K&L GATES

Belgium

Employer Guide

10TH ANNIVERSARY EDITION

CONTENTS

INTRODUCTION

Over the past year, Belgian employment legislation has once again seen some important changes. The most significant reform has been the introduction of an obligation for employers with 50 or more workers to appoint a person of trust within the company. This person can hear workers and can advise them on the procedures available regarding psychosocial risks at work.

For the termination of employment contracts, the legislator has capped the notice period for employees who resign at 13 weeks in all cases and now also for employment contracts that entered into force before 1 January 2014. Moreover, a new dismissal protection has been introduced for employees undergoing infertility treatment and medically assisted reproduction procedures, and employees whose employment contract has ended can now reclaim their original phone number if the employer had taken over the employee's telephone subscription and phone number during the performance of the employment contract.

Finally, the Belgian Federal Parliament adopted a new Private Investigations Act that targets internal investigations conducted by an external investigator or an in-house investigation service. This new act, which has not yet entered into force, has a strong focus on protecting the rights of the person subject to an internal investigation.

EMPLOYMENT RELATIONSHIP

I. PRE-EMPLOYMENT

Immigration/Work Permit and Visa Requirements

European Economic Area and Swiss Citizens

Nationals of the European Economic Area (EEA) and Switzerland have a right to work in Belgium without a work permit.

Non-EEA and Non-Swiss Citizens

In principle, every non-EEA or non-Swiss national working and residing in Belgium must be in possession of the necessary permits.

If an employer and an employee want to establish a working relationship in Belgium for a period exceeding 90 days, the employer needs to request that the appropriate regional authorities issue a so-called “single permit” for the employee, which is a combined work and residence permit. Applications for this “single permit” must be submitted through an online portal.

Employers that want to employ an employee in Belgium for a period not exceeding 90 days will need to request the appropriate regional authorities to issue a work permit via email (and in the near future through an online portal as well).

To obtain a single permit or a work permit, the employer must submit a file that comprises, among other documents, a passport, an application form, and an employment contract.

There are a number of exceptions to the obligation to apply for a work permit or single permit.

Depending on whether the employee is already residing in Belgium (and the reason for doing this), on the term of the employment in Belgium (more or less than 90 days), and on the country of origin of the employee, the employee will also need to request a visa to be able to travel to Belgium.

Reference/Background Checks

Reference checks are allowed with the applicant’s consent. However, if the applicant clearly marks a certain former employer as a “reference” on his or her CV, then such designation as a referee can be considered as “giving consent.” The employer must inform the applicant prior to actually making contact with the former employer. In addition, all references and background checks must be limited to what is proportionate for the purpose of the recruitment (following the concept of data minimization).

Police and Other Checks

The mere checking of a criminal record excerpt without keeping a copy of it or processing it in any way is allowed when this is relevant for the job function and proportionate. However, there is a general prohibition on the processing of criminal records, except for functions for which the law explicitly requires a clean criminal record (e.g., director functions in the financial sector, security agents) and subject to proportionality requirements.

Education checks are common and allowed with the applicant’s consent.

Medical Examinations

Biological tests, medical examinations, or the gathering of oral information for the purpose of obtaining medical information are only permitted when intended to verify the current (not the future) suitability of

an employee or prospective employee for a vacant position, taking into account the specific characteristics of that position. Medical tests are only permitted for certain functions (safety functions, functions with increased vigilance, or an activity with a specific risk) and must be related to the specific nature of the position. The medical checkup of a candidate is only allowed insofar as the checkup is the last step in the selection procedure and will result in an employment contract being entered into if the candidate is declared medically suitable.

Minimum Qualifications

Generally speaking, this is not applicable, but in order to obtain or renew a work permit/single permit, it can be required to file, for example, diplomas or certificates and pay slips.

II. TYPES OF RELATIONSHIPS

Employee

Employees can be hired for an indefinite period, for a fixed-term period, for a specific project, and on a full-time or part-time basis.

Independent Contractor

Independent contractors can be engaged directly by the company or via a personal services company (management company).

Agency Worker

Agency workers are common but can only be employed (a) to temporarily replace an employee whose employment contract was terminated or suspended, (b) to address an increase in workload, (c) for the execution of an exceptional job, or (d) to fill a vacancy. In the latter case, the user company is offered the opportunity to test the skills of the temporary agency worker with the aim of providing to the temporary agency worker a permanent job with the user when the period of temporary agency work of a maximum of six months has come to an end. Agency workers are subject to strict conditions and are employed for a limited time.

Remuneration for agency workers cannot be lower than what would be received by a permanent worker for the same job.

Different collective bargaining agreements (CBAs) set out the benefits enjoyed by agency workers, and a joint committee has been created specifically to cover the agency workers.

An employment contract between a temporary work agency and a temporary agency worker must be entered into in writing no later than the time when the worker starts working.

III. INSTRUMENTS OF EMPLOYMENT

Contracts

An employment contract for an indefinite duration can be concluded orally or in writing. However, the following contracts must be in writing:

- Fixed-term contracts.
- Contracts for specific projects.
- Part-time contracts.
- Replacement contracts.
- Contracts for domestic servants.
- Contracts for working at home.
- Contracts for temporary work and temporary agency work.

- Student contracts.

The essential elements of the employment contract include:

- The function performed.
- Amount of wages.
- Working time.
- The workplace.

There are specific requirements for written employment contracts in regard to certain clauses, which include schooling clauses and noncompete clauses.

Three elements need to be present to qualify a contract as an employment contract:

- An employee performs work for wages.
- Payment by the employer.
- The work is performed under the authority of the employer.

Following the act of 7 October 2022 on transparent and predictable working conditions, which transposes an EU directive, employers must ensure that they inform their employees at the latest on their first working day, whether in writing or electronically, and either in the employment contract or in a separate document(s), about the essential aspects of the employment relationship. Besides more "standard" elements, such as the place of work, the function, the start date, the salary, and fringe benefits, these essential aspects also include "less standard" elements, such as information about the fixed or variable work schedule; the function title; the rank, capacity, or category of the work performed to determine the employee's salary and employment conditions; and the arrangements relating to the performance of overtime hours and additional hours (for part-time workers).

This act and CBA no. 161 have also introduced the right of employees with at least six months' length of service to request a form of employment that is more predictable and secure (e.g., an indefinite-term employment contract for employees with a definite-term contract, fixed working schedules for employees with variable working schedules). The employer has the obligation to justify any postponement or refusal of such a request. The employees making use of this CBA benefit from protection against dismissal and any negative action.

Belgian labor law allows employment agreements to be signed electronically. However, an electronic employment contract is only legally compliant if it is signed with the employee's e-ID and card reader or through a qualified electronic signature (e.g., DocuSign) and if the contract is archived with a qualified electronic archiving service. Currently, there is only one qualified electronic archiving service in Belgium, namely Docbyte. However, the Employment Contracts Act does not provide for a specific penalty when the electronically signed employment contract is archived with another electronic archiving service.

Codes or Rules

CBAs can be concluded at three different levels:

- At the national level, within the National Labour Council.
- At the sector-of-activity level, in joint committees or joint subcommittees.
- At the company level.

CBAs at the national or sector level can be made compulsory by royal decree, which means that the CBA will also apply to those employers who are not represented by an employer's representative organization and their employees.

Where the CBA is not compulsory, only the clauses that are not contrary to the written contract of employment will apply to the employers who are not represented by an employer's representative organization and their employees.

Registered Agreements

No requirement to lodge an employment contract with, or get approval from, a third party.

Policies

A distinction has to be made between work rules, which are a mandatory document, and other policies (e.g., car policy, Internet policy).

The mandatory work rules must contain specific information required by law (e.g., work schedules, an overview of disciplinary measures, grievance procedures, policy on alcohol and drug abuse, a written health and safety policy).

In order to prepare and amend the work rules, specific procedures must be followed.

IV. ENTITLEMENTS

Minimum Employment Rights

Working Hours

There is a limit on working time of an average of 38 hours per week.

Deviations exist on the sector level provided in CBAs.

Generally, working at night, on Sundays, or on public holidays is prohibited. However, the law provides for certain exceptions.

Employees holding managerial positions or positions of trust (this includes a director, manager, or any person exercising authority who has responsibility for all, or a significant subset of, the enterprise), as well as sales representatives, home workers, and domestic servants, are not affected by the regulations on working time.

The Act of 5 March 2017 on Practicable and Flexible Work modernized Belgian employment law in regard to working time. This act introduced, among other things, a legal framework for flexitime (working with core time frames and flexible time frames within certain limits), provided that certain formalities are met and a time registration system is put in place.

In a landmark judgment of 14 May 2019, the Court of Justice of the European Union (CJEU) held that EU member states must oblige employers to set up a system for recording the time worked each day by each worker. Following this judgment and like other member states, Belgium will have to amend its working time legislation and oblige employers to introduce a working time registration system for all employees and not only for employees with flexitime, as is the case today. On 22 May 2020, the Brussels Labour Court of Appeal rendered the first Belgian judgment applying this ruling of the CJEU. However, caselaw from different Labour Tribunals of 2020 and 2021 ruled that as long as the Belgian state has not adapted its legislation, an employer cannot be obliged to introduce a time registration system.

The Labour Deal Act of 3 October 2022 has introduced (a) a four-day work week (i.e., an option for full-time employees to work their working week during four rather than five days and to perform the same working time during four longer work days), (b) a varying weekly working regime (i.e., an option to work more in one week and have more time off in the following week), and (c) an obligation to

increase the notification period for variable working time schedules for part-time workers from five to seven days.

Rest Breaks

An employee cannot work for more than six hours without a break. After six hours, an employee is entitled to a break of at least 15 minutes.

An employee is entitled to a break of 11 hours between two working periods. Once per week, an employee is entitled to 35 hours (11+24) of uninterrupted rest.

Overtime

Grounds

In principle, overtime hours can only be performed on the basis of a limited number of specific grounds, such as sudden, unexpected increases in workload and work to prevent or repair damage to assets.

However, there is an exception to the employer's obligation to prove such specific grounds of justification. Employers can indeed use voluntary overtime hours in their company without any need for justification, provided that the employee's prior written approval is given in this regard. Such approval is valid for six months, but it can be renewed.

There exist two types of voluntary overtime hours:

- "Ordinary" voluntary overtime hours that can be performed up to 120 hours per employee per year. A CBA at sector level can even increase this credit of "ordinary" voluntary overtime hours by up to 360 hours.
- "Relance" voluntary overtime hours that can only be performed during the period from 1 July 2023 to 30 June 2025. The maximum number of "reliance" voluntary overtime hours that an employee can perform is 120 hours per year. However, the combined maximum of "ordinary" and "reliance" voluntary overtime hours may not exceed 220 hours per year.

For some grounds of overtime, the employer needs the prior consent of the trade union delegation and the social inspection services or needs to provide notice to the trade union delegation and the social inspection services.

Overtime Pay and Compensatory Rest

In principle, working overtime entitles the employee to 50% extra pay for the overtime performed, while working on Sundays or on public holidays entitles the employee to 100% extra pay for the overtime performed.

Compensatory rest breaks are also provided.

Working time may be performed on average during a certain reference period, which is in principle a quarter, but it can be extended to one year. At no time during such reference period may the number of overtime hours exceed 143 hours, i.e., the so-called internal threshold, but a sector CBA can provide for a higher threshold (without upper limit). If the threshold is reached, the employee should immediately receive compensatory rest before he or she is allowed to perform more overtime hours. However, provided that certain procedures are followed and for certain types of overtime hours, employees can waive their entitlement to compensatory rest for a maximum of 91 hours per calendar year (which can be extended to 130 or 143 hours if certain procedures are complied with) and agree on a simple payout.

As an exception to the rules above, employees performing “ordinary” voluntary overtime hours are entitled to normal pay and overtime pay (50% or 100%), but they are not entitled to any compensatory rest. Employees performing “relance” voluntary overtime hours will not be entitled to overtime pay nor to compensatory rest.

Wages

Minimum wages are determined in CBAs (on a national or sectoral level) and are, in general, based on an employee’s professional experience and seniority.

With the recent European Pay Transparency Directive, the European Union wants to close the gender pay gap by defining key concepts, introducing binding pay transparency measures and strengthening remedies and enforcement mechanisms. Belgium has not yet transposed this directive into national legislation. The deadline for doing so is 7 June 2026.

Vacation

Employees are entitled to four weeks’ paid annual leave (20 days for those working five days a week, and 24 days for those working six days a week), provided that they worked the entire preceding calendar year.

Employees receive their normal remuneration together with an extra payment of holiday pay equivalent to 92% of their monthly remuneration (so-called “double holiday pay”).

Employees who are starting their careers or who are restarting their activities after a long time off are entitled to additional holidays after an introductory period of three months, so they have the possibility of benefitting from four weeks of holiday over the period of one year. The employee will receive holiday pay that is equal to his or her regular salary. Holiday pay will be financed through a deduction from the double holiday pay of the next year.

As from 1 January 2024, employees who fall ill during their legal holidays are allowed to take up these legal holidays at another time within a period of 24 months.

There are 10 public holidays a year. An employee is entitled to a replacement holiday day when a public holiday falls on a normal rest day.

The Act of 5 March 2017 on Practicable and Flexible Work introduced an option for employees to “save” time and to take this up as holidays at a later stage during their careers, e.g., the saving of voluntary overtime hours or conventional holidays or the converting of a premium in paid annual leave (if provided for by royal decree). The legal framework on “career saving” entered into force on 1 February 2018. However, this system can only be called upon if a sector CBA is entered into setting out the framework. If, after six months following such a request, no sector CBA is entered into, then the system can be introduced by company CBA. In some sectors, like the clothing sector and the insurance sector, a CBA on career savings has been adopted. In other sectors, such as, among others, the additional national joint committee for white-collar workers (which applies to a large proportion of white-collar workers), the chemical industry, the food industry, and the metal and the petroleum sectors, a request has been submitted but no sector CBA has been entered into within a period of six months, which means that employers in these sectors can now enter into a company CBA on career saving.

Sick Leave and Pay

Employees are entitled to sick leave due to incapacity to work. Employees are entitled to 30 days of “guaranteed” remuneration in these circumstances, paid by the employer as follows:

- A white-collar worker is entitled to 100% of his or her remuneration.

- A blue-collar worker is entitled to 100% of his or her remuneration for the first seven days, then 85.88% of his or her remuneration from day eight to day 14 and 30% of his or her remuneration from day 15 to day 30, topped up with an allowance from the National Health Service.
- After the 30-day period, the employee is entitled to disability allowances paid by the National Health Service.

If so provided for in the work rules or in a CBA, the employee must submit a medical certificate for any work incapacity. Recent legislation now provides that the employee will be exempted from this obligation to submit a medical certificate three times a year for the first day of work incapacity. Companies that employ less than 50 employees can deviate from this exemption in their work rules.

To accommodate the reintegration of sick employees, a so-called "reintegration track" exists in which the occupational physician (arbeidsgeneesheer – médecin du travail) examines whether or not a disabled employee can continue to work temporarily or permanently by giving him or her adjusted work or another function within the company. The procedure for "medical force majeure" (i.e., establishing the termination of the employment contract without any notice period to be performed or indemnity in lieu of notice to be paid) can only be initiated after at least nine months of incapacity for work and will have to be established through a separate "medical force majeure" track. Since 1 April 2024, an employer who terminates an employment contract for medical force majeure must pay a contribution of €1,800 to a "Back to Work Fund" set up within the National Health Service. This contribution replaces the obligation to pay an outplacement package.

Maternity/Parental Leave and Pay

Maternity leave normally lasts for 15 weeks, which includes six weeks of prenatal leave (of which one week is compulsory and five weeks can be carried over as postnatal leave) and nine weeks of postnatal leave.

In the case of multiple births, maternity leave normally lasts for 19 weeks, which includes eight weeks of prenatal leave (of which one week is compulsory and seven weeks can be carried over as postnatal leave), nine weeks of postnatal leave, and two additional weeks at the request of the employee.

Maternity leave can be extended in specific cases, e.g., for up to 24 weeks in the case of hospitalization of the newborn.

Maternity leave allowances are paid by the National Health Service. Within the first 30 days, 82% of normal pay is paid, then 75% of normal pay is provided thereafter.

Employees have the right to return to work, and there is protection against dismissal from the date the employer is notified about the pregnancy up until a month following maternity leave.

The father or co-parent of a newborn child is entitled to 20 days of paid birth leave. The father or co-parent benefits from protection against dismissal as from the notification of the birth leave and up to five months following the date of birth. Birth leave can be taken within four months from the date of the newborn's birth.

For birth leave, the employer is required to pay the normal remuneration for the first three days of leave, with the other 17 days being paid as an allowance by the National Health Service.

Carer's Rights

Employees are entitled to carer's breaks in order to assist or provide care to a household or family member suffering a serious illness, parental leave, palliative care leave, etc., under certain conditions.

This carer's break system enables employees to suspend their employment contract completely (full break) or to reduce their working hours by half or one-fifth for a maximum period of 51 months (in some cases). During this period, they will receive a lump-sum monthly allowance from the National Unemployment Office on top of their reduced salary.

Different forms of parental and thematic leave exist, for example:

- One-tenth parental leave (for full-time employees), e.g., the possibility for parents to stay with their children on Wednesday afternoon.
- Flexible forms of taking up full-time and half-time parental leave.
- Flexible forms of taking up thematic leave for providing medical assistance.

A national CBA no. 162, which entered into force on 1 October 2022, allows employees with at least six months' of service to ask their employer for a more flexible working scheme (e.g., telework, an amendment of their work schedule, a reduction of working time) for specific reasons relating to child care or personal care of a severely ill family member. The employees making use of this CBA benefit from protection against dismissal and any negative action. The employer has the obligation to justify any postponement or refusal of such a request.

Discretionary Benefits

An employment contract of an individual employee can always stipulate that an employee will also receive other benefits, including a car, laptop, mobile phone, and insurance, for example.

In Belgium, one of the most popular discretionary benefits is the provision of "meal vouchers." These vouchers can be used to buy food and other provisions and are accepted in stores and most restaurants. Another very popular benefit is the granting of a company car, which the employee can use for private purposes. In an attempt to solve road congestion caused by such company cars, the Belgian government introduced a so-called "mobility budget."

This "mobility budget" is a budget that an employee can freely allocate to three "buckets" (a company car that is more environmentally friendly, alternative means of transportation, or a cash balance amount).

TERMINATION OF EMPLOYMENT

I. GROUNDS

Termination of the employment contract resulting from a unilateral decision taken by either party usually takes one of the following forms: termination with notice, termination with payment of an indemnity in lieu of notice, or termination for serious cause.

An employer may give notice to, or dismiss, an employee on any grounds as long as the grounds are not prohibited by law (e.g., discrimination) and as long as the dismissal is not considered to be "clearly unjustified" (see "Dismissal Action" below). No administrative or legal approval is needed. There is specific protection against dismissal on the basis of a number of reasons, including, among others:

- Employee representatives in the works council and the Committee for Prevention and Protection at Work.
- Nonelected candidates for the works council and the Committee for Prevention and Protection at Work.
- Trade union delegates.
- Application for maternity or birth leave.
- Parental leave or adoption leave.
- Being a candidate for a political mandate.
- Redundancy or threatened redundancy due to new technologies.
- Application for paid education leave.
- Application for leave in order to assist a person who is suffering a serious disease.
- Request by a night worker to return to a daytime working schedule.
- The lodging of a claim in relation to violence, harassment, or sexual harassment.
- The lodging of a claim in relation to discrimination.
- New protection grounds, such as the filing of a request for a form of employment that is more predictable and secure (CBA no. 161) or a more flexible working scheme due to child care or taking care of a severely ill family member (CBA no. 162), a request for a four-day work week, or the making of a report as a whistleblower.
- Very recently, a new dismissal protection has been introduced for employees undergoing infertility treatment and medically assisted reproduction procedures.

The employer will have to prove that the grounds of dismissal are not related to the reasons listed above or it will have to comply with a strict dismissal procedure before the employee is terminated.

The employer may terminate an employment contract without notice and without paying any compensation in the event of a serious cause, i.e., a fact due to which the relationship between the employer and the employee is immediately and irrevocably damaged beyond repair, provided that the reason is not known by the employer for more than three working days.

II. MINIMUM ENTITLEMENTS

Payments/Notice

An employer wishing to terminate an employment contract does not have to consult or obtain prior approval from the works council or any other regulating body or court (unless the employee would have a protected status for which such prior approval is provided).

Notice of termination subject to a notice period by the employer may only be validly given in a written statement, sent by registered mail, or a delivery by bailiff, specifying the starting date and duration of the notice period. For a termination subject to the payment of an indemnity in lieu of notice, no specific

formalities apply. However, it is advisable to send the employee a notice letter as proof of the date of termination.

For employment contracts that became effective before 1 January 2014, notice periods are calculated in two distinct steps. The first step of the notice period is calculated based on the seniority of the employee on 31 December 2013. The second step is calculated based on the seniority acquired after 1 January 2014.

The following notice periods apply when an employee is dismissed under an employment contract that became effective on or after 1 January 2014. They also apply to the second step of the calculation for employment contracts that began before 1 January 2014:

- Zero to three months of continuous service – one week.
- Three to four months of continuous service – three weeks.
- Four to five months of continuous service – four weeks.
- Five to six months of continuous service – five weeks.
- Six to nine months of continuous service – six weeks.
- Nine to 12 months of continuous service – seven weeks.
- 12 to 15 months of continuous service – eight weeks.
- 15 to 18 months of continuous service – nine weeks.
- 18 to 21 months of continuous service – 10 weeks.
- 21 to 24 months of continuous service – 11 weeks.
- Two to three years of continuous service – 12 weeks.
- Three to four years of continuous service – 13 weeks.
- Four to five years of continuous service – 15 weeks.
- As of five years – plus three weeks per commenced year of continuous service.
- As of 20 years – plus two weeks per commenced year of continuous service.
- As of 21 years – plus one week per commenced year of continuous service.

The first step for employment contracts that became effective before 1 January 2014, taking into account the seniority of the employee on 31 December 2013, is calculated as follows for white-collar employees:

- If the annual remuneration of the employee was below the amount of €32,254 gross on 31 December 2013, the first part of the notice period amounts to three months per started period of five years of seniority.
- If the annual remuneration exceeded the amount of €32,254 gross on 31 December 2013, the first part of the notice period amounts to one month per started year of seniority, with a minimum of three months.

For blue-collar workers, the first step for contracts that entered into force before 1 January 2014 gives rise to shorter notice periods.

For workers who resign, a recent Act of 16 March 2023 has capped the notice period to be performed at 13 weeks in all cases and is thus now also for employment contracts that entered into force before 1 January 2014.

Where the individual is entitled to an indemnity in lieu of notice, this is calculated on the basis of the gross annual compensation at the time of termination, which includes all benefits earned over the last 12 months of employment. The indemnity in lieu of notice is equal to the salary that would have been due for the full duration or the remaining part of the notice period.

The Labour Deal Act of 3 October 2022 has introduced a so-called “transition path” providing for the option to already have an employee start working for a new employer (known as the “user”) during the employee’s notice period with their employer. Such work will be organized by the temporary work agencies or by the regional employment agencies. An agreement will have to be concluded between the initial employer, the employee, the new employer (known as the “user”), and the temporary work agency or regional employment agency regarding the modalities and the duration of this transition path.

Statutory Entitlements

During the notice period, the employee is entitled to paid time off to look for new employment: a half-day per week and up to one day per week during the last 26 weeks of the notice period.

All employees who are entitled to a notice period (or an indemnity in lieu of notice) of at least 30 weeks are entitled to outplacement services (the general system). If the employment contract is terminated with a notice period, the employee must use this outplacement support during his or her working hours. In case the contract is terminated with an indemnity in lieu of notice, the employer may deduct four weeks’ salary from the indemnity in lieu of notice. Employers are exempt from the obligation to offer outplacement to employees proving their medical incapacity to follow the outplacement support (for example, a terminally ill employee). If the contract is terminated with an indemnity in lieu of notice, the full amount of the indemnity in lieu of notice will in that event be due without deduction of the four weeks’ salary.

Please note that the general system does not apply to companies that are considered companies in “restructuring.” If the employee is not entitled to a notice period (or an indemnity in lieu of notice) of at least 30 weeks but he or she is older than 45, subsidiary rules pertaining to outplacement services apply.

Employees with a notice period or indemnity in lieu of notice of at least 30 weeks will be entitled to a one-off budget of €1,800 to pay for additional redeployment measures, such as extra outplacement, coaching, or training. This budget will not entail an extra cost for the employer but will be financed through the employer’s social security contributions on part of the notice period or the indemnity in lieu of notice. This system will enter into force on a date still to be determined but by the latest on 1 April 2025.

Employees will also be entitled to a pro rata end-of-year premium (known as the “13th month”) if provided for in the applicable sectoral CBAs.

An employee will also be entitled to departure holiday pay, which is an anticipated payment of the holiday pay for the year following the year in which the employment relationship came to an end and will, therefore, be deducted from the holiday pay normally due by the new employer of the employee concerned for that year.

Following a recent legislative change, employees whose employment contract has ended can now reclaim their original phone number if the employer had taken over the employee’s telephone subscription and phone number during the employment contract’s performance.

Dismissal Action

Since 1 April 2014, each dismissed employee has the right to know the precise reasons that have led to his or her dismissal and can request a “motivation” or “justification.” Failure to comply with the obligation to provide the reasons for dismissal within the prescribed period can lead to an administrative fine amounting to two weeks’ salary. If the employee is not satisfied with the reasons given by the employer, he or she can bring a claim for “clearly unjustified dismissal” before the Labour Court. If the court accepts that the dismissal was “clearly unjustified,” the employer can be liable to

pay damages to the employee amounting to a minimum of three and a maximum of 17 weeks' salary, according to the "degree of unreasonableness."

Litigation involving termination disputes is not unusual. Such litigation usually takes between 12 to 15 months after the application is made before being tried before the Labour Tribunal, with an additional year if an appeal is lodged with the Labour Court.

BUSINESS TRANSFER AND RESTRUCTURING

I. LEGAL REQUIREMENTS

Transfer of Business

There are protections under the EU Acquired Rights Directive/CBA no. 32 to automatically transfer employee entitlements in the event of transfers of an undertaking or part thereof. All employees' rights and obligations are automatically transferred to the new employer, and it is not necessary to sign a new employment contract.

There is a duty to inform and consult with employee representative bodies or, in the absence of representative bodies, to inform employees directly.

If an employee is dismissed because of a transfer, this is considered unfair unless economic, technical, or organizational reasons can be established or it is a case of a serious cause.

II. RESTRUCTURING/REDUNDANCY

Collective Dismissal/Plant Closure: Definitions

Regarding the employer's information and consultation obligations, a collective dismissal occurs when the following number of employees are laid off during a 60-day period:

- Where there is an average of 20 to 100 workers employed in the year prior to the redundancies, 10 or more employees are laid off.
- Where there is an average of 100 to 300 workers employed in the year prior to the redundancies, 10% or more of employees are laid off.
- Where there is an average of more than 300 workers employed in the year prior to the redundancies, 30 or more employees are laid off.

An employer planning a collective dismissal must follow strict procedures in terms of information and consultation.

A plant closure occurs:

- In the case of a definitive cessation of the main activity of the company.
- If the number of employees is reduced below one-quarter of the average number of employees employed in the company during the four quarters preceding the quarter in which the definitive cessation of the company takes place.

Information and Consultation

The employer must give notice of its intention to conduct a collective dismissal to the employee representatives (or the employees directly in case of absence of employee representatives), as well as to the appropriate public authorities.

The employer must inform and consult with the works council before any decision of collective redundancies is taken and before any public announcement is made. Where there is no works council, the employer must inform and consult (in accordance with a prescribed format) with the trade union delegation; where there is no works council and no trade union delegation, the Committee for Prevention and Protection at Work must be informed and consulted; and where there is no works

council, no trade union delegation, and no Committee for Prevention and Protection at Work, the employees must be informed and consulted directly.

Following the information and consultation, if the employer decides to proceed with the collective dismissal, the employer must send a second notification to the appropriate public authorities that sets out the number of employees normally employed, the number of employees being laid off, the reason for the collective dismissal, the period during which the layoff will occur, etc.

In principle, the collective dismissal cannot occur during the 30 days following the second notification to the appropriate public authorities, i.e., the cooling-off period.

During the cooling-off period, it is common to negotiate a social plan detailing the conditions under which the concerned employees will be dismissed and to set up an employment cell if the employer is required to do so. An employment cell is a redeployment body aimed at assisting the dismissed employees in finding new employment and to comply with formalities toward authorities. It must be set up by employers employing more than 20 employees, together with the trade unions and the regional employment agency. An employer employing 20 employees or less is only obliged to set up such cell if it wishes to dismiss employees within the framework of “bridge pension” (a system of unemployment benefits with company top-up) at a lower age than the age that is normally applicable for “bridge pension” within the company. The employment cell must make an outplacement offer to the employees who participate in the cell.

After the cooling-off period, the employer can, in principle, proceed with the individual dismissals in accordance with legal provisions and the provisions of the social plan (if any).

It should be noted that additional formalities would need to be complied with if the collective dismissals were to be accompanied by the closure of the company or a division of the company.

Payment

Employees made redundant during a collective dismissal are in principle entitled to receive a collective dismissal allowance. This collective dismissal allowance is not due to employees who are entitled to the special closure indemnity.

Contrary to the definition of “collective dismissal” in the context of information and consultation obligations, a “collective dismissal” with respect to the specific collective dismissal indemnity is defined as: any dismissal of personnel due to economic or technical reasons and involving, over a period of 60 days, a 10% reduction of the workforce, with a minimum of six dismissals in the case of companies employing between 20 and 59 employees.

PROTECTION OF ASSETS

I. CONFIDENTIAL INFORMATION

Following Article 17 of the law regarding employment agreements, an employee may not disclose, even after termination of employment, any “trade secrets” or secrets concerning personal or confidential matters that he or she has obtained during his or her employment with the company.

A law of 30 July 2018, transposing the European Directive 2016/943 on the protection of trade secrets into Belgian law, introduced, among others, a definition of what is understood by a “trade secret” within the Belgian Code of Economic Law. To qualify as a trade secret, company information must meet three cumulative criteria:

- The information must be secret.
- The information must have commercial value.
- The person holding the information must have taken reasonable protective measures to safeguard its confidentiality.

Article 17 of the law regarding employment agreements has been brought in line with this definition of “trade secrets” in the Code of Economic Law. However, in practice, this should not lead to substantial changes, as this update is a mere modification of terminology (making it clearer and consistent with other legislation) and is in line with existing caselaw on this concept.

II. CONTRACTUAL RESTRAINTS AND NONCOMPETES

In order for an “ordinary” noncompete to be valid, certain requirements must be met:

- The clause must be in writing.
- It must concern activities similar to those activities that the employee exercised at his or her former company and the activities are exercised with a competitor of the former company.
- A geographic limitation is to be taken into account.
- The noncompete clause must not exceed 12 months, starting from the termination of the employment contract.

The employer is obliged to provide payment of a single lump-sum amount in compensation for a noncompete clause of at least 50% of an employee’s gross salary corresponding to the duration of the clause, unless the employer waives the application of the clause within 15 days of the end of the employment relationship.

A “derogating” noncompete clause is also used in Belgium but only for certain categories of undertakings. This is an alternative for multinationals to protect their cross-border interests.

Specific rules apply to noncompete clauses for sales representatives.

Employee nonsolicitation clauses are permissible but are only enforceable if they are reasonable.

The recent local implementation of the EU Directive on Transparent and Predictable Working Conditions has significantly reduced the application of exclusivity clauses, limiting them to situations of fair or unfair competition by the employee, the disclosing of business secrets, or the disclosing of secrets relating to personal or confidential matters.

III. DATA PROTECTION OBLIGATIONS

Data Protection Legislation

The General Data Protection Regulation (GDPR) entered into force on 25 May 2016. It harmonizes data protection legislation in the European Union and strengthens the rights of individuals regarding the collection and processing of their personal data.

The GDPR still leaves room for member states to lay down specific rules, which may not deviate from the GDPR, in national legislation. In Belgium, a new Data Protection Act of 30 July 2018 entered into force on 5 September 2018.

Protection of personal data is also guaranteed by the Act of 13 June 2005 on electronic communications, which lays down the principles applicable to the secrecy of communications, data processing, and protection of users' privacy.

The Belgian Data Protection Authority is responsible for monitoring compliance with data protection legislation. It has the power to sanction companies that violate the data protection rules with huge administrative fines of up to €20 million or 4% of the company's annual global turnover.

Legal Basis for Processing

Circumstances where the processing of personal data is allowed, in principle, include:

- Where it is necessary for the performance of a contract to which the data subject is a party.
- Where it is necessary for compliance with a legal obligation of the controller.
- Where the person concerned has given his or her explicit consent, although consent is often considered to be problematic in an employment context considering the hierarchical imbalance between employers and employees. Moreover, consent may be freely revoked.
- Where it is required to achieve the legitimate interests of the controller or of a third party.
- Where it is necessary to protect the vital interests of the data subject or another natural person.
- Where it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

The processing of sensitive personal data (i.e., ethnic origin, political opinions, religious beliefs, union membership, genetic or (certain) biometric data or data relating to health or sexual orientation) is, in principle, prohibited, but there are some limited exceptions under the GDPR (e.g., the processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law; the data processing is necessary to protect the vital interests of the employee).

Recording Obligations

Employers are required to maintain records of their personal data processing activities. In the context of labor law, this includes documenting what, how, why, for how long, and by whom employee data is collected and processed; details of (any) transfers to third countries; and information about technical and organizational security measures.

When processing operations are likely to result in high risks to data subjects (e.g., when involving new technologies, such as artificial intelligence), employers will additionally need to conduct a specific Data Protection Impact Assessment, detailing the risks and ways to remedy such risks, prior to implementing the relevant processing operations.

Employee Information

An employer is obliged to inform individuals in detail about the collection and processing of their personal data, including data sharing and international transfers. Such information should generally be provided through various privacy notices for each category of individuals (e.g., employees, applicants), in order to only convey the information relevant to that category.

Data Sharing

Data sharing with third parties (including service providers such as payroll providers and marketing partners) must be thoroughly assessed and framed within a data sharing agreement to ensure that GDPR requirements are complied with throughout the data life cycle. Additionally, both disclosure of data to and receipt of data from third parties must be indicated in the records of personal data processing activities.

There are no intragroup exemptions, so group companies have to be treated as third parties and any data flows among group companies need to be carefully assessed.

Data Transfers

There are limited ways in which data can be transferred to third parties outside the EEA. Where the recipient is not located in a country benefiting from an "adequacy decision" or all involved parties have implemented binding corporate rules, a data transfer agreement will generally need to be implemented to ensure that GDPR requirements are complied with throughout the data life cycle.

Data Subject's Rights

Employees have several rights under the GDPR regarding the processing of their personal data, including:

- The right to access, rectify, or delete their data.
- The right to restrict the processing.
- The right to data portability.
- The right to object.
- The right to freely withdraw consent.

Upon receiving a data subject's access request, the employer will need to address the request within one month of its receipt, but an additional two-month time extension may be applied to complex requests.

Data Protection Officer

Employers, especially larger organizations, may be required to designate a data protection officer (DPO) responsible for monitoring GDPR compliance and engaging with data subjects and supervisory authorities.

A DPO must have expert knowledge of data protection, a good understanding of the organization's operations, and independence when performing his or her tasks.

The DPO is a protected employee who may not be dismissed for performing his or her tasks.

IV. WORKPLACE SURVEILLANCE

Camera Surveillance

An employer has the right to monitor an employee's activity during work time if the following requirements are met:

- The monitoring is temporary.
- The monitoring demonstrates one of the following purposes: (a) health and safety, (b) protection of company assets, (c) monitoring the production process of machines or workers to check that they are working properly and to assess and improve the organization of workers' tasks, or (d) control of the employee's work (which cannot be permanent).
- The purpose of monitoring cameras is clearly defined.
- The employer informs and consults with the works council or, failing that, the Committee for Prevention and Protection at Work, which must regularly evaluate the monitoring systems used and make proposals for their revision in line with technological developments.
- The employer informs each employee individually prior to the implementation of the monitoring system (including the number and location of cameras, whether or not images are retained, the purpose of the cameras, and the relevant periods during which they are in operation), and monitoring by the camera must not lead to interference in an employee's private life.

Information obtained in violation of these rules is null and void, will not constitute evidence, and cannot justify either sanction or dismissal. In Belgium, it is up to the court to assess the admissibility of evidence irregularly obtained, taking into account all the elements of the case.

Except where a formal requirement under penalty of nullity has not been complied with, irregular evidence may only be refused if the irregularity committed affects the reliability of the evidence or if the use of the evidence is contrary to the right to a fair trial.

Whistleblowing

The Belgian Act of 28 November 2022 on whistleblowing, which transposes the EU Whistleblowing Directive, obliges companies with at least 50 workers to install an internal reporting channel.

The obligation to set up an internal reporting channel does not apply for legal entities with less than 50 employees, with the exception of companies falling within the scope of the provisions on financial services, products, and markets and the prevention of money laundering and terrorist financing. Therefore, a law firm must establish an internal reporting channel as soon as there is one employee working in the firm.

The categories of persons who may act as a whistleblower include employees but also self-employed persons, shareholders, board members, volunteers, and (un)paid trainees, as well as persons who work under the authority and supervision of contractors, ex-employees, subcontractors, or suppliers. Companies must open their internal reporting channel to their employees. Whether or not they also open it to other categories of persons is optional. External reporting is always possible.

Workplace Investigations

Employers may conduct a workplace investigation to determine policy breaches, misconduct, or misuse of confidential information. However, the investigation has to be open, and evidence must be shared with the employee in question to allow him or her to defend himself or herself.

There are significant restrictions on the monitoring of entrances and exits, emails, and Internet use.

In May 2024, the Belgian Parliament adopted a new Private Investigations Act that targets internal investigations conducted by an external investigator or an in-house investigation service. This new act, which has not yet entered into force, has a strong focus on protecting the rights of the individual subject to an internal investigation.

Internal investigations falling under the new act's scope must meet stringent obligations, such as the obligation (a) to prepare a "mission statement" detailing the investigation's scope and purpose; (b) to

draft a written policy outlining the rules and conditions of the internal investigation; (c) to inform persons that are being interviewed of their rights, which closely mirror the rights granted in police interrogations (e.g., the right to be accompanied by another person, such as legal counsel); and (d) to draft a final report that must comply with certain requirements, etc. For some obligations (e.g., the obligation to have a written policy), the act provides for the nullity penalty, implying that the courts may declare findings of an internal investigation null and void if certain obligations are not complied with.

WORKPLACE BEHAVIOR

I. MANAGING PERFORMANCE AND CONDUCT

Given legislation regarding the reason for dismissal, it has become more important to keep a file and to document information such as remarks, assessments, warnings, and absences relating to individual employees. This will allow an employer to duly communicate the specific reasons that have led to the dismissal in case of a request from the employee for detailed information. This will also ensure that the reasons for each dismissal are evidenced to the extent possible and cannot be considered as "clearly unreasonable."

The recent Labour Deal (Act of 3 October 2022) provides that each company with at least 20 employees will be required to respect the right for employees to be "offline" after working hours.

II. BULLYING AND HARASSMENT

Bullying

In Belgium, workplace bullying is more commonly referred to as "moral harassment" (harcèlement moral – moreel geweld).

"Moral harassment" is defined as an unlawful set of repeated, similar, or different behaviors of any origin, internal or external to the enterprise, which include notably unilateral conduct, words, intimidations, acts, gestures, or writing having as their purpose or effect to negatively affect the personality, dignity, or the physical or mental integrity of an employee during the performance of the employment, to jeopardize the employee's employment, or to create an intimidating, hostile, degrading, humiliating, or offensive environment.

Harassment

Sexual harassment and violence at work are covered by the law relating to the well-being of workers when carrying out their work (4 August 1996).

"Sexual harassment" is defined as "any form of verbal, nonverbal, or physical conduct of a sexual nature that has an effect on the dignity of a person or creates an intimidating, hostile, degrading, humiliating, or offensive environment at the workplace."

The law provides for a very specific procedure to be followed in cases of moral or sexual harassment or violence at work.

The employer must conduct a risk analysis and identify measures that can be taken to prevent violence, moral harassment, and sexual harassment at work and, in general, all psychosocial risks at work. These measures are then implemented after consulting the Committee for Prevention and Protection at Work. The employer must also call upon a prevention advisor specializing in the psychological aspects of work.

Since 1 December 2023, it has been mandatory for employers employing 50 or more workers to appoint a person of trust who can listen to workers and advise them on the available procedures. For employers employing fewer than 50 workers, the designation of a person of trust is an option, not an obligation, unless all members of the union delegation or all workers would request the appointment of such a person of trust. In principle, the person of trust is a company employee; if the company employs less than 20 workers, then the person of trust can also be external.

An employee who is a victim of harassment can request a formal intervention by the prevention advisor, which protects him or her against dismissal. He or she may be entitled to compensation that is equal to six months' pay in case of unlawful dismissal.

III. DISCRIMINATION

In Belgian employment law, there are three relevant laws in relation to anti-discrimination: the general anti-discrimination law, the anti-racism law, and the law that imposes equality between men and women.

Direct and indirect discrimination is prohibited on the grounds of age; sex; social origin; language; sexual orientation; marital status; birth; wealth; religious or philosophical beliefs; political beliefs; union membership; past, current, and future health situations; disability; physical or genetic characteristics; and family responsibilities.

Direct discrimination is when there is a direct distinction, based on a protected criterion, and results in a person being treated less favorably, without justification, than another person in a comparable situation. Direct discrimination is prohibited unless the distinction is based on an objective and reasonable justification.

Indirect discrimination occurs when a seemingly neutral term or criterion appears to be especially disadvantageous to certain people characterized by a given protected criterion in comparison to other people.

The Belgian anti-discrimination legislation was modified in 2023 to recognize the concepts of "cumulative discrimination" (discrimination based on several protected criteria that are distinct) and "intersectional discrimination" (discrimination based on several protected criteria that interact and are inseparable).

Also, new types of discrimination have been introduced, such as "discrimination by association" (i.e., discrimination against a person based on the fact that this person is closely linked to an individual with a protected criterion) and "discrimination based on a presumed criterion" (i.e., when an individual believes that a person presents a protected criterion when this is not the case).

The anti-discrimination provisions stated in the Anti-Discrimination Act cover all employment aspects, including the interview stage, the hiring process, terms and conditions of employment, equal pay, promotion opportunities, fringe benefits, and termination.

Remedies include uncapped compensation for discrimination based on the claimant's financial loss or a lump-sum indemnity that is equal to three or six months' remuneration. For "cumulative discrimination," lump-sum damages based on each protected criterion can be cumulated.

Where discrimination is alleged, it is up to the employer to prove that there is no discrimination.

Employees also benefit from protection against any detrimental measure related to the filing of a complaint for discrimination. This protection includes compensation for damages equal to a lump-sum amount of six months' salary or to compensation for the actual damages suffered.

Not only the victim of discrimination but also witnesses, whether "official" witnesses who can produce a written testimony or employees who have simply "stood up" for a victim of discrimination, are protected against retaliation.

IV. UNIONS

Representation

With over 54% of all employees being members of a particular trade union, Belgium has one of the highest participation levels in the world.

Employees' personal data relating to their union activities is considered as sensitive data under the GDPR, as it reveals political opinions. The processing of such data is, in principle, prohibited.

Trade unions represent the interests of their members through their bargaining role by negotiating with employer organizations on issues such as wages, compensation, working conditions, and health and safety issues, as well as consulting with different levels of government when preparing new labor legislation.

A Committee for Prevention and Protection at Work must be established when there are at least 50 employees. In principle, the committee is composed equally of elected employee representatives and employer representatives. It promotes and actively contributes toward the welfare of employees and exercises certain works council powers if a works council does not exist within a company.

A works council must be established when the company has at least 100 employees. This is a consultative body with equal representation of employee representatives and employer representatives. It has duties in relation to information, consultation, and active participation.

Right of Entry

At the request of the trade union and in accordance with the applicable national or sectoral provisions, an employer is obliged to allow the setting up of a trade union delegation within the company. Trade union delegations negotiate CBAs at the company level, monitor compliance with employment legislation, and play an important role in conflict situations.

Industrial Disputes

The right to strike is based on the European Social Charter. Otherwise, there is no specific Belgian law that governs industrial actions and lockouts.

The Belgian courts have acknowledged the right of an employer to declare a lockout or lockdown; however, this has rarely been seen in Belgium.

V. REMOTE/HYBRID WORK

Belgian labor law distinguishes between two forms of telework, namely:

- Structural telework, where the employee works at a chosen location outside the company premises on a regular basis and using information technology.
- Occasional telework, where the employee is offered the option to occasionally perform telework in the case of "force majeure" (e.g., an unplanned train strike or serious traffic disruption) or for personal reasons (e.g., a doctor's appointment or a car-servicing appointment).

Both systems are characterized by their voluntary nature—an employee cannot be obliged to telework—as well as by the fact that the employee can carry out this work in his or her home and also in any other place of his or her choice (e.g., an Internet café).

In addition to the above “telework” regimes, there is also the system of “home working,” where the employee works from his or her home or other location of his or her choice but without the use of information technology.

Structural telework must be formalized in a written agreement between the employer and employee and concluded, at the latest, when the telework starts. This agreement must contain a number of mandatory provisions, such as the number of teleworking days, the periods during which the employee must be reachable and by what means (email, telephone, Microsoft Teams, Skype, etc.), and an agreement on the costs associated with the telework.

For occasional telework, the employee must make a request, but the employer may refuse. The employer can lay down a framework for this type of telework in a CBA or the work rules, but it is not obliged to do so.

In principle (i.e., if they are not under the employer’s direct control), teleworkers are excluded from the stringent rules regarding working time.

For structural telework, the employer must provide the equipment necessary to perform the telework and must pay any Internet and communication costs linked to the telework. If the employee has to use his or her own equipment, then he or she is entitled to a reimbursement of the costs regarding the installation and the use of this equipment.

The employer is not obliged to refund any other costs, such as heating, electricity, small office equipment, etc., but employers who wish to do so can grant their employees a lump-sum compensation of €154.74 per month (the current figure as of 1 June 2024), which is accepted by the tax authorities and the National Social Security Office as being free from social security contributions and taxes.

In the case of occasional telework, there is no obligation for the employer to cover costs or provide equipment; the employer is only obliged to make the arrangements for occasional telework with the employees. In theory, it thus seems that the parties could agree that no such reimbursement is to be paid.

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