insurance for the benefit of its employees, or by the levy of social security contributions for supplying a social security organization responsible for this protection.

We can only rejoice of the protections that already exist and hope that in the future, given the current economic and social climate, these protections can be maintained and to guarantee workers an income that allows them to live in dignity.

C. TOPIC FOR NEXT YEAR

Well being at work: Health and safety at work