

LEGISLATION RELATING TO STAFF REPRESENTATION IN UNDERTAKINGS

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PART I – EXPLANATORY GUIDE

Introductory remarks

The implementation of the Law of 23 July 2015 on reform of the social dialogue¹ involves wide-ranging changes to the landscape regarding the representation of staff within undertakings. Above all, the abolition of central and divisional delegations, and of young workers' delegations and joint committees, will bring about significant changes in a great many undertakings.

However, the delegations and committees hitherto in place have, for the time being, been maintained. This is due to the fact that the entry into force of the new legislative provisions is to take place only gradually. Thus, from 1 January 2016, serving delegates have benefited from a number of innovations regarding their status and remit and the means at their disposal, whereas the effects of other new elements will not be felt until the outcome of the next elections within the undertaking. It is only then, for example, that joint committees will be replaced, with their competences being transferred to the delegations.

This publication does not deal with Title II (Representation of employees in *sociétés anonymes* [public limited companies]), Title III (the European Works Council and the procedure for informing and consulting workers on a cross-border basis) or Title IV (Involvement of workers in European companies) of Book IV (Representation of Staff) of the *Labour Code*.

TITLE I – Strengthened position as from 1 January 2016

The new legislation strengthens the position of the staff delegation with effect from 1 January 2016 as regards the scope of its tasks and the means and resources at its disposal, as well as the status of its members. ***Those elements introduced by the 2015 Law that are new compared to the previous legislation are indicated below in bold italics.***

Chapter 1. – Tasks of staff delegates

Section 1. – Staff delegation

1.1. General mission²

The general task of the staff delegation ("the Delegation") is to safeguard and defend the interests of employees with regard to working conditions, security of employment and employment status.

In that context, it is called upon to intervene to prevent and settle disputes, whether individual or collective, that may arise between the employer and the staff. It may submit any claim to the employer and may, where disputes prove incapable of amicable settlement, refer a complaint or observation to the *Inspection du Travail et des Mines* (Labour and Mines Inspectorate – ITM).

In exercising its remit, it must ensure strict compliance with the rules concerning equal treatment within the meaning of Title V of Book II of the Labour Code as regards access to employment, training and career advancement, as well as pay and working conditions. The authors of the draft Law have clearly stated that the Delegation's remit covers the monitoring of equal treatment generally (based on criteria such as religion, beliefs, age, handicap, sexual orientation, race or ethnicity) and not equal treatment as between men and women, which falls within the remit of a specific delegate, the Equality Delegate.

¹ *Mémorial* No 144 of 27 July 2015: <http://www.legilux.public.lu/leg/a/archives/2015/0144/index.html>

² Articles L. 414-1 and L. 414-2.

The Delegation is additionally vested with rights to be informed and consulted, as described in detail below, subject to the qualification that the employer and the social partners are free to define the information and consultation modalities, even where these are different, by way of negotiated agreement.

1.2. – The right to be informed³

Under the legislation, the term "right to be informed" means that the employer is required to send to the Delegation information enabling the latter to take cognisance of the relevant subject-matter, to conduct an adequate study and, where necessary, to prepare for consultation. ***The new Law allows the Delegation to ask the head of the undertaking to provide additional information where the Delegation considers that the information already provided is insufficient to enable it to carry out its tasks. However, such request by the Delegation must remain within the confines of the limits to the information with which it must be provided by law.***

General information regarding the life of the undertaking

The head of the undertaking is required to communicate to the Delegation all such information as is necessary for the proper performance of its task and which may enlighten its members regarding the functioning and life of the undertaking, including recent developments and the way in which its activities are likely to develop in the foreseeable future, as well as its economic situation.

In undertakings employing at least 150 staff, such information must be communicated upon request by the Delegation or monthly.

In undertakings employing fewer than 150 staff,⁴ such information must be communicated on the occasion of meetings between the delegates and the management of the undertaking. Additionally, in such undertakings, the management is required to inform the Delegation at least once in every year of the undertaking's economic and financial development and of its recent and future activities. To that end, it must submit to the Delegation a comprehensive report on the undertaking's activities, turnover, global production and operating results, orders, developments concerning the structure and amount of staff remuneration and any investments made.

General information regarding health and safety in the workplace

The head of the undertaking is further required to communicate to the Delegation, and to the Health and Safety Delegate, all necessary information concerning:

- health and safety risks and protection and prevention measures and activities concerning both the undertaking generally and each type of job or function;
- the protection measures needing to be taken and, where necessary, the protection equipment to be used;
- ***developments regarding the rate of absenteeism.***

That information (apart from information concerning the rate of absenteeism) must also be provided to any external undertaking intervening in the undertaking; in such cases, the external undertaking must in turn transmit the information in question to its own Delegation.

1.3. – The right to be informed and consulted⁵

In certain areas, the Delegation must be not only informed but also consulted, whilst in some cases it will be required to deliver an opinion. Consultation is defined as an exchange of views and the establishment of a dialogue between the delegates and the employer, on the basis of the information provided by the latter. In those areas where consultation is obligatory, the Delegation has the right to put forward opinions, to meet with the employer and to obtain a duly reasoned response to its opinions, notably with a view to reaching, as the case may be, an agreement regarding decisions falling within the powers of the employer.

The *Labour Code* provides that, as regards information and consultation, the Delegation is tasked with:

³ Articles L. 414-1 and L. 414-2.

⁴ Save in so far as may be otherwise stated, provisions subject to a threshold condition are applicable where the respective number of staff employed within the undertaking is reached during the 12-month period prior to the first day of the month in which notice of the elections is announced.

⁵ Articles L. 414-1 and L. 414-3.

- giving its opinion and putting forward proposals regarding any question that relates to improvement of the working and employment conditions of the staff and their employment status;
- giving its opinion on the drawing-up or modification of the undertaking's internal rules, and strictly monitoring the application and enforcement of those rules, as well as proposing modifications to the internal rules; in response to any such proposals for modifications, the management⁶ must then take a decision within not more than two months, which decision must be communicated immediately to the Delegation;
- promoting the integration of persons disabled by an accident and handicapped persons, and devoting itself to the creation of jobs appropriate to their physical and intellectual capacity;
- participating in protection in the workplace and its environment and prevention of accidents in the workplace and occupational diseases;
- giving its opinion prior to the setting-up, modification or discontinuance of a supplementary pension scheme.

The following competences are henceforth added:

- participating in the implementation of the policy for **preventing harassment and violence in the workplace**;
- giving its opinion on questions relating to **working time**;
- participating in the management of measures in favour of young persons and advising the employer on all questions relating to the working conditions and protection of **young workers**;
- collaborating in the **implementation of internal reclassifications**;
- promoting **a healthy balance between family life and professional life**;
- with regard to **vocational training**: collaborating in the establishment and implementation of any basic vocational training and in particular apprenticeships, as well as giving its opinion on plans for ongoing vocational training. According to the authors of the draft Law, this is intended to cover all training plans, whether or not they are co-financed by the public authorities. In undertakings employing more than 100 staff, the Delegation's task additionally includes participating in the training of apprentices and the management of apprenticeship centres where these exist.

Moreover, the Delegation must be informed and consulted,

- along with the Equality Delegate, on the situation, structure and probable development of employment within the undertaking, and on any anticipatory measures envisaged, in particular where there is a threat to employment. To that end, the head of the undertaking must in particular provide the Delegation and the Equality Delegate every six months with statistics, broken down according to gender, on the recruitment, career advancement, re-assignment, pay and training of employees;
- on decisions likely to lead to substantial changes in work organisation or in employment contracts, including decisions covered by the legislation on collective dismissals, the safeguarding of employees' rights in the event of transfers of undertakings, **and recourse to temporary employees**;
- on the conclusion of employment support contracts and pre-employment contracts, likewise along with the Equality Delegate, and
- on the management of company benefit schemes set up within the undertaking for the benefit of employees and their families, including measures designed to ensure or facilitate accommodation for employees. **To that end, the head of the undertaking must provide the Delegation, at least once per year, with a management report. Where the employees make a financial contribution to the company benefit scheme, that management report must be formally approved by the Delegation.**

There are no precise rules laying down the way in which the information is to be provided and in which consultation is to take place. However, the employer is required to fulfil its obligations in this regard at such time, in such fashion and/or using such means, and with such content as is appropriate. Lastly, it should be stated that Article L. 414-1 et seq., the content of which is hereinbefore set out, provide only a general overview of the areas in which the information and consultation obligations are applicable. This list is not intended to be exhaustive, and must where necessary be considered together with other articles governing in greater detail the areas

⁶ Or, as the case may be, with effect from the next social elections, in undertakings employing at least 150 staff: the persons participating in the meeting provided for by Article L. 414-10 (meeting between the employer and the Delegation concerning points subject to co-decision, which must take place at least once every quarter).

concerned or providing for other more specific competences. By way of example, where an employer employing at least 150 staff is planning to dismiss an employee, it must first call upon the employee concerned to attend an interview and send the Delegation a copy of the letter calling on the employee to attend that interview.⁷

Section 2. – The Health and Safety Delegate⁸

Each delegation must have a delegate specifically tasked with dealing with safety matters, and henceforth also **health in the workplace**, known as the Health and Safety Delegate. He or she is designated by the Delegation itself from amongst its members or from amongst the other employees of the undertaking. **Where the Health and Safety Delegate is not an elected member of the Delegation, he or she may attend all meetings, but in an advisory capacity only.**

Without prejudice to the general remit of the Delegation itself in health and safety matters, the Law reserves unto the Health and Safety Delegate the right to take certain specific courses of action, such as the right to carry out inspection tours both in the undertaking's head office and on its sites or other temporary workplaces. In principle, he or she may carry out such tours each week, save in the administrative departments, where no more than two such tours may be carried out per year. He or she must be accompanied on those tours by the head of the undertaking or the latter's representative. The person in charge of the part of the undertaking which is the subject of the inspection tour and the person in charge of maintenance shall also take part therein. Self-evidently, those persons must be given sufficient advance notice informing them of the tour.

The Health and Safety Delegate must deposit the results of his or her findings, countersigned by the departmental head, in a special register to be kept in the offices of the undertaking, where they may be inspected by members of the Delegation and by the ITM. In urgent cases, where the findings in question call for immediate intervention, the Health and Safety Delegate has the right to contact the ITM directly, on condition that he or she also informs the head of the undertaking and the other delegates at the same time.

Moreover, at or prior to the start of an inspection visit by its inspectors, the ITM is required to give notice of such visit to the Chair of the Delegation, who must then pass that information on to the Health and Safety Delegate and the Equality Delegate having competence for the workplace in question. Those persons will then be entitled to be present during the visit.⁹ As regards the Health and Safety Delegate, the ITM may even request his or her presence and assistance during inspection tours and in the investigation of accidents. The *Labour Code* provides that the Health and Safety Delegate may not suffer any loss of remuneration on account of his or her absence from normal work duties occasioned by such inspection tours or the provision by him or her of such assistance.

The Health and Safety Delegate must in addition be consulted and informed by the employer regarding:

- the evaluation of risks in respect of health and safety in the workplace, including those concerning groups of employees at particular risk;
- protection measures and equipment;
- declarations to be submitted to the ITM under Article L. 614-11, that is to say, in the event of an accident in the workplace or in the case of an occupational disease;
- any action which may have significant effects on health and safety;
- the appointment of designated employees to deal with protection against, and the prevention of, occupational risks;
- measures taken, and dealings with, external services regarding matters of first aid, urgent medical assistance, rescue and firefighting, and evacuation;
- recourse to competent bodies outside the undertaking with a view to organising protection and prevention activities;
- the provision to each employee of adequate training in the interests of his or her health and safety;

⁷ Article L. 124-2.

⁸ Article L. 414-14.

⁹ Article L. 614-3.

- **the evaluation of the risks that the undertaking's activities may pose to the environment, and any measures taken to protect the environment, in so far as health and working conditions are concerned;**
- **changes in the rate of absenteeism.**

The Health and Safety Delegate is entitled to request the employer to take appropriate measures and to submit to him or her proposals in that regard, such as to reduce all risk for the employees or to eliminate sources of danger. He or she must work in close collaboration with the employee(s) designated by the employer pursuant to Article L. 312-3 in relation to activities to protect against, and to prevent, occupational risks faced by the undertaking or establishment.

Section 3. – The Equality Delegate¹⁰

One of the members of the Delegation (either a **full member or a substitute member**) shall also act, throughout the duration of his/her mandate as a delegate, as the Equality Delegate. **Even where the Equality Delegate is merely a substitute member, he or she may participate in all decisions relating to his/her special mandate and may attend all meetings of the Delegation in an advisory capacity.**

The Equality Delegate is tasked with defending equal treatment between men and women as regards access to employment, training and career advancement, as well as pay and working conditions. He or she must in addition ensure that employees are protected against sexual harassment. To that end, he or she is empowered in particular, either on his/her own or in concert with the Delegation (but only in relation to matters concerning gender equality),

- to issue opinions and put forward proposals: in particular, he/she may issue an opinion prior to the creation of any part-time posts, propose to the employer actions to raise awareness amongst the employees, and submit a programme of measures to the employer;
- in the event of any dispute: to submit to the employer any claim by an employee, take steps to prevent and reconcile any differences that may arise between the employer and staff members, and, where such differences cannot be amicably settled, refer them to the ITM. In addition, he/she is empowered to assist and advise any employee who feels him/herself to be a victim of sexual harassment¹¹;
- in training matters: to collaborate in the establishment and implementation of any **basic vocational training schemes**, notably apprenticeship schemes, and to ensure that apprentices receive training in equality matters;
- as regards contact with staff members: to summon employees of one or other gender to appear, separately, and to hold consultations in an appropriate location, either outside or during working hours. In the latter case, the Equality Delegate must agree with the head of the undertaking the time at which, and the arrangements whereby, such consultations are to be organised; their duration will be charged to his/her time-off rights.

Alongside these general tasks, the Equality Delegate has a number of further prerogatives provided for in various places throughout the *Labour Code*. For the most part, he/she shares those prerogatives with the Delegation or the Health and Safety Delegate. These include, for example, the right to be informed and consulted in certain areas such as the situation, structure and development of employment,¹² the conclusion of employment support contracts and pre-employment contracts,¹³ positive action projects,¹⁴ risks for pregnant and/or breastfeeding women¹⁵ and the right to attend ITM inspections¹⁶ and consultation of the files of staff members.¹⁷ In addition,

¹⁰ Article L. 414-15.

¹¹ Article L. 245-6(1).

¹² Article L. 414-3(2).

¹³ Article L. 414-3(4).

¹⁴ Article L. 243-3(3).

¹⁵ Article L. 334-1.

¹⁶ Article L. 614-3(2).

¹⁷ Article L. 414-17.

the Equality Delegate plays a role in the procedure for hiring a person of the under-represented sex.¹⁸

Chapter 2. – Status of staff delegates

Section 1. – Obligations of delegates¹⁹

1.1. – Internal rules

Delegates are required, *in the exercise of their mandate, to respect the internal rules, but without any possibility of those rules being applied in such a way as to impede them in the performance of their tasks.*²⁰

1.2. Obligation to inform the management before leaving their normal employment position

Delegates are obliged to inform the head of the undertaking before leaving their normal employment position. They may do so, without any reduction of pay, in order to perform their statutory tasks. However, two conditions must be fulfilled: *the head of the undertaking must be informed, and the smooth running and operation of the service must not be impaired.* It follows that, if it is impaired, the employer may prevent the delegate from leaving his or her normal employment position.

1.3. Professional secrecy

Delegates remain bound to observe professional secrecy, on pain of being liable to criminal sanctions.²¹ The same applies to advisers and *experts*. This professional secrecy obligation applies automatically in relation to all matters concerning manufacturing processes. It also extends to all other information expressly classified as confidential. Consequently, the head of the undertaking may, on a case-by-case basis, require delegates to treat certain information as being confidential, and the latter are then bound to keep it secret. The head of the undertaking may further refuse to communicate information or to engage in consultations where the nature of the information in question is such that, on the basis of objective criteria, its disclosure would seriously impair the functioning, management or future of the undertaking, would cause prejudice thereto or would compromise a planned operation. Where delegates consider that the classification of information as confidential, or a refusal to provide information or to enter into consultations, is unjustified, they may refer the matter to the Director of the ITM. Such an action will be time-barred after *fifteen days* and will trigger an obligation for the ITM to adopt a duly reasoned decision within 8 days. Finally, that decision may be the subject of an application for annulment, to be made to the *Tribunal administratif* [Administrative Court] within 15 days after notice thereof has been given to the interested parties.

Section 2. – Duration of the mandate²²

2.1. End of the mandate

Delegates are elected for a term of five years, and are eligible for re-election.

Where a delegate is not re-elected, his/her mandate will come to an end upon the installation of the new Delegation. However, the mandate of a delegate may also come to an end, in the absence of elections, where he or she:

- ceases to be a staff member;
- resigns from his/her mandate as a delegate;
- ceases to be a member of the trade union which put him or her forward as a candidate;
- dies; or
- *ceases to hold the authorisations required in order to be able to work.*

¹⁸ Article L. 242-2(1).

¹⁹ Articles L. 415-1 and L. 415-2.

²⁰ Article L. 417-1.

²¹ Article L. 417-5.

²² Articles L. 415-3 to L. 415-5.

2.2. Replacement

Where the mandate of a full member of the Delegation comes to an end for one of those reasons, his/her substitute will be called upon act in his/her stead and to replace him/her definitively.

Moreover, the substitute will replace the full member during the latter's absence where the full member is prevented only temporarily from exercising his/her functions.

2.3. Reinstatement of delegates in their old job

Where, during his or her mandate, a delegate is given a time-off right corresponding to at least 50% of his/her working time, account is taken, for the purposes of his/her full reinstatement in his/her old job or an equivalent job, of the theoretical development of his/her career.

The theoretical development of careers is determined by common accord between the head of the undertaking and the Delegation. Their agreement in that regard must also cover the participation of delegates in ongoing vocational training provided by the undertaking, in particular training relating to the job occupied prior to the mandate and, where necessary, training relating to an equivalent new job to be occupied during or upon the expiration of the mandate of the delegate in question.

Section 3. – Protection against dismissal²³

Full and substitute members, including health and safety delegates and equality delegates, are afforded special protection,

- both during the currency of their mandate and during the first six months following the expiration or cessation of their mandate; and
- in the case of candidates for election, for a period of three months from the presentation of their candidacy. ***Where the results of elections are contested and they are followed by new elections, that period is extended until the date of the new elections.***

The special protection afforded to delegates is such that the employer is prohibited from dismissing them. Where a delegate enjoying such protection is dismissed or, as the case may be, summoned to attend an interview prior to dismissal, that delegate may opt to apply:

- either for the dismissal to be annulled, with the delegate being retained or reinstated in the undertaking, or
- ***for the employment contract to be terminated and for payment of compensation by the employer.***

An exception is provided for where the undertaking is closing down. In that event, with effect from the cessation of all activity, and on condition that the closure is total and definitive, the delegates' mandates automatically cease and they may be dismissed.

Moreover, under the legislation, the head of the undertaking may announce that a delegate is to be suspended on grounds of serious misconduct. Such suspension constitutes a provisional measure pending a ruling of the employment tribunal on the employer's application for termination of the delegate's contract of employment. It has the effect of suspending performance of the employment contract. The person concerned may no longer enter the establishment, but will nevertheless continue to be entitled to receive his/her salary for three months.

The new Law provides that the suspension must be accompanied by a statement of reasons and may not be ordered during any period of protection on grounds of the delegate's sickness. A delegate who is the subject of a suspension measure may, at his/her option, bring judicial proceedings either for an order requiring his/her remuneration to continue to be paid beyond the end of the 3-month period, pending the final ruling on the application for termination of the employment contract or, if he/she does not wish under any circumstances to return to his/her job, for ***termination of the contract of employment together with an award of damages.***

Where the employment tribunal refuses to grant the employer's application for termination of the contract, the suspension is automatically annulled and its effects are automatically cancelled, that is to say, the delegate may return to his/her job and any salary lost during the suspension period must be paid to him/her retroactively.

²³ Articles L. 415-10 and L. 415-11.

Lastly, the new Law enshrines the case-law prohibiting the modification of an essential element of the contract of employment of a delegate on the same grounds as those on which he/she was dismissed.

By reason of the complexity of these new procedures, employers are recommended in such situations to contact a FEDIL adviser before resorting to a sanction vis-à-vis a delegate.

Chapter 3. – Means and resources available to staff delegates

Section 1. – Time²⁴

1.1. Time-off rights

Delegates are entitled to leave their normal employment position in order to fulfil their tasks, and the head of the undertaking must allow them the time needed to do so, remunerating them for such time as working time.

According to the authors of the draft Law, this provision should not be construed as a mere statement of principle concerning the employer's obligations with regard to the exercise by the members of the Delegation of their functions. In point of fact, the concrete modalities for the application of this general principle are regulated by reference to a system of remunerated time-off rights. Thus, depending on the size of the undertaking, delegates are awarded time-off rights proportional to the number of employees that they represent, on the basis of a credit of 40 hours per week,

- at the rate of 500 employees represented in undertakings employing not more than **149 staff**;
- **at the rate of 250 employees represented in undertakings employing between 150 and 249 staff.**

Fractions of hours equal to or greater than one half are rounded up to the immediately higher unit; fractions of hours of less than one half are rounded down to the immediately lower unit.

Examples:

- | |
|--|
| <p>a) Number of staff concerned: 130
Time-off right (hours): $130 \times 40/500 = 10.4$ hours = 10 hours</p> <p>b) Number of staff concerned: 248
Time-off right (hours): $248 \times 40/250 = 39.68$ hours = 40 hours</p> |
|--|

The time-off rights are shared out in proportion to the number of votes received, between all the lists that won at least 20% of the seats at the election.

1.2. Released delegates

In **undertakings employing 250 staff or more**, the head of the undertaking is required to grant a permanent dispensation from service to:

- 1 delegate, where the total number of staff is **between 250 and 500**;
- 2 delegates, where the total number of staff is **between 501 and 1,000**;
- 3 delegates, where the total number of staff is **between 1,001 and 2,000**;
- 4 delegates, where the total number of staff is **between 2,001 and 3,500**;
- 1 additional delegate per tranche of **1,500 employees**, where the total number of staff is greater than **3,500**.

A delegate permanently dispensed from service is released from all work, whilst retaining his/her pay

²⁴ Articles L. 415-5 to L. 415-7.

entitlement and, as the case may be, rights to promotion and advancement.

The released delegates are designated by way of a secret ballot carried out by the members of the Delegation in accordance with the proportional representation rules. However, where the number of staff exceeds **1,000 employees**, the trade unions that are nationally representative, represented within the Delegation and linked to the undertaking by a collective agreement, will each designate one of the released delegates.

The Delegation may decide to convert one or more released delegates into time-off rights, on the basis of 40 hours per released delegate **and in proportion to the number of votes obtained at the election. It must inform the head of the undertaking of such decision. Finally, in the event of suspension of a released delegate, his/her time-off rights will revert to the Delegation, which will share out those hours amongst its members.**²⁵

1.3. Time-off rights of the Equality Delegate²⁶

The Delegation's time-off rights are increased for the benefit of the Equality Delegate. The number of extra hours varies in proportion to the number of staff employed by the undertaking. It is as follows:

- 4 hours per month for between 15 and 25 employees;
- 6 hours per month for between 26 and 50 employees;
- 8 hours per month for between 51 and 75 employees;
- 10 hours per month for between 76 and 150 employees;
- 4 hours per week for over 150 employees.

This additional time-off right is reserved for the exclusive use of the Equality Delegate.

1.4. Meetings

The Delegation may meet once per month during working hours. **At least five working days' notice** of the intention to hold a monthly meeting must be given to the management, save where a shorter notice period is agreed to. However, the Delegation must meet during working hours at least six times per year; of those meetings, three must be held with the management of the undertaking. The head of the undertaking may be invited by the Delegation to take part in the deliberations, but without any right to take part in the voting. The time spent in such meetings is remunerated as working time. Meetings which take place outside working hours are not remunerated, which means, according to the authors of the draft Law, that delegations may meet as many times as they deem necessary where this is not during working hours.

The Delegation meets upon being called to do so by a written notice from its Chair.²⁷ The agenda is drawn up by the Delegation's Board and must be communicated to the delegates at least five days before the meeting. The Chair is required to call meetings at least six times per year, and also whenever at least one third of the delegates so requests in writing. In such cases, the delegates requesting a meeting must indicate the points that they wish to have included in the agenda of the meeting. The Delegation's Board is additionally required to place on the agenda all points specified in a request submitted by at least one third of the members of the Delegation, at least three working days before the meeting. Where, in such a case, the request has been submitted only after the agenda has been disseminated, the Chair must inform the members of the Delegation of it within 24 hours. Finally, a meeting of the Delegation may also be called by the Minister of Labour. He or she may delegate an official of his/her choice to attend such a meeting, at which the latter's views must be heard. The head of the establishment must be invited to attend such meetings called by the Minister.

According to case-law, meeting agendas must succinctly and clearly indicate the matters to be dealt with. The deliberations may relate to all points reasonably and implicitly comprised in the subjects indicated on the agenda. The nomenclature of the subjects to be discussed may be brief, but it must be sufficiently precise to enable the significance and importance of the meeting to be assessed and for cognisance to be taken of any problems that may arise.²⁸

²⁵ Article L. 415-12.

²⁶ Article L. 414-15(4).

²⁷ Article L. 416-3.

²⁸ CSJ 9 February 2011, No 35608.

It has also been held by court judgment that, where a delegate has previously taken part in the meeting without raising any complaint, he/she cannot subsequently plead a failure to comply with these formalities.²⁹

Meetings of delegations are held in camera; accordingly, they may be attended only by delegates (but not, in principle, substitutes unless the Delegation is composed of only one full member) and the head of the undertaking, together with, as the case may be and in the circumstances referred to above, expert advisers, inspectors and public officials.

The former articles allowing central delegations to hold meetings have been repealed with effect from 1 January 2016. Consequently, they may no longer meet, at least not during working hours.

Section 2. – Means of communication³⁰

2.1. Displaying and dissemination of communications

The employer must allow delegations (the Delegation itself plus the Equality Delegate and the Health and Safety Delegate) to display their communications, reports and position statements. Whilst this previously involved posting-up on notice boards, these can now be easily displayed in addition on other ***media which are accessible to staff*** and reserved for such use, ***including electronic media***. According to the authors of the draft Law, the wording of the Law allows information to be disseminated via an internal e-mail system (INTRANET). However, the information displayed or disseminated must have a direct connection with the statutory remit of the delegates.

Delegates elected on a list presented by a trade union (representing its members at the general national ***or sectorial*** level or on the basis of its majority within the Delegation) may in addition:

- request that separate media, reserved for such use, be made available for the display of trade union communications. A copy must be sent to the head of the undertaking simultaneously with the display of the communication concerned;
- disseminate publications and pamphlets of a trade union nature to the employees, within the precincts of the undertaking and in places to be agreed with the head of the undertaking.

2.2. Contact with employees

Members of the Delegation have the right to enter into contact with all employees of the undertaking. For that purpose, they are authorised to move freely within the undertaking, on its sites and in other workplaces of a temporary nature, after informing the employer. They also have the right to contact employees by all means of communication available within the undertaking.

2.3. Access to personnel files

Each employee has the right to access the personnel files relating to him or her twice per year during working hours; on that occasion he or she may arrange to be assisted by a delegate or by the Equality Delegate, who are bound to maintain confidentiality regarding the contents of those files to the extent that they have not been released from that obligation by the employee concerned.

2.4. Consultation hours³¹

The Delegation may provide for consultation hours in its premises for employees of the undertaking.

Where the Delegation includes one or more released delegates, those consultations are carried on by the latter during working hours at times fixed by the Delegation and communicated in advance to the head of the undertaking. Delegations not comprising any released delegates may provide for consultation hours either outside working hours or during working hours; in the latter case, they must agree in advance with the head of the undertaking the length of time for which the consultations are to take place, the arrangements for organising them and the consultation times, which will be charged to the time-off rights.

²⁹ CSJ 30 June 2005, No 29039.

³⁰ Articles L. 414-16 and L. 414-17.

³¹ Article L. 415-8.

Consultation hours for young workers' delegations have been abolished as from 1 January 2016.

2.5. Annual meeting³²

The Delegation may once a year hold a general plenary meeting with the employees of the undertaking. That annual meeting shall be called by the Chair of the Delegation. The head of the undertaking **may be** invited to attend or to arrange to be represented thereat. The meeting is held in camera, to the exclusion of persons outside the undertaking (trade unions, press, etc.). Save where otherwise provided for by law, it must be possible for such meeting to be held outside working hours and for employees not to be remunerated for attending.

Section 3. – Training³³

The employer is required to allow delegates (Delegation members plus the Health and Safety Delegate and the Equality Delegate) the free time, known as training leave, needed to take part in training sessions, without any loss of pay, at times coinciding with normal working hours. The duration of the training leave may not be charged to the duration of the annual paid leave; it is assimilated to a period of work.

The training sessions for which delegates may register are included in the training events approved each year in the context of a list drawn up by common accord by the employers' professional organisations and the trade unions representing their members at a general national and **sectorial** level. This concerns training sessions organised by trade union organisations or by specialist institutions, including in particular business chambers. **Upon request, the Minister of Labour may officially approve other training courses.**

Training courses attended by delegates must be useful for the performance of their tasks, notably by contributing to the improvement of the knowledge:

- of Delegation members concerning economic, social and technical matters;
- of the Equality Delegate concerning economic, legal, social and psychological matters; and
- of the Health and Safety Delegate concerning health and safety in the workplace.

The duration of the training leave will depend on the number of employees working in the undertaking:

Number of employees	Training leave		Remuneration
Staff Delegation			
15 to 49	1 week	per mandate	1 week to be paid for by the State
50 to 150	2 weeks		
over 150	1 week	per year	to be paid for by the employer
Health and Safety Delegate³⁴			
up to 150	40 hours	per mandate	to be paid for by the State
150 or more			to be paid for by the employer
Equality Delegate			
up to 150	2 half-days	per year	to be paid for by the State
150 or more			to be paid for by the employer

Substitute members are allowed one half of the training hours allowed for full members. Where they become full members of the Delegation during the course of their mandate, that part of the training leave that has already been taken is deducted from the training leave which they are allowed to take as full members.

³² Article L. 415-7.

³³ Articles L. 415-9, L. 414-14(9) and L. 414-15(5).

³⁴ The arrangements for such training leave may be laid down by Grand-Ducal Regulation, which may increase the length thereof where exceptional circumstances arise by reason of changes occurring in the workplace.

Section 4. – Advice and expert assistance³⁵

The Law allows delegations, in certain circumstances, to have recourse to internal or external advisers, as well as the right to have recourse to an expert. On that basis, employers risk finding themselves up against external interlocutors having no links with the undertaking, notably representatives of trade unions. The Law states that, unlike experts, advisers requested to assist by the Delegation are not remunerated by the employer for their participation in meetings.

4.1. Advisers

Where the undertaking has 51 employees or more, the Delegation may invite advisers to attend meetings, whether or not they form part of the undertaking's personnel, for the purpose of considering specific points. Their participation must be requested by a majority of the delegates and is of a purely consultative nature. However, the number of advisers must not exceed one third of the members of the Delegation. **They are proposed by trade unions representing their members at a general national or sectorial level (OGB-L, LCGB and ALEBA) and which either**

- **account for at least one third of the full members elected, in undertakings employing between 51 and 150 staff; or**
- **won at least 20% of the seats at the last elections, in undertakings employing more than 150 staff. Unions that fulfil these criteria may each propose one of the advisers. In this particular case, the number of advisers may even exceed the limit of one third of the members of the Delegation.**

However, the decision-making power rests with the Delegation, which will ultimately designate the advisers having the right to attend meetings, on the basis of the proposals submitted to it. Where the total number to be designated exceeds that of the advisers proposed, the Delegation may approve additional advisers up to the limit of one third of the members of the Delegation. To that end, the trade unions representing their members at a general national or sectorial level and accounting for at least one third of the full members elected are entitled to submit proposals.

4.2. Experts

The Delegation may decide to appoint an external expert (a lawyer, accountant or someone else) where it considers that the matter is decisive for the undertaking or the employees. It must inform the head of the undertaking of its decision and of the nature of the mandate to be conferred. Unless otherwise agreed in advance, the financial burden on the undertaking in this regard is limited to one expert and may not exceed a certain percentage per financial year and per expert (limited to 0.10% by the Grand-Ducal Regulation of 15 December 2017) of the annual total wage bill as declared by the employer to the Centre commun de la sécurité sociale [Joint Social Security Centre] in the course of the previous year.

4.3. Professional bodies

The Delegation may decide, upon request by the delegates or the head of the undertaking, to refer specific questions for joint consideration by an employers' professional body and a trade union representing its members at a general national **or sectorial** level.

Section 5. – Material and financial means

5.1. Accommodation and travel expenses³⁶

The employer is obliged to bear the accommodation and travel expenses incurred by delegates, provided that those expenses are directly related to the exercise of their mandate, except for those incurred in relation to training leave. **Similarly, the employer is under an obligation to facilitate moves between the undertaking's various units, where necessary by making appropriate means of transport available to delegates.** The arrangements for paying those expenses must be agreed between the Delegation and the head of the

³⁵ Article L. 412-2.

³⁶ Article L. 416-6.

undertaking. As the Law refers to expenses incurred in relation to the exercise of the mandate, the assumption must be that the expenses in this regard will only be payable by the employer if they are of an exceptional nature and exceed the expenses normally incurred in the course of a day's work.

5.2. Premises and equipment³⁷

Meetings and consultations must take place within the undertaking in premises which are *appropriate*, and the cost of the equipment supplied to those premises, *including computer hardware and access to the available internal and external means of communication*, together with the office expenses and heating and lighting costs, must be borne by the employer. Consequently, the employer is required to place at the disposal of the Delegation *appropriate* premises in which to hold its meetings and consultations, but those premises do not need to be permanently reserved for use by the Delegation. Only if the Delegation includes released delegates can permanent premises and equipment be requested. Upon request by the released delegates, the employer must also provide the requisite secretariat staff. The premises and equipment made freely available to the Delegation shall remain the property of the undertaking, but the employer must ensure that they are properly maintained. Self-evidently, these facilities may not be used for purposes other than those falling within the ambit of the Delegation's remit.

TITRE II – Monopoly position as from the next elections

The next social elections will be the first following the entry into force of the Law of 23 July 2015. In most undertakings, they will take place on 12 March 2019, which means that all of the changes provided for by the new legislation will become applicable and that the Delegation will be placed in a monopoly position.

Though certain criticisms may be levelled at it as a whole, this element of the reform may offer an advantage. This is because, once the new delegations are in place and undertakings have become accustomed to the new system, there will no longer be any confusion or duplication as between the Delegation and any joint committee. Moreover, during the discussions leading to the adoption of the new Law, FEDIL helped to avoid any lowering of the current thresholds, notably the one giving rise to the involvement of undertakings in the co-decision procedure – which remains at the level of 150 employees.

Chapter 1. – Monopoly in respect of representation

The reform will make itself felt principally in large undertakings employing at least 150 staff and having, prior to the social elections, apart from their staff delegations, joint committees composed equally of the employer's representatives and representatives of the employees. Those committees will cease to exist as from the next social elections, so that the delegates will have a monopoly when it comes to representing the staff.

The elections in question will also mark the end of the young workers' delegations, as well as of the central and divisional delegations. As stated above, transitional provisions have operated to keep alive the old delegations and committees during the period from the entry into force of the Law of 23 July 2015 and the first of the new social elections, which will take place in most undertakings on 12 March 2019.

However, from that time onwards, undertakings employing at least 15 staff will cease to have more than a single Delegation for all the staff, namely the Delegation set up at the level of the undertaking. Alongside it, there will subsist only the employees' representatives on the board of directors of certain *sociétés anonymes* [public limited companies], namely those employing at least 1,000 staff and/or benefitting from a financial participation of at least 25% on the part of the State or a concession from the State.

Moreover – and this is a new element provided for by the Law – staff delegations of undertakings which, although independent of each other, together form an economic and social entity (ESE), will each of them continue, where necessary, to be represented by one or more of their members (full or substitute) within an ESE delegation.

According to the *Labour Code*, the term "undertakings constituting an ESE" means "a group of entities, including those having an autonomous and/or distinct legal personality and those operating on a franchise basis, which

³⁷ Article L. 416-7.

*exhibit one or more characteristics from which it can be concluded that they are not independent and/or autonomous units, but which show a concentration of management powers and identical and complementary activities, or a community of employees linked by identical, similar or complementary interests, with a comparable employment status. For the purpose of assessing whether an economic and social entity exists, all available factors shall be taken into account, such as the fact of having common or complementary structures or infrastructures; of having a common, complementary or coordinated strategy; of having one or more economic beneficiaries who are wholly or partly identical, complementary or interlinked; of having a common, complementary or interlinked management or body of shareholders, or management, leadership or control bodies composed wholly or partly of the same persons or of persons representing the same organisations; or of having a community of employees linked by common or complementary interests or having a similar or related employment status. Where several establishments operate under the same or a broadly similar brand, including on a franchise basis, they shall be deemed to form an economic and social entity within the meaning of this Article.*³⁸

This new representation model has been devised in order to represent the interests of all employees working in the various undertakings comprising the ESE and to replace the former central delegation. It should be borne in mind that the role of the delegation set up at the level of the ESE is limited solely to the provision of information. It has no remit other than the exchange of information between the different undertaking delegations of which it is an emanation. Accordingly, all competences vested in staff representatives are held by them at the level of the undertaking delegations.

Chapter 2. – Monopoly in respect of competences

Section 1. – Transfer of competences

Given that, with effect from the next elections, the representation of the staff will lie exclusively with the Delegation, the competences hitherto reserved to the other organs, in particular the joint committee in undertakings employing at least 150 staff, will be quite simply transferred to the delegates. The same applies as regards its tasks, both in relation to information and consultation and in respect of co-decision.

The new Law reiterates, in essentially unchanged form, the various statutory provisions existing hitherto, but removing references to the joint committee. The subjects in respect of which the employer is required to issue communications remain the same (save for the addition of a supplementary matter subject to mutual agreement between the employer and the Delegation, marked in bold italics below) and – it bears repeating – the competences which the Delegation is to inherit from the joint committee will continue to apply only in undertakings employing at least 150 staff. The most significant novel element is thus to be found, in essence, at the level of the identity of the employer's interlocutors and not in the subjects for discussion.

Section 2. – Information and consultation

First of all, in undertakings employing at least 150 staff, it is no longer the joint committee that must henceforth be informed and consulted by the head of the undertaking about technical, economic and financial matters, but rather the staff delegates.

The information/consultation process will be triggered, in particular, prior to any important decision relating to:

- the production or administration installations and mechanisms;
- equipment;
- working methods and production processes (apart from manufacturing secrets).

The head of the undertaking must underline the effects of planned changes on working conditions and the working environment.

In addition, an information/consultation procedure must take place at least once a year concerning the current and foreseeable needs in respect of the workforce and the measures, notably regarding basic training, advanced

³⁸ Article L. 161-2.

training and vocational retraining, which may, as the case may be, result therefrom for the employees of the undertaking.

The Delegation must continue to be informed and consulted about any decision of an economic or financial nature which may have a decisive effect of the structure of the undertaking or the level of employment. This covers, in particular, decisions concerning the production and sales volumes, the planning and orientation of production, investment policy, plans for the closure or transfer of the undertaking or parts of the undertaking, plans to restrict or expand the activities of the undertaking, plans for the merger of undertakings and planned changes to the way in which the undertaking is organised, or the setting-up, modification or discontinuance of a supplementary pension scheme. In this connection, the information and consultation process must necessarily concern the repercussions which the planned measures will have on the size and structure of the workforce and the employment and working conditions of the staff of the undertaking. In addition, it must concern any social measures, notably regarding vocational training and retraining measures, taken or envisaged by the head of the undertaking.

The information and consultation process must in principle take place prior to the decision envisaged, save where this poses a risk to the management or an operation of the undertaking justifying the provision of the information only three days in advance.

Lastly, the head of the undertaking will be required to inform and consult the Delegation in writing, at least twice per year, about the economic and financial development of the undertaking. To that end, he or she must submit to it a comprehensive report on the undertaking's activities, turnover, global production and operating results, orders, developments concerning the structure and amount of staff remuneration and any investments made.

Where the undertaking is in the form of a *société par actions* [company limited by shares], an *association sans but lucratif* [not-for-profit association], cooperative or foundation, its directors or managers must in addition communicate to the Delegation, before submitting the same to the general meeting of shareholders ("the general meeting") or the decision-making organ, the profit and loss account, the annual balance sheet, the auditors' report and, as the case may be, the report of the board of directors or the management, together with any other document to be submitted to the general meeting or the decision-making organ.

Any divergent positions between the head of the undertaking and the Delegation must be brought to the knowledge of the general meeting or, as the case may be, the manager or managers. Where the undertaking is not in the form of a *société par actions*, divergent positions must be brought to the knowledge of the head of the undertaking if the latter has not taken part in person in the deliberations. In all cases, the head of the undertaking, the board of directors, the decision-making organ and/or the manager must give a duly reasoned account of the steps taken by way of follow-up to the positions expressed.

Moreover, in all undertakings, including those having fewer than 150 employees, only the Delegation will be vested with competence to perform the tasks which, hitherto, have been assigned to it only in the absence of a joint committee (for example, concerning the employment of temporary staff and the temporary secondment of members of the workforce,³⁹ part-time working,⁴⁰ the processing of personal data for the purposes of supervision in the workplace, occupational medicine⁴¹ and priority criteria for allowing employees to take early retirement⁴²).

Section 3. – Co-decision

In undertakings employing fewer than 150 staff, decisions must be taken by common accord between the employer and the Delegation concerning:

- the introduction or application of technical installations or mechanisms aimed at monitoring the behaviour and performance of an employee in his/her job;
- the introduction or modification of measures concerning the health and safety of employees and the prevention of occupational diseases;

³⁹ Article L. 134-1.

⁴⁰ Article L. 123-2.

⁴¹ Articles L. 325-4, L. 326-5 and L. 334-1.

⁴² Article L. 581-4.

- the establishment or modification of general criteria concerning the selection of members of staff for recruitment, promotion, transfer or dismissal and, as the case may be, the priority criteria for allowing employees to take early retirement;
- ***the establishment and implementation of any programme or collective action regarding ongoing vocational training;***
- the establishment or modification of general criteria for staff assessments;
- the establishment or modification of the internal rules, having regard, as the case may be, to any collective agreements in force;
- the grant of rewards to employees who, by their initiatives or proposals for technical improvements, have made a particularly useful contribution to the undertaking, without prejudice to the laws and regulations governing patents and inventions;⁴³
- the processing of personal data for the purposes of supervision in the workplace to meet employees' health and safety needs, or for the temporary monitoring of production or the performance of employees, where such a measure affords the only means of determining the right salary, or in the context of organising work in accordance with flexitime.⁴⁴

The employer and the Delegation must meet at least once in every quarter to discuss the various points subject to co-decision, with a view to reaching an agreement.⁴⁵ The way in which such meetings are to be conducted (which persons are to be present, the agenda, decision-taking, etc.) is provided for in detail by the *Labour Code*.⁴⁶

Chapter 3. – Installation of new staff delegations

Section 1. – Election of staff delegates

As has been the case hitherto, an undertaking is required to arrange for the appointment of staff delegates if it employs at least 15 staff. That threshold of 15 staff must be reached during the 12 months prior to the first day of the month in which the notice announcing the elections is posted up or displayed.

In most undertakings having a Delegation at the time of the entry into force of the Law of 23 July 2015, the first new social elections will not take place until 12 March 2019. However, before that date, the need for early elections may already have arisen:

- pursuant to a decision of the Minister of Labour ordering, in light of an opinion by the representative trade unions represented within the delegation elected, the early renewal of the Delegation on the ground that there is no longer a sufficient number of full members on the list and no longer enough substitute members to occupy the vacant seats;
- where the number of employees of the undertaking has reached the minimum number of staff required for the setting-up of a Delegation.

It will be recalled that the next elections within the undertaking, organised following the entry into force of the Law of 23 July 2015 to take place on 12 March 2019 or on a date prior to that, are to be organised in accordance with the new rules and will render all of the changes introduced by the Law of 23 July 2015 immediately applicable. In the event of early elections, the mandate of the Delegation thus set up or renewed will expire in 2019, at the time of the social elections at national level, unless this results in the duration of its mandate being less than one year, in which event the mandate of the delegates will be automatically extended for a further period of five years.

As regards the organisation of elections in the strict sense of the term, the new Law makes no significant changes, and adds nothing substantially new, to the previous arrangements (computation of thresholds, ballots, eligibility to exercise active and passive voting rights, etc., save that it provides for the age at which employees are now eligible to vote to be lowered from 18 to 16 years and for new procedures in the event of an absence or

⁴³ Article L. 414-9.

⁴⁴ Article L. 261-1.

⁴⁵ Article L. 414-10.

⁴⁶ Articles L. 414-10 to L. 414-13.

insufficiency of candidacies). The number of full and substitute members to be elected has not changed. It remains proportionate to the number of employees working in the undertaking, namely:

Number of employees	Full members of the Delegation	Substitute members of the Delegation
15 to 25	1	1
26 to 50	2	2
51 to 75	3	3
76 to 100	4	4
101 to 200	5	5
201 to 300	6	6
301 to 400	7	7
401 to 500	8	8
501 to 600	9	9
<i>etc. (see Article L.412-1).</i>		

The specific rules governing ballots and electoral disputes have been laid down by [Grand-Ducal Regulation](#).⁴⁷ Furthermore, the [Law of 10 August 2018](#) provides that the head of the undertaking is to be given a code enabling him or her to follow the various administrative steps in the context of the social elections via the electronic platform MyGuichet.⁴⁸

Section 2. – Installation at the level of the undertaking

2.1. Setting-up of the Delegation⁴⁹

The Delegation is set up at a meeting called, within one month following the elections, by the employee who has won the greatest number of votes in the ballot. On the occasion of that meeting, known very appropriately as the "constituent meeting", the Delegation appoints from amongst its full members, by secret ballot and in accordance with the relative majority rules, a Chair, a Vice-Chair and a Secretary. In the event of a tie, the older person shall be elected. Where no elections are held, if the number of candidates putting themselves forward did not exceed the number of delegates to be elected and the candidates have been able to reach an agreement allowing them automatically to be declared elected, the constituent meeting shall be called, on the same conditions, by the oldest full delegate.

A [Grand-Ducal Regulation of 15 December 2017](#)⁵⁰ lays down the points which must appear on the agenda of the constituent meeting. Thus, the agenda must comprise, in order, the following points:

- 1° Designation of an electoral office comprising at least two members, and at least one member of each trade union represented within the staff delegation;
- 2° Election of the Chair;
- 3° Election of the Vice-Chair;
- 4° Election of the Secretary;
- 5° Election of the Delegation's Board;
- 6° Election of the Equality Delegate;
- 7° Election of the Health and Safety Delegate;
- 8° Implementation of Article L.415-5 of the *Labour Code*.

⁴⁷ Grand-Ducal Regulation of 11 September 2018 concerning electoral operations for the appointment of staff delegates.

⁴⁸ Law of 10 August 2018 amending Articles L. 413-1, L. 414-14, L. 414-15 and L. 416-1 of the *Labour Code*.

⁴⁹ Article L. 416-1(1).

⁵⁰ Grand-Ducal Regulation of 15 December 2017 implementing Article L. 416-1 of the *Labour Code*.

Minutes of the constituent meeting, recording points 1 to 8 and signed by the members of the electoral office, must be drawn up and sent to the head of the undertaking and the ITM by no later than five days after the date of the meeting.

2.2. Appointment of the Delegation's Board

The Delegation appoints from amongst its full members a Board, to be chosen by secret ballot from a list in accordance with the proportional representation rules. The Chair, Vice-Chair and Secretary of the Delegation are ex officio members of the Board.

The Board is responsible for the despatch of day-to-day business and for the preparation of meetings. It is composed as follows:

- 1 member, where the Delegation is composed of at least 8 members;
- 2 members, where the Delegation is composed of at least 10 members;
- 3 members, where the Delegation is composed of at least 12 members;
- 4 members, where the Delegation is composed of at least 14 members.

For the performance of its tasks in relation to co-decision matters, the Board shall be enlarged by at least one delegate, in proportion to the number of votes obtained, from each list represented in the Delegation but not represented on the Board. By no later than three days after the constituent meeting, the Chair of the Delegation must communicate in writing, to the head of the undertaking and the ITM, the names of the Vice-Chair and Secretary and the names of the members of the Board.

2.3. Appointment of specialist delegates

The Delegation shall, at the constituent meeting, appoint the Equality Delegate (from amongst its full or substitute members),⁵¹ together with the Health and Safety Delegate (from amongst its members or from amongst the other employees of the undertaking)⁵² and must, within the next three days, inform the head of the undertaking and the ITM, in writing, of their names. Since, under the Law, those persons can only be appointed during the course of the constituent meeting, any vacancies arising in their posts cannot be filled until the outcome of the next social elections.

2.4. Provision of information and training upon starting

In order to help newly elected delegates properly to take up their duties and tasks, the *Labour Code* provides that they are to be informed by the head of the undertaking, at the first meeting after the constituent meeting, about the structure of the undertaking, any links that it has with other undertakings, foreseeable economic developments, the employment structure, and the policies with regard to ongoing vocational training, health and safety in the workplace and equal treatment.

Moreover, delegates elected for the first time are entitled to 16 hours' additional training leave during the first year of their mandate.⁵³ The training leave of the Health and Safety Delegate, totalling 40 hours, is increased by 10 additional hours for his or her initial mandate in the undertaking concerned.⁵⁴

Section 3. – Installation at the level of the ESE

Where several undertakings form an ESE, a delegation at the level of the ESE may be set up upon request by at least two delegations within the entity.⁵⁵ Requests for the setting-up of a Delegation at that level must be addressed to the respective employers within three months after the social elections.

The ESE delegation is composed of full or substitute delegates from each separate undertaking having a Delegation. The number of delegates per undertaking will depend on the number of persons employed by the undertaking:

⁵¹ Article L. 414-15(1).

⁵² Article L. 414-14(1).

⁵³ Article L. 415-9(2).

⁵⁴ Article L. 414-14(9).

⁵⁵ Article L. 411-3(1).

Number of employees	Full delegates	Substitute delegates
15 to 100	1	1
101 to 500	2	2
over 500	3	3

The members of the ESE Delegation are elected by the undertaking delegations from amongst their members, by secret ballot and on a list basis, in accordance with the relative majority rules. Where the undertakings constituting an ESE include one or more undertakings employing fewer than 15 staff and having no Delegation, a representative shall be appointed by all the employees of that or those undertakings to take part in meetings of the ESE Delegation. That representative is entitled to one half of the hours of training provided for by paragraph 1 of Article L. 415-9 (training leave for full delegates). However, he or she does not enjoy the special protection against dismissal which the *Labour Code* affords to staff delegates.

Where at least three undertakings each employing fewer than 15 staff constitute an ESE and together employ at least 15 staff, an application for the establishment of an ESE Delegation may be made to the ITM by at least 15 employees. The ITM will then fix the date of the elections, which will take place in accordance with the relative majority system.

Where the merits of an application for the setting-up of an ESE Delegation are contested, the parties may have recourse to mediation.

TITLE III – Mediation, judicial applications and remedies, and criminal sanctions

The ITM is charged with monitoring the application of the legislation on staff representation in undertakings and the measures for the implementation thereof. Certain disputes which are not resolved following the intervention of the ITM may now be brought before a mediation board. In addition, all procedures prescribed under the ordinary law, and all judicial remedies, remain available, notably where mediation fails.

Chapter 1. – Mediation⁵⁶

This applies to disputes arising under Articles L. 411-3 (setting-up of an ESE Delegation), L. 412-2 (recourse to expert advisers – although it is not clear which disputes are covered by this, inasmuch as responsibility for defraying the cost of the expert's services is not subject, as it was under the initial draft Law, to the employer agreeing to bear that cost), L. 414-2(7) (requests for additional information), L. 414-9 to L. 414-13 (decisions subject to mutual agreement between the employer and the Delegation) and L. 416-2 to L. 416-7 (organisation and functioning of staff delegations) which are certified as being unresolved within one month following any intervention by the ITM pursuant to Article L. 612-1; such disputes may, within one month from the issue of the certificate in question, be brought before a mediation board or, failing that, before a mediator.

The mediation board is set up within the framework of a collective agreement concluded either at the level of the undertaking or at the sectorial level, or alternatively pursuant to an agreement providing for interprofessional dialogue. The agreement in question designates who is to act as mediator and fixes the time-limits to be complied with, as well as determining who is to bear the costs and the other practical arrangements for the mediation. The mediator thus appointed may arrange to be assisted in his or her task by a representative of the employer and a representative of the Delegation.

In the absence of a mediation board, the parties may, within one month from the issue of the certificate confirming that the dispute has not been resolved, refer the matter to the Director of the ITM, who must summon them within five days with a view to the designation of a mediator, to be chosen by common accord

⁵⁶ Article L. 417-3.

from a list drawn up by the Government. Where the parties are unable to agree who is to act as mediator, the latter is designated by a drawing of lots from the names on that list. That mediator may appoint one or more experts and is assisted by an official of the ITM responsible for providing the services of an administrative secretariat. Where the mediation does not end in an agreement within three months, the mediator draws up a formal record of disagreement and sends this for information to the parties and to the Director of the ITM.

Chapter 2. – Judicial applications and remedies⁵⁷

Any disputes which may arise from the application of the legislation on staff representation within the undertaking fall within the jurisdiction of the *Tribunal de travail* [Labour Court], apart from those relating to the electorate and the regularity of the electoral operations, which are determined by the Director of the ITM, whose decision may be the subject of an application before the administrative courts.

Chapter 3. – Criminal sanctions⁵⁸

Criminal sanctions are provided for in respect of any deliberate act designed to obstruct either the setting-up of a delegation or the unfettered appointment of its members, or their proper functioning or the performance of their tasks.

The same applies in relation to any breach of the relevant obligations regarding access to personnel files⁵⁹ and professional secrecy.⁶⁰

⁵⁷ Article L. 417-4.

⁵⁸ Article L. 417-5.

⁵⁹ Article L. 414-17.

⁶⁰ Article L. 415-2.