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The Littler International Guide provides an overview of workplace laws and regulations of over 45 countries and territories. Written by selected attorneys and scholars from around the globe, as well as Littler attorneys, the *Guide* tracks the employment life cycle in a question-and-answer format, covering over 90 workplace law topics under 14 categories. Each jurisdiction provides responses to the same questions, facilitating comparison across jurisdictions. To meet the needs of our expanding audience, it is now available in a variety of electronic formats.

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Although the major developments are generally covered, this publication is not all inclusive, and the current status of any decision or principle of law should be verified by counsel. Developments and decisions subsequent to **July 1, 2023** are generally not covered.

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§ 1 OVERVIEW OF EMPLOYMENT & LABOR LAW IN BELGIUM

§ 1.1 What are the primary constitutional provisions, statutes, and regulations related to employment?

Belgium is a federal state made up of three regions: the Flemish Region, the Walloon Region, and the bilingual region of Brussels, *i.e.*, the Brussels-Capital Region. Regulating employment is mainly in the hands of the federal government. The regional governments' competences with respect to employment law relate *inter alia* to foreigners' access to the local employment market, redeployment of unemployed employees, and the use of language (Dutch, French, or German) in employment matters.

Belgian legislation on employment & labor law spans thousands of pages and (save some specific areas of employment law) is not codified. Legislation is mainly embodied in parliamentary instruments (acts), royal decrees, and (country-wide and industry-specific) CBAs that are declared generally binding.

A few fundamental federal Acts regulating employment law include:

- The Act of 3 July 1978 on employment contracts
- The Act of 16 March 1971 regulating employment
- The Act of 12 April 1965 on the protection of salary
- The Act of 4 August 1996 on employees' health and safety in the workplace
- The social criminal code of 6 June 2010
- The Act of 8 April 1965 on work regulations
- The Code of 28 April 2017 on health & safety in the workplace

To date, there are about 160 CBAs on a national level applying across each sector of industry and about 165 sectors of industry, each having many collective bargaining agreements applying to employers belonging to their scope of application.

As a member state of the European Union, Belgium is also bound by E.U. directives and regulations (which prevail over federal or regional acts) and collective bargaining agreements in case of conflict.

§ 1.2 What are the primary mechanisms for enforcement?

The Social Inspectorate, which is composed of public officers belonging to the Ministry of Labor, has the task of monitoring employers' compliance with all their obligations under labor law, including collective

bargaining agreements. The Social Inspectorate can decide at its own discretion when to inspect a company. The Social Inspectorate can impose penalties on employers.

If required, the Social Inspectorate can transfer the matter to the public prosecutor who can initiate court proceedings. The court can impose criminal sanctions.

Employees and unions can also file claims before the courts.

§ 1.3 What are the primary means for resolving disputes between employees and employers?

§ 1.3(a) *Conciliation/Mediation*

Social dialogue is one of the key characteristics of employment law in Belgium. Many Belgian law provisions are set forth in collective bargaining agreements between employer representatives and unions. Various labor laws require conciliation/mediation to prevent or resolve conflicts between employers and employees. Parties also can decide to submit their conflict to professional mediators/conciliators. Except in cases of collective actions (*e.g.*, strikes and injunctions sought by employers), where unions often refer the case to state-paid mediators in labor matters, few labor cases are brought before mediators/conciliators, despite recent legal initiatives promoting this type of conflict resolution.

§ 1.3(b) *Litigation Before Court*

Once a case is brought before the labor courts, the parties rarely enter into conciliation/mediation procedures, despite some recent legal initiatives to facilitate such conflict resolution proceedings.

Belgian labor law stipulates a mandatory conciliation phase for disputes that are brought before the labor courts, yet this remains rather theoretical. Once the case is brought before the labor court, it is usually the court and only exceptionally a mediator/conciliator who will end the dispute.

At the occasion of the first hearing, the labor court sets a calendar (in principle by approving the calendar agreed by the parties themselves prior to the hearing) for the exchange of trial briefs. The court also sets a date for a second hearing, during which the parties present their oral arguments (based on the trial briefs). The court makes a decision in principle one month after this second hearing.

The labor courts consist of three judges: one professional judge (civil servant), one representative for an employer organization and one representative for a union organization. A final ruling is made by consensus amongst all three judges, with the understanding that the professional judge does have additional authority especially when it comes to specific legal aspects.

Unless the labor court decides otherwise (which is rather exceptional), the decision by the labor court is enforceable/executable with immediate effect and regardless of any appeal.

A party can challenge the court's decision by filing an appeal with the labor court of appeal. The labor court of appeal follows the same order of proceedings, scheduling hearings, the exchange of trial briefs, and oral arguments before a three-judge panel (one professional judge, one employer representative, and one union representative). The – labor court of appeal renders its decision one month later.

§ 1.4 What are the most important characteristics of the legal culture relating to employment?

Belgian legislation on employment and labor law spans thousands of pages and (save some specific areas of employment law) is not codified. Legislation is mainly embodied in parliamentary instruments (acts), royal decrees, and (country-wide and industry-specific) CBAs that are declared generally binding. Most of these provisions aim to protect employees, so deviations are not allowed unless they would be more favorable to the employees or are explicitly allowed (which is very rare).

Unlike many other European countries, an employment contract can (except for some employee representatives) be terminated immediately at any time without burdensome formalities, third-party approval or a specific pretermination procedure (see **§ 12.1**). Such an immediate breach would entitle an employee to claim compensation in lieu of notice, which would be calculated based on the employee's length of service and salary and is known exactly in advance. A claim of unfair dismissal or discrimination may warrant additional compensation, which typically is rather low (depending on the case, most often between three weeks to six months of extra salary). This approach provides certainty, allowing employers to calculate the exact cost in advance when making a termination decision.

Many rules derive from agreements between employers' representatives and employees' representatives. To date, there are about 160 CBAs on a national level applying across each sector of industry and about 165 industry sectors, each having multiple collective bargaining agreements applying to covered employers. As a result, there are almost no class actions. Most litigations that arise are purely individual and relate to sanctions imposed on the employees or to the termination of the employment contract, such as when the contract has been terminated without notice or compensation in lieu for serious cause.

§ 1.5 What are the five most common mistakes foreign employers make and what can be done to help avoid them?

There are several unique aspects of Belgian law that often take employers by surprise.

One of these is language regulations (see **§ 3.3**). All official communication between an employer and its employees must be in Dutch, French or German, depending on the location of the employer, including employment contracts and bonus plans. While penalties are region-specific, they can be as extreme as a document being null and void. This can have serious consequences, including for multinational employers that rely upon uniform agreements written in only a few common languages. For example, if a noncompetition clause is drafted only in English, it may not be enforceable. Likewise, employer-friendly clauses in bonus plans may not be enforceable if not drafted in the correct language.

Another surprising aspect is that in Belgium, unlike other European countries, an employment contract can be terminated immediately at any time without burdensome formalities, third-party approval or a specific pretermination procedure (see **§ 12.1**). While such an immediate breach would entitle an employee to claim compensation in lieu of notice (calculated based on the employee's length of service and salary), additional penalties in case of any type of claim of unfair dismissal are rather low. This procedure provides certainty, allowing employers to calculate the exact cost of a termination before the decision is made.

Thirdly, a dismissal for serious cause must be carried out within three working days after the person authorized to proceed with the dismissal has acquired sufficient knowledge of the facts. If the authorized person, for example, becomes aware of a theft on Wednesday and proceeds with the dismissal of the guilty employee on Monday, the dismissal is too late, and the employee will be entitled to normal compensation in lieu of notice as if they were terminated without serious cause. (In Belgium, Saturday is considered as a working day.)

A fourth example is dismissal of protected employees (see § 13.3).

A fifth example is the importance of CBAs entered into at the national level and at industry sector level. To date, there are about 160 CBAs on a national level applying across each industry sector, and about 165 industry sectors that have their own collective bargaining agreements. (See § 1.1). These provisions aim to protect employees, so deviations from them are not allowed (not even through collective bargaining agreements at company level), except if such deviations would be more favorable to the employees.

§ 2 HIRING

§ 2.1 What are the definitions of employee, employer, independent contractor, and contingent worker (*i.e.*, a temporary or agency worker)?

An *employee* (or *worker*) is any person who carries out work or renders a service under a relationship of subordination in return for remuneration. Only natural persons can qualify as employees. While differences are vanishing slowly but certainly, there is still a distinction between blue- and white-collar employees and each category still has some distinct rules, mainly regarding the way in which they are paid. Given the extraordinary evolution of the employment market and how work is organized in a company, it is becoming more and more difficult to determine whether a type of work is more manual (blue collar) than intellectual (white collar).

An *employer* is any natural person or legal entity who employs one or more employees.

An *independent contractor* is any natural person or legal entity who performs services for a principal in return for a fee, without any relation of subordination to that principal.

Contrary to some other countries and in spite of modern evolutions such as "platform work," Belgium does not have a third category somewhere in between independent contractor and employee (often called "workers"). Except for civil servants (employed within the public sector), one is either self-employed or an employee. Mandatory employment laws and regulations only apply to employees, not to self-employed. Employees and self-employed each have their own social security regime, with different contributions and different benefits.

The main difference between an employee and a self-employed worker is the existence or absence of employer's authority (*i.e.*, existence of a relation of subordination).

Subordination is the right to exercise hierarchical power or control on someone else. Independent contractors provide their services on a self-employed basis. They are free to organize their working time and their work.

If subordination in fact exists—where the independent contractor in fact works under the direction and control of a company or another person—the independent contractor may be deemed an employee and the relationship may be deemed an employment relationship, for purposes of bringing the worker under the coverage of the labor laws. This may result even if the parties previously agreed on an independent contractor relationship (see § 2.2(a) for further discussion).

A *contingent*, *temporary*, or *agency employee or worker* (also known in Belgium as an *interim employee or worker*) is an employee whose employment contract (with the interim agency) aims at making the employee available to another company (the client of the interim agency).

§ 2.2 What are the consequences of misclassifying a worker as an independent contractor, contingent worker, or temporary worker?

§ 2.2(a) *Misclassifying an Employee as an Independent Contractor*

Parties are free to choose the nature of their collaboration (*i.e.*, employment contract or self-employment). Nevertheless, the given qualification has to correspond to reality (*i.e.*, the actual execution of the collaboration). Work/services that have been initially carried out under an employment contract can in theory at a later stage be performed for the same employer without any link of subordination. The authorities however pay special attention to the changes of a worker's status. If it appears, based on the affiliation form filed by the person concerned, that the worker performed previously the same function, authorities are likely to further investigate.

The main difference between employee and self-employed is the existence or absence of employer's authority (*i.e.*, existence of a relation of subordination). Both the self-employed and the competent public authorities may challenge the qualification.

A requalification from self-employed to employee under Belgian law would in essence have the following consequences for the principal/client/employer:

- the employee may claim the payment of vacation pay, end-of-year premium, overtime salary, severance (in the event of termination), salary for public holidays, benefits imposed by the industry (*i.e.*, the applicable joint committee), etc., computed as of the beginning of the "employment";[1]

- the social security authorities may claim the payment of the employers' contributions (approximately 27%) and the employees' contributions (13.07%) on the paid fees, increased with interest (7%) and penalties (10%), which cannot be recovered from the employee;

- the tax authorities may claim payment of withheld payroll taxes, which can be recovered from the employee; and

- the misclassification as an independent contractor may entail a criminal fine of up to EUR 48,000 or an administrative fine of up to EUR 24,000 (because of the lack of DIMONA, *i.e.*, the electronic declaration by means of which the employer notifies the National Social Security Office of every entry into and out of service of an employee).

There is nothing illegal about working with self-employed persons, not even if the self-employed persons would be devoting 100% of their time working for one single client. Self-employed working relationships are common in Belgium, and in only rare cases self-employed working relationships with white-collar workers are actually reclassified into an employment relationship.

If the performance of the contract reveals sufficient elements that are irreconcilable with the qualification given by the parties, the contractual relationship will be reclassified. The Act of 27 December 2006 sets

[1] Albeit there are differing opinions on the actual statute of limitations. In principle the employee may, where relevant, claim the payment of such amounts computed as of the beginning of the "employment."

forth limited criteria that can be considered for assessing whether the actual performance of the contract is incompatible with its qualification, including:

- the parties' intention;
- the worker's freedom to organize the work;
- the worker's freedom to organize the working time/hours; and
- the existence (or not) of a hierarchical control by one party over the other.

For certain sectors or professions, other criteria apply. The sectors concerned are: construction; transport; security and surveillance; cleaning; agriculture; and horticulture. For these sectors and professions there is a (rebuttable) presumption that an employment contract exists if it appears from the analysis of the parties' working relationship that more than half of the following nine criteria are met:

1. absence of any financial or economic risk for the service provider;
2. absence of liability and decision-making power on the part of the service provider regarding the financial means of the hiring company;
3. absence of any decision-making power for the service provider regarding the purchasing policy of the hiring company;
4. absence of any decision-making power for the service provider regarding the pricing policy of the hiring company, except for prices imposed by law;
5. absence of an obligation for the service provider to achieve a certain result;
6. guaranteed payment of fixed remuneration regardless of the results achieved or regardless of the amount of work actually undertaken by the service provider;
7. not being the employer of freely and personally hired employees or not having the possibility to hire employees or to be replaced in the execution of the agreed work;
8. not appearing—towards third parties or its contractual partner—to be an entity that works mainly or usually for the same contractual partner (the hiring company);
9. the fact that the service provider works in a place that is not owned or rented by the service provider, or the fact that the materials that the service provider is using were provided or financed by the hiring company.

For platform workers specific criteria apply. There is again a (rebuttable) presumption that an employment contract exists if it appears from the analysis of the parties' working relationship that at least three of the following eight criteria are met (or if two of the last five criteria are met):[2]

[2] Art. 337/3, § 2 Program Act (I) of 27 December 2006.

1. the platform operator may demand exclusivity with respect to its field of operation;

2. the platform operator may use a geolocation mechanism for purposes other than the proper functioning of its basic services;

3. the platform operator may restrict the freedom of the platform worker in assessing how the work is performed;

4. the platform operator may restrict the income level of a platform worker, in particular by paying hourly rates and/or by restricting an individual's right to refuse offers of work based on the rate offered and/or by not allowing the individual to determine the price of the service. Collective bargaining agreements are excluded from this clause;

5. the platform operator may require a platform worker to comply with mandatory regulations on appearance, conduct with respect to the recipient of the service or performance of the work (excluding requirements under the law, especially concerning the health and safety of users, clients or workers themselves);

6. the platform operator may determine the prioritization of future job offers and/or the amount bid for a job and/or the determination of ranking by using the information collected and by controlling the performance of the service by the platform workers, excluding the result of this performance, in particular by electronic means;

7. the platform operator may restrict, possibly including by means of sanctions, the freedom of organization of work, in particular the freedom to choose one's own working hours or periods of absence, to accept or refuse tasks, or to have recourse to subcontractors or substitutes, except when, in the latter case, the law expressly limits the possibility of having recourse to subcontractors; and

8. the platform operator may restrict the ability of the platform worker to build up a client base outside the platform or to perform work for a third party.

Under Belgian law, certain contractual relationships are presumed to be bound by employment contracts. For example, complementary services rendered for the performance of a service contract are presumed to be covered under an employment contract, with no possibility to demonstrate the contrary if the service provider and the principal are bound by an employment contract for similar services. This legal presumption relates to the situation where a person carries out salaried work and independent work for the same entity.

Belgian law presumes certain categories of workers to be self-employed. The Royal Decree No. 38 of 27 July 1967, governing the social security contributions and benefits of self-employed workers contains this presumption for the following scenarios:

- Persons who carry out professional activities in Belgium that result in income that is taxable as: (1) benefits of manufactory, commercial company, or a farm;[3] (2) the profit from a liberal profession, official duties, or from a profitable activity, which are other than benefits or

[3] Arts. 3, § 1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed; Art. 23, § 1, 1° of the Code of 10 April 1992 on income tax.

remunerations; and (3) remunerations of managers.[4] This presumption – including that the directors of a company are considered to be self-employed – is rebuttable.

- Persons who hold a mandate for a profit-making association or company.[5]

§ 2.2(b) *Misclassification of an Employee as a Contingent Worker*

The Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users, prohibits the "illicit posting of employees," which occurs when an employer lends employees to a user (third party) who benefits from the work of these employees, and exercises (apart of) the authority that the employer typically would exercise over the employees. Such posting of employees is unlawful and subject to sanctions, except if the users are interim (temporary) agencies (see discussion in **§ 2.9**) or meet other exceptions, as discussed further below.

However, the following instructions are not considered to be part of the employer's authority:

- Instructions on well-being at work that are given by the user to the employees.
- Instructions given in the framework of a written contract concluded between the employer and the user, on the condition that:
  - the contract also contains a detailed and explicit description of the kind of instructions that can be given by the user;
  - such instructions do not erode the employer's authority (*e.g.*, the employers should still determine the job content, salary increase, etc.); and
  - the user's actual performance of the contract corresponds to what has been agreed in writing between parties.[6]

The posting of employees is not illicit if:

- the Social Legislation Inspectorate is informed in advance: within the framework of collaboration between employers of the same economic or financial entity, or in light of the short-term performance of specialized tasks that require special professional qualifications; and
- the Social Legislation Inspectorate has given its prior consent and the posting of employees is accepted by the trade union delegation or, in absence of one, by the union organizations represented in the joint committee.

[4] Art. 3, § 1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed workers; Art. 23, § 1, 2° and Art. 30, § 2 of the Code of 10 April 1992 on income tax.

[5] Art. 3, § 1, 4 of the Royal Decree of 27 July 1967 governing the social security for self-employed workers; Art. 2 of the Royal Decree of 19 December 1967 executing Royal Decree No. 38; Art. 5:70; 6:58; 7:85; 7:105; 7:107 Code of 23 March 2019 on Companies and Associations.

[6] Art. 31 of the Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users, as modified per application of the Act of 27 December 2012.

If there is an illicit posting of employees, the following sanctions can apply:

- Civil sanctions:
  - the user will be deemed to be bound by an employment contract for an indefinite duration with the involved employee from the start of the work;[7]
  - the involved employee will have the right to resign without having to serve or comply with any notice period;[8] and
  - the user and the employer will be held jointly and severally liable to pay all social security contributions, salary, allowances, and other benefits resulting from the employment contract.[9]
- **Criminal and/or administrative penalties:** Both the employer and the user risk a criminal fine from EUR 800 to EUR 8,000 or an administrative fine from EUR 400 to EUR 4,000 (both include the mandatory multiplications but are still to be multiplied with the number of employees involved (with a maximum of 100).[10]

§ 2.2(c) *Misclassification of an Employee as a Temporary Worker (One Recruited Through an Interim Agency)*

On the civil level, in case of breach of the rules with regard to interim (agency) work, the user and the temporary worker are considered to be bound by an employment contract of indefinite duration starting from the beginning of the performance of the work (see **§ 2.2(b)**).

Moreover, the following criminal and administrative penalties can apply: a criminal fine from EUR 800 to EUR 8,000 or an administrative fine from EUR 400 to EUR 4,000 (both include the mandatory multiplications but are still to be multiplied with the number of employees involved (with a maximum of 100)). These criminal fines can be applied to the interim agency as well as to the user.[11]

§ 2.3 Does your jurisdiction allow or prohibit outsourcing? If allowed, what are an employer's obligations to avoid liability?

Belgian law does not prohibit outsourcing. However, employers who outsource must pay attention to the following issues.

§ 2.3(a) *Transfer of Undertaking*

A transfer of undertaking applies to a transfer of "an economic entity which will keep its identity after the transfer" (a "going concern"). Whether an undertaking will retain its identity following a transfer will be determined by specific criteria, such as the type of business or undertaking being transferred, whether the

[7] Art. 31, § 3 of the Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users.

[8] Art. 31, § 3 of the Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users.

[9] Art. 31, § 4 of the Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users.

[10] Art. 101 and 177 of the social criminal code of 6 June 2010.

[11] Art. 101 and 177 of the social criminal code of 6 June 2010.

transfer includes tangible assets, the value of intangible assists on the date of the transfer, the percentage of the staff being taken over voluntarily, etc.

Many different situations can give rise to a transfer of undertaking, such as the outsourcing of an activity (or a division,[12] such as the IT division, cleaning division, etc.), the situation where a new contractor continued carrying out a service that had already been outsourced before, or the insourcing of an activity depending on the amount of workforce transferred and on whether other "identity" factors (*e.g.*, the way the business is organized, etc.) are affected as well, see **§ 14.3**.

§ 2.3(b) *Illicit Posting of Employees*

If a company makes use of the employees of another company, it should make sure not to violate the prohibition of illicit posting of employees (see **§ 2.2(b)**).

§ 2.3(c) *Specific Liabilities*

In certain industries, specific liabilities apply. For instance, in the construction industry, the instructing party can, under certain circumstances, be held liable for the salaries of the employees of their subcontractor.[13]

Contractors can under certain circumstances also be jointly and severally liable for the salaries of the illegal employees of their subcontractors.[14]

§ 2.4 What rules apply to background checks?

There is no general legal requirement in Belgium for employers to give or take up references on a prospective employee.

As work references will necessarily include personal data as defined by the EU's General Data Protection Regulation (GDPR) (which entered into force on May 25, 2018), the giving, taking up and/or otherwise processing references may constitute a processing of data for purposes of the GDPR.

Therefore, the giving or taking up of references will only be permissible subject to the relevant employer complying with the relevant requirements under the GDPR and the DPA (the Belgian Data Protection Act) in either one of six possible situations referred to in Article 6 of the GDPR (if the references would be "necessary for the purposes of the legitimate interests pursued by" the employer or if the employee has freely consented).

Where the work reference is processed, as defined by the GDPR, information has to be provided to job applicants in accordance with Articles 13 and 14 of the GDPR. Job applicants may also request a copy of a reference given about them as provided for in Article 15 of the GDPR.

[12] The Court of Cassation defined a division of an undertaking as a part of a company which presents a certain cohesion and differentiates from the rest of the undertaking by its own technical independence and a distinguished sustainable activity for which a distinguished staff group has been appointed (Cass, 4 February 2002, *JTT*, 2002, 473).

[13] Chapter VI/1 of the Act of 12 April 1965 on the protection of salary.

[14] Act of 11 February 2013.

In addition, as a general principle, national CBA No. 38 provides that any queries with respect to a job applicant's personal life are only permissible where such queries would be necessary taking into account the nature of the position to be filled by the applicant.

An employer who gives a reference has a general duty of care to those who receive and act upon its contents, and also to the person who is the subject of the reference. This means that the content must be accurate and not misleading. Moreover, care needs to be taken to avoid discrimination claim.

Furthermore, employees might want to do a criminal record check. These are not normally mandatory, but may be required for (certain) people to be employed in a "regulated activity" (work with children, insurance, banking, financial markets, accounting, private security, etc.). This information is regarded as sensitive personal data. Therefore, their processing is only allowed in very limited circumstances and is subject to some additional requirements.

Where there would be no requirements to undertake a criminal records check, an employer may not process any information relating to the job applicant's criminal history. However, the employer may make inquiries as to such history provided that – as required by national CBA No. 38 – such would be necessary taking into account the nature of the position to be filled and provided that such information is not subsequently processed in any way. Therefore, the scope of the criminal history check should be limited to those offenses, etc. that impact on the individual's suitability to perform the job in question.

In any case (mandatory or nonmandatory criminal records check), these records can be requested only by and provided to the person to whom they relate (the job applicant).

There are no specific rules on social media and Internet screening and the GDPR remains applicable to them. However, the consent of the applicant must be obtained to process that information. (Possible future) employers should also be careful that their data does not have a potential unlawful discriminatory element.

The information obtained through all the above kinds of background checks are to be treated as confidential by the employer in accordance with CBA No. 38.

§ 2.5 What rules apply to medical examinations or health-related tests?

The Code of 28 April 2017 on health & safety in the workplace, provides that both during the course of employment, as well as during the recruitment phase, employers may not have any other medical tests and examinations performed than those that may be performed by the company doctor by virtue of that Code. In this respect, tests and examinations that include removing any part of the human body (*e.g.*, blood, urine, saliva, and hair) amongst others fall under the scope of Code of 28 April 2017 on health & safety in the workplace.

Medical examinations may only be requested/carried out for reasons that are directly linked to the nature and specific characteristics of the position of the (candidate) employee. The employees may decline and the employer cannot make medical examinations a condition for employment.

However, some categories of employees are obligated to undergo a medical examination, as follows:

- employees holding a "security function," which is defined as "any role that is characterized by the use of any work instruments, the operation of motor vehicles, cranes, rotating bridges, hoisting devices of whatever nature or machines that operate dangerous installations or devices,

as well as the carry of service weapons, provided that such use, operation or carry could endanger the health and safety of other employees or employees of outside contractors";

- employees holding a "function that requires increased vigilance," which is defined as "any role that consists of the permanent supervision of the operation of an installation, provided that a lack of vigilance in the framework of such supervision could endanger the health and safety of other employees or employees of outside contractors"; and

- employees who are employed in an "activity that is characterized by a particular risk," which is defined as "any activity or role that, in accordance with the results of the company's risk analysis, is characterized by (a) an identifiable risk for the health of the employee due to exposure to a physical, biological or chemical agent, (b) by a correlation between, on the one hand, the exposure to stress of an ergonomic nature or related to the taxing nature of the role or exposure to monotonous and tempo-related work and, on the other hand, an identifiable risk on the physical or mental occupational stress for the employee, and/or (c) an identifiable risk for the health of the employee due to an increased exposure to psycho-social risks." Roles that are generally considered to fall under these categories include airline pilots, professional drivers (*e.g.*, on public transport), workers handling hazardous materials, etc.

Even where an employee belongs to one of the above categories, medical examinations may only be performed at specific times, *i.e.*:

- prior to employment;

- during employment in the framework of the so-called periodic medical surveillance (*i.e.*, in principle on an annual basis); and

- prior to the employee resuming work following an absence due to sickness, accident, or pregnancy of at least four consecutive weeks.

Further, employers must provide notice of the planned examination (including, the type of information sought, the tests to be performed, and the reason for such examination) by confidential and registered letter at least 10 days prior to the examination.

As a general principle, an employer can under no circumstances require a job applicant (candidate) or employee to undergo genetic tests.

§ 2.6 May an employer require drug and alcohol testing?

Alcohol and drug testing is strictly regulated under the 2003 Employees Medical Surveillance Act and the Code of 28 April 2017 on health & safety in the workplace, which provides that, both during the course of employment as well as during the recruitment phase, employers may not have any other medical tests and examinations performed than those that may be performed by the company doctor by virtue of that Code. In this respect, tests and examinations that include removing any part of the human body (*e.g.*, blood, urine, saliva, and hair) in view of analysis fall under the scope of Code of 28 April 2017 on health & safety in the workplace (see **§ 2.5**).

On the other hand, employers may perform nonmedical alcohol and drug tests (*i.e.*, only breath analysis and psychomotor testing, no blood tests) during the course of the employment insofar this testing would constitute part of the employer's preventative alcohol and drugs policy and provided the other requirements set out in CBA No. 100 are met.

The minimum requirements of a company's drug and alcohol policy, pursuant to CBA No. 100, are as follows:

- **Compulsory stage:** The employer must draft a "declaration of intent" setting out the general intention of its drug and alcohol prevention policy. This declaration of intent has to be inserted within the work rules.

- **Optional stage:** The employer may, but is not obliged to, further supplement the policy with details regarding its general principles and objectives. The employer may also identify the applicable rules to implement the policy. The employer may list drug and alcohol tests in the optional section of its alcohol and drug policy. However, the employer must notify its employees of this aspect of the policy.

If the alcohol and drugs test is part of the company's preventive alcohol and drug policy, the employer must determine the detailed rules that need to be followed. These rules must determine the nature of the tests, the target group(s) of employees that may be submitted to these tests, the procedures to be followed when taking these tests, the time(s) when the tests can be taken and the possible consequences of a positive test.

Moreover, alcohol and drugs tests may only be used with a view towards preventing risks at work. In particular, the test results may only be used to determine whether or not a worker is fit to carry out their work or they need assistance to rehabilitate. The employer may not use the test results in a way that is incompatible with the aforementioned purpose. In particular, the employer may not base an adverse employment action against the employee solely on the results of the test. However, such results may be considered as a factor to evaluate the employee's fitness for the job.

In addition, tests must be adequate and not excessive, the employee must agree to be tested and the test results may not be processed in a database.

Prior to implementing a drug and alcohol policy, the employer must follow specific procedures to consult with and seek the opinion of the employees or the employee's representatives, as well as with the entities that will provide the preventive and protective services. The employer is also required to mention all applicable rules and measures in the company's work rules.

§ 2.7 Are there mandated preferences in hiring?

Employers are not required to recruit employees from any particular source or to recruit within an existing workforce. There is no legal obligation to rehire employees who have been dismissed for economic reasons. However, agreements concluded in the framework of collective dismissals sometimes stipulate a mechanism that obliges the employer to inform dismissed employees about any new vacancies and to give them priority if they apply.

If a part-time employee submits a written request to obtain full-time employment or part-time employment with higher working time, within one month, the employer must notify the employee of the vacancies for full-time or part-time employment concerning the same function as the one the employee is employed in and for which the employee qualifies. An employee who thereafter requests this job must be hired on a priority basis. These rules do not apply to agency workers.[15]

[15] Programme Law of 22 December 1989 and Royal Decree of 2 May 2019.

Employees with more than six months of uninterrupted service with the same employer (including with the employer-user in case of temporary work) may under certain conditions request a form of employment with more predictable and secure working conditions.[16] Such working conditions may be:

- an employment contract for an indefinite period rather than for a definite period;
- a full-time employment contract rather than a part-time;
- a part-time employment contract with more hours rather than a part-time employment contract with fewer hours;
- an employment contract with fixed hours rather than an employment contract with variable hours; or
- a weekly or monthly temporary employment contract rather than a daily temporary employment contract.

Employers must respond to such requests in writing within one month (or two months for companies of the private sector with less than 20 employees). The response must include reasons for refusal, postponement or counter-proposal based on factors such as availability, qualifications and organizational matters (*e.g.*, schedule). Employers can justify their decision based on resources and operational capacity by concretely identifying the specific problems that can arise for the company.

Employees are protected against dismissal or "adverse treatment" (*e.g.*, non-renewal of a fixed-term employment contract) after making such request. A claim can give rise to compensation for the employee, ranging from two to six months' salary.

Specific administrative or criminal sanctions can apply for noncompliance, including being subject to a Level 2 sanction (*i.e.*, a criminal fine of EUR 400 to EUR 4,000 or an administrative fine of EUR 200 to EUR 2,000, multiplied by the number of employees involved).

Furthermore, employers with at least 50 employees (full-time equivalents) are obliged to employ a certain percentage of young employees (*i.e.*, workers below the age of 26).

For most employers, this percentage is 3%, whereas the percentage is 1.5% for certain employers of the public sector and the private nonprofit sector. The employment of young employees must be additional employment and may not be compensated by the dismissal of personnel. Failure to comply with this obligation entails a possible fine of EUR 75 multiplied by: (1) the number of not-employed young employees or the number of employees that were dismissed in order to compensate the hiring of young employees; and (2) by the number days that the obligation was violated.[17]

Moreover, all services of the public sector must employ a certain number of disabled persons. The applicable quota depends on the authority concerned and vary between 2% and 5%.[18]

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[16] This measure has been implemented through the national CBA n°161 applicable to the private sector.

[17] Art. 39-42 and 47 of the Act of 24 December 1999 on the promotion of employment.

[18] Art. 3 of the Royal Decree of 6 October 2005 regarding various measures relating to recruitment the comparative recruitment selection and to the traineeship; Art. 81 of the Order of the Walloon Government of 18 December 2003 on the Walloon Civil Service Code; Art. 3 of the Order of the Walloon Government of 7 February 2013 on the

§ 2.8 Are there any rules regarding inquiry into an applicant's salary history or prior compensation? Are there any requirements related to employers disclosing the salary range for open positions?

There are no rules regarding inquiry into an applicant's salary history or prior compensation, nor requirements related to employers disclosing the salary range for open positions. Usually, vacancy notices in Belgium do not mention any salary and applicants cannot be obliged to disclose their previous salary. Moreover, Belgian employees usually do not disclose their previous salary during an application procedure.

§ 2.9 Are there restrictions on filling openings with contingent workers?

Temporary work agencies must be accredited and the law (*i.e.*, Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users) limits the use of agency workers to:

- temporary replacement of a permanent employee of the hirer, whose employment contract has been (partially) suspended (for other reasons than economic ones or adverse meteorological conditions) (*e.g.*, long-term sickness, vacation, pregnancy, maternity leave) or has been terminated;
- exceptional work (as defined in CBA No. 108);
- work in response to a temporary increase in workload; and
- fill an open vacancy, whereby the hirer intends to hire the agency worker for that position on a permanent basis following the end of the assignment as an agency worker and subject to some conditions (see below).

Even if the reason for needing the temporary worker meets one of the above criteria, the employer is in some instances required to follow specific procedures. For example, in some instances, the employer must receive the approval of the trade union delegation. Moreover, the use of temporary agency work is limited as to time.

Temporary work cannot be called upon in case of a strike or lockout within the hirer's undertaking.

If the hirer calls upon agency workers outside the abovementioned instances, the agency worker is deemed to have entered into an employment contract of unlimited duration with the hirer.

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employment of disabled workers in the provinces, municipalities, public social welfare centers and public service associations; Art. 4 of the Order of the Flemish Government of 24 December 2004 containing measures to promote and support the equal opportunities and diversity policy in the Flemish administration; Art. 325 of the Order of the Brussels-Capital Region Government of 21 March 2018 on the administrative rules and regulations on the remuneration of officials of the public service institutions of the Brussels-Capital Region; Order of the Board of the French community commission of 13 April 1995 laying down the status of officials of the services of the Board of the French community commission; the Brussels Order of 2 February 2017 on the obligation to employ people with disabilities in local government administration; Order of the Joint Community Commission Brussels-Capital of 21 March 2018 concerning the obligation to recruit persons with disabilities in the services of the Public Centres for Social Welfare.

Agency work is permitted to fill a vacant post provided:

- a user can only use three agency workers per vacant post;
- the employment contracts for agency workers is of at least one week and maximum six months; and
- per vacant post, the total duration of the employment under agency work is limited to nine months.

The hirer must inform the temporary employment agency about the number of agency workers used to fill a vacant post. The number of agency workers must be included in the employment contract. Moreover, the hirer is required to inform and consult with its trade union delegation. However, the hirer is not required to obtain approval of the trade union delegation in order to hire temporary workers.

Save for an opposite agreement on sector level, an agency worker who is hired afterwards must be hired through an employment contract of indefinite duration and the period of agency work must be counted towards the employee's seniority with the new employer.

§ 2.10 Must a foreign employer set up a local entity to employ local workers and, if so, what are the requirements?

A foreign employer does not have to set up a local entity in Belgium to employ local workers. However, the employer will have to respect Belgian employment, social security and tax law and will therefore be required to fulfill the following administrative formalities:

1. Registering with the Social Security Administration ("ONSS/RSZ") before starting to work with employees carrying out their work in Belgium[19] and setting up the following funds and services:
    a. work accident insurance coverage (in coordination with an insurance company);
    b. the applicable sector fund (depending on the employer's main activity and the requirements existing at sector level);
    c. an inter-company medical service; and
    d. a vacation fund (if the employer hires blue-collar employees).
2. Making the necessary tax withholdings or payments to the competent local tax authority.
3. With regard to payroll:
    a. Employers are required to pay social security contributions to the ONSS/RSZ, *i.e.*, the employer's contributions (between 25.5% and 27.5% of the gross salary for white-collar employees and between 31% to 33% for blue-collar employees (calculated on 108% of the gross amount)) and employees' contributions (13.07% of the gross amount of the salary (which is calculated on 108% of the gross salary amount for blue-collar employees)). The

[19] The DIMONA declaration.

employees' social security contributions are withheld from the salary the employer will pay to the employee.

b. Employers must withhold a certain amount as a tax advance on the taxes that the employee will owe.

c. The employer pays the salary to the employee after deducting the employee's social security contributions and tax advance payment. The amount paid to the employee after these deductions/withholdings is called the *net salary*. Given the complexities of these requirements, it is recommended that employers retain the services of a payroll agency.

§ 2.11 What rules apply to the employment of foreign nationals? How much time should an employer allow to obtain the required work authorization documents?

Belgian law provides many different procedures for employment of foreign nationals. Here we explain two of the most common procedures: the posting of workers and the single permit.

§ 2.11(a) *Posting of Workers*

"Posting of workers" concerns the situation of workers who, for a limited period, carry out their work in the territory of an E.U. Member State (*i.e.*, Belgium) which is a State other than the E.U. Member State in which they normally work.

In order to avoid "social dumping," these posted workers are entitled to the same salary and the same basic set of labor conditions as Belgian employees.

In order to post workers, no authorization is required. Nevertheless, prior to the employment, the foreign employer must electronically declare the posting of the worker to the national organization of social security via the LIMOSA system, after which the employer immediately receives a certificate of receipt.

The Belgian user must ask the posted worker to hand over the certificate of receipt. If this is not possible, the Belgian user must do the declaration.[20]

§ 2.11(b) *Single Permit*

European treaties provide for the free movement of persons within the European Economic Area (European Union, Iceland, Norway, Lichtenstein, plus Switzerland). The citizens of a European Economic Area country are, in principle, free to work in another Member State without a work permit.

In principle, every non-EEA national working in Belgium must be in possession of a work permit, although some categories of workers are exempted from this requirement (*e.g.*, students or a spouse of EEA

[20] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services; Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'); both transposed in the Act of 5 March 2002; the new Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services must be transposed into Belgian law before 30 July 2020, but will not change much in Belgium.

nationals). By virtue of the Single Permit Directive,[21] foreign employees from outside the European Economic Area and Switzerland who want to work in Belgium during more than 90 days need a single permit. This single permit combines an employment authorization and a residence permit.

The federal Immigration Office deals with the residence question, whereas the Regions (Brussels-Capital, Flanders, and Wallonia) and the German-speaking Community are competent for the employment question. These different authorities have concluded a Collaboration Agreement[22] in order to determine the specific modalities for the execution of the Single Permit Directive. Because of this division of powers, the rules governing the work permit (as opposed to the residence permit) can differ between regions/the German-speaking community.

The competent Region or Community for the employment permit aspects is determined by:

- The place of the business unit where the activities of the foreign employee are concentrated, if the employer or the user of the services has one or more business units in or ore more regions.
- The place of the registered office, if the main place of employment cannot be determined.
- The place where the foreigner will execute the activities, if the employer or the user of the services has no registered office, nor business unit in Belgium.
- The place of the official residence of the employee for requests concerning work permits of indefinite duration or dispensation of indefinite duration.

If the request is not introduced with the competent region, the request will be transmitted to the competent region within four days from the receipt.

The request (which must contain the documents concerning the work permit as well as the documents concerning the residence) is introduced with the competent region, that will decide on the completeness and the admissibility of the request. Within 15 days after the request has been declared complete and admissible, the competent region sends the file to the federal Immigration Office. Then, both the region and the federal Immigration Office examine the request within their sphere of competence. Within four months after the admissibility decision, the authorities must take a decision concerning the allocation of the single permit. If this delay is not respected, the single permit is allocated. In other cases, the single permit will be delivered only after a positive decision of both the federal Immigration Office and the competent regional authority or the German-speaking community. The single permit is delivered only after a positive residential inspection. In case of a negative decision concerning the employment aspects, both the employee as the employer can introduce an appeal with the regional minister. If the federal Immigration Office has taken a negative decision, only the employee can introduce an appeal with the Council for Alien Disputes.

The single permit procedure does not apply to certain categories of employees such as diplomats and consular personnel, people who are recognized as refugees in Belgium, frontier workers, au pairs etc.

[21] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[22] Collaboration Agreement between the federal State, the Walloon Region, the Flemish Region, the Brussels-Capital Region and the German-speaking Community of February 2, 2018 regarding the coordination between the policy concerning the authorization for work and the policy concerning the residence permits and regarding the norms concerning employment and residence of foreign workforce.

The permit can be delivered for indefinite or for a fixed duration.

§ 3 EMPLOYMENT CONTRACTS

§ 3.1 Are written employment contracts required for certain employees?

In principle, written employment contracts are not required under Belgian law, but are strongly recommended as evidentiary proof of the parties' intention. Absent a written employment contract, parties may rely on witness testimony and other relevant evidence to prove (or contest) the existence and terms and conditions of an employment contract."

In contrast to the "ordinary" employment contract, the employment contracts for fixed-term employment and employment for clearly defined work,[23] part-time employment,[24] student labor,[25] replacement contracts, domestic workers,[26] temporary work, agency work,[27] and fixed term contracts of paid sportspeople[28] must be established in writing. For the flexi-job worker,[29] a written framework agreement must be concluded between the employer and the flexi-job worker. The flexi-job worker's employment contract itself, however, does not need to be concluded in writing.

The written contracts of these categories must be established in the required language (see **§ 3.3**) must contain some specific terms (see **§ 3.2**) and must be concluded prior to the commencement of the performances (except for noncompete clauses).

§ 3.2 What terms are required in employment contracts (if any)?

According to Belgian law, an employment contract is deemed to be concluded for an indefinite term and for a full-time working time regime, unless expressly stated otherwise.

Most of the terms and conditions of employment are specified in applicable statutory provisions, CBAs, and work rules and do not need to be expressly included in the employment contract. Other terms and conditions are customary and might need to be concluded in writing, such as a noncompete clause or a *del credere* clause for sales representatives.

Notwithstanding the foregoing, under Act of 7 October 2022, partially transposing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable employment conditions in the European Union, employers are required to provide employees with certain

[23] Art. 9 of the Act of 3 July 1978 on employment contracts.

[24] Art. 11*bis* of the Act of 3 July 1978 on employment contracts.

[25] Art. 123 of the Act of 3 July 1978 on employment contracts.

[26] Art. 119.4 of the Act of 3 July 1978 on employment contracts.

[27] Art. 8 of the Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users.

[28] Art. 4 Act of 24 February 1978 concerning the employment contract for paid.

[29] Art. 6 Act of 16 November 2015.

information about their employment relationship. This information must be provided no later than the first day of employment and includes:[30]

- identity of the parties;
- place of work;[31]
- employee's job function and title, grade, quality or category (if any, whether sector-based or internal) and the characteristics or a brief description of the work;
- start date of the employment relationship;
- end date or expected duration (if it concerns an employment relationship with a fixed duration);
- salary and benefits;[32]
- probationary period, including duration and pertinent details (if applicable); and
- details regarding the fixed or variable hourly schedule.

This information can be provided in writing or electronically, provided that it is accessible to the worker and can be saved and printed. This may be done through the employment contract, but it may also be done through an additional document.

In addition to providing the abovementioned information individually to each worker, mandatory information must be included in the work rules. If the legal provisions about work rules are not applicable (*e.g.*, community workers), mandatory information must be provided in an additional document either in writing or electronically no later than one month from the start of the employment relationship, including among others:[33]

- the employee's right to training or the reference to the legal or regulatory provisions or CBA governing this right;
- the duration of annual leave, as well as the arrangements for granting such leave or the reference to the relevant legal or regulatory provisions;
- the social security body that collects the social security contributions related to the employment relationship;

[30] Art. 4, §2 of the Act of 7 October 2022.

[31] When the work is not (or not mainly) performed in a fixed place, the notice must indicate that the worker is employed in various places or free to choose their place of work, any arrangements for moving between the various places of work or a reference to the work rules for this purpose, and the registered office or, if applicable, the domicile of the employer.

[32] Including the initial amount, plus any other components (if applicable) listed separately, including the fringe benefits relating to social security offered by the employer and to which the employee is entitled, and the method and frequency of payment of the salary to which the employee is entitled, or the reference to the legal or regulatory provisions or collective bargaining agreements governing these points.

[33] Art. 5 of the Act of 7 October 2022.

- reference to the CBA's concluded in the company and applicable to the working conditions, as well as the CBA's concluded outside the company, with references to the competent joint body in which they were concluded; and

- the procedure, including formal requirements and notice periods, that the employer and the employee must follow in the event of termination of the employment relationship, as well as the time limits for appealing against the dismissal, or reference to the legal or regulatory provisions governing these points.

Finally, specific mandatory information must be provided to employees who work abroad for at least four consecutive weeks. These employees should be given an additional document in writing or electronically before departure.[34]

As rules concerning termination are legally determined and are the same for all employment contracts of the same category, termination provisions should not (but can) be specified in employment contracts. However, recently they must be mentioned in the work rules (see above). If wanted, more favorable termination provisions for the employee can be included in the employment contract.

In some circumstances, some aspects of the employment relationship could be considered essential by the parties. These essential elements need to be expressly stated in the employment contract, requiring the consent of both parties. These elements concern, *e.g.*:

- compensation and benefits;

- place where work will be executed;

- the term of the contract (contract for indefinite term or fixed term); and

- the working time regime (full-time or part-time).

In contrast to the "ordinary" full-time employment contract for indefinite period, the more specific employment contracts, mentioned in **§ 3.1**, must respectively contain the following terms:

- fixed-term employment contracts or employment contracts for a clearly defined work must specify their automatic termination on: (1) a specific date; (2) the expiry of a specific term; or (3) the occurrence of an event occurring on a known date;[35]

- the part-time employment contracts must mention the working time regime (the number of worked hours per week) and the agreed working schedule (hours and days of work). (For the variable part-time working hours, by way of derogation, it is only necessary to mention the part-time working regime and the fact that the working schedule will be determined in accordance with a 'general temporal framework' that must be provided for in the work regulations.);[36]

[34] Art. 6 of the Act of 7 October 2022.

[35] Art. 9 of the Act of 3 July 1978 on employment contracts.

[36] Art. 11*bis* of the Act of 3 July 1978 on employment contracts.

- a student employment contract must include several mandatory elements, such as the identity of the parties, the time, place and duration of the work, the salary, etc.;[37]

- replacement contracts must include the following elements: the reason for the replacement, the identity of the replaced employee and the conditions of enlistment;[38]

- employment contracts of domestic workers must contain the information about the employer (identity, address, registered office, etc.) and the employee (identity and place of residence), the salary (or the salary's method and basis of calculation), the compensation of the costs related to the domestic labor, the place(s) of work, a short description of the work, the work schedule and the competent joint committee;[39]

- the employment contract concluded between the temporary employment agency and the agency worker must mention the employment agency's authorization number and registration number with the social security authority , the competent joint committee, the reason of the agency work, the place and duration of the employment, the work schedule with the user, the professional qualification of the agency worker, the salary of permanent employees with the same qualification with the user, the method of payment of the salary and the specific characteristics of the place of work;[40] and the framework agreement between the flexi-job worker and the employer (see **§ 3.1**) must include the following elements: the identity of the parties; the way on which and the period in which the flexi-job employment contract must be notified to the flexi-job worker by the employer; a brief description of the function(s) to be performed; the basic wage; the text of Article 4 § 1 of the Act of 16 November 2015.[41]

There are no mandatory terms for employment contracts of paid sportspeople.[42]

§ 3.3 In what language(s) must employment contracts be written?

In Belgium, strict rules apply to determine the language in which the employment contract and other documents addressed to employees must be drafted. Belgium has three official languages: Dutch, French and German. The language to be used (Dutch in Flanders, German in German linguistic area, French in Wallonia and Dutch or French, depending on the employee's language, in the Brussels Capital Region) depends on the location of the employer's "exploitation seat" to which the employee is attached.

The *exploitation seat* (*i.e.*, not necessarily the same place as the registered office of the employer) can be described as the place where the social relations between the employer and employee take place and tasks and instructions are given. For example: The place where the contract is signed, meetings and/or trainings take place, questions are asked on holidays, working hours, etc. and other employment-related issues are dealt with (*e.g.*, company car and/or IT-issues are arranged), etc. All this is assessed from the employer's perspective (*e.g.*, when all these contacts would mainly take place through email, Skype, etc.). The places where clients are visited are less relevant.

[37] Art. 124 Act of 3 July 1978 on employment contracts.

[38] Art. 11*ter* of the Act of 3 July 1978 on employment contracts.

[39] Art. 119.4 Act of 3 July 1978 on employment contracts.

[40] Arts. 4 and 8 Act of 24 July 1987 on temporary labor, temporary agency work and the hiring-out of workers for users.

[41] Art. 6 Act of 16 November 2015.

[42] Art. 4 of the Act of 24 February 1978, concerning the employment contract for paid sportspeople.

This means the employment contracts of companies with exploitation seat in:

- the German linguistic area must be established in German;
- the "municipalities with language facilities" in the language of the community where the specific municipality is located (Dutch, French, or German);
- the Region of Brussels-Capital must be established in Dutch for Dutch-speaking employees and in French for French-speaking employees.

In the three abovementioned areas—*i.e.*, German linguistic area, municipalities with language facilities, and the Brussels Capital Region—documents drafted in the wrong language are not automatically null and void but must be translated in the appropriate language should the employee demand so. The translated document will replace the document that was drafted in the incorrect language. Employers in these areas can thus consider drafting the employment contract in English.[43]

If the company's exploitation seat is in the Dutch linguistic area, in principle, the employment contract and other employment documents must be established in Dutch, regardless of the language of the employee. Even if the employee does not understand Dutch, the employer is still obligated to draft the documents in Dutch. All documents drafted in another language are null and void (as if they never existed) so that potentially employer-friendly clauses (*e.g.*, a noncompete clause) cannot be enforced without prejudice to the employee's rights. Nevertheless, for individual employment contracts, an accessory translation can be added in an official language of the European Union (EU) or of a member state of the European Economic Area (EEA) that is not part of the European Union provided all parties understand that language and provided there is a cross-border element, more specifically if:

- the employee resides in a member state of the European Union or the EEA; or
- the employee resides on the Belgian territory and has practiced the right of free movement of workers or freedom of establishment as guaranteed by the E.U. regulations; or
- the employee falls within the scope of the free movement of employees based on an international or supranational treaty.

This document will be considered to be merely a translation, so that in case of differences between the versions, the Dutch version prevails.[44]

If the employer's exploitation seat is in the French linguistic area, the employment documents must be established in French, but an additional translation in the language chosen by the parties is permitted. In case of differences between these versions, the French version prevails.[45]

[43] Coordinated acts of 18 July 1966 on the use of languages in administrative matters.

[44] Decree of 19 July 1973 on the use of languages in relations between employers and employees, as well as in company documents and papers that are required by law and by regulation.

[45] Decree of 30 June 1982 on protecting the freedom of language use and of the use of the French language in relations between employers and employees, as well as in company documents and papers that are required by law and by regulation.

If the employer's exploitation seat is not located in Flanders, Wallonia, or the Brussels Capital Region, but abroad, there are arguments to support the position that the employer is not obliged to comply with the corresponding language regulations.

Importantly, the language requirements are of public order. Accordingly, neither party can choose to use another language, but only the employee can seek to declare the document as null and void based on these rules. Thus, only the employer is bound by the language obligations (*e.g.*, a letter sent by an employee in the "wrong" language will not be sanctioned).

§ 3.4 What rules exist relating to the duration of employment contracts?

There are two main categories of employment contract with respect to their duration:

- **Fixed-term (or for a clearly defined work)**: These contracts automatically end at expiration of the period agreed upon (specific date or expiration of term) or at the completion of the task in question.

- **Indefinite duration:** This type of employment contract is the general rule. If the employer and the employee have made no provision for the duration of the contract, it is automatically considered to be a contract of indefinite duration. These contracts will continue to apply until terminated by (one of) the parties (*e.g.*, by giving notice, paying a severance indemnity in lieu of notice, immediate for serious cause, etc.).

Both types of contracts can be concluded for full-time or part-time work.

According to Article 7 of the Act of 3 July 1978 on employment contracts, an employment contract can never be concluded for a lifelong period.

As a principle, when parties enter into multiple, successive, fixed-term contracts without there being an interruption that may be attributed to the employee, they are deemed to have entered into an employment contract of unlimited duration. The notion of "fixed-term" contract must be interpreted in a strict sense (*e.g.*, no intern agreements). Replacement agreements, however, are also taken into account safe, with some exceptions.

However, this presumption (of the contract being of unlimited duration) can be rebutted by the employer, provided it can show that such a succession of fixed-term contracts is:

- justified by the nature of the work (*e.g.*, seasonal work); or

- justified by another legitimate reason (*e.g.*, successive fixed-term employment contracts for scientific research that is dependent on government grants).

As a further exception to the abovementioned principle, successive fixed-term contracts can be entered into under the following circumstances:

- a maximum of four successive fixed-term contracts can be concluded without any specific justification being required, provided that: (1) the individual duration of such contracts is not less than three months; and (2) the total duration of the successive fixed-term contracts does not exceed two years; and

- subject to obtaining the Labor Inspectorate's authorization, a maximum of six successive fixed-term employment contracts can be entered into without any specific justification being required, provided that: (1) the individual duration of any such contracts is not less than six months; and (2) the total duration of the successive fixed-term contracts does not exceed three years.

Another exception to aforementioned principle, if the parties conclude successive employment contracts for temporary agency work in accordance with statutory provisions, they shall not be deemed to have entered into an employment contract for indefinite period.

§ 3.5 Are probationary periods allowed, and if so, what restrictions apply?

The general possibility for employers and employees to agree to a probationary period has been abolished since January 1, 2014. Consequently, apart from a few exceptional situations where probationary periods are still possible (*i.e.*, notably, in the framework of an employment agreement for agency work, student labor), any trial clause provided in an employment contract will be considered to be null and void.

§ 3.6 Do employment contracts customarily contain covenants to safeguard the employer's intellectual property, covenants not to compete, and/or agreements not to solicit the employer's customers or employees?

The use of such covenants in the employment contracts are quite common, but will vary among the different business sectors and also to some degree depend on the position and remuneration of the employee in question.

Although restrictive covenants are generally enforceable in Belgium, they are highly regulated under Belgian law. The greatest restrictions apply to noncompete restraints. The rules may differ depending on the status of the employee and when the restrictive covenants were entered into by the parties. Clauses with respect to nonsolicitation of customers and nonenticement away of employees are much less regulated, although some nonsolicitation of customers restraints might potentially be considered by the courts as, in effect, noncompete restraints "by the back door" and so subject to the more rigorous regime.

It is important to acknowledge that there is an important language requirement for restrictive covenants. The covenants must be in the language of the location where the exploitation seat of the employer is located, see **§ 3.3**.

§ 3.6(a) *Nonsolicitation*

During employment, an employee's obligation of loyalty/good faith imposed by Article 5.73 of the Belgian Civil Code prohibits the employee, whilst still employed, from: (1) soliciting clients in competition with the employer; and (2) enticing away colleagues to leave their employment with the employer.

In principle, Belgian law allows the solicitation of the ex-employer's clients and/or employees postemployment, as it is part of the freedom of trade, commerce, and competition. However, in certain circumstances, soliciting the ex-employer's clients may constitute unfair competition and/or a violation of fair market practices, *i.e.*, essentially where such actions are considered to constitute wrongful action. As unfair competition and unfair market practices are generally hard to prove, employers with such concerns typically incorporate a nonsolicitation clause in the employment contract.

As opposed to noncompetition clauses, nonsolicitation clauses are not subject to any statutory conditions. In light of the general principles of freedom of trade, labor and competition, the validity of such clauses is nevertheless debatable, especially when the restrictions imposed on the employee are rather extensive.

To mitigate the risk of such clauses being held unenforceable, it is important to limit the scope of the clauses, both in terms of duration and territorial scope, and to draft them as an expression or further clarification of legal confidentiality and unfair competition rules. In any event, it should be avoided that such clauses are viewed as in breach of the legal rules on noncompetition clauses which could lead to a separate (valid) noncompetition clause being held unenforceable.

§ 3.6(b) *Intellectual Property Clauses Are Customary*

For employers in certain industries, employment contracts customarily contain intellectual property clauses, especially for white-collar employees.

Without this clause, the employer may still be the owner of the intellectual property rights for work developed in the framework of the employment contract (*e.g.*, copyrights related to computer programs, databases, drawing, models, etc.) For some other intellectual property rights, however, the employee will remain the owner, unless agreed otherwise (*e.g.*, moral rights on works, copyright, inventions, etc.).[46]

§ 3.6(c) *Noncompete Covenants*

§ 3.6(c)(i) *Competition During Employment*

Regarding Article 5.73 of the Belgian Civil Code and Article 17 of the Act of 3 July 1978 on employment contracts, it is not necessary to include express noncompete restraints within the employment contract for competition with the employer during the employee's employment. Aforementioned articles prohibit any act of competition with the employer during employment (including working for a competitor, providing services through a competing business, solicitation of customers, or enticing away employees).

It is, however, common practice to include express noncompete clauses that apply during employment in order to clarify, tighten, and/or reinforce the obligation (*e.g.*, by providing for a (lump sum) penalty clause). There is no requirement for employers to compensate for such express restraints during employment.

However, under recent legislation (*i.e.*, Act of 7 October 2022, partially transposing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable employment conditions in the European Union), an employer can no longer prohibit an employee from taking up employment with other employers outside the work schedule nor subject an employee to adverse treatment for doing so.[47] Thus, where a prohibition on competitive activities during employment is still permitted, this is not the case for a general prohibition on multiple jobs.

§ 3.6(c)(ii) *Competition After Employment, When Covenant Was Entered into Prior to or During Employment*

There are only three types of noncompete restraints that are permitted when entered into before or during employment:

- **Regular noncompete clause:** Applicable to: (1) blue-collar employees; and (2) white-collar employees employed by companies that cannot use a so-called "international" noncompete

[46] Book XI Economic Code of 28 February 2013.

[47] Art. 20 of the Act of 7 October 2022.

clause (see below) —governed by Article 65 and Article 86 § 1 of the Act of 3 July 1978 on employment contracts.

- **International noncompete clause:** Applicable for white-collar employees employed by "international" employers—governed by Article 86 § 2 of the Act of 3 July 1978 on employment contracts.

- **Noncompete clause for sales representatives:** Governed by Article 104 of the Act of 3 July 1978 on employment contracts.

Each has different requirements and are applicable to different classifications of employees.

- **Regular Noncompetes:** Regular noncompetes fall within the scope of Article 65 and Article 86 § 1 of the Act of 3 July 1978 on employment contracts if they meet the following conditions:

  - they prohibit the employee from engaging in competitive activities; and

  - the employee is able to cause damage to the employer; and

  - such damage would be caused by the employee using commercial or industrial information that came to the employee's knowledge during the employment with the ex-employer; and

  - the noncompete clause has been entered into in writing, either in the employment contract itself (which is the norm) or in an ancillary document to the employment contract.

    A regular noncompete clause will not have any effect if the employment contract is terminated:

    - during the first six months of employment with the employer;

    - by the employee on account of the employer's "gross misconduct" (*i.e.*, resignation for cause, following the first six months of service); or

    - by the employer other than for cause (following the first six months of service), including for example constructive dismissal (this limitation does not however apply to international noncompetes as discussed below).

    A regular noncompete restraint must satisfy five conditions for it to be valid, which are:

  - **Employee's remuneration:** regular noncompete clauses are generally only valid with respect to employees whose annual remuneration is in excess of EUR 78,706 (amount applicable as of January 1, 2023, indexed annually). CBA's agreed at joint committee level can however provide otherwise, but these are rare. For this purpose, annual remuneration includes all salary, financial remuneration, and the value of any benefits (*e.g.*, medical insurance or company car, etc.) and is to be assessed at the moment when employment comes to an end. A regular noncompete clause may thus be valid if the employee's annual remuneration exceeds the statutory threshold on termination of the employment, even if it was under de threshold at the beginning of the employment.

    - **The noncompete clause must explicitly mention that the activities prohibited by the noncompete restraint must be both:** (1) similar to the activities performed by the

employee for the ex-employer; and (2) the ex-employer's activities must be similar to those of the new employer.

- The territory must be expressed in the clause and be limited to the territory where the employee could compete – *e.g.*, the geographical areas in which they were active or responsible for with the ex-employer. However, this cannot extend beyond the Belgian territory.

- **Duration:** maximum 12 months from the date of termination of the employment contract.

- **Compensation:** The ex-employer is required to pay the employee compensation of at least 50% of the employee's gross remuneration for the period of the restraint. This payment has to be explicitly provided for in the noncompete clause. Such payment can be avoided by waiving the noncompete restraint within 15 days after the end of the employment agreement.

- **International Noncompetes:** So-called international noncompete restraints are only permissible where the employer has one of the following: (1) an international field of operations; or (2) important economic, technical or financial interests in international markets; or (3) its own research services (*e.g.*, an R&D department).

  In contrast to regular noncompetes, international noncompetes may:

  - Be enforceable where the employment ends during the first six months of service or the employee is dismissed by the employer whether or not for cause (after the first six months of service).

  - Deviate from the restriction concerning the duration and geographical area (which must still to be expressly provided for in the noncompete, regardless of the extent of the deviation). However, the scope of the noncompete should not be no wider (geographic) or longer (duration) than is reasonably necessary to protect the employer's legitimate business interests.

    Otherwise all of the other conditions/elements for regular noncompete restraints (see above) are also applicable to international noncompetes.

- **Noncompete Clause for Sales Representatives:** This category only applies to sales representatives, *i.e.*, white-collar employees whose function mainly consists of soliciting and visiting customers with a view to negotiating and/or brokering business from them on behalf of their employer. Noncompete clauses for sales representatives only apply to employees with a gross annual remuneration of EUR 39,353 (amount applicable as of January 1, 2023; indexed annually) or more.

  The same conditions that are applicable to regular noncompete restraints (see above) also apply to sales representatives' noncompete restraints, with the following exceptions:

  - the geographical area of the restriction must be limited to the salesperson's sales territory; and

  - no compensation is required.

§ 4 DISCRIMINATION, HARASSMENT & RETALIATION

§ 4.1 What prohibitions against discrimination exist, and how are they defined (*e.g.*, what are the specific protected categories)?

The Belgian Constitution contains a general principle prohibiting discrimination (on whatever ground) as a civil liberty of citizens to be enjoyed vis-à-vis the State.

General Belgian discrimination law is principally enshrined in three statutes enacted on May 10, 2007, *i.e.*, the 2007 Gender Act, the 2007 Racism Act, and the 2007 General Discrimination Act (the "2007 Acts"). These 2007 Acts apply:

- **pre-employment** (*i.e.*, during the recruitment process): for example during the CV selection process, questions asked during interviews, (not) offering employment, etc.;

- **during employment:** for example whilst fixing remuneration, access to benefits, promotion, time off requests (*e.g.*, in the framework of time credit), selection for dismissal (on an individual basis or in the framework of a collective redundancy), etc.; and

- **postemployment:** for example with regard to information provided to the National Unemployment Office (RVA/ONEm) or the provision of references, etc.

The 2007 Acts prohibit discrimination on the following grounds ("protected characteristics"):

- gender, pregnancy, medically assisted reproduction, childbirth, breastfeeding, motherhood, family responsibilities, gender identity, gender expression, sex characteristics, and gender reassignment;

- so-called race, skin color, nationality, and descent, including national and ethnic descent ("race"); and

- age, sexual orientation, marital and family status, birth, wealth, religion or belief, political opinions, trade-union-related opinions, language, state of health, disability, physical or genetic characteristics and social background.

Next to these 2007 Acts, discrimination-related law is also *inter alia* found in:

- two minor acts enacted on March 5, 2002, prohibiting discrimination on the grounds of an employee being on a part-time or fixed-term contract (the "2002 Acts");

- national CBA No. 95, which prohibits discrimination on the grounds of age, gender or sexual orientation, marital and family status, history of illness, race, skin color, descent or national or ethnic descent, political opinions or beliefs, disability and membership of a trade union or any other organization during the entire employment relationship;

- national CBA No. 38, which prohibits discrimination during the recruitment process on any grounds whatsoever; and

- the Act of 27 June 1969 revising the Decree-Law of 28 December 1944 on social security for workers, which prohibits to make any distinction, in the framework of additional social security benefits, between employees who belong to the same category.

Finally, Belgian law also prohibits discrimination of employee representatives.

In line with European law, once the claimant has brought forward sufficient elements to raise a suspicion of unlawful discrimination, the burden of proof shifts to the employer, who will then have to prove that its actions and/or omissions were not tainted by discrimination.

§ 4.2 What prohibitions exist against religious discrimination, and what accommodations of religious practices are required of the employer?

Religious discrimination is prohibited by the General Discrimination Act of 10 May 2007.

Nevertheless, freedom of religion is not an absolute right and employers can prohibit the expression of religious belief at the place of work for safety reasons and in order to maintain the neutrality policy of a company. These rules must however be the same for all employees and for all religions.

In a 2013 case, for instance, concerning a retailer who asked a Muslim worker not to wear the veil anymore, the Tribunal ruled that the employer may establish rules regarding wearing or displaying religious symbols, provided that these rules are equally applicable to all employees. In the case at hand, the tribunal ruled that the prohibition was not justified by a legitimate aim since the rule did not apply before the worker concerned entered into service.[48]

Even though the matter remains open for discussion, the European Court of Justice provided guidance in three recent decisions.

In the first case, the European Court of Justice ruled, that there was no direct discrimination based on religion or belief within the meaning of the European Directive[49] because, in that case, the internal rule treated all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia,* to dress neutrally, which precludes the wearing of such signs.

For completeness' sake, the Court emphasized that, even though there was no direct discrimination, the prohibition could constitute indirect discrimination if the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In this regard, the Court stated that the desire to display a policy of political, philosophical or religious neutrality must be considered a legitimate aim, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers. Moreover, a prohibition of visibly wearing signs of political, philosophical, or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner. Finally, as regards the question whether the prohibition was

[48] Labor Tribunal Tongeren, 2 January 2013, G.R. 11/2142.

[49] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

necessary, according to the Court, it must be determined whether the prohibition is limited to what is strictly necessary (in the case at hand whether the prohibition only covers employees who interact with customers). According to the Court, the referring court must thus ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without the company being required to take on an additional burden, it would have been possible for the company, faced with a refusal from an employee to stop wearing a headscarf, to offer her a post not involving any visual contact with those customers, instead of dismissing her.[50]

In a second case, the European Court of Justice ruled that if the employer's only consideration in introducing the prohibition is the customer's preference regarding headscarves, this provision cannot be deemed a "genuine and determining occupational requirement" within the meaning of the E.U. directive.[51]

In a more recent case, based on a preliminary question of the French-speaking labor tribunal of Brussels, the European Court of Justice confirmed that an employer's desire to pursue a policy of neutrality is a legitimate objective that could justify the indirect discrimination based on religion, which could follow from a blanket ban on all signs of political, religious or philosophical beliefs. However, the European Court of Justice also maintained that a policy of neutrality is not enough on its own to justify indirect discrimination based on religion or belief. The employer must demonstrate a "genuine need" for the policy, and it must be applied in a general and undifferentiated way.[52]

According to Article 20, 5° of the Act of 3 July 1978 on employment contracts, an employer must give an employee the necessary time to fulfill their religious duties. This obligation however is not absolute and Belgian law does not require accommodations of religious practices. These questions (for instance regarding a time or place to pray) are dealt with directly between the employer and the employee. Most often these accommodations are accepted as long as they do not hinder the work.

§ 4.3 What prohibitions exist against disability discrimination, and what accommodations of disabilities are required of the employer?

The 2007 General Discrimination Act prohibits the following types of discrimination: direct discrimination, indirect discrimination, instruction to discriminate, intimidation, and the refusal to take reasonable measures to accommodate disabled persons. More precisely, this Act prohibits discrimination based on state of health, disability, and physical or genetic traits. Since the 2007 General Discrimination Act does not contain any definition of these criteria, they have been defined by case law.

The criteria "physical or genetic traits" and "state of health" cover many pathologies, such as tendon tears, epileptic seizures, cancer, obesity, mental health problems, etc. It should also be noted that "state of health" refers to the past, current and future "state of health."

The criterion of disability is defined by the European case law as "a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis

[50] European Court of Justice, Case No. C-157/15, *Achbita*, §§ 30-44.

[51] European Court of Justice, Case No. C-188/15, *Bougnaoui*, §§ 31-441.

[52] European Court of Justice, Case No. C-344/20, *L.F./S.C.R.L*.

with other workers."[53] The term disability covers the definitive inability to work, but also chronical or long-term diseases, which can also include diabetes, morbid obesity, etc.[54]

However, the different treatment of disabled persons does not necessarily constitute discrimination. More precisely, this is not prohibited if the different treatment is directly related to a "genuine and determining occupational requirement" (*i.e.*, if a specific characteristic related to the disability is, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, essential and determining; provided that the requirement is based on a legitimate aim and is proportionate to that aim).

According to the General Discrimination Act, an employer must make reasonable adjustments for disabled persons. This obligation requires employers to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate (*e.g.*, financial) burden on the employer. Such burden on the employer shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the State's disability policy.

Reasonable adjustments can take many forms, such as providing easier access to the workplace, providing auxiliary equipment, architectural adjustments, adjusted parking places, adjusted telephones, adjustment to the work schedule, breaks, assistance, etc.

Nevertheless, the obligation to take reasonable action does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training.[55] However, a recent judgement of the Court of Justice of the European Union further clarified that reasonable adjustments for an employee with a permanent incapacity for their own position can take the form of the assignment of another position within the same undertaking if there is at least one vacancy for a job that the worker in question is capable of holding.[56]

Belgian law does not require that a minimum percentage of an employer's workforce consist of disabled workers, save for specific organizations.

§ 4.4 What prohibitions are there against harassment?

Belgian law prohibits: (1) mental or physical violence; (2) moral harassment; and (3) verbal, nonverbal, and physical sexual harassment at work.[57]

Employers, employees (including trainees), and all other persons who come in contact with employees while performing their work are obliged to refrain from any act of violence, moral or sexual harassment at work.

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[53] European Court of Justice, Case No. C406/15, *Petya Milkova v. Varhovna administrativna prokuratura* (March 9, 2017); European Court of Justice, Case No. C335/11, *Dansk almennyttigt Boligselskab* (April 11, 2013).

[54] A. Mortier and M. Simon, "*Licencier en raison des absences médicales passées: une discrimination*?", *J.T.T.*, 2018/6, p. 82.

[55] Consideration 17 of the EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[56] European Court of Justice, Case No. C485/20, *HR RAIL SA* (February 10, 2022).

[57] Art. 32*ter* of the Act of 4 August 1996 on employees' health and safety in the workplace.

Every employer must take preventative measures against workplace harassment (*inter alia* implement procedures for informal and formal psychosocial interventions) and provide psychological support (at the employer's expenses) to employees who have been the victim of violence committed by their employer or colleagues.[58] Employers must also appoint a prevention advisor and a prevention advisor specialized in psychosocial risks.

Furthermore, the Act of 4 August 1996 on employees' health and safety in the workplace provides for internal and external procedures to act against psychosocial risks.

Employees who prove that they have been the victim of violence, moral or sexual harassment at work, are entitled to an indemnity from the perpetrator, equal to either the damage suffered by the victim or a lump sum amount of three months of salary. This lump sum indemnity amounts to six months of salary if the violence or harassment is linked to the grounds for discrimination as defined by the discrimination acts, if the perpetrator is a superior of the victim or because of the severity of the facts.[59]

Some case law also ruled that perpetrators of harassment at work were guilty of stalking[60] and/or degrading treatment.[61]

§ 4.5 What exceptions are permitted to the prohibitions against discrimination (*e.g.*, job requirements that mandate hiring candidates of a certain age or gender, or quotas to address past discrimination)?

The exceptions depend on the type of distinction (*i.e.,* direct or indirect).

A direct distinction is a situation that occurs when one person is treated less favorably than another is, has been or would be treated in a comparable situation based on one of the protected criteria. Such direct distinction is allowed (*i.e.,* does not constitute discrimination) if it can be justified by a legitimate aim, if the means for achieving such aim are appropriate and necessary.

However, if the direct distinction is based on so-called race, gender, age, sexual orientation, religion or belief or disability, such difference will only be allowed if it can be objectively justified by showing that the relevant protected characteristic is a genuine and determining occupational requirement and provided that such requirement is based on a legitimate aim as well as proportionate to such aim.

An indirect distinction occurs where an apparently neutral provision, criterion or practice is likely to place persons characterized by a certain protected criterion at a particular disadvantage compared with other persons. Such indirect distinction is allowed (*i.e.*, does not constitute discrimination) if it can be justified by a legitimate aim provided that the means for achieving such aim are appropriate and necessary. Indirect distinction based on handicap, in particular, does not constitute discrimination if it is proven that no reasonable measures can be taken.

Distinctions made to comply with a law never constitute discrimination.

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[58] Art. 32*quinquies* of the Act of 4 August 1996 on employees' health and safety in the workplace.

[59] Art. 32*decies* of the Act of 4 August 1996 on employees' health and safety in the workplace.

[60] Art. 442*bis* of the Penal Code; Corr. Brussels 6 November 2012, *Soc.Kron*. 2017,vol. 4, 161; Corr. Hainaut (dep. Mons) 17 June 2014, *Soc.Kron*. 2017, vol. 4, 165.

[61] Art. 417*quinquies* Penal Code; Labor Tribunal Liège 26 March 2015, *Soc.Kron.* 2017, vol. 4, 154.

Distinctions that constitute measures of positive action (*i.e.*, specific measures to prevent or compensate for disadvantages linked to one of the protected criteria, with a view to ensuring full equality in practice) never constitute discrimination.

In the framework of employment and supplementary social security schemes, direct distinctions on grounds of age do not constitute discrimination where it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy objectives, labor market policy or any other similar legitimate aim, if the means of achieving that aim are appropriate and necessary.

Specific justifications apply in some other cases.

Finally, for identity-related organizations (based on religion or ideology), a direct distinction based on religion or ideology will not be considered to imply discrimination provided that the religion or ideology are essential, legitimate, and justified job requirements in light of the religion or ideology the organization is based on because of its nature of the activities or the context in which they are exercised.

§ 4.6 What prohibitions exist regarding retaliation/reprisal?

An employer is prohibited from retaliation or reprisal towards certain employees.

Two parallel systems of protection exist against reprisals: on the one hand, the anti-discrimination law protects employees who take steps to report acts of harassment or violence related to a discrimination ground, and on the other hand, the employees' health and safety Act provides protection for employees who report acts that are not related to a discrimination ground.

The protected employees are employees who:

- have filed a request for formal psychosocial intervention due to violence, moral or sexual harassment at work;
- have filed acomplaint or in respect of whom a complaint is filed on the grounds of discrimination and the employees who have supported a person – in any way whatsoever, formally or informally – in filing the aforementioned complaint;[62]
- have filed a report with the competent organization, service or institution on the grounds of discrimination;
- have filed a complaint with the competent inspectorate for certain reasons;
- have filed a complaint with the police services, the public prosecutor's office or the investigating judge for certain reasons;

[62] European Court of Justice, Case No. C404/18, *Jamina Hakelbracht* (June 20, 2019); Act of 7 April 2023 amending the Act of 10 May 2007 designed to combat discrimination between women and men; the Act of 30 July 1981 designed to suppress certain acts inspired by racism or xenophobia; the Act of 10 May 2007 designed to combat certain forms of discrimination, and the Act of 4 August 1996 on employees' health and safety in the workplace.

- have brought a lawsuit or in respect of whom a lawsuit is brought before the tribunal or court for the purpose of enforcing the provisions regarding violence, moral and sexual harassment at work and discrimination; or

- have witnessed in the framework of an investigation of a request for formal psychosocial intervention for violence, moral or sexual harassment and who have witnessed in the framework of a complaint on the grounds of discrimination or who have witnessed before a court in the aforementioned matters

Retaliation includes termination of the employment relation and detrimental measures (both during and after employment relation).[63]

In situations of alleged discrimination, once the employee has brought forward sufficient elements to raise a suspicion of unlawful discrimination, the burden of proof shifts to the employer, who will then have to prove that its actions and/or omissions were not tainted by discrimination. To ease the burden of proof on employees, the law provides that when an employee has made a report, has taken legal action, has filed a complaint, has witnessed or has supported a person – in any way whatsoever, formally or informally – in filing the aforementioned procedures, the employee may request a written and dated proof from the organization, service or institution where the legal action, complaint or testimony was lodged. If the employer terminates the employment relation or takes detrimental measures towards a protected employee within a period of 12 months from the time the employer became aware or could reasonably have been aware of the report, request, complaint, action or witness, the employer must prove that the dismissal was not linked to the content or filling of this report, request, complaint, lawsuit, or witness. In practice, this is a difficult burden of proof. The employer also bears this burden of proof if they terminate the employment relation or take a detrimental measure between the moment on which an employee brings a lawsuit and until three months after the court decision has become definitive.

After these 12 months (or three months after the final judgement in a court case), the burden of proof will be on the employee to demonstrate that the detrimental measure taken against the employee is linked to the report, request, complaint, action, testimonial or to the content thereof.

However, during these periods, employees can be dismissed, but only for reasons that are not linked to the content or filling of their request, complaint, lawsuit or testimonial.

Employees who are dismissed because of their request, complaint, lawsuit, or witness can ask reinstatement.

If a court rules that the termination of the employment relation or the detrimental measure was retaliatory, regardless of whether or not the employee has requested the reinstatement, the employee is entitled to an indemnity (at the choice of the employee) equal to either six months of salary or the actual damage suffered by the employee. In the latter case, the employee must prove the extent of this damage.

In situations of discrimination, the aforementioned damages due under the protection against retaliation/reprisal may be combined with the damages due for the discrimination itself.

Belgian law currently has no explicit prohibitions from retaliation related to pay equity/pay transparency.

[63] Art. 32*terdecies* of the Act of 4 August 1996 on employees' health and safety in the workplace; Art. 22 of the Act of 10 May 2007 designed to combat discrimination between women and men ; Article 15 of the Act of 30 July 1981 designed to suppress certain acts inspired by racism or xenophobia ; Article 17 of the Act of 10 May 2007 designed to combat certain forms of discrimination.

§ 4.7 May individual persons be liable for discrimination, harassment, or retaliation/reprisal?

Not only employers, but also employees, directors, agents, contractors, and/or any other person can be personally held liable for unlawful discrimination committed in the workplace environment. Persons who are found guilty of discrimination may be sentenced to pay criminal fines or imprisonment

Individual persons may also be held liable for harassment. There is case law in which perpetrators of harassment were found guilty of stalking[64] and degrading treatment.[65]

§ 4.8 Are employers required to investigate allegations of sexual harassment from employees?

Employers are not required to investigate allegations of sexual harassment themselves, but they are required to designate an (internal and/or external) prevention advisor.

As stated in **§ 4.4**, in case of harassment, employees can choose to solve the problem internally or externally. In the framework of the internal procedure, the employee can choose to submit a request for informal or formal psychosocial intervention.

With regard to the formal psychosocial intervention, an employee can submit a request to the prevention advisor, who will build a file, inform the accused person of the allegations, will hear all persons (and witnesses) in order to investigate the request and, if necessary, will propose protective measures to the employer. Within three months from the receipt of the request, the prevention advisor submits an advice to the employer.

If the employer does not implement the proposed protective measures or the measures proposed in the advice, the prevention officer must submit the file to the Labor Inspectorate, who can impose the penalties provided by the social criminal code of 6 June 2010. The employee can also file a complaint with the said Inspectorate if the employee believes that the employer has not taken the adequate measures.[66]

§ 4.9 Are employers required to provide antiharassment/antiretaliation training to their workers?

According to Belgian law, employers are not required to provide such training.

§ 5 COMPENSATION

§ 5.1 What restrictions are there on hours that may be worked?

Belgian law provides for strict regulations of working time. Some of these restrictions, however, do not apply to sales representatives, home workers and employees in a managerial role or a position of trust within the company.

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[64] Art. 442*bis* of the Penal Code; Corr. Brussels 6 November 2012, *Soc.Kron.* 2017,vol. 4, 161; Corr. Hainaut (dep. Mons) 17 June 2014, *Soc.Kron*. 2017, vol. 4, 165.

[65] Art. 417*quinquies* Penal Code; Labor Tribunal Liège 26 March 2015, *Soc.Kron.* 2017, vol. 4, 154.

[66] Act of 4 August 1996 on employees' health and safety in the workplace; Art. I.3-13 of the Code of 28 April 2017 on health & safety in the workplace.

§ 5.1(a) *Daily & Weekly Limits*

Working time is in principle limited to 40 hours per week, provided the weekly working time is 38 hours over the applicable reference period (*i.e.*, from a quarter of a year to a full year). If the actual weekly working time exceeds 38 hours, employees are entitled to days off (*i.e.*, the so-called working time reduction days) in order to respect the average number of hours.

Moreover, the daily working time is limited to eight hours per day.[67]

Lower maximum durations apply in certain industries and companies.

There are also many exceptions to these working time limits, which, in some circumstances, imply the absence of a maximum. These exceptions can be temporary (*e.g.*, where an urgent intervention/works are required) or structural (related to the organization of the work).

Employers from specific sectors can implement "new working time regimes" as a derogation from the normal rules. In order to implement such regimes, employers must respect a strict procedure.

Under recent legislation (*i.e.*, the Act of 3 October 2022 on diverse employment relations), employers can deviate from the normal rules by implementing a four-day week (instead of a five- or six-day week)[68] or alternate work schedules.[69] For a four-day work week, the daily limit of work time for a full-time employee can be increased to 9.5 or 10 hours per day. For alternate work schedules, work can be organized in two-week cycles, with the first week's work compensating for the second week's work. During these cycles, employees can work up to nine hours per day and up to 45 hours per week. Employers must follow specific procedures to implement these regimes.

Employees who request to work under these regimes are protected from dismissal for reasons related to such request. However, and notwithstanding certain specific situations whereunder the dismissal would be illegitimate for other reasons as well, there is no special sanction for employers who violate this prohibition.

According to Belgian law, certain rules on minimum hours must also be respected. More precisely, the weekly working time of a part-time employee may not be less than 1/3 of the weekly working time of the full-time employees of the same category in the company.[70] Moreover, the duration of each working period may not be less than three hours.[71] These rules do not apply for certain employees, companies, and industries.

§ 5.1(b) *Overtime*

Work that exceeds the daily working limit of (in principle) nine hours or the weekly working limit of (in principle) 40 hours constitutes overtime.

Overtime work is only authorized under certain conditions and in certain circumstances (*e.g.*, to overcome the threat of or where an accident has occurred, to carry out urgent work on machinery or equipment for third parties, etc.), subject to maximum hours and, depending on the situation, prior trade union notification

[67] Art. 19 of the Act of 16 March 1971 regulating employment.

[68] Art. 20*bis*/1 of the Act of 16 March 1971 regulating employment.

[69] Art. 20*quater* of the Act of 16 March 1971 regulating employment.

[70] Art. 11*bis* of the Act of 3 July 1978 on employment contracts.

[71] Art. 1 of the Act of 16 March 1971 regulating employment.

or consent and/or notification or consent of the inspector/district head of the General Directorate for the Supervision of Social Legislation.

Employees who work overtime are generally entitled to: (1) their normal salary and an additional overtime pay equal to 50% of their normal salary (or 100% for overtime worked on a Sunday or a public holiday); and (2) compensatory rest period if the normal weekly working time has been exceeded due to overtime work.[72]

§ 5.1(c) *Sunday Work & Work on Public Holidays*

Employees may, in principle, not work on Sundays or public holidays. However, this is allowed in certain circumstances (*e.g.*, if it is not possible to perform the work on other days, for instance to deal with an accident that has occurred or is imminent). Moreover, work on Sundays is allowed in specific industries.[73]

§ 5.1(d) *Night work*

Belgian law in principle prohibits night work. But, there are exceptions to this prohibition.[74]

§ 5.2 What minimum wage requirements exist?

Minimum wages are typically defined by the social partners (*i.e.*, the employees and employers and their organizations). Therefore, minimum wages differ from industry to industry.

The authorities, however, implemented some mechanisms to control the determination of minimum wages, *inter alia* by determining a margin for the increase of minimum wages, taking into account the evolution of wages in the neighboring countries.

Even though higher minimum wages apply in many industries, the absolute bottom limit is the guaranteed average minimum monthly income, which has been determined by the National Labor Council. The average gross minimum monthly wage is EUR 1,954.99 for all employees as of the age of 18.[75] This amount applies as per December 1, 2022 but will be increased from time to time.

Lower minimum thresholds apply for employees employed in the framework of an employment agreement for students.

Apart from minimum wages, industries also determine other types of remunerations. For instance, in some industries, employees are entitled to meal vouchers, a thirteenth (and fourteenth) months' pay, group and/or hospitalization insurance. Therefore, it is important to verify the applicable industry and company CBA's on minimum wages and remuneration.

§ 5.3 What is the required schedule for paying wages, and in what form and currency must they be paid?

Remuneration must be paid in accordance with the terms and conditions that the parties have agreed upon. Most employment contracts provide for payment by wire transfer and, exceptionally, from hand to hand.

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[72] Art. 29 of the Act of 16 March 1971 regulating employment.

[73] Arts. 11-18 of the Act of 16 March 1971 regulating employment.

[74] Arts. 35-38 of the Act of 16 March 1971 regulating employment.

[75] Art. 3 of CBA no. 43 of 2 May 1988 on the guaranteed average minimum monthly income.

Wages of white-collar employees are paid on a monthly basis. Since blue-collar employees are entitled to advance payments, their wages are paid at least twice a month, with a maximum interval of 16 days.

Commission fees of sales representatives are paid 15 days after the employer delivered the record of the commissions concerning the previous month. If the salary of a sales representative is fixed, it is paid on a monthly basis.

Commission fees of employees that are not defined as sales representatives, are paid every three months.

When wages are to be paid is either defined by CBA's, or, in their default, by the labor regulations or in any other valid regulation. In any case, wages may not be paid later than the seventh day after the working period they concern.

The Act of 12 April 1965 on the protection of salary provides that salary should be paid in the currency that is legally accepted in Belgium, *i.e.*, in Euro. When the work is carried out abroad, employer and employees can agree to pay all or part of the remuneration in Euros or in the currency that is applicable in the country of the work activity.

Based on CBA's concluded at the level of the joint committees, many employees are entitled to an end-of-year premium (also called thirteenth month salary for white-collar employees), which is paid once per year.

Only in strictly determined cases, employers may deduct amounts from the wages of their employees.[76] However, since parties usually agree upon *gross* remuneration, employers must deduct: (1) tax withholdings, the percentage of which depends on specific wage scales; (2) social security contributions (in principle 13.07% of the gross amount or for blue-collar employees 13.07% of 108% the gross amount); and (3) possible other additional social security contributions or taxes. The result is the net salary, which is paid to the employee. On top of these gross amounts, employers must pay so-called employer's contributions equal to 25% to 32% of the gross amount for white-collar workers and 25% to 32% of 108% of the gross amount for blue-collar workers. In certain cases, employers can recover a part of these contributions.

A part of the remuneration may be paid in kind (*e.g.*, housing, water, heating, food), but this is in principle limited to 1/5 of the remuneration. However, if the employer puts a house or an apartment at the disposal of the employee, the payment in kind may not exceed 2/5 of the total gross remuneration. The remuneration in kind of house staff, janitors, apprentices, or trainees may amount to a maximum of 1/2 of their remuneration provided that they are fully housed and fed by their employer.[77]

In any case, employers may never restrict the freedom of the employee to spend their remuneration.

§ 5.4 What overtime pay requirements exist?

Unless parties agree on higher amounts, hourly overtime compensation should be at least 50% of the hourly salary. The salary for overtime on Sundays and on official holidays is 100% more than the normal salary. There can be higher overtime pay rates agreed at the level of the joint committee or at the level of the company.

[76] Art. 23 of the Act of 12 April 1965 on the protection of salary.

[77] Art. 6 of the Act of 12 April 1965 on the protection of salary.

Nevertheless, overtime pay can be converted into "time off in lieu" if provided by a CBA. In this case, overtime for which overtime pay of 50% should be paid, gives rise to 30 minutes of time off in lieu; whereas overtime for which overtime pay of 100% should be paid, gives rise to one hour of time off in lieu.[78]

The rules on overtime pay and time off in lieu do not apply to certain categories of employees such as employees with an executive position, trust staff, employees of certain family-run businesses, and sales representatives.[79]

Employees can, however, express their desire to do overtime work. In this case, the parties must sign an agreement. Such overtime is limited to 120 hours per year (or 360 hours per year if increased by collective bargaining agreement) and will exclusively be paid by overtime pay (so, no time off in lieu).[80] In 2022 overtime work was allowed up to 220 hours per year in all sectors due to the COVID-19 pandemic.[81] At this time, the option has not been renewed for 2023.

The hours exceeding the daily and weekly limits are not automatically considered compensable overtime to employees working far from home,[82] work organized in successive shifts,[83] continuous work,[84] sectors or categories wherein the normal limitations cannot be respected, and employees with flexible working time.

§ 5.5 What bonuses are mandated or customary?

Even though only certain joint committees impose (by way of CBA) to pay bonuses, this is common practice. The terms and conditions must not be established in a bonus scheme, but this is recommended, especially to inform the employees about the targets.

Bonus plans may be agreed upon for a limited period and may be prolonged or replaced by a new plan after it ceases to have effect. Employers can also decide not to grant a bonus anymore. In any case, employers are not allowed to change the terms and conditions of a plan unilaterally.

It is possible to implement a bonus plan that is subject to a favorable regime with regard to tax and social security contributions (*i.e.*, the so-called nonrecurring result-related benefits). Such plan is subject to strict conditions.[85]

§ 5.6 Are there any rules related to pay equity or pay transparency?

Unequal pay can be considered to be a discrimination if the difference is based on a category that is protected by the antidiscrimination acts (see **§ 4.1**). Larger companies, with elected employee representation bodies, have to report on the gender pay gap every two years. Employee representatives can ask to draft an action plan to address any gender pay gap issues.[86]

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78 Art. 29 of the Act of 16 March 1971 regulating employment.

79 Art. 3 of the Act of 16 March 1971 regulating employment.

80 Art. 25*bis* of the Act of 16 March 1971 regulating employment; CBA No 129.

81 Art. 2 of the Act of 12 December 2021in execution of the social agreement in light of the interprofessional negotiations for the period of 2021-2022.

82 Art. 22 § 2 of the Act of 16 March 1971 regulating employment.

83 Art. 27 of the Act of 16 March 1971 regulating employment.

84 Art. 22, 2° of the Act of 16 March 1971 regulating employment.

85 Art. 2-20 of the Act of 21 December 2007; CBA No. 90.

86 Art. 13/2 and following Act of 10 May 2007 on discrimination between women and men.

In Belgium, salaries are generally not discussed. Therefore, there are currently no requirements or prohibitions concerning pay transparency. This is set to change in the near future with the recent entry into force of the Pay Transparency Directive at the E.U. level. For now, however, Belgium still needs to implement this into national legislation.

§ 6 TIME OFF FROM WORK

§ 6.1 What public, statutory, or national holidays are required, and what are the requirements if employees work on such holidays?

Under Belgian law, employees are entitled to the following 10 public holidays each year with normal pay:

Public Holiday	Date
New Year's Day	January 1
Easter Monday	Monday after Easter
Labor Day	May 1
Ascension Day	40 days after Easter
Whit Monday	50 days after Easter
National Day	July 21
Assumption Day	August 15
All Saints Day	November 1
Armistice Day	November 11
Christmas	December 25

If a public holiday coincides with a Sunday or a regular day of inactivity (such as the weekend in a five-day working week), it should be substituted by another day of activity (a "substitute" holiday). This substitute holiday compensates the loss resulting from the fact that the employees will not benefit from the public holiday that falls on a day the employee would not work. The dates of those substitute holidays are determined:

- by the social partners at industry level (decision must be notified to the Minister of Labor before October 1 of the preceding year and must be declared generally binding by royal decree);
- in absence thereof, by the works council at company level;
- in absence thereof, by agreement between the employer and the trade union delegation (or in absence thereof the employees); and
- in absence thereof, by individual agreement between the employer and the employee.

Where the substitute holiday has not been determined in accordance with one of the above rules, the public holiday shall be substituted by the first regular working day following that public holiday. In any case the employer must notify the employees of such substitute holidays at the latest on December 15 of the preceding year by posting a written notification at its offices. A copy of such announcement should also be attached to the work rules.[87]

As a general principle, employees may not work on public holidays. However, a limited number of exceptions to this prohibition exist. Where such an exception applies, the employee who worked on a public

[87] Act of 4 January 1974.

holiday is entitled to paid compensatory rest (equal to one day if the employee worked longer than four hours during the public holiday and at least half a day if the employee worked less than four hours during the public holiday). Employees who work on holidays are in general entitled to their normal salary for the holiday and for the (half) day of compensatory rest.[88]

§ 6.2 What are the requirements for short-term sick pay, and who pays it?

§ 6.2(a) *White-Collar Employees*

White-collar employees are entitled to receive a guaranteed salary paid by the employer during the first month of work incapacity because of illness (other than an occupational illness) or an accident (other than an accident at work or an accident on the way to or from work).[89] Thereafter, the health insurance organization will pay the incapacitated employee an illness and disability allowance.

If the employee becomes newly incapacitated due to the same illness or accident within 14 days of a previous incapacity, the employer is not required to pay the guaranteed salary again. Exceptions to this rule include if a doctor certifies that the new incapacity is different than the previous one, or if the employee did not receive the guaranteed salary for the maximum period during the preceding incapacity. Under certain circumstances – and with the approval of the employer – an employee can partially resume work after a period of incapacity to work. During the first 20 weeks of such periods of "partial resumption," the employer is exempted from paying the guaranteed salary in case of illness (other than an occupational illness) or accident (other than an accident at work or an accident on the way to or from work). After this 20-week period, the general rules for guaranteed salary apply again.

§ 6.2(b) *Blue-Collar Employees*

During the first month of work incapacity because of illness (other than an occupational illness) or accident (other than an accident at work or an accident on the way to or from work), blue-collar employees are entitled to the following payments (which result in providing the blue-collar employee a guaranteed salary for a period of one month, equal to the net amount of salary that the employee would have received if they had continued to work):

- **During the first period of seven days of incapacity to work:** 100% of the gross salary paid by the employer.
- **During the second period of seven days of incapacity to work:** 85.88% of the normal salary, which will be paid by the employer.
- **On the 15th through the 30th day of incapacity to work:** 25.88% of the part of the normal salary not exceeding the salary limit that is considered for the calculation of the indemnities of the health insurance, which will be paid by the employer; plus 85.88% of the part of the normal salary exceeding this salary limit, which will also be paid by the employer; and additionally, 60% of the gross salary paid by the health insurance.[90]

[88] Holiday Act of 4 January 1974; Royal Decree of 18 April 1974.

[89] Art. 70 of the Act of 3 July 1978 on employment contracts.

[90] Art. 52 of the Act of 3 July 1978 on employment contracts; Collective bargaining agreement n° 12*bis.*

Afterwards, the blue-collar workers will be paid an illness and disability allowance by the health insurance organization.

Entitlement to the abovementioned amounts only applies if the employee has a seniority in the same company for at least one month without interruption.

§ 6.3 What are the requirements for paid vacation or annual leave?

Under Belgian law, employees are entitled to an annual paid leave of four weeks (*i.e.*, 20 working days in a five-day work week). In addition to this statutory annual paid leave, social partners have concluded a significant number of industry-level collective bargaining agreements providing additional vacation entitlements to the employees (generally based on seniority). In addition, some employers award extra-legal vacation days to their employees, either based on a collective bargaining agreement concluded at company level, the contract, or a unilateral award.

The entitlement to annual paid leave depends on the number of days worked or assimilated during the so-called "holiday service year," (*i.e.*, the calendar year directly preceding the vacation year in which vacation is taken). Employees will thus only be entitled to the full four weeks of paid leave if they have been working during the entire holiday service year. Employees who were inactive during the holiday service year, provided that this period of inactivity is not assimilated, will not be entitled to the statutory paid leave. Employees who start (or resume) an activity have, however, the possibility to take days of supplementary vacation (so-called "European vacation"), which was introduced by the Belgian legislator in order to comply with the EU Working Time Directive.

As regards the vacation pay, a distinction is made between blue-collar and white-collar employees:

- Blue-collar employees are entitled to 15.38% of their annual salary, paid by a vacation fund, which is financed by social security contributions.

- White-collar employees are entitled to vacation pay paid by the employer, which consists of two parts:

    - The "single" vacation pay (the employer continues to pay the normal salary during the employee's vacation).

    - The "double" vacation pay (equal to 92% of the employee's monthly salary for the month in which the employee takes the "main" vacation).

Employees younger than 25 who have graduated during the holiday service year and worked for at least one month during the holiday service year, may, in addition to the number of vacation days to which they are entitled in accordance with the ordinary scheme, be entitled to "youth vacation days" in proportion to the number of days worked and assimilated during the holiday service year. During these youth vacation days, the employee is entitled to unemployment benefits granted by the National Employment Office.

Employees older than 50 who resume work after a period of unemployment or long incapacity and who, for that reason, have no or incomplete entitlement to statutory paid leave are entitled to "senior vacation days" in addition to the vacation days accrued during the holiday service year. During these senior vacation days, the employees are entitled to an unemployment benefit granted by the National Employment Office.

§ 6.4 What requirements exist for paid or unpaid maternity and paternity leave?

Apart from specific leaves for foster parents (see **§ 6.7**), under Belgian law, four different types of leave for the birth or adoption of a child exist.

§ 6.4(a) *Maternity Leave*

Belgian law provides for a maternity leave period of 15 weeks, which can be divided into prenatal and postnatal rest.

- *Prenatal rest* may start at the earliest six weeks prior to the expected date of birth (eight weeks for multiple-birth delivery). As from the seventh day prior to the expected date of birth, the employee *cannot* perform any work.

- *Postnatal rest* has a mandatory duration of nine weeks from the date of birth (11 weeks for multiple births). At the request of the employee postnatal rest can be extended by the period of prenatal rest that has not been taken by the employee.

Pregnant employees who have noticed their employer of their pregnancy are entitled to receive their normal salary while absent from work due to medical pregnancy checkups if any of these checkups cannot take place outside the working hours.[91]

As long as the employee has not applied for prenatal rest, any incapacity occurring in the five weeks (seven weeks in the case of multiple births) preceding the mandatory prenatal rest period must give rise to payment of the guaranteed salary (up to 30 days) by the employer.

When an employee is subject to a risk assessment,[92] she may be eligible for allowances from the Public Health Insurance.

During the period of maternity leave, the employee receives allowances from the Public Health Insurance. In some cases, the employer must pay the guaranteed salary for the period of incapacity to work within the six weeks prior to the expected date of birth.

Employees are protected against dismissal (and against the non-renewal of a fixed-term or interim employment agreement), as from the moment the employer is informed of the employee's pregnancy until one month after the end of the postnatal rest. Moreover, this protection also applies thereafter when the employer has already prepared the dismissal during the protection period.

§ 6.4(b) *Birth leave*

Effective January 1, 2023, employees (other than the birth mother) are entitled to be absent from work for 20 days due to the birth of their child. The employee can choose when to take the leave as long as it is taken within four months of the child's birth. This right applies to the father of the child, as well as "co-parents" (such as the mother's lesbian partner or any partner who lives with the formal parent of the child, even when they have not formally recognized the child themselves). In any case however, only one employee

[91] Art. 28, 2°*bis* Act of 3 July 1978 on employment contracts; Art. 39*bis* Act of 16 March 1971 regulating employment.

[92] The risks are listed in Art. 42, §1 Act of 16 March 1971 regulating employment.

can enjoy the birth leave. During the first three days, the employer must pay the normal salary. During the following 17 days, an allowance is paid by the Public Health Insurance.[93]

Birth leave is separate from the right of the father or the co-parent to convert the maternity leave into birth leave in the event of the mother's death or hospitalization. Public Health Insurance pays for the days of birth leave.[94]

Employees who (wish to) make use of their right to birth leave (under certain conditions) will be protected against dismissal and against the non-renewal of a fixed-term or interim employment agreement. Protection begins when the employer is notified of the employee's intent to take the leave or the first day of the leave (whichever is earlier) and until five months after the day of the birth. Moreover, this protection also applies thereafter when the employer has already prepared the dismissal during the protection period.

§ 6.4(c) *Adoption Leave*

Employees who adopt a minor are entitled to seven weeks adoption leave. As from 2021, the adoption leave will be extended to eight weeks, to nine weeks as from 2023, to 10 weeks as from 2025 and to 11 weeks as from 2027.

The adoption leave is doubled if the child has a severe disability.

In case the child has two adoptive parents, the number of weeks that exceeds six weeks is divided between both parents.

In case of simultaneous adoption of several minor children, the maximum duration of the adoption leave is extended with two weeks.

If the adoptive parent chooses not to take the maximum amount of adoption leave, the leave must at least be one week or a multitude of weeks.

During the first three days the employer must pay the normal salary. During the following days an allowance is paid by the Public Health Insurance.

Employees who (wish to) make use of their right to adoption leave (under certain conditions), will be protected against dismissal and against the non-renewal of a fixed-term or interim employment agreement.[95]

§ 6.4(d) *Parental Leave*

Under Belgian law, employees can choose between two different parental leave schemes.

- According to the Royal Decree of 29 October 1997:

  An employee can take up to four months of parental leave for each child until the child reaches the age of 12 (21 in case the child has a severe disability) provided that the employee has been employed for at least 12 months during the 15 months preceding the request for parental leave. The previous periods of employment that the employee carried out with the employer as an interim worker will also be taken into account for this purpose.

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[93] Art. 30, § 2 Act of 3 July 1978 on employment contracts.

[94] Royal Decree of 17 October 1994.

[95] Art. 30*ter* Act of 3 July 1978 on employment contracts.

- Parental leave can be taken as follows:

  - a full suspension of the employment contract for four months (should not necessarily be taken for a continuous period of four months but can be divided over four separate months; subject to the agreement of the employer, the period of four months can be divided in periods of one week or multiple weeks);

  - a reduction of the (full-time employed) employee's working time of 50% during eight months (should not necessarily be taken for a continuous period of 8 months but can be divided over periods of two months, subject to the agreement of the employer, the period of eight months can be divided in periods of one month or multiple months);

  - a reduction of the (full-time employed) employee's working time by 1/5 during 20 months (should not necessarily be taken for a continuous period of 20 months but can be divided over periods of five or 10 months);

  - a reduction of the (full-time employed) employee's working time by 1/10 during 40 months, subject to the agreement of the employer.

  The abovementioned forms can be combined by the employee.

  During parental leave the employee will be entitled to an allowance requested to the National Employment Office.

- According to CBA No. 64:

  CBA No. 64 only applies if no CBA at industry or company level has provided for an at least equivalent parental leave entitlement.

  An employee can take parental leave for each child until the child reaches the age of eight and provided that the employee has been employed for a period of at least 12 months during the 15 months preceding the request for parental leave.

  In general, the employment contract is fully suspended for a period of four months. Employer and employee may, however, agree that the entitlement of parental leave:

  - will be exercised in parts; or

  - will be exercised with reduction of the employee's working time.

  According to the scheme of CBA No. 64, the employee is not entitled to a compensation or benefit.

After taking (unpaid) parental leave according to CBA No. 64, the employee may take two more months of (paid) parental leave for the same child under the form of full suspension of the employment contract.

According to both schemes, employees on parental leave benefit from a protection against dismissal as from the notification date of the request for parental leave up to two or three months (depending on the applicable scheme) after the end of the parental leave. During this protection period, employees may not be dismissed except for legitimate reasons or on grounds of grave misconduct. Should the employer fail in proving such reason(s), the employee will be entitled to a lump-sum protection indemnity equal to six

months' salary (calculated as if the employee had not reduced the working time). This indemnity is to be paid on top of the compensation in lieu of notice. Moreover, employees could also still enjoy protection against dismissal following the protection period when the employer has already prepared the dismissal during this period or when the dismissal would otherwise be deemed unreasonable or discriminatory.

§ 6.5 What requirements are there for new mothers (*e.g.*, part-time work, breaks for breast feeding, or day care)?

§ 6.5(a) *Nursing (Breast-Feeding) Breaks*

Under CBA No. 80, an employee who resumes work after maternity leave while still breastfeeding her child is entitled to "breast-feeding breaks" up to nine months after the birth of the child. During this period, the employee may interrupt the execution of her employment contract for 30 minutes when working between four and seven and a half hours and two times 30 minutes (to be taken in one or two separate breaks) when working more than seven and a half hours a day.

Employer and employee must agree on which moment(s) of the day the employee will take the breast-feeding breaks. In order to be entitled to breast-feeding breaks, the employee must provide evidence that she actually breast feeds her child.

Breast-feeding breaks are not paid by the employer. The employee receives an allowance from the Public Health Insurance. The employee benefiting from breast-feeding breaks is protected against dismissal and may only be dismissed for reasons not related to her breast feeding. The sanction for dismissing the employee during the protection period (without a reason not related to the breast feeding) is the payment of a protection indemnity of six months' salary on top of the applicable compensation in lieu of notice to the employee.

§ 6.5(b) *Miscellaneous*

The following specific rules must be respected as regards pregnant employees:

- The employer must carry out a risk assessment in the company. This evaluation shall examine any risk to safety and health and any impact on the pregnancy or breastfeeding of the employee or the health of the child. Where a risk is identified during the risk assessment provided for this purpose, the employer shall immediately take an appropriate measure in the case of the employee concerned in order to avoid her being exposed to that risk. If not possible, the employment contract will be suspended and the employee will receive an allowance from the health insurance.

- During eight weeks before the expected date of birth (and prior during the pregnancy or until four weeks after the maternity leave when providing a medical report), the employee cannot be obliged to perform night work. In this case the employer must provide for day work or, if not possible, suspend the employment contract.[96]

- Pregnant and breast-feeding employees may not perform overtime work.[97]

- After maternity leave, the employee has the right to perform her original function.

[96] Art. 43 of the Act of 16 March 1971 regulating employment.

[97] Art. 44 of the Act of 16 March 1971 regulating employment.

- A pregnant employee may not be discriminated against because of her pregnancy.

- Pregnant employees are entitled to a specific protection against dismissal: as of the moment the employer is notified of the pregnancy until one month after the end of the maternity leave (or even later when the employer has already prepared the dismissal during the aforementioned period), the employee may not be dismissed except for a reason that is not related to the employee's physical condition resulting from pregnancy or giving birth.

§ 6.6 What requirements exist for paid or unpaid medical leaves of absence?

The execution of the employment contract is suspended during periods of incapacity to work resulting from illness or an accident. Subject to certain conditions, the employee will receive (a portion) of their salary while the contract is suspended during the first 30 days (see **§ 6.2**).

Employees must generally immediately inform their employer of the incapacity to work and provide a medical certificate in order to receive paid medical leave. However, recent legislation (*i.e.*, Act of 30 October 2022 laying down various provisions on incapacity to work) allows for some exceptions: Employees can take one day of paid medical leave without a medical certificate up to three times per calendar year. This exemption also applies to the first day of a longer period of incapacity. In companies with fewer than 50 employees, it is possible to derogate from this exemption through a collective bargaining agreement or work regulations.[98]

Following the period covered by the guaranteed salary, the employee will receive sickness benefits from the Health Insurance Fund.

There is also a specific procedure for reintegrating employees after a (long-term) incapacity for work. The aim is to offer sick employees adapted or different work, either temporarily until the work agreed between the parties can be resumed, or permanently if the employee is permanently incapable of performing the agreed work. The law also makes it possible to terminate the employment contract for medical force majeure (as discussed below) provided some conditions are fulfilled).

The reintegration process can be initiated by either the employee (or the employee's treating doctor) or the employer as early as three months after the start of the employee's incapacity. The request must be filed with the prevention advisor-labor doctor. After four weeks of incapacity, the prevention advisor-labor doctor must contact the employee to discuss options for returning to work.

Employers with 50 or more employees have an extra incentive to participate in or even initiate the reintegration process as they can be penalized if an excessive amount of their employees have been incapacitated for work for more than one year. The penalty is a quarterly employer contribution of 0.625% on all wages subject to social security contributions and is applied if the average inflow of employees into disability is two times higher than in companies in the same sector and three times higher than in the private sector in general.[99] However, for this sanction to be applied, some additional conditions must be met, and

[98] Art. 31, §2/1 of the Act of 3 July 1978 on employment contracts.

[99] Act of 20 November 2022 containing various provisions on employer accountability for disability and alternative social security financing; Royal Decree of 19 December 2022 implementing Article 145 of the Program Law of 27 December 2021 on proactive communication to employers whose average employee inflow into disability is unfavorable.

specific rules apply to the calculation of the aforementioned ratios. In any case, the NSSO will proactively inform those employers if they are at risk of being penalized.

After receiving a reintegration request, the prevention advisor-labor doctor must invite the employee for the integration assessment. The reintegration process is terminated when the employee does not accept the invitations by the prevention advisor-labor doctor, after they have been invited three times (there must be at least 14 calendar days between invitations each time). During the reintegration assessment the prevention advisor-labor doctor will examine the situation of the employee and will consult with the employee and—as the case may be and subject to the consent of the employee—with other persons, such as the treating doctor or other persons who might contribute to the success of the reintegration. After the examination, the labor-advisor doctor can take the following decisions:

- The employee is temporarily incapable to perform the agreed work and modified or other work is possible during the temporary incapacity.

- The employee is definitively incapable for the agreed work, but performance of adapted or other work is possible.

- It is not (yet) opportune to do a re-integration assessment for medical reasons:

If definitive incapacity for the agreed work is established (decision B), the employee who does not agree with this decision may appeal to the General directorate of the Supervision of welfare at work.

In a next step (under point (a) and (b) above), the employer will have to draft a reintegration plan. If the employer considers it technically or objectively impossible or reasonably impossible on justified grounds to draft a reintegration plan, the employer states the reasons thereof in a report that it provides to the employee and the prevention advisor-labor doctor. This plan must show that the possibilities for adjustment of the work station and/or for modified or other work were seriously considered.

Recently, the procedure to terminate the employment contract due to medical force majeure and the reintegration process have been completely separated. From now on, there is a specific procedure for termination of the employment contract due to medical force majeure, in which the prevention advisor-labor doctor must be engaged by the employer or the employee to decide whether it is permanently impossible for the employee to perform the agreed work.[100] This examination can only take place after a continuous period of nine months of incapacity for work and if no reintegration process is ongoing.

More specifically, the employment contract can only be terminated due to medical force majeure if the examination of the prevention advisor-labor doctor against which no further appeal is possible, or the result of the appeal procedure, shows that it is definitively impossible for the employee to perform the agreed work, and:

- the employee has not asked to examine the possibilities for adapted or different work;

- the employee has asked to examine the possibilities for adapted or different work and the employer has provided a motivated report explaining why the drawing up of a plan for adapted or different work is technically or objectively impossible or cannot reasonably be required for justified grounds; or

[100] Art. 34ter of the Act of 3 July 1978 on employment contracts.

- the employee has asked to examine the possibilities for adapted or different work but has refused the plan for adapted or different work provided by the employer.

Termination for medical-related force majeure means that the employment contract is terminated without notice or indemnity in lieu of notice. An employer who wishes to terminate the employment contract due to a medical-related force majeure is obliged to report this to the so-called Back To Work Fund and to deposit a contribution of EUR 1,800.[101] The exact date of entry into force of this contribution obligation and the different modalities of application have yet to be determined. Until the above obligation and its modalities have become definitive, employers will continue to be held to the "old" obligation to make an outplacement offer equal to EUR 1,800 to the employee whose employment contract is being terminated due to medical force majeure.[102]

§ 6.7 What other paid or unpaid leaves of absence must be provided by employers?

§ 6.7(a) *Time Credit*[103]

Time credit offers employees the possibility to suspend temporarily, all or a part of their professional career, without having to terminate the employment contract. During this period, the employee can receive – if additional/stricter conditions are met[104] - an allowance from the National Employment Office. Under Belgian law, two forms of time credit exist:

- **Time credit for specific reasons:** An employee is entitled to full-time, part-time, or 1/5-time credit during maximum 51 months for the following caring motives:
  - taking care of a child until the child is eight years old;
  - providing palliative care;
  - providing assistance or care to a family member who is seriously ill;
  - taking care of a disabled child until the child is 21 years old; and
  - providing assistance or care to the heavily ill minor child or to a heavily ill minor child who is a family member.

  An employee is entitled to full-time, part-time or 1/5-time credit during maximum 36 months in order to follow a recognized education.

- **Time credit at the end of career:** As from the age of 55 (some exceptions apply), the employee with at least 25 years of professional career as an employee is entitled to a 1/5- or 1/2-time credit, in certain circumstances without maximum duration. In principle, only employees who are at least 60 years old have a right to interruption allowances, within the end-of-career time credit framework, although some exceptions apply.

[101] Art. 10. § 1 of the Program Act of 26 December 2022.

[102] Art. 18/1 Act of 5 September 2001 on the improvement of the employment rate of employees.

[103] CBA No.103.

[104] Royal Decree of 12 December 2001.

To be eligible for an end-of-career time credit, the employee must have:

- at least 24 months of seniority with the employer (unless derogation from this is allowed by the employer) at the moment of the request; or

- during the 24 months preceding the request, the employee must be occupied 3/4 of a full-time employment for the time credit to be reduced to part-time or occupied full-time or 4/5 of a full-time employment for the time credit to be reduced to 1/5.

Both forms of time credit can be combined. Derogatory regimes exist for employees who still fall under old CBA No. 77.

As from the written request until three months after the end of the time credit, the employee, may not be dismissed, except for serious cause or a reason not related to the time credit. Moreover, this protection against dismissal also applies after the protection period when the employer has already prepared the dismissal during this period. The sanction for dismissal during this period without a reason not related to the time credit is a six months' salary indemnity on top of the compensation in lieu of notice to the employee.

§ 6.7(b) *Foster Care Leave*[105]

An employee who is a appointed as a foster parent by an official authority has the right to be absent from work during maximum six days a year for the fulfillment of obligations and assignments or to face situations resulting from the foster care, namely attending hearings of judicial or administrative authorities, contacting the biological parents or other important people to the child and contacting the foster care service. If the foster family comprises two employees, both of whom have been appointed as a foster parent, these six days must be divided between them. During the foster care leave, the employee is entitled to a lump sum allowance from the National Employment Office.

§ 6.7(c) *Foster Parents Leave*[106]

Since January 1, 2019, an employee who has been appointed as a foster parent in the context of a long-term foster care is entitled to a one-time foster parents leave, up to a maximum of six weeks.

The foster parents leave is increased by one week as of 2019, two weeks as of 2021, three weeks as of 2023, four weeks as of 2025, five weeks as of 2027. The maximum duration is doubled if the child is disabled. If two persons are jointly appointed as foster parents in the same foster family, these additional weeks are to be divided between both foster parents.

During the first three days of foster parents leave, the employee receives the normal salary from the employer. Afterwards the employee will receive an allowance from the employee's health insurance.

§ 6.7(d) *Paid Educational Leave*

Employees who follow an educational program are, under certain circumstances, entitled to paid educational leave (or Flemish educational leave in the Flemish region). This means that the employee has the right to be absent from work in order to follow certain educational programs while retaining a normal salary. The employer can obtain a partial reimbursement of the salary from the competent regional authority

[105] Art. 30*quater* of the Act of 3 July 1978 on employment contracts Act; Royal Decree of 27 October 2008 concerning absence from work with regard to providing foster care.

[106] Art. 30*sexies* of the Act of 3 July 1978 on employment contracts.

for the days and hours of educational leave. This matter is a regional competence, so the applicable rules may differ between regions.[107]

§ 6.7(e) *Palliative Leave*[108]

Employees have the right to suspend the execution of their employment contract or to reduce their working time for the palliative care of a terminally ill person (not necessarily a family member). An employer cannot refuse or postpone palliative leave. During this leave, the employee is entitled to an allowance from the National Employment Office. This employee is protected against dismissal from the day of their request until three months after the end of the palliative leave.

§ 6.7(f) *Political Leave*[109]

Employees are entitled to political leave in order to fulfill their political mandate. The duration of the leave depends on the specific mandate. An employee receives a normal salary during the political leave, except for mayors, aldermen, presidents of a district council, or the president of a public center for social welfare.

The employer can claim reimbursement of the salaries and employer contributions from the institution in which the employee executes the mandate. The institution can than deduct the amounts it reimbursed to the employer from the remuneration of the employee/representative.

§ 6.7(g) *Leave for Assistance & Taking Care of a Heavily Ill Family Member*[110]

In order to assist or to take care of a heavily ill family member, an employee has the right to suspend the employment contract or reduce the working time with 1/2 or 1/5.

The right to reduce the working time does not apply in small companies (less than 10 employees on June 30, of the previous year).

The employer can postpone the leave seven days (except in case of leave for a heavily ill child staying in a hospital). Only small and medium sized enterprises can refuse the leave provided the employee has already suspended the employment contract full-time during six months or reduced the working time part-time during 12 months (some exceptions exist).

During the leave, the employee will receive an allowance from the National Employment Office.

The employee requesting leave for assistance and taking care of a heavily ill family member is protected against dismissal from the day of the request until three months after the end of the leave.

§ 6.7(h) *Donation of Conventional Leave*[111]

An employee who enjoys extra conventional leave that may be taken freely has the possibility to transfer these days to an employee within the company that takes care of a child younger than 21 who is ill or

[107] Restoration Act of 22 January 1985 containing social provisions.

[108] Restorative act of 22 January 1985; Royal Decree of 22 March 1995.

[109] Act of 19 July 1976 installing leave for the exercise of a political mandate; Royal Decree of 28 December 1976; Royal Decree of 22 February 1977; Royal Decree of 31 May 1977; Royal Decree of 5 April 2001; Ministerial Decree of 5 September 1977.

[110] Restorative Act of 22 January 1985; Royal Decree of 10 August 1998.

[111] Act of 5 March 2017 on practicable and maneuverable work.

disabled or who has been the victim of a serious accident and who needs constant presence and essential care.

The donation of conventional leave must be established in an industry CBA or, in the absence thereof, in a company CBA or, in the absence thereof, in the labor regulations.

§ 6.7(i) *Career Saving*[112]

Within the framework of career saving, employees may save some specific time elements in order to take these later on as leave. The system of career saving must in principle be introduced on industry level.

§ 6.7(j) *Absence Because of Particular Circumstances*[113]

Employees have the right to be absent from work, with normal pay, on the occasion of family events, for the fulfilment of civil obligations or civil assignments and in case of appearance before a court. A Royal Decree determines for which events or obligations employees may be absent and for how long this absence may last. For instance, employees are entitled to be absent two days to celebrate their own marriage; 10 days due to the death of a spouse, child, or spouse's child; and three days upon the death of a father, mother, father-in-law, mother-in-law, stepfather, or stepmother. More favorable provisions can be introduced in an individual agreement or collective bargaining agreement.

§ 6.7(k) *Leave for Compelling Reason*[114]

An employee is entitled to leave for compelling reason because of an unforeseeable situation that is not work-related and that requires an urgent and necessary intervention by the employee. The employee can be absent from work as needed to deal with the compelling situation, but only for up to 10 days per year. During this leave the employee will not be paid.

§ 6.7(l) *Care leave*[115]

Under Act of 7 October 2022, which partially transposes Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and caregivers, and repealing Council Directive 2010/18/EU and regulating certain other aspects relating to leave, an employee is entitled to take leave in order to provide personal care and support for family members or household members who need significant care or support for a serious medical reason. The employee is entitled to up to five days of carers' leave per calendar year, which can be taken consecutively or not. This leave is charged to the already existing leave for compelling reasons and is therefore by definition unpaid. However, the Act of 7 October 2022 allows for the possibility of providing an allowance for each day of carers' leave, although this has not yet been implemented.

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112 Act of 5 March 2017 on practicable and maneuverable work.

113 Art. 30 Act of 3 July 1978 on employment contracts; Royal Decree of 28 August 1963.

114 CBA No. 45; Royal Decree of 11 October 1991.

115 Art. 30*bis*, §2 Act of 3 July 1978 on employment contracts.

§ 7 BENEFITS

§ 7.1 What benefits must employers furnish to employees?

The employer must pay a monthly salary, equal to or exceeding the minimum wage (see § 5.2), and double holiday pay. The employer must also grant the benefits that are laid down in CBAs concluded at industry level or at company level.

The employer can be obliged to pay a transportation allowance, which is an indemnity for the employee's travel from home to the place of work. The amount depends on the relevant industry sector, the distance, and the employee's type of transportation.

The equipment and tools required to carry out the agreed work must be provided by the employer to the employees.

Employees and employers usually include the following benefits in the compensation package (on top of the indemnities mentioned above), but none are mandatory (except where they are to be granted according to an industry level CBA): meal vouchers, group and healthcare insurance, eco vouchers, mobile phone and subscription, thirteenth months' pay, and a company car. In some joint committees, employees are automatically affiliated to group insurance benefits.

§ 8 CODES OF CONDUCT/WHISTLEBLOWING

§ 8.1 Are codes of conduct governing employees required (*e.g.*, internal work rules)?

Even though Belgian law does not regulate codes of conduct, employers are obliged to establish working regulations according to the Act of 8 April 1965 on work regulations.

§ 8.2 What whistleblowing protections exist?

The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblower Directive) entered into force on December 16, 2019. The deadline for the member states to transpose the Whistleblower Directive was December 17, 2021. However, like the vast majority of Member States, Belgium missed this deadline and only adopted a law (*i.e.*, Act of 28 November 2022 on the protection of reporters of breaches of Union or national law established within a legal entity in the private sector) for the private sector on November 28, 2022. This law recently entered into force on February 15, 2023 and provides for the obligation to implement internal reporting channels by that date.

An exemption applies for legal entities in the private sector with 50 to 249 employees who have until December 17, 2023 to implement such internal reporting channels. Other obligations that follow from the Whistleblower Act (such as, *e.g.*, whistleblower protection) apply as of February 15, 2023 onwards for all legal entities in the private sector.

Note that these laws do not affect existing systems, such as the Act of 4 August 1996 on employees' health and safety in the workplace, which governs disclosures relating to violence, bullying and/or unwanted sexual behavior at work (see § 4.4 and § 4.6).

Finally, whistleblowing policies must comply with the EU's General Regulation on Data Protection (GDPR), which entered into force on May 25, 2018. The Belgian Commission on Privacy published a recommendation for implementing whistleblowing systems and the compliance with Belgian law.[116]

§ 9 PRIVACY & PROTECTION OF EMPLOYEE PERSONAL INFORMATION

§ 9.1 What rules regulate an employer's obligation to protect the privacy of personal data about employees, and what is the scope of the employees' protection(s)?

The Belgian Constitution provides a merely civil protection of privacy of personal data vis-à-vis the State.

Where a significant amount of protection given to employees' privacy is provided by the EU's General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), additional protection is afforded through a number of other statutory acts and national collective bargaining agreements (CBAs), including instruments dealing with surveillance and monitoring by employers.

The Belgian Data Protection Act of 30 July 2018 provides for the implementation of the GDPR's provisions open to further definition, derogation or additional requirements. The largest part of its provisions applies to the processing of personal data in the public sector. In relation to the private sector, the Data Protection Act only deviates and/or complements the GDPR to a limited extent and therefore has a minor impact on the processing of personal data by private companies and organizations.

Scope of the protection offered by GDPR:

- **Individual access:** Any data subject (*e.g.*, employee) is entitled to request access to and obtain a copy of the personal data, together with prescribed information about how the data have been used by the controller.

- **Rectification rights:** The GDPR further requires employers to ensure that the personal data it holds, is accurate and, where necessary, up to date. In this respect, employees may require inaccurate or incomplete personal data to be corrected or completed without undue delay.

- **Right to erasure ("right to be forgotten"):** Employees may request erasure of their personal data. The right is however not absolute; it only arises in quite a narrow set of circumstances, notably where the controller no longer needs the data for the purposes for which they were collected or otherwise lawfully processed, or as a corollary of the successful exercise of the objection right, or of the withdrawal of consent.

- **Right to restriction of processing**: Employees enjoy a right to restrict processing of their personal data in defined circumstances. These include the following:

[116] Belgian Commission on the Protection of Privacy, Recommendation no. 1/2006 of 29 November 2006 related to the compatibility of whistleblowing systems with the Act of 8 December 1992 related to the protection of the private life with respect to the treatment of personal data, *available at* http://www.privacycommission.be/sites/privacycommission/files/documents/recommandation_01_2006.pdf.

- where the accuracy of the data is contested;
- where the processing is unlawful;
- where the data are no longer needed save for legal claims of the data subject, or
- where the legitimate grounds for processing by the controller are contested.

- **Right to data portability:** Where the processing of personal data is justified either on the basis that the employee has given the consent to processing or where processing is necessary for the performance of a contract, then the employee has the right to receive or have transmitted to another controller all personal data concerning the employee in a structured, commonly used and machine-readable format. Where technically feasible, the possibility to transmit personal data directly from one controller to another should be offered.

- **Right to object:** Employees have the right to object to processing on the legal basis of the legitimate interests of the data controller or where processing is in the public interest. Controllers will then have to suspend processing of the data until such time as they demonstrate "compelling legitimate grounds" for processing that override the rights of the employee. In addition, employees enjoy an unconditional right to object to the processing of personal data for direct marketing purposes at any time.

- **Right not to be subject to automated decision making:** Further, employees have the right not to be subject to automated decision making, including profiling. Automated decision making is only permitted where:
  - necessary for entering into or performing a contract;
  - authorized by E.U. or Member State law; or
  - the employee has given explicit (*i.e.*, opt-in) consent.
    - Where significant automated decisions are taken based on either: (1) entering into or performing a contract; or (2) the employee has given explicit consent, the employee has the right to obtain human intervention, to contest the decision, and to express the employee's point of view.

§ 9.2 What information must the employer provide to employees before processing (*e.g.*, collecting, storing, using, disclosing, etc.) their personal data, and what are the potential consequences for failure to comply?

The GDPR imposes an obligation on employers to provide, at the time when personal data are obtained, the following information to the employee (or, where relevant, any other data subject) with respect to the processing operation:

- the identity and the contact details of the controller and, where applicable, of the controller's representative;
- the contact details of the data protection officer, where applicable;

- both the purposes of the processing for which the personal data are intended and the legal basis for processing, including, where applicable the legitimate interests for processing;

- the recipients or categories of recipients of the personal data, if any;

- where applicable, details of international transfers;

- the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

- the existence of rights of the data subject including the right to access, rectify, require erasure, restrict processing, object to processing and data portability;

- where applicable, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal and the right to lodge a complaint with a supervisory authority;

- whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data; and

- the existence of any automated decision-making and profiling, as well as the consequences of such processing for the data subject.

Where personal data have not been obtained from the data subject, the controller must provide the data subject with the following additional information:

- from which source the personal data originate, and if applicable, whether it came from publicly accessible sources; and

- the categories of personal data concerned.

In this scenario, the information must be provided by the controller:

- within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;

- if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or

- if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller must provide the data subject prior to that further processing with information on that other purpose and with any relevant further information.

The foregoing information must be provided by controllers to the employees in a concise, transparent and easily accessible form, using clear and plain language.

Failing to comply with the rules laid down by the GDPR may potentially result in:

- **Civil action** being brought by the individual. Given that applicable legislation does not provide for any specific civil remedies, the employee will only be able to take advantage of remedies that are generally available under Belgian law. These include a claim for damages (under which the claimant will bear the full burden of proof) and/or an injunction to restrain the employer's infringements.

- **Administrative/criminal action** brought by the competent authorities. Depending on the obligations infringed, **administrative fines** can reach up to EUR 20 million; or, in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.[117] With regard to criminal action, the Belgian legislator has introduced **criminal fines** ranging from EUR 100 to EUR 30,000.[118]

Further, the Belgian Data Protection Authority is empowered to:

- propose a settlement;
- issue warnings and reprimands;
- impose penalties;
- order compliance with the demands of the person concerned, to protect the person's rights;
- order the suspension of the cross-border data flows; and
- forward the file to the prosecutor when the facts may constitute criminal offences.

Fines (and facts) are time-barred after the expiry of a five-year period. The period of limitation is interrupted by any act of investigation or pursuit or, for the fine, by an appeal procedure.

§ 9.3 What restrictions apply to an employer's export of its employees' personal data to related companies in the United States?

As a general principle, the GDPR prohibits personal data from being transferred to a country or territory outside the EEA, unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Data transfers from Belgium to the United States were permitted provided the receiving party company was certified under the E.U.-U.S. Privacy Shield. However, on July 16, 2020 the European Court of Justice declared the E.U.-U.S. Privacy Shield invalid.

Since then, data transfers from Belgium to the United States are only permitted in the following instances:

1. If the controller provides the adequate level of protection on the basis of an agreement - either (a) by using the Standard Contractual Clauses of the European Commission ("SCC"); or (b) by drafting its own contractual clauses, which must be ratified by the Belgian Data Protection

[117] Art. 83 of the GDPR.

[118] Arts. 222-227 of the Belgian Data Protection Act.

Authority and must be subject to the consistency mechanism, entailing that the clauses must be approved by the European Data Protection Board.

On June 4, 2021, the European Commission published a Commission Implementing Decision which, among other things, adopted new SCCs and requires businesses use the new SCCs for any new contractual relationship involving the transfer of personal data from the European Union to "third countries" (including the United States). The new SCCs impose new requirements on the parties, including the obligation to assess and document any risk inherent in the data transfer based on the laws and practices in the country of destination. The new SCCs must be adopted for new contracts entered into after September 27, 2021; as of December 27, 2022, only the new SCCs can be used.

If the SCC are used, the data exporter should ensure that these maintain, in practice, a level of protection that is essentially equivalent to the one guaranteed by the GDPR. If the result of this assessment is that the country of the importer (here, the United States) does not provide an essentially equivalent level of protection, the exporter may have to consider putting in place additional measures to those included in the SCC. If the exporter would conclude that, considering the circumstances of the transfer and possible supplementary measures, appropriate safeguards would not be ensured, the exporter is required to suspend or end the transfer of personal data. However, if the exporter is intending to keep transferring data despite this conclusion, the exporter must notify the competent supervisory authority.

2. If the binding corporate rules are respected. Binding corporate rules are internal codes of conduct for data movement within an organization with an establishment outside of the European Union. Binding corporate rules must be approved by the Belgian Data Protection Authority and the European Data Protection Board;

3. If one of the following conditions is fulfilled:

    a. the employee has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

    b. the transfer is necessary for the performance of a contract or the implementation of precontractual measures taken at the data employee's request;

    c. the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the employee between the controller and another natural or legal person;

    d. the transfer is necessary for important reasons of public interest;

    e. the transfer is necessary for the establishment, exercise or defense of legal claims;

    f. the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

    g. the transfer is made from a register which according to European Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but

only to the extent that the conditions laid down by European Union or Member State law for consultation are fulfilled in the particular case.

4. If the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the employee, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. In this case, the controller must inform the supervisory authority of the transfer and must inform the employee of the transfer and on the compelling legitimate interests pursued.

§ 10 REPRESENTATION OF WORKERS, TRADE UNIONS & WORKS COUNCILS

§ 10.1 Do workers have a freedom of association and representation?

Employees have freedom of association, which is contained in the Constitution.[119] This includes the right to become a member of a trade union.

§ 10.2 Does the law require workers to be a member of a trade union, and/or require the employer to establish a works council?

According to the Freedom of Association Act of 24 May 1921 Belgian employees can neither be forced, nor hindered, to be part of a trade union.

Although the freedom for employees to organize themselves as part of a trade union is unrestricted, only the so-called "representative trade unions" benefit from powers given to trade unions under Belgian collective labor law, such as the power to negotiate and conclude collective bargaining agreements, put forward candidates in the framework of social elections, etc. Only three trade unions have been recognized as representative trade unions, *i.e.*, the ABVV/FGTB (socialist trade union), the ACV/CSC (Christian trade union), and the ACLVB/CGSLB (liberal trade union).

Next to the trade union delegation, Belgian law provides for two other employee representative bodies to be potentially established at company level, *i.e.*, the works council and the committee for the prevention and protection at work (CPPW).

§ 10.2(a) *Works Council*

In accordance with the applicable statute, the works council is to be informed and consulted with on a wide array of matters, both at regular intervals (on an annual or quarterly basis) or on an ad hoc basis.

A works council must be established through social elections to be organized by every "undertaking" that "usually" employed on "average" at least 100 "employees" during the "statutory reference period" (as these terms are defined below).

[119] Arts. 26 and 27 of the Constitution.

The *statutory reference period* coincides with the four quarters preceding the quarter in which the social elections are to be announced.

The notion of *undertaking* is defined by the applicable statute as the "technical exploitation unit" (TEU), which does not necessarily coincide with the legal entity. The assessment of what constitutes a technical business unit is based on economic and social criteria. A single legal entity may therefore comprise several business units if the units are sufficiently economically and socially independent from one another. Several legal entities could constitute one single technical business unit if all those units depend on each other and function together as one undertaking.

In order to calculate the *average* number of employees employed by the TEU during the reference period, the following rules apply:

- for full-time employees (which includes all employees who perform at least 3/4 of a full-time position) the average number of employment is calculated by dividing by 365 the number of calendar days during the statutory reference period in relation to which the employee has been registered under the DIMONA system as an employee of the employer;

- for part-time employees (*i.e.*, employees who perform less than 3/4 of a full-time position) the average number of employment is obtained by dividing by two the result obtained using the above calculation; and

- for interim workers, the average number of employment is obtained by dividing by 92 the number of calendar days during the last quarter of the statutory reference period in relation to which the interim worker provided services for the benefit of the employer. Again, this result is to be divided by two where an interim worker works only part-time for the employer.

For the purposes of establishing whether the social elections threshold is met, the following individuals are considered to be *employees*:

- individuals employed under an employment agreement;

- interim/agency workers; and

- certain other individuals who have been equated to employees by Royal Decree.

Finally, it should be verified whether the average employment level—as calculated in accordance with the above rules—can be considered the *usual* average employment level. In this respect, three scenarios are to be distinguished:

- the average employment level is considered to be usual, in which case this average number is taken at face value in order to assess whether social elections are to be organized;

- where the threshold would be exceeded, social elections will not have to be organized where the employment level would be considered unusual and the usual average would not meet the statutory threshold, *e.g.*, taking into account a planned (genuine) reduction of personnel; or

- where the threshold would not be met, some case law takes the position that the employer would still be required to organize social elections, provided it is considered that the average number has been artificially reduced, *e.g.*, by temporarily reducing certain employees' work schedule to a part-time work schedule.

Where the usual average employment would have fallen below 100, the employer will in principle not be required to organize social elections for the establishment of a works council. However, companies employing 50 to 100 workers might have the obligation to establish (or re-establish) a works council even if the average workforce is below 100 employees if the company had a works council in the past. The works council is then exclusively composed of the members of the CPPW.

§ 10.2(b) *Committee for the Prevention & Protection at Work (CPPW)*

The CPPW has the general task to actively contribute to all matters that may be undertaken in order to improve the well-being of the workers in the execution of their work.

A CPPW must be established through social elections to be organized by every *undertaking* that *usually* employed on *average* at least 50 *employees* during the *statutory reference period*. The italic terms are interpreted in largely the same manner as is the case for the establishment of a works council (see above).

Where no works council has been established, the CPPW will become competent for the matters provided for under statute and for which the works council would have normally been competent to deal with had it been present at the employer.

§ 10.3 How do workers obtain trade union representation?

As stated in **§ 10.2**, companies employing at least 100 employees are required to establish a works council and a CPPW, while enterprises employing 50 to 99 workers are required to establish only the latter. The employees' representatives in the works council and the CPPW are elected by the employees among the list of candidates filed by the union organization in the framework of the social elections. These elections are in principle organized once every four years, whereby the employer will have to rigorously follow the procedure set by the 2007 Social Elections Act. The next social elections will be organized in 2024.

Failure by the employer to organize social elections can result in a criminal fine of a minimum of EUR 800 and a maximum of EUR 8,000, or an administrative fine of minimum of EUR 400 and a maximum of EUR 4,000 being imposed, to be multiplied by the number of affected employees (with a maximum of 100).

A trade union delegation can be established at the request of one or more recognized trade unions, subject to the conditions provided for in the relevant CBA, which generally consist of a double threshold relating to: (1) employment figures; and (2) unionization within the company. The establishment of a trade union delegation does not, in contrast to the works council and the CPPW, depend on social elections. The members of the union delegation are either elected or designated by the union organization, depending on the rules that have been agreed at the level of the joint committee.

Where no works council and/or no CPPW have been established at the company, the trade union delegation will become competent for the matters provided for under statute and for which the works councils and CPPW would have normally been competent to deal with had they been present at the employer.

§ 10.4 Does the law permit picketing, strikes, lockouts, and/or secondary action?

§ 10.4(a) *Strikes*

Since Belgium ratified the European Social Charter, which sets forth the right to strike (and the right for the employer to lockout), strikes are considered as a fundamental right, despite the fact that Belgian law contains no specific provision in that respect to confirm this.

As a principle, the right to industrial action—including the right to strike—is unrestricted. Employers have, in principle, no course of action against those on strike, not even if procedural rules are violated (*i.e.*, if the union organizations have not respected a notice period before starting a strike or if an employee participates in a strike that has not been recognized by a trade union organization[120]).

However, where such industrial action would be accompanied by circumstances/actions that would illicitly restrict the employer's or third parties' rights (including coworkers' rights), such as the right to property, the right of entrepreneurship and the right to work, some employment tribunals may grant injunctions to restrict such illegal action. When employees damage equipment or products of the company, the employer could seek damages insofar as they can gather evidence of the (extent of) damages suffered.

§ 10.4(b) *Secondary Action*

The above approach regarding strikes also applies to secondary actions (*i.e.*, situations in which strikers want to enforce something for the benefit of a fellow employee or the employees of another company or industry), especially when such secondary actions are carried out in support of primary actions.

§ 10.4(c) *Lockout*

Even though there are no legal provisions governing the conditions for such right, case law accepts that lockouts can validly be applied by employers in exceptional circumstances, *i.e.*, if justified by *force majeure* or by contractual shortcomings of the employees that are sufficiently severe in order to invoke the *exceptio non adimpleti contractus* (exception of an unperformed contract).[121]

Employees may seek damages if an employer instituted a lockout in a situation where it was not justified.

§ 10.4(d) *Picketing*

The question about the legality of picketing is still debated. Participating in a strike picket is not in itself unlawful when the mere presence of strike pickets constitutes a call for workers' solidarity. However, such participation must be proportionate to the intensity of the collective dispute.[122] In any case, the participants in a strike picket may not commit facts that affect the civil rights of the employer. Therefore, picketing is not permitted if the participants commit acts of violence or take over the actual control over the company by hindering persons and vehicles to enter or exit the company and by preventing nonstrikers to go to work or third parties to fulfill their agreements with the employer.

§ 11 WORKPLACE SAFETY

§ 11.1 What general health and safety rules apply in the workplace?

The Act of 3 July 1978 on employment contracts contains an obligation for the employer to take proper care that the labor can be performed in decent conditions as regards the health and safety of the employees and that, in the event of an accident, the first medical aids can be provided to him. To this end, a first-aid kit must be available to staff at all times.[123]

The Act of 4 August 1996 on employees' health and safety in the workplace provides that employers have the obligation to take the necessary measures to promote the well-being of their employees while

[120] Court of Cassation, 21 December 1981, *Pas.*, 1982, I, p. 531.

[121] Court of Cassation 7 May 1984, *JTT* 1984, 292.

[122] Labor Court Mons, 19 March 1985, *JTT* 1985, 377.

[123] Art. 20, 2° Act of 3 July 1978 on employment contracts.

performing their work. These measures concern safety, protection of the health of employees, psychosocial aspects of the work, ergonomics, workplace hygiene, embellishment of the workplace, and the influence of environment on the preceding points.[124] The procedures necessary to safeguard employees' health and safety will vary by employer. Employers must adapt their policies in light of past experiences, changing circumstances and work procedures.[125]

The Code of 28 April 2017 on health & safety in the workplace (which is a codification of most of the decrees implementing the Act of 4 August 1996 on employees' health and safety in the workplace) contains an obligation for the employer to set up a systematic prevention policy by means of a "dynamic risk management system." Within this framework, the employer must in particular:

- carry out a risk assessment;
- determine preventive measures;
- draw up an overall prevention plan every five years; and
- draw up an annual global prevention plan.

The Code of 28 April 2017 on health & safety in the workplace further contains measures concerning the equipment of workplaces, lighting, ventilation, temperature, social facilities (sanitary conveniences including changing rooms, washbasins, showers and toilets, refectories, rest rooms, room for pregnant and breastfeeding workers), and fire prevention.

According to the Code, employers must also organize health monitoring for certain categories of employees and upon request of an employee. In addition, employers must prepare specific reports on labor accidents ("notification to social inspectorate" and/or "work accident form")[126] and provide training sessions on security matters to all employees (including those newly hired, temporary workers, etc.).[127]

Companies with usually at least 50 employees on average must establish a Committee for Prevention and Protection at Work (CPPW), which meets once a month, to be composed of the employer and elected employee representatives. The role of the CPPW is to involve employees in risk-prevention measures and to contribute to and to promote a healthy and safe working environment. The CPPW also acts as a general advisor for all matters related to health, safety, and hygiene at work. The employer must consult the CPPW at least once a year on the employer's "annual action plan," as well as the employer's "global prevention plan," describing the employer's policy on health, safety, and well-being.

Every employer must have an Internal Service for Prevention and Protection at work. If this internal service is unable to carry out all the tasks entrusted to it, the employer may additionally call upon the services of an External Service for Prevention. These services are composed of professionals who assist the employer in all measures related to employees' well-being.

[124] Art. 4, § 1 of the Act of 4 August 1996 on employees' health and safety in the workplace.

[125] Art. 5, § 2 of the Act of 4 August 1996 on employees' health and safety in the workplace.

[126] Arts. I.6-3 and I.6-12 of the Code of 28 April 2017 on health & safety in the workplace.

[127] Art. I.3-52 of the Code of 28 April 2017 on health & safety in the workplace.

§ 12 TERMINATION OF EMPLOYMENT

§ 12.1 What grounds for dismissal/termination of contract are permitted?

Belgian law does not require the employer to have grounds to terminate an employment contract.

Moreover, even when very exceptional circumstances exist that require prior approval for the dismissal (by a court or by the Works Council), an employer's failure to seek such approval will never result in the nullity of the dismissal itself. The sanctions that are imposed when these principles are not respected, are all of a pecuniary nature. However, there are some exceptions to this principle.

Employment contracts can be terminated for a serious cause that makes it immediately and definitively impossible for the parties to continue their collaboration, in which case the employment contract is terminated with immediate effect without paying a compensation in lieu of notice. A dismissal for serious cause has to be executed within three working days after the employer has acquired sufficient knowledge of the facts. Afterwards, the employer must detail the serious cause in the dismissal letters within another period of three working days. Only the elements mentioned in the letter can be invoked before court if the employee challenges the dismissal for serious cause.

Employees with at least six months of service can request their employer to give them the reasons or grounds for their dismissal. Employers who do not respond in writing by registered letter within two months, or who did not communicate in writing the reasons or grounds for the dismissal, can be condemned to pay a fine of two weeks of the employee's salary.

In addition, employees having an employment agreement of unlimited duration can challenge the grounds for their dismissal before court if they believe the dismissal is manifestly unfair, in which case the employer can be condemned to pay an additional indemnity equal to three to 17 weeks' salary.[128]

§ 12.1(a) *Reason for Dismissal: Should it Be Included in the Termination Letter?*

CBA 109 has applied to dismissals since April 1, 2014. Pursuant to CBA 109, employees are entitled to be informed in writing about the reason for their dismissal.

CBA 109 does not require the employer to include the reason for the dismissal in the termination letter (there is a different procedure for termination for *serious cause*) and the employer should only provide the reason for the dismissal at the request of the employee.

Still, an employer is free to include the reason for the dismissal in the termination letter.

The employee can request the reason for the dismissal in a registered letter within two months after the employment contract has ended. If the employment contract is terminated with a notice period, the request must be made within six months after the notification of the notice (the day on which the notification takes effect) and without exceeding the two-month period following the end of the employment contract.

[128] CBA No. 109.

If the employer does not provide a reason for dismissal, the employee is entitled to two weeks' additional severance pay. In addition, the employer will bear the burden of proof if the employee brings a claim for unlawful dismissal before a Labor Court.

§ 12.2 What reasons for dismissal/termination of contract are prohibited?

Strictly speaking, employees can be dismissed for any possible reason.

It should however be noted that employees with a length of service of more than 6 months may request the reasons for their dismissal and claim that their dismissal was manifestly unfair. A dismissal will be deemed "manifestly unfair" if: (1) the justification provided is not related to the employee's attitude or performance or to the employer's operational requirements; and (2) a normal and reasonable employer would not have taken the same decision. If a tribunal would deem that a dismissal is unfair, it will award a compensation between three and 17 weeks of salary.

In addition, numerous categories of employees are protected against dismissal, which implies they may be entitled to an (additional) indemnity in case they are dismissed/terminated. See **§ 12.4**.

Employees may be protected because of their specific function: trade union delegates, candidates or members of the works council and/or the Committee for prevention and protection at work, prevention advisors.

Employees may also be protected because of a specific situation: pregnant employees, employees who breast-feed or pump, employees who take certain leaves (paternity leave, maternity leave, parental leave, adoption leave, educational leave), employees who interrupt their career completely or partially, employees who take time credit, part-time employees.

Furthermore, victims of discrimination; employees who invoke discrimination between salaries of women and men; employees who claim they are victim of violence, bullying, unwanted sexual conduct; and witnesses in discrimination cases may be protected against dismissal based on the alleged/proven discrimination.

§ 12.3 What notice requirements are there for dismissal and may the employer provide pay in lieu of notice?

Except for dismissals for serious cause, an employer who dismisses an employee can choose to make the employee perform a notice period (the duration of which is determined by law, see below) or to end the employment agreement with immediate effect (or a combination of both).

Where the employer terminates the agreement with immediate effect or with insufficient notice, the employee will be entitled to (additional) compensation in lieu of notice. Such compensation in lieu of notice is equal to the salary and (value of) benefits to which the employee would have been entitled to if the employer had given (sufficient) notice (see **§ 12.4**).

§ 12.3(a) *Employment Agreements of Unlimited Duration*

Since 2014, the calculation of the length of the notice is no longer based on the distinction between blue- and white-collar workers or between lower and higher white-collar workers, but purely on the length of

service of the employee. The applicable notice periods to be served by employers and employees in the framework of a termination of an employment of unlimited duration respectively are as follows:[129]

Length of Service as of January 1, 2014	Notice Due from Employer (Weeks)	Notice Due from Employee (Weeks)
0 – < 3 months	1	1
3 – < 4 months	3	2
4 – < 5 months	4	2
5 – < 6 months	5	2
6 – < 9 months	6	3
9 – < 12 months	7	
12 – < 15 months	8	4
15 – < 18 months	9	
18 – < 21 months	10	5
21 – < 24 months	11	
2 – < 3 years	12	6
3 – < 4 years	13	
4 – < 5 years	15	7
5 – < 6 years	18	9
6 – < 7 years	21	10
7 – < 8 years	24	12
8 – < 9 years	27	13
9 – < 10 years	30	
10 – < 11 years	33	
11 – < 12 years	36	
12 – < 13 years	39	
13 – < 14 years	42	
14 – < 15 years	45	
15 – < 16 years	48	
16 – < 17 years	51	
17 – < 18 years	54	
18 – < 19 years	57	
19 – < 20 years	60	
20 – < 21 years	62	
21 – < 22 years	63	
22+ years	63 + 1 per started year of seniority	

For those employees who started their employment prior to January 1, 2014, certain transitional arrangements apply:[130]

- In respect of periods of service prior to January 1, 2014, notice of termination is calculated as per the old rules. For years of service from January 1, 2014, the notice period is calculated as

[129] Art. 37/2 of the Act of 3 July 1978 on employment contracts.

[130] Art. 67 of the Act of 23 December 2013 on the introduction of a unitary status between blue- and white-collar workers as regards notice periods and the waiting day and accompanying measures.

per the new rules (above). For pre-January 1, 2014 service, they vary depending on the length of service, employee categorization, and (for white-collar workers) their earnings level.

- The same rule applies to blue-collar workers, except that, since the pre-January 2014 rules on notice periods had treated them less favorably than white-collar workers, the Belgian State will top up their notice indemnity for the difference between the above transitional calculation and what their notice would have been had the new notice rules applied to their entire period of service. This additional indemnity is paid by the State directly to the employee.

It is also necessary to check sector and local collective agreements to see whether longer notice periods apply.

Note that the notice to be performed will be suspended (and therefore extended) in certain cases, such as illness or annual leave.

Employee representatives (*i.e.*, effective and substitute members of the works council and the committee for the prevention and protection at work (CPPW)), as well as candidates who unsuccessfully stood for election to the works council or CPPW, (in principle only effective not substitute) members of the trade union delegation and prevention advisors can only be given notice after having followed a strict procedure provided for by law.

§ 12.3(b) *Fixed-Term Employment Agreements*

If notice of termination is given (by any of the parties) during the first half of the agreed term (with a maximum of six months) of the first fixed-term employment contract, the statutory notice periods that apply upon termination of an employment contract of unlimited duration (see **§ 12.3(a)**) must be respected.

If this notice period is not (entirely) performed, the party who terminates the contract must pay to the other party a compensation in lieu of notice equal to the salary and benefits corresponding to (the balance of) the notice period.

In all other cases, the party who terminates the contract must pay to the other party a compensation in lieu of notice equal to the salary and benefits that would have been due until the end of the agreed fixed term but without exceeding the double of the compensation in lieu of notice that would have been due in case it would have concerned the termination of an employment contract of unlimited duration.

§ 12.3(c) *Specific Rules for Collective Redundancies & Closures*

Where the employment agreement is terminated in the framework of a closure of an undertaking or a collective redundancy, the employee may—subject to the relevant requirements being satisfied—be statutorily entitled to a redeployment indemnity, a collective redundancy indemnity and/or a closure indemnity. See **§ 13.1** and **§ 13.2**.

In addition, it should be noted that, although an employer is *not required* to offer enhanced redundancy pay, trade unions will in the framework of a collective redundancy/closure always claim the payment of extra-legal indemnities on top of the aforementioned legal entitlements.

§ 12.4 How is termination pay calculated, including any commissions, and when must it be paid?

Although compensation in lieu of notice may be due (see **§ 12.3**), there is no statutory requirement to pay an additional termination indemnity when terminating an employee's contract.

The compensation in lieu of notice of **§ 12.3** is equal to the salary, other remuneration (*e.g.*, end-of-year premium and commissions) and (the monetary value of) benefits such as the private use of the company car to which the employee would have been entitled if the employer had given (sufficient) notice.

If the salary, other remuneration, and/or the benefits are (partially) variable, the variable pay of the last 12 months is taken into account.

In addition to the compensation in lieu of notice, employees whose contracts of employment are terminated may be entitled to the following amounts:

- (Prorated) 13th-month pay.
- Vacation pay upon departure (must be paid to white-collar employees). The vacation pay upon departure corresponds to the number of days of vacation/annual leave accrued by the employee for the present year, as well as the entitlements to vacation/annual leave already accrued for the following year.
- Salary for the public holidays that fall within the period of 30 days following the termination of the contract, unless the individual concerned finds another job in the meantime. Exceptions apply.
- Outplacement—which is known as a set of accompanying services and advice provided by a third party on behalf of an employer to enable an employee to find a job with a new employer or pursue a professional activity on a self-employed basis, within the shortest period of time possible—must be offered to employees who are entitled to a notice period of at least 30 weeks (regardless of the employee's age) or to employees aged 45 or older (on condition that they have performed at least one year of service), unless the employee has already reached retirement age.
- Possible commissions.
- Noncompete indemnity (see **§ 3.6**).
- Elder employees (in principle aged 60 or older) may under certain conditions be entitled to a "pre-pension" arrangement or unemployment with bonus paid by the employer, *i.e.*, a regime in which the employee is entitled to: (1) unemployment allowances that are paid by the State (unemployment office); and (2) an indemnity that is paid by the employer on a monthly basis. Both indemnities are paid as from the end of the notice period or period covered by the compensation in lieu thereof up to the age of legal retirement.

§ 12.5 Are there rights to severance pay and how is severance calculated?

Belgian law does not provide an obligation to pay severance pay. However, employees may be entitled to a compensation in lieu of notice (see **§ 12.3**).

§ 12.6 How can former employees bring claims on behalf of other workers (*i.e.*, a collective or class action)?

According to Belgian law former employees cannot bring claims on behalf of other workers.

Nevertheless, representative trade unions can under certain circumstances bring claims before the courts on behalf of their members. The union organization must defend the interests of the employee that they are representing and not their own interests.

Belgian law also provides a possibility to bring class actions (or more specifically: actions for collective redress) but these actions are currently limited to claims from consumers and SME's concerning consumer rights and competition law.[131]

§ 12.7 May employers compel employees to arbitrate claims of wrongful dismissal?

The principle is that arbitration clauses included in the employment contract are null and thus, employers cannot compel employees to arbitrate claims by including a clause in the employment contract.[132] However, once the contract is terminated, parties can agree to submit their claim to arbitration.

As an exception hereto, white-collar employees with a yearly salary exceeding EUR 78,706 (amount for 2023) who are assigned with the day-to-day administration of the company or who have the management responsibility of a business unit of the company comparable to the management responsibility over the whole company can validly enter into an arbitration clause before the dispute has arisen. Thus, for those employees, employers can compel employees to arbitrate claims by including a clause in their employment contract or in an annex to the employment contract.[133]

§ 12.8 Can an employer obtain a release of claims from a former employee?

Settlement agreements (including a release of claims) are common practice in Belgium. However, parties may not agree on a release of claims during the term of the employment contract (as they are considered to be under the authority of the employer).

When the employer has served the notice, or once the contract has been terminated, the employee is no longer considered to be under the authority of the employer and the employee has the right to enter into a release of claims. Settlement agreements can be concluded at the earliest after the employer has notified its decision to terminate the employment contract (and the notice period has started, in the event that the employee must perform the notice).

In any case, an employee cannot waive claims of public order (for instance fundamental rights, the protection of (candidates for the position of) employee representatives in the works council or in the committee for prevention and protection at work, the prohibition of lifelong commitment).

The employee should bring any claim before the Labor Court within a maximum of one year as of the termination of the employment contract. If not, the claim will generally be deemed time barred by the statute of limitation.

131 Book XVII Code of Economic Law.

132 Art. 13 of the Act of 3 July 1978 on employment contracts.

133 Art. 69 of the Act of 3 July 1978 on employment contracts.

§ 12.9 What procedures and terms are required to have an enforceable separation agreement with a former employee?

The settlement agreement can be concluded at the earliest after the dismissal, must comply with the requirements of the Civil Code, must be agreed in writing and must contain reciprocal concessions.[134]

There is no specific procedure to follow to ensure the enforceability of a settlement agreement and employees do not need to be assisted by external counsel in order for the settlement agreement to be valid.

§ 13 COLLECTIVE DISMISSALS (LAYOFFS) & BUSINESS CESSATION & SALE OF A BUSINESS

§ 13.1 What rules apply to collective dismissals?

According to Belgian law, dismissals are considered to be collective dismissals if an undertaking (or divisions thereof):

- employs more than 20 workers on average during the calendar year preceding the collective dismissal, assessed on the basis of quarterly social security registrations and includes temporary agency workers (with the exception of temporary agency workers replacing regular employees); and

- envisages to proceed in (any) consecutive period of 60 calendar days with dismissals for economic or technical reasons as follows:

Redundancies	**Headcount**
10 or more employees	between 21 and 99
at least 10% of employees	between 100 and 299
30 or more employees	≥ 300
Headcount means the average headcount throughout the course of the calendar year preceding the collective dismissal, based on the quarterly social security registrations and includes temporary agency workers (with the exception of temporary agency workers replacing regular employees).	

For the purposes of collective dismissals law, the notion of "undertaking" is defined not by reference to the legal entity but by reference to the "technical business unit" (*i.e.*, an undertaking in the factual—*i.e.*, economic and social—sense). The same rules apply to a "division" of an undertaking, *i.e.*, a unit with a sufficient level of social and economic autonomy, without qualifying as a separate technical business unit.

As soon as the employer has the intention to proceed to a collective dismissal, the information and consultation procedure should be initiated. Information and consultation is to be held with the appropriate employee representatives. More precisely:

[134] Court of Cassation, 31 October 2005, *J.T.T.*, 2006, 131; H. DE PAGE, *Traité élémentaire de droit civil belge*, V, No. 483, 3°.

1. the employee representatives on the works council, or in absence thereof;

2. the members of the union delegation, or in absence thereof;

3. the employee representatives on the committee for prevention and protection at work, and/or in absence thereof;

4. the workforce itself (in which case employees can theoretically appoint *ad hoc* representatives, which is however rather rare in practice).

The employer will communicate a written announcement, setting out the project (intention, as opposed to decision) to potentially carry out a collective redundancy, which must be discussed during a notification meeting to which the appropriate employee representatives should be invited.

A copy of this written announcement is to be sent (on the same day as the above information meeting) to the director of the sub-regional employment office and to the president of the board of directors of the Federal Government Service of Employment, Labor and Social Dialogue (using the relevant government issued template), so as to inform the latter of the employer's intention to proceed to a collective dismissal.

After that, the appropriate employee representatives, throughout several consultation meetings, must have the opportunity to formulate: (1) questions; (2) arguments and counter-proposals; (3) remarks, suggestions, and complaints; and (4) alternatives to (mitigate) the envisaged dismissals.

Once the information and consultation procedure has come to a close, the employer can proceed with the formal notification confirming its intention to proceed with a collective dismissal (although not technically required, it is advisable to organize a second board meeting to this effect), in the framework of which the following steps should be completed simultaneously:

- a consultation meeting is to be organized during which the employer: (1) confirms its intention (but not the decision) to proceed with a collective redundancy; and (2) informs the appropriate employee representatives that its intention to proceed with a collective redundancy will be notified to the competent authorities;

- a second notification is to be sent to the director of the sub-regional employment office, and to the president of the management board of the board of directors of the Federal Government Service of Employment, Labor and Social Dialogue (using the relevant government issued template), informing the latter of the employer's intention to proceed with a collective redundancy, stating the information required by law; and

- finally, on the same day, a copy of the above second notification is to be sent to the applicable employee representative body. This notification is also to be posted in a visible location at the employer's premises and to be sent by registered mail to the employees who fall within the scope of the collective redundancy and whose employment agreement would have already been terminated on the day of the notification and of its posting.

In addition, after the information and consultation procedure has come to a close, the employer can proceed with setting up an employment cell.

Within a 30-day period (possibly extended to 60 days) as from the date of the posting of the above second notification:

- the appropriate employee representatives can submit objections regarding the employer's compliance with the collective dismissal procedure to the employer, as well as to the director of the sub-regional employment office;
- no dismissals can be carried out; and
- the parties are expected to negotiate a "social plan" (*i.e.*, enhanced legal redundancy payment entitlements). The employer is not legally required to enter into a social plan. However, failure to reach an agreement regarding this matter may expose the employer to a collective action by the employees (strikes, work interruptions, reduction in productivity).

Once the cooling-off period of 30 (possibly 60) days has expired, the employer can proceed with the implementation of the actual dismissals (provided that the employment cell is up and running). The individual dismissals must be preceded by a meeting with the affected employee, during which the affected employee will be given additional information with regard to the services offered by the employment cell and the consequences of participation.

§ 13.2 Are there special rules that apply when an employer ceases operations?

Additional obligations apply if the contemplated restructuring qualifies as a closure. The Act of 26 June 2002 on company closure only applies to companies having employed an average of at least 20 employees during the previous calendar year.

A company or a division is closing down within the meaning of this legislation when: (1) there is a final termination of the main activity (of the company or a division); and (2) the number of personnel employed in the company or a division thereof has decreased below 25% of the average number of employees employed during the previous calendar year.

In addition to the formalities to be respected in case of a collective dismissal (see **§ 13.1**), the employer must give additional notice when the decision (and not the intention) to close down the company or the division is made. These notices are given to the employees, the works council (or, if there is none, the trade union delegation) and the competent authorities.

In case of closure of the undertaking, the employees will be entitled to a closure indemnity. This indemnity, however, will under certain circumstances be paid by a specific Closure Fund.

It is also necessary to check the applicable collective labor agreements in the applicable joint committee as additional conditions or obligations may be imposed at the level of the joint committee.

§ 13.3 Are certain employees protected from collective dismissal?

§ 13.3(a) *Generally*

Protections against dismissal are in principle lifted for employees who are dismissed in the framework of a collective dismissal, except for the protection against dismissal of social election candidates (see below), which is not automatically lifted in case of collective dismissal.

§ 13.3(b) *Protection of Social Election Candidates*

All employees who are candidates to the social elections benefit from a special protection against dismissal, including those who are not elected, which means they cannot be dismissed except for: (1) economic and/or technical reasons approved by the joint committee; or (2) a serious cause recognized as such by the Labor Court.

All decisions of the joint committee must be made unanimously, which rarely happens if no social plan has been negotiated since the joint committee is composed of representatives from both the union and employers' federations. The only exception to this principle is in the event of closure, in which event the employer can proceed with the dismissal of protected employees even if there is no decision from the joint committee. Protected employees might challenge that they have been dismissed in the framework of a closure.

The employer might also take the case to court to seek the court's recognition of its intention to dismiss a specific category of employees.

In the event that the employer violates the applicable protection procedure, they must pay a protection indemnity to the employee, which consists of a fixed and a variable part. The fixed part amounts to two years of salary in the event that the employee has a seniority of less than 10 years, three years of salary in the event that the employee has a seniority between 10 and 20 years and four years of salary in the event that the employee has a seniority of, more than 20 years. The variable part is due if the protected employee has asked to be reintegrated into the company and the employer has refused this request for reintegration. The variable part corresponds to the remuneration up to the end of the mandate for which the employee was elected (or who stood as a candidate). It is important to note that this indemnity replaces the regular compensation in lieu of notice and does not need to be paid on top of it.

§ 13.3(c) *Protection of Trade Union Delegation Members*

Members of the trade union delegation also benefit from a protection against dismissal, as they may not be dismissed because of their mandate, and a specific procedure of dismissal to be followed. If this procedure is not (properly) followed, the employer must pay a protection indemnity, which varies from one joint committee to another, but usually amounts to one year's salary and comes on top of the regular compensation in lieu of notice.

The employee who is member of the trade union delegation and was also candidate to the social elections only benefits from the protection as a candidate to the social elections as described above.

§ 13.4 How long does the collective dismissal process usually take?

Although the information and consultation process is not subject to any specific legal deadlines, it generally takes between a few weeks to three to four months (and possibly longer).

§ 14 EMPLOYMENT & SALE OF A BUSINESS

§ 14.1 In the sale of a business's *stocks* (shares), what (if anything) does corporate law or labor/employment law require of the seller as to pre-deal-closing notification to, or consultation with, the seller's employees, employee representatives, or government labor agencies?

§ 14.1(a) *Towards the Employees and/or Employee Representatives*

Whether the employer is to inform and consult with employee representatives or only to inform such representatives, depends on the level at which the sale of shares is being negotiated.

§ 14.1(a)(i) *Negotiations at the Employing Entity's Level*

According to CBA No. 9, the works council should be: (1) informed of any "negotiations conducted by the company which may result in important changes to the company's structure", including, amongst others, the acquisition of the company's shares by a third party; and (2) consulted about the impact such changes might have on, for example, employment prospects, work organization and employment policy in general. In the absence of a works council, the company will have to inform and consult with its union delegation or, in the absence thereof, the committee for prevention and protection at work.

Therefore, where the sale of shares would be negotiated *at the level of the employing entity*, the employer will be required to inform and consult with the competent employee representative body. Where the latter is to be informed and consulted, its consent is not required (no right of veto).

With regard to the timing of this information and consultation obligation, CBA No. 9 does not provide for any strict timeframe and merely provides that this process should be initiated *before* any decision has been taken and at such time when consultation (regarding the impact the intended change may have on employment) would still be effective and meaningful, to be assessed on a case by case basis. In any event, this process should be initiated before the acquisition is to be announced to the public.

§ 14.1(a)(ii) *Negotiations at Another Level*

Where the negotiations on the sale of shares are not to be held at the employing entity's level, the employer is still—in accordance with the Royal Decree of 27 November 1973—required to inform and consult with its works council regarding the sale of shares, provided that the sale of shares constitutes an event "which may have an important impact on the undertaking". Such event may include the acquisition of its shares.

As to timing, the employer will need to inform and consult with its works council upon being (officially) informed of such acquisition.

Where, in the absence of a works council, the information and consultation requirement under the Royal Decree is not delegated to any other employee representative body, CBAs concluded at industry level can still provide for similar information and consultation requirements to be complied with towards the union delegation.

§ 14.1(b) *Towards the Authorities*

No government labor agency must be notified. However, note that the final beneficiary (*i.e.*, the person who owns more than 25% of the shares, more than 25% of the voting rights or otherwise has the real power) must be registered in the so-called Ultimate Beneficial Owners (UBO) Register.[135]

§ 14.2 Regarding seller's employees, what (if any) mandates does the law impose on a seller contemplating a stock (shares) sale of its business?

Belgian law does not provide any mandates in this regard.

§ 14.3 In a sale of a business's *assets*, do the seller's employees transfer to the buyer by operation of law?

Yes, based on CBA No. 32*bis* on the safeguarding of employees' rights with a change of employer as a result of a conventional business transfer ("CBA No. 32*bis*") employees are automatically transferred in case of a transfer of undertaking. CBA No. 32*bis* is the implementation in Belgian law of the EU Acquired Rights Directive No. 2001/23/EU ("ARD Directive").

Under CBA No. 32*bis, transfer of undertaking* is defined as "the transfer of an economic entity by virtue of an agreement or a merger, with a view of continuing an economic activity (regardless of whether such activity is the company's primary activity), subject to that economic entity retaining its identity".

Consequently, in order for a business transfer to constitute a transfer of undertaking under CBA No. 32*bis*, the following three conditions are to be satisfied:

1. the identity of the employer (running the business) has to change;

2. the transfer should relate to an "undertaking" for the purposes of CBA No. 32*bis* (or a division thereof); and

3. the transfer should be the result of an "agreement" or a merger.

§ 14.3(a) *Change of Employer*

As stated above, in order for a transfer to constitute a transfer of undertaking for the purposes of CBA No. 32*bis*, the employer running the business is required to change, *i.e.*, the undertaking/business should be transferred to another legal entity. Therefore, share deals are excluded from the scope of CBA No. 32*bis*.

§ 14.3(b) *Transfer of an "Undertaking"*

Next, the transfer has to relate to an "economic entity, pursuing an economic activity, which retains its identity and includes a series of organized means", which falls into two sub-conditions:

- the transfer of an **organized grouping of persons and assets** (*i.e.*, not necessarily a legal entity) facilitating the exercise of an economic activity (regardless of such activity being the employer's principal activity or merely an ancillary activity) which pursues a specific objective. Consequently, in order for an undertaking (or a division thereof) to exist for the

[135] Arts. 73-75 of the Act of 18 September 2017 on the prevention of money laundering and terrorist financing and on restrictions on cash movements.

purposes of CBA No. 32*bis*, it has to sufficiently structured and autonomous, meaning essentially that it has to pursue an economic activity which is distinguishable of any other activities;

- the undertaking is to **retain its identity**. According to the case law of the European Court of Justice, this is to be understood as requiring the undertaking to be transferred as a "going concern", although the buyer's intention to continue or discontinue the activity in a durable manner is irrelevant (otherwise, there would be a potential risk that the employer intentionally uses this loophole to escape the application of CBA No. 32*bis*). Whether an undertaking retains identity will need to be assessed on a case-by-case basis, taking in account (amongst other things) whether the undertaking is asset-reliant or labor-intensive

§ 14.3(c) *Transfer by Virtue of an "Agreement" or a Merger*

Although the different linguistic versions of the ARD Directive contain different language as to cause of the transfer, the European Court of Justice has extensively interpreted this requirement to mean a transfer "in the context of contractual relations".

Consequently, CBA No. 32*bis* will not only apply to situations where an undertaking is sold by virtue of a formal agreement, but also (for example) in the framework of a second generation outsourcing arrangement (*i.e.*, termination by company A of a service agreement with company B, followed by the transfer of that activity to company C under a new service agreement concluded by company A) or an insourcing operation.

§ 14.4 Where a seller of business *assets* does not intend to employ its staff after closing the asset sale, does the law allow the parties to the asset sale to structure an "employer substitution" or mandatory transfer—so as to avoid triggering severance pay obligations for the asset seller?

If the sale of business assets qualifies as a transfer of an undertaking under CBA No. 32*bis*, the employees transfer automatically by operation of law. If the sale does not qualify as such, any transfer of employment will require employee consent.

§ 14.5 How do parties best structure those employer substitutions/transfers? Can they be structured without employee consent?

See response under **§ 14.4**.

§ 14.6 In the sale of a business's *assets*, what (if anything) does corporate law or labor/employment law require of the seller as to pre-deal-closing notification to, or consultation with, employees, employee representatives, or government labor agencies?

§ 14.6(a) *Towards the Authorities*

Under Belgian law, there is no obligation to notify or consult a government labor agency.

Nevertheless, it is important to know that, in case of an asset deal, the transferee is jointly and severally liable for paying the social security contributions owed by the transferor.

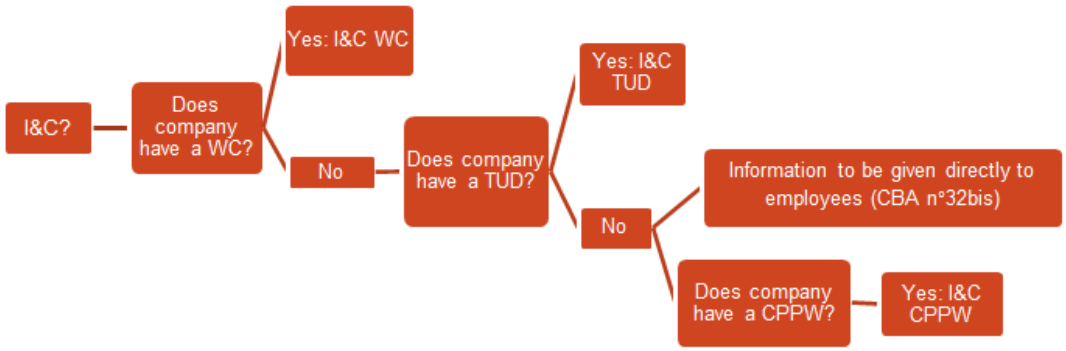
The reason is that the transfer will only be effective *vis-à-vis* the authorities after one month following the month in which a certified copy of the transfer agreement is filed with the competent administrations. As long as this period has not expired, the authorities can take protective measures with regard to the transferred assets as well as have the transferred assets seized, as deemed necessary by the authorities to preserve or execute their rights.

This liability does not apply if parties attach to the transfer agreement a certificate of the National Social Security Office showing that the transferor: (1) does not owe any social security contributions, contribution surcharges or interests on arears; and (2) is not subject to any legal proceedings for the recovery of social security contributions.

The same principle applies with regard to social security contributions of self-employed persons. A certificate must be requested from the Social Security Agency for Self-Employed Workers ("RSVZ-INASTI").

§ 14.6(b) *Towards the Employees and/or Employee Representatives*

Where the business transfer constitutes a transfer of an undertaking for the purposes of CBA N°32*bis* (see **§ 14.3**), the employer will have to inform and consult with the appropriate employee representatives. These information and consultation (I&C) requirements can be summarized as follows: works council (WC); committee for the prevention and protection at work (CPPW); and trade union delegation (TUD):



Given that a business transfer will in principle be the result of "negotiations conducted by the company which may result in important changes to the company's structure", the employer will have to comply with I&C requirements laid down in CBA No. 9. Such I&C exercise is, in principle, to be undertaken with the company's works council. In the absence of a works council, the company will have to inform and consult with its union delegation or, in the absence thereof, the committee for prevention and protection at work.

In the absence of both a works council and a trade union delegation, the employer will moreover have to provide certain information directly to the employees.

§ 14.6(b)(i) *Duty to Inform*

According to CBA No. 9, the appropriate employee representatives (see above) should be informed of any "negotiations conducted by the company which may result in important changes to the company's

structure", which will include any envisaged business transfer that would be subject to CBA No. 32*bis*. As to timing, see "Duty to Consult" below.

Where no works council nor a union delegation has been established within the organization of the transferor (and regardless of whether the transferor has a CPPW), it is important to note that the employer will moreover be required to directly provide information to the affected employees. In such event, the transferor is to give the affected employees the following information prior to the transfer:

- the (envisaged) date of the transfer;
- in case of transfer following bankruptcy, the (envisaged) date of the transfer of transferring assets;
- the reasons for such transfer;
- the legal, economic, and social consequences of such transfer; and
- the envisaged measures regarding the employees.

§ 14.6(b)(ii) *Duty to Consult*

Apart from being entitled to be informed, the appropriate employee representatives should moreover be consulted by the employer about the impact such changes might have on, for example, employment prospects, work organization, and employment policy in general.

With regard to the timing of the above information and consultation obligation, CBA No. 9 does not provide for any strict timeframe and merely provides that this process should be initiated *before* any decision has been taken and at such time when consultation (regarding the impact the intended change may have on employment) would still be effective and meaningful, to be assessed on a case by case basis. In any event, this process should be initiated before the transfer is to be announced to the public.

§ 14.6(b)(iii) *Remedy for Failure to Inform and/or Consult*

Where the company does not comply with applicable information and consultation requirements, the employee representatives can theoretically initiate legal proceedings, requesting the President of the competent Employment Tribunal to order the company to comply with the relevant requirements. In addition, a penalty payment per day (or any other time unit) could also be linked to the order should the company not comply. Where this action results in the transaction being delayed, the employee representatives will not be able to block the transaction altogether (nor can the Employment Tribunal) and a breach of the applicable information and consultation requirements will not affect the validity of the transaction.

Failure to comply with the above information and consultation requirement is a criminal offense, which can, in principle, result in: (1) a criminal fine of minimum of EUR 400 and a maximum of EUR 4,000; or (2) an administrative fine of a minimum of EUR 200 and a maximum of EUR 2,000, to be multiplied with the number of affected employees (with a maximum cap of 100).

§ 14.6(b)(iv) *Information to be Given to Employees*

Where no works council or union delegation has been established at the transferor's organization, the transferor is required to provide the affected employees with the information set out in CBA No. 32*bis* (see above).

Where no legal obligation to provide information exists under CBA No. 32*bis* (*i.e.*, where a works council or trade union delegation has been established at the transferor's organization), it may nevertheless be considered good practice for the transferor to give a written communication to affected employees explaining the impact of the transfer on them (*e.g.*, the name of their new employer (the transferee), that their terms and conditions will remain unchanged, their seniority will not be impacted, etc.).

§ 14.7 Employee transfer issues aside, what rules regarding a seller's employees and labor agreements govern a "transfer of undertakings" in the sale of a business's assets?

Besides the automatic transfer of employees, CBA No. 32*bis* also covers the protection against dismissal, the automatic transfer of terms and conditions of employment of the transferred employees (including *inter alia* accrued length of service) and the joint liability of the transferor and the transferee.

§ 14.7(a) *Protection Against Dismissal*

As for the ARD Directive, CBA No. 32*bis* provides that the transfer of undertaking in itself may not be a reason (by the transferor prior to the transfer or by the transferee following the transfer) to dismiss an employee that is (to be) transferred.

The only exceptions are where:

- the employee would be dismissed for serious cause; or
- the reason for the dismissal is an "economic, technical or organizational reason entailing changes in the workforce" (an "ETO reason").

An employee who alleges having been dismissed on the grounds of the transfer will bear the initial burden of proof. Conversely, where the employer alleges that it dismissed the employee due to an ETO reason, the onus of proof will be on the employer to prove that the dismissal was based on an ETO reason.

CBA No. 32*bis* does not provide for any specific sanction where the employer would dismiss an affected employee in contravention of the above prohibition.

Therefore, an employee who alleges having been dismissed due to the transfer will, in principle, be required to prove the existence and extent of the loss the employee suffered as a result, in order to obtain damages. Given that such evidence is, in practice, often hard to bring forward, some Employment Tribunals and Employment Courts appear to be willing to award lump-sum damages, ranging from EUR 2,500 to EUR 5,000.

Notwithstanding the above, the employee could also claim that the dismissal constitutes a "manifestly unreasonable" dismissal for the purposes of CBA 109, in which context the Employment Tribunal may—if such a claim would be successful and depending on "*how*" unreasonable the dismissal is considered to be—award a lump-sum indemnity equal to a minimum of three weeks and a maximum 17 weeks' pay.

In any event, dismissing an employee in contravention of CBA No. 32*bis* constitutes a criminal offence, which may result in an administrative fine of a minimum of EUR 80 and a maximum of EUR 800 (to be multiplied with the number of employees dismissed in contravention of the dismissal prohibition, with a maximum of 100).

§ 14.7(b) *Transfer of the Terms & Conditions*

§ 14.7(b)(i) *Effects of the Transfer on Employees*

All employees who are assigned to the undertaking (or division thereof) transferred in the framework of the business transfer, are impacted in the following ways:

- the transfer does not, of itself, terminate their employment;
- their employment agreements are automatically transferred to the transferee (whereby the employee may in principle not refuse such a transfer), together with their terms and conditions of employment (including *inter alia* accrued length of service). The exception to this is extra-legal pension schemes (see below); and
- all of the transferor's rights, powers, duties, and liabilities connected with the transferring employees' employment contract transfer to the transferee.

Where the transferee cannot continue one or more of the transferor's plans (*e.g.*, group-wide profit share plans, other group-wide benefits, etc.), it will be required to provide a substantially equivalent level of benefit, if participation to such plans are provided for in the employees' employment contracts.

Where the transferor dismisses employees pretransfer for a reason connected with the transfer of undertaking (and it is not for an ETO reason – see below), the liability for the dismissed employees will, in principle, be inherited by the transferee (unless contractually excluded by the parties to the transfer), even though such employees never actually transferred to the transferee.

§ 14.7(b)(ii) *Pensions*

Although CBA No. 32*bis* provides that the transferee is not required to take over/honor extra-legal pension schemes, it should be noted that entitlement to participate in such schemes is (generally) considered to be an essential term of employment. As such, the transferee will, in practice, have to provide a substantially equivalent scheme. If changes are to be made to the pension scheme, a strict procedure must be followed, including information and consultation with competent employee representative bodies.

With regard to "past" accruals, there is no legal requirement to transfer the amounts accrued under the transferor's pension scheme to the transferee's pension scheme. Where such accruals would nevertheless (*i.e.*, notwithstanding the fact that there is no legal requirement to do so) be transferred to the transferee's pension fund, a strict procedure must be followed.

Where no transfer of accruals is planned, the transferee may be required: (1) to make a payment in the framework of so-called "dynamic management" (where the pension scheme takes the form of a defined benefits plan); or (2) to guarantee the statutorily required minimum return on investment (where the pension scheme takes the form of a defined contribution plan). If this is the case, it will be advisable, from the transferee's perspective, to clarify the parties' respective obligations in the transactional documentation (*e.g.*, business transfer agreement).

§ 14.7(b)(iii) *Changing Terms & Conditions of Employment*

As the transferee inherits all rights, powers, duties, and liabilities connected with the transferring employees' employment agreement, it will be able to change terms and conditions of employment provided and to the same extent the transferee would have been able to do so.

A brief overview of the transferee's abilities to *unilaterally* change terms and conditions are set out below.

1. **Changes in the Framework of a Variation Clause**

First of all, where the employment contract includes a (valid) provision entitling the employer to unilaterally change terms and conditions of employment (which are subject to stringent rules and restrictions), the employer transferee may take advantage of this clause to unilaterally change the in-scope terms and conditions.

2. **Changes Outside the Framework of a Variation Clause**

Outside the scope of operating a (valid) variation clause, the transferee will only be able to unilaterally Belgian change/impose employment terms in the framework of the so-called *ius variandi*.

Accordingly, the Court of Cassation ruled that although the employer cannot, in principle, unilaterally change employment terms, such a prohibition would only apply to terms and conditions that were agreed upon between the parties. On the contrary, it is generally accepted that the employer can unilaterally impose terms and conditions that were not agreed upon between the parties, provided that these changes are "non-essential". Examples include the unilateral change by the employer of the range of products to be sold by its sales representative, the introduction of a dress code, etc.

In spite of remaining a contentious issue, and further complicated by a divided case law, some courts are of the opinion that although the employer cannot in principle unilaterally change employment terms agreed upon between the parties, the principle of good faith dictates that in certain circumstances the employee cannot reasonably object to the change (*e.g.*, minor change necessary for the employer's legitimate business needs).

3. **Other Options**

An alternative method of changing terms and conditions in connection with a transfer of undertaking is to obtain the affected employees' consent, whereby this may potentially be structured as a termination of employment by mutual agreement followed by the employee being rehired under a new employment contract (which will in principle, however, not interrupt accrued seniority).

Unlike some countries where a change to terms and conditions of employment (especially detrimental changes) made in connection with the transfer will be held null and void even where the employee expressly agrees to the change, in Belgium, the parties to an employment contract (*i.e.*, initially the transferor and the employee or post transfer between the employee and transferee) can, by mutual consent, change terms and conditions of employment and this regardless of the fact that the change occurred because of the transfer itself.

§ 14.7(b)(iv) *Collective Agreements*

1. **General Principles**

According to the 1968 Collective Bargaining Agreements Act, the transferee is to honor the CBAs to which the transferor was bound by at the time of the transfer, and this up until the moment where such CBAs are no longer applicable (*e.g.*, where the CBAs have been terminated by notice from one of the parties). Therefore, it will be essential for the transferee

to ask the transferor for a list of all CBAs by which it is bound, as well as a copy of the CBAs concluded at the company level.

Although the CBA that "transfers" to the transferee will cease to apply at some point in time, the so-called "individual normative provisions" included in the CBA (*i.e.*, essentially provisions that provide individual entitlements to employees) will generally survive, as such provisions will, in principle, be deemed to have been incorporated into the employees' employment contracts.

2. **Change of Competent Joint Committee**

Where the transfer of undertaking would result in a change of the joint committee (*i.e.*, the sectoral committee competent for, in general, the industry to which the employer belongs) competent for the transferred employees (*i.e.*, where the transferee is covered by different joint committee than that applicable to the transferor), there is some debate as to whether the CBAs concluded within the joint committee that was initially competent, will continue to apply.

The majority of Employment Tribunals and Employment Courts appear to accept that such CBAs cannot continue to apply, although the so-called "individual normative provisions" included in such CBAs (see above) will generally survive, as these provisions will, in principle, be deemed to have been incorporated into the employees' employment contracts.

§ 14.7(b)(v) *Employee Representative Bodies*

1. **Works Council and Committee for Prevention and Protection at Work**

Under Belgian law, works councils and CPPW's—subject to satisfying certain conditions—are, in principle, established at the so-called "technical exploitation unit" level (TEU). The impact of the transfer of an undertaking on employee representative bodies will essentially depend on whether the transfer affects the nature of the TEU:

a. where the nature of the TEU *is not* affected by the transfer of the undertaking, the works council and/or CPPW that exist will continue to exist within the organization of the transferee without any changes; or

b. where the nature of the TEU *is* affected by the transfer of the undertaking, the existing works council and/or CPPW will in principle be split into two bodies, one remaining within the organization of the transferor and one being established (or, where applicable, merged into an existing body) within the organization of the transferee.

2. **Union Delegation**

With regard to the union delegation that exists at the undertaking to be transferred, similar rules are provided for under CBA No. 5:

a. where the nature of the undertaking at the level of which the union delegation has been established *does not* change, the union delegation will continue to exist without any changes within the organization of the transferee; or

b. where the nature of the undertaking at the level of which the union delegation has been established *does* change, the union delegation will only continue to exist for a period of six

months. On expiry of this period, the union delegation will have to be reconstituted, provided the conditions necessary for its establishment are satisfied.

§ 14.7(c) *Joint Liability of the Transferor & Transferee*

According to CBA No. 32*bis*, the transferor and the transferee are jointly liable for the payment of any debts resulting from the transferred employment contracts (with the exception of debts relating to extra-legal pension schemes), that existed at the time of the transfer.

The effects of this joint liability can, however, be excluded or otherwise tailored by the parties in the context of the transactional documentation.

§ 14.8 Before a *buyer* consummates either a stock (shares) or asset purchase of another business that has its own, separate workforce, what (if anything) does the law expressly require regarding notice to, or consultation with, the *buyer's* own existing workforce, employee representatives, or with government labor agencies?

The buyer is—in accordance with the Royal Decree of 27 November 1973—required to inform and consult with its works council regarding the acquisition of shares or assets, provided that the acquisition constitutes an event "which may have an important impact on the undertaking". Such event may include the acquisition of shares or assets of another business.

As to timing, the employer will need to inform and consult with its works council upon being (officially) informed of such acquisition.

Where, in the absence of a works council, the information and consultation requirement under the Royal Decree is not delegated to any other employee representative body, CBAs concluded at industry level can still provide for similar information and consultation requirements to be complied with towards the union delegation.

No government labor agency must be notified.