

BELGIUM

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BELGIUM

§ 1

I. SOURCES OF LAW

§ 1.1

A. What are the primary constitutional provisions, statutes and regulations related to employment?

The Belgian Constitution lays down several rights related to employment: the right to labor and the right to the free choice of professional labor in the framework of a general employment policy.¹ The aims of these constitutional provisions include guaranteeing: the highest and most stable employment rate, the right to equitable labor conditions and equitable remuneration, as well as the right to information, consultation, and collective bargaining.

The Constitution also proclaims the right to social security, protection of health, and social, medical and legal assistance.

In addition, the Constitution provides for the freedom of association, which forms the basis of the development of trade union rights.

Belgian labor law consists of hundreds of pieces of legislation that are not codified.

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. The federal government and the three regional governments share responsibility for regulating employment. The regional governments' competences with respect to employment law relate mainly to foreigners' access to the local employment market, redeployment of unemployed employees, and which language (Dutch, French, or German) controls in employment matters.

In addition to the laws and all other regulations adopted by the federal and regional governments, many aspects of employment and labor law are governed by collective bargaining agreements (CBAs)--and there are thousands of these. CBAs can be concluded at different levels, and their binding nature varies. CBAs that are concluded at the level of the National Council for Employment² bind all private employers. Those concluded at the level of the joint committees (which group all employers having the same type of business activities) bind employers belonging to the joint committees concerned, even if the employers did not directly or indirectly participate in the negotiation. Most of the working conditions are laid down in CBAs concluded at joint committee level. CBAs can also be concluded at company level.

¹ Art. 23 of the Belgian Constitution.

² « *Nationale Arbeidsraad/Conseil national du Travail.* »

Belgian legislation on labor law spans literally thousands of pages regulating various aspects of the employer–employee relationship, such as:

- the different types of employment contracts/relationships;
- obligations of the employer and of the worker;
- illegal behaviors (committed by either the employer or employee) and the sanctions to such behaviors (governed by the recently introduced Social Criminal Code);
- remuneration;
- representation of the employer and the worker at different levels (national level, industry level, company level, branch level);
- health and safety;
- dismissal and resignation; and
- annual leave, public holidays, absence, sick leave, work incapacity.

These labor laws are not codified. Rather, these pieces of legislation are embodied mainly in parliamentary instruments (acts), royal decrees, and CBAs that are declared generally binding.

§ 1.2

B. What international treaties apply to employment?

Belgium has been a member country of the International Labour Organization (ILO) since the ILO's formation in 1919. Belgium has ratified a considerable number of ILO conventions. As a result, Belgian employment law has been influenced by the ILO standards and conventions. However, to date, Belgian courts have not considered these standards and conventions to be entirely enforceable. As an example, for many years Belgian courts did not follow the several agreements and recommendations of the ILO with respect to the right for the employee to be informed about the grounds of his or her dismissal.

Compliance with the Code of Conduct (the “Guidelines”) for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD) is purely voluntary. Although the Guidelines are not enforceable as law, they are significant in practice.

Belgium has ratified the European Social Charter³ and the Convention for the Protection of Human Rights and Fundamental Freedoms treaties which guarantee fundamental social and economic human rights for the member states of the European Union (EU). Accordingly, EU directives, regulations, decisions, recommendations, and opinions are binding in Belgium.

Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems is especially important because it governs the principles with respect to the applicable social security schemes in situations where the employee could be subject to the system of several member states.⁴ Council

³ Council of Europe, European Social Charter (Revised), May 3, 1996.

⁴ Some provisions are even applicable in the relations with Switzerland.

Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses is also significantly important in practice. This directive has been implemented in Belgian law through a CBA concluded at the level of the National Council for Employment. However, this CBA does not apply to the public sector. For companies and workers in the public sector, the direct effect of the directive can be invoked.⁵

In addition, treaties and bilateral agreements between Belgium and other countries focus on the terms and conditions of employment, as well as the mobility of their nationals when working in another member country.

The Treaty of the European Union and the Treaty on the Functioning of the European Union also have an impact on national labor and employment law. Article 6 of the Treaty of the European Union gives the provisions of the Charter on Fundamental Rights (civil, political, economic and social rights) a binding legal effect, with the Charter having the same legal force as the Treaties establishing the EU.

§ 1.3

C. What are the primary mechanisms for enforcement?

Most Belgian labor law provisions aim to protect the employees. Hence, many provisions on labor law contain criminal sanctions.

The Social Inspectorate, which is composed of public officers belonging to the Ministry of Labor,⁶ has the task of monitoring employers' compliance with all their obligations under labor law.⁷ The Social Inspectorate can decide when to inspect a company at any time or when to launch an investigation based on a filed complaint. The Social Inspectorate can impose criminal or administrative sanctions 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 and will order the employer to comply with the rules that it has violated.

§ 1.4

D. What are the primary means for resolving disputes between employees and employers?

§ 1.4(a)

Conciliation/Mediation

Social dialogue is very important in Belgium. Many Belgian law provisions result from agreements reached between the employers' associations and union organizations within the National Council for Employment or the joint committees, which are also composed of representatives of the employers and employees. Social dialogue within the company is also important.

⁵ Against Belgian State.

⁶ Federal Public Service Employment, Labour and Social Dialogue, <http://www.meta.fgov.be>.

⁷ Including collective bargaining agreements.

Hence, it is not surprising that Belgian labor law stipulates a conciliation phase in the framework of some procedures if no agreement is reached between the employer and the employees. For instance, when the employer intends to implement work rules or adapt them, and there is no agreement, the Social Inspectorate will try to conciliate the points of view from all parties so that an agreement can be reached.

Individual disputes can be discussed between the management and the union delegation. If parties do not come to an agreement, the individual concerned can bring his or her case to court.

Collective disputes, which are those in which several employees are concerned, or that relate to working conditions in general, can also be discussed between the management and the union delegation. If such disputes cannot be resolved at all at company level, the dispute can be transferred to the conciliation office of the joint committee. This office will hear the parties and make its suggestions on how to resolve the dispute. However, the suggestions made by such office do not bind the parties.

There are also professional mediators/conciliators. Parties can decide to bring their disputes before such mediator/conciliator. The discussions before this mediator/conciliator are considered confidential and parties may not use in any judicial procedure the elements they have discussed confidentially. Parties are not bound by the suggestions made by this professional mediator/conciliator. In addition, it is important to stress that the fees of such mediators are charged based on hourly rates, and, since these mediations require long discussions over time, reaching an agreement this way is therefore rather expensive.

§ 1.4(b)

Litigation Before a Court

As discussed in § 1.4(a), social dialogue is very important in Belgium. As such, Belgian labor law stipulates a conciliation phase for disputes that are brought before the labor courts.

Generally, during the conciliation phase, the judge will encourage the parties to hold a first attempt at conciliation, where the discussions will remain confidential between the parties and cannot impact the result of the judicial procedure. Parties are often reluctant to submit the case to a formal conciliation with the judge and prefer mediation where a mediator (a third party) tries to conciliate the interests of the parties.

As a rule, the statute of limitations is five years after the events occurred but a maximum of one year after the date of termination of the employment contract.⁸

However, if there is a violation of legislation having criminal sanctions (e.g., noncompliance with the rules on salary payment), the statute of limitations is five years (or, in some instances, even longer) regardless the date of termination of the employment contract. Violations of most Belgian labor law provisions have criminal sanctions.⁹

⁸ Art. 15 of the Act of 3 July 1978 on employment contracts.

⁹ Art. 26 of the Preliminary Title to the Criminal Code (Act of 17 April 1878).

§ 1.5

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

Under Belgian law, an *employee* (or *worker*) is any person who enters into the service of an employer under a contract to carry out work or render a service under a relationship of subordination in return for remuneration.¹⁰ Only natural persons qualify as employees. There is still a distinction between blue- and white-collar employees: blue-collar employees carry out mainly manual work and white-collar employees perform mainly intellectual work. Given the extraordinary evolution of the employment market and how work is organized in a company, it is becoming more and more difficult to assess whether a type of work is more manual than intellectual.¹¹

An *employer* is any natural or legal entity who employs one or more workers under an employment contract.

An *independent contractor* is any natural person or legal entity who enters into a contract with a principal for the provision of services without any relation of subordination to that principal. The absence of “subordination” between the independent contractor and his/her/its principal differentiates the “independent contractor” from the “employee.” *Subordination* is defined as the right to exercise a power of director and/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. Independent contractors do not benefit from the protections afforded under the labor law. They are also subject to other rules of the country’s social security regime. The amount of social security contributions paid by independent contractors is lower than that which applies to workers.

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 § 2.10(a) below for further discussion).

A *contingent, temporary, or agency worker* (also known in Belgium as an *interim worker*) is a worker who is made available by his or her employer (a temporary employment agency) to another company (a third party). This interim worker is bound by an employment contract with the temporary employment agency. There is also a service agreement between the temporary employment agency and the third party (the company receiving the benefits of the services rendered by that interim worker).

¹⁰ Arts. 2 and 4 of the Act of 3 July 1978 on employment contracts.

¹¹ For example, drivers need to use computers, read road signs, and draw up reports as part of their work. It is difficult to determine which part or whether their work is characterized by manual labor more than intellectual labor.

§ 1.6

F. What are the most important characteristics of the legal culture relating to employment?

The life cycle in the employment relationship (“from hiring to firing”) is regulated by many pieces of legislation, including statutory rules, regulations, and legally enforceable CBAs. Most of the provisions aim to protect employees, so deviations from them are not allowed except if such deviations would be more favorable to the employees.

As discussed in § 1.4(a), above, social dialogue is very important in Belgium, and most rules derive from agreements between employers’ (representatives) and employees’ (representatives). Therefore, workers in Belgium do not tend to be litigious, especially while their employment contract is valid. Most litigations that arise relate to sanctions imposed on the employees or to the termination of the employment contract, and notably when the contract has been terminated without notice period or indemnity for reason of grave misconduct (see §14.1 below).

§ 2

II. HIRING

§ 2.1

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

Foreign employers are not required to form a local entity to hire workers on the Belgian labor market. However, numerous administrative formalities, many of which are obligatory, are required for any entity that hires employees in Belgium.

Any employer, whatever its legal form and including those without any local entity in Belgium, that employs workers in Belgium must register with the Social Security Administration (“ONSS/RSZ”) and also must set up the following funds and services:

- a family-allowances fund (no later than 90 days after the first worker has entered into service);
- work accident insurance coverage (in coordination with an insurance company);
- an inter-company medical service; and
- a vacation fund, if the employer hires blue-collar employees.

The newly established employer will also be required to make the necessary tax withholdings or payments to the competent local tax authority.

Obligations related to payroll can prove to be complicated for newly established employers. Employers are required to pay social security contributions to the ONSS/RSZ. The employer must pay for not only the employer’s contributions, which amount to about 35% of the gross salary for white-collar employees and between 40% to 60% for blue-collar employees

(calculated on 108% of the gross amount) but also employees' contributions, which amount to 13.07% of the gross amount of the salary (which is calculated on 108% of the gross salary amount for blue-collar employees). The employer must withhold the employees' social security contributions from the salary it will pay to the employee. The employer must also withhold a certain amount as a tax advance on the taxes that the employee will owe. 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 strongly recommended (though not required) that new employers retain the services of an experienced and reputable payroll agency. Such agencies typically help with the drafting of all required documents, calculation of salaries (based on the input given from the employer), registration formalities with the different authorities, and making sure that the payments to the authorities are made timely.

§ 2.2

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

In principle, all foreign employees who are not nationals of a country from the European Economic Area¹² and who intend to work in Belgium need to have a work permit¹³ that is issued by the competent Belgian regional authority.¹⁴

There are three different kinds of work permits:

1. **Work permit A** for employees who have, during an uninterrupted period of ten years of legal stay in Belgium, worked for four years on the basis of a work permit B.
2. **Work permit B** that is granted to an employee for a fixed period of time (usually 12 months) so that he or she can work for one employer.
3. **Work permit C** that is granted to all salaried employees for an open-ended term and that is usually granted to certain categories of foreigners who only have a limited period of legal stay in Belgium, such as students or refugees.

To hire a foreign worker, the employer will have to apply for an employment authorization and a work permit B for that particular foreign worker. The procedure can be summarized as follows:

- An employment authorization application form must be filled in and sent to the competent regional employment services¹⁵ by the company (i.e., the party wishing to hire that foreign worker). Some documents must be enclosed with the application

¹² The Belgian legislation on work permits does not concern nationals from EU-member states and nationals from Lichtenstein, Iceland, Norway, or Switzerland.

¹³ “*Permis de travail*” in French and “*arbeidskaart*” in Dutch.

¹⁴ Act of 30 April 1999 concerning the employment of foreign employees stipulates this.

¹⁵ E.g., if the employees will work in Flanders, the application form should be filed with the competent employment services in Flanders.

form: (1) a medical certificate¹⁶ completed and issued by a physician recognized by the Belgian diplomatic or consular authorities; and (2) a copy of the employment contract.¹⁷

- Once the authorization is granted, the employee must submit an application for a visa type D to the Belgian diplomatic or consular authorities, which have jurisdiction (also known as “competence”) to handle employment matters in that employee’s place of residence. The applicant employee may absolutely not enter the Belgian territory before he or she is given the employment authorization.¹⁸
- Work permit B is limited to an employee’s working at one job for only one employer and is valid for one year. The employer may apply for another employment authorization and a new work permit B if it wants to continue employing the same employee for the same job after that one-year period. The renewal application must be filed no later than one month before the expiry of the previous valid employment authorization/work permit.

The principle is that an employment authorization (and therefore a work permit B) is issued only when, given vocational training or not, there are not enough qualified workers on the Belgian labor market to do the job in a satisfactory way within a reasonable period of time.¹⁹ This condition is generally very difficult to prove. However, in some exceptional cases, the employer does not have to prove such condition.

There are a number of exceptions²⁰ to the condition of proving that there are no other qualified workers on the Belgian labor market, the most relevant exceptions being:

Employing “highly qualified” staff:²¹ if the employer wishes to employ a highly qualified employee for a particular job. *Highly qualified employees* can be defined as those with a higher education diploma, provided that their gross annual remuneration is more than EUR 39,422 (amount for 2014²²) and that the duration of the employment will not exceed four years. The work permit for highly qualified employees may only be renewed once for an additional period of four years. The four-year limit for work permit B does not apply if the gross annual remuneration of the highly qualified employee exceeds EUR 67,771 (amount for 2014). Since September 10, 2012, a “highly qualified worker” also has the opportunity to apply for a European Blue Card. Several conditions must be fulfilled for this, including a minimum annual gross salary of EUR 50,974 (amount for 2014).

¹⁶ The medical certificate must declare that the health of the employee will not make him or her incapable of working within a certain time period in the near future (Arts. 14 and 15 of the Royal Decree of 9 June 1999 concerning the implementation of the Act of 30 April 1999 on the employment of foreign employees).

¹⁷ Arts. 12 and 13 of the Royal Decree of 9 June 1999.

¹⁸ Art. 4, §2 of the Royal Decree of 9 June 1999.

¹⁹ Art. 8 of the Royal Decree of 9 June 1999.

²⁰ The exceptions are set forth in the Royal Decree of 9 June 1999.

²¹ Art. 9, 6° of the Royal Decree of 9 June 1999.

²² This amount is adapted according to inflation.

- **Employing managerial staff:**²³ if the employer wishes to hire a person for a managerial position and if the gross annual remuneration of this prospective employee will be more than EUR 67,771 (amount for 2014).

In addition, when the employer wishes to hire highly qualified employees or managerial staff, those prospective employees may enter the Belgian territory before the employment authorization is granted,²⁴ and the employer does not have to enclose an employment contract to its application for employment authorization.²⁵ However, the employment contract should mention the management position of that prospective employee.

The *annual gross salary* is calculated the same way as how the indemnity in lieu of notice is calculated. Hence, it includes the basic monthly salary, the end-of-year premium (thirteenth month), the double holiday pay, the variable pay (including holiday pay on it), and all benefits in kind including, but not limited to, meal vouchers, value of the private use of the company car, and employer contributions to insurance policies.

The employer (or whomever it has given a power of attorney to)—and not the prospective worker—must apply for work permit B. If the employer is not a Belgian company, a Belgian holder of a power of attorney (for example, a lawyer) must make the application on the employer's behalf.

Once the application has been filed, the process to obtain a work permit will take between three and six weeks, depending on the time of year the application was submitted and on the competent region handling the application.

§ 2.3

C. What rules apply to background checks?

The permissibility of background checks is determined by balancing the parties' interests. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22 of the Belgian Constitution guarantee the right to privacy. However, the right to privacy is not absolute; rather, it may be limited if justification exists. Interference with this right is justified if a legitimate interest exists; if the interference with the right to privacy is proportionate to the pursued goal; and if it is based on a clear and accessible rule.

Within the employment context, there must be a balancing between the employee's right to privacy and the legitimate interests of the employer. Pursuant to a national level CBA no. 38 which binds all private employers in Belgium,²⁶ the job applicant's privacy rights must be respected during the recruitment, selection and hiring process, and inquiries into the job applicant's private life are only justified if they are relevant to the nature and conditions of the job. As such, the question of permissibility of background checks must be determined on a case by case basis.

Generally, criminal background checks of job applicants or employees are not allowed. This is so because the processing of personal data of a judicial/legal nature is prohibited, except

²³ Art. 9, 7° of the Royal Decree of 9 June 1999.

²⁴ Art. 5 of the Royal Decree of 9 June 1999.

²⁵ Art. 13 of the Royal Decree of 9 June 1999.

²⁶ CBA No. 38 of 6 December 1983, concerning recruiting and selection of employees.

for the purposes expressly specified by law. Moreover, the Data Protection Act²⁷ places specific restrictions on the processing of personal information that is contained in a database (see § 11 below). Therefore, records that have been submitted to or produced by the administrative or judicial bodies relating to criminal charges, suspicions, persecutions, indictments or convictions in matters of criminal offenses, administrative sanctions, or security measures can only be processed in a limited number of cases and in exceptional circumstances.

These restrictions notwithstanding, employers may ask the candidate to provide a certificate or testimonial of good conduct. While the employer may review it, the employer is not allowed to process this information. Moreover, the candidate may refuse to provide it. However, where a legitimate interest to protect the public or the company's property exists, the employer may request and process this information.

Employers may also inquire about a candidate's skills and performance by contacting the candidate's former employer. The courts have not yet conclusively decided whether prospective employers are allowed to contact any references other than those provided by the candidate.

At the works council's request, the employer must provide information to the Council about the company's selection and recruitment process.²⁸ The works council also may advise on the employer's selection criteria.²⁹

§ 2.4

D. What rules apply to medical examinations or health-related tests?

As a matter of principle, the employer may not force employees to undergo medical examinations. But some workers are obligated to undergo a medical examination when entering into service and after they have been absent for at least four weeks because of illness, accident, or pregnancy.³⁰ These limited and specific categories of workers are:

- workers whose duties place them at risk of being exposed to chemical, physical, or biological agents that are likely to be harmful to their health;
- workers entrusted with a security post;
- workers who are, in the course of their duties, in direct contact with food and nutrients;
- disabled persons employed under the Law on Social Replacement and Integration of Disabled Persons;

²⁷ Act of 8 December 1992 with respect to the right of privacy in the processing of private data ("Data Protection Act").

²⁸ Article 9 of the CBA No. 9 of 9 March 1972 (on coordination of national agreements and collective bargaining agreements on Works Councils concluded in the National Labor Council, declared generally binding by Royal Decree of 12 September 1972).

²⁹ Art. 15 of Act of 20 September 1948 on Organization of Enterprises.

³⁰ Royal Decree of 28 May 2003 on the health surveillance of workers.

- workers younger than 21 years old; and
- workers whose work responsibilities involve carrying heavy weights..

With respect to other categories of employees, employers are not prohibited from requesting that these employees undergo medical examination; however, employees may decline, and the employer cannot make medical examinations a condition for employment.

The nature of the medical examination is described in detail in several Royal Decrees with respect to workers who are exposed to chemical and/or biological agents or radiation at the workplace.

§ 2.5

E. May an employer require drug and alcohol testing?

The rights and obligations of the employers and employees with respect to drug and alcohol testing have been set out recently in CBA No. 100,³¹ which has been negotiated at the level of the National Council for Employment. The minimum requirements of a company's drug and alcohol policy, pursuant to CBA No. 100, are as follows:

- **Mandatory section:** The drug and alcohol prevention policy must contain a section in which the employer sets forth the general principles and main elements of the policy. Template policies exist, and they have been elaborated by the National Council for Employment. Employers are not bound by these templates, but they can use them as an inspiration source.
- **Optional section:** The employer may supplement the policy with additional details regarding the general principles and objectives of the policy. The employer may also identify the applicable rules to implement the policy. For example, the policy may identify the rules to prevent the use or abuse of drugs and alcohol in the workplace; and the procedures the employer will follow in the event of a violation of the policy or when finding that a worker is intoxicated or under the influence of a controlled substance in the workplace.

The employer may provide for the conduct of drug and alcohol tests in the optional section of its alcohol and drug policy. However, the employer is required to notify its employees of this aspect of the policy.

The only permissible tests are breath analysis and psychomotor testing. Blood tests are not allowed. Because the sole objective of the policy is prevention of the use or abuse of drugs and alcohol, the test result should be used only to assess whether the employee can perform his or her job or needs assistance to rehabilitate. The employer is not allowed to base an adverse employment action against the employee solely on the results of the test, except that such results may be considered as a factor to evaluate the employee's fitness for the job.

Prior to implementing a drug and alcohol policy, the employer is required to follow specific procedures to consult with and seek the opinion of the workers or the workers' 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.

³¹ CBA No. 100 of 1 April 2009 concerning a company's alcohol and drug policy.

§ 2.6

F. Are there mandated preferences in hiring?

Belgian law prohibits discrimination during the hiring process. However, employers in the private sector employing an average of at least 50 employees have the obligation to employ “young employees,” the number of which should be at least 3% of the average employment. *Young employees* are workers below the age of 26.³²

Belgian discrimination law is discussed in § 4 below.

§ 2.7

G. Are there mandated sources for recruiting employees, such as local labor authorities, agencies, or to recruit from within an existing workforce?

Employers are not required to recruit employees from any particular source or to recruit within an existing workforce. There is no legal obligation to re-hire 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.

§ 2.8

H. Are there requirements to advertise or post openings in particular places?

Belgian law requires employers employing at least 20 workers in the preceding calendar year to notify the Regional Employment Agency (in Flanders, VDAB; in the Walloon part, FOREM;³³ and in the Region of Brussels, Actiris) about its job vacancies. This notification must be done no later than the day the job vacancy is published or advertised in the media.

§ 2.9

I. Are there restrictions on filling openings with contingent workers?

The use of interim workers is permissible only in limited circumstances. Pursuant to the Act of 24 July 1987,³⁴ *temporary work* is defined as work that is performed under an employment contract and is permissible only when:

- replacing a permanent employee whose employment contract has been suspended (for example, in the case of a leave for pregnancy or illness);

³² Art. 30 *et seq.* of the Act of 24 December 1999 on the promotion of employment.

³³ Art. 52 of the Decree of 6 May 1999, added by the Decree of 20 February 2014; this obligation applies to companies employing an average of 100 employees and having one place of business in the Walloon Region.

³⁴ Act of 24 July 1987 on temporary work, interim work and the putting of employees at the disposal of another.

- filling in a vacancy and allowing the employer to decide whether to permanently hire the employee concerned;
- managing a temporary increase of work; or
- managing the performance of exceptional work not considered part of the company's normal activities or of special projects that require specific professional qualifications.

Even if the reason for needing the temporary worker meets one of the above criteria, the employer is required to follow specific procedures. For example, in some instances, the employer must receive the approval of the trade union. Moreover, the use of *temp work* is limited as to time and is strictly prohibited when there is a strike by the company's workers.

For further discussion, see § 2.10(b) and § 2.10(c) below.

§ 2.10

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

§ 2.10(a)

Misclassifying an Employee as an Independent Contractor

The distinction between a self-employed worker (i.e., an independent contractor) and a subordinate employee centers on the existence (or the absence) of a subordinated relationship between the parties. Subordination—which is an employment contract trait—exists when a party might actually exercise authority and control over the acts of another person.³⁵ In order to assess the existence or the absence of subordination between the parties, the decisive factor is not the effective exercise of authority, but rather the possibility and the right to exercise such authority.³⁶

If an independent contractor is in fact working in a relationship of subordination,³⁷ the contractual relationship between the parties will then be recharacterized into an employer–employee relationship, i.e., one that is bound by an employment contract.

Parties are free to qualify their contractual relationship except if such qualification contravenes public order, public decency and/or mandatory provisions of law.³⁸ The

³⁵ Arts. 2 and 3 of the Act of 3 July 1978.

³⁶ Cass., 12 January 2004, *J.T.T.*, 2004, p. 33; Cass., 10 September 2001, *Pas.*, 2001, I, p. 1364; Labor Court of Appeal of Ghent, 3 November 2000, *J.T.T.*, 2001, p. 193; Cass., 27 April 1998, *R.W.*, 1999-00, p. 131; Cass., 23 June 1997, *J.T.T.*, 1997, p. 335; Labour Court Liège, 21 January 1997, *J.T.T.*, 1997, p. 497; Cass., 18 May 1981, *Pas.*, 1981, I, p. 1079.

³⁷ In this scenario, the worker is treated as a “fake” self-employed worker (“*schijnzelfstandigh/faux indépendant*”).

³⁸ Art. 331 of the Act of 27 December 2006, Programme-Act I, which adopts into law the latest case law of the Belgian Supreme Court of Cassation with respect to the elements that are to be considered in assessing whether or not the relationship is to be recharacterized.

qualification agreed upon by the parties prevails unless it is irreconcilable with the actual performance of the contract.³⁹

If the performance of the contract reveals sufficient elements that are irreconcilable with the qualification given by the parties, the contractual relationship will be recharacterized. The Act of 27 December 2006 sets forth limited criteria that can be considered for assessing whether the actual performance of the contract is incompatible with its qualification, including:

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

The constraints inherent in specific professional activities imposed by any law can under no circumstance be taken into account to assess the nature of the contractual relationship. In addition, the Act of 27 December 2006 specifies that the name of the contractual relationship, registration with any social security office,⁴⁰ registration with the Crossroads Bank for Enterprises of Belgium, VAT registration, and the way in which the income has been declared to the tax authorities are all irrelevant in qualifying the contractual relationship between the parties.

The Act of 27 December 2006 also allows for the possibility to list criteria that are specific to certain sectors or professions. There is a (rebuttable) presumption of the existence of an employment contract (i.e., an employment relationship) if a range of socioeconomic criteria are met. This new presumption,⁴¹ which for now only applies to four specific sectors (construction; transport; security and surveillance; and cleaning), is that the existence of an employment contract is presumed when 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;

³⁹ Art. 331 of the Act of 27 December 2006, Programme-Act I.

⁴⁰ Registration with the administration for salaried employees or self-employed workers is not relevant.

⁴¹ Act of 25 August 2012, which entered into force on January 1, 2013.

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 his or her property or that he or she did not rent, or the fact that he or she is working with materials that are put at his or her disposal or financed by the hiring company.

This presumption is rebuttable, which means that parties can rebut it if they can demonstrate that there is no link of subordination between the parties despite the elements mentioned above.

Belgian law contains some legal presumptions whereby certain contractual relationships are presumed to be ones bound by employment contracts.

For example, pursuant to the Act of 3 July 1978, complementary services rendered for the performance of a service contract are considered to be rendered under an employment contract without any 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.⁴²

Under Belgian law, certain categories of workers are presumed to be self-employed workers. The Royal Decree No. 38 of 27 July 1967 governing the social security contributions and benefits of self-employed workers contains such presumptions that apply to 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,⁴³ (2) the profit from a liberal profession,⁴⁴ official duties, or from a profitable activity, which are other than benefits or remunerations,⁴⁵ and (3) remunerations of managers.⁴⁶ This presumption is rebuttable. According to this presumption, the directors of a company are considered to be self-employed workers.
- Persons who hold a mandate for a profit-making association or company, such persons are presumed to be self-employed.⁴⁷ This presumption concerns only managers and business managers.⁴⁸

⁴² For example, the situation of a salesperson working for a specific shop open all the days of the week (including on Sunday) who would work for the same shop as a salaried employee from Monday through Friday and as self-employed person during the weekend.

⁴³ Articles 3, §1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed and article 23, §1, 1° of the Tax Code on revenues 1992.

⁴⁴ For example, doctors and lawyers.

⁴⁵ Article 3, §1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed workers and Article 23, §1, 2° of the Tax Code of 1992 on revenues.

⁴⁶ Article 3, §1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed workers; Article 23, §1, 2° and Article 30, 2 of the Tax Code of 1992 on revenues.

⁴⁷ Article 3, §1, 4 of the Royal Decree of 27 July 1967 governing the social security for self-employed workers and Article 2 of the Royal Decree of 19 December 1967 executing Royal Decree No. 38.

It should also be stressed that the Court of Cassation has ruled that it is absolutely possible that work/services that have been initially carried out under an employment contract are at a later stage performed for the same employer without any link of subordination.⁴⁹ According to the Labor Court of Liège, it must be verified whether this change of status is profitable to the employee or if the latter has accepted this new status under pressure:

(...) if the parties have signed two written documents named ‘contract of collaboration’, they have actually continued . . . their old relationship; (...)

This one has continued to relate to the same function, the object of which is only conceivable in the framework of an employment contract that was performed under the same conditions, including under an unchanged link of subordination; only the remuneration modalities were changed but in a way that did not affect the nature of the contract; (...)

The contracts of collaboration were clearly concluded with the sole purpose of subjecting the person to the social security for the self-employed and to remedy by this conversion the decrease of turnover by the laboratory which is being exploited by the employer.⁵⁰

The social fund for self-employed workers pays special attention to the changes of a worker’s status. If it appears, based on the affiliation form filed by the person concerned, that he or she performed previously the same function, the National Service for the Social Security for Self-employed Persons communicates a copy of the declaration to the National Service of Social Security for further investigation.

If the self-employed-worker-and-principal relationship is recharacterized into one bound by an employment contract, there are severe financial consequences for the party who is considered the employer:

- the “self-employed worker” can invoke the application of specific labor law mechanisms and consequently pursue a claim against the hiring company, seeking payment of arrears of employee benefits, such as end-of-year premiums (thirteenth month salary), salary increases resulting from indexation, holiday pay, employee severance pay, etc.;
- the social security authorities can pursue a claim against the hiring company, seeking arrears of social security contributions, both employers’ contributions of about 35% of the gross amounts, and the employees’ contributions of 13.07% of the gross amount, without any possibility to seek the reimbursement of the employees’ contributions from the employee.⁵¹ In addition, the employer must pay a fine equal to 10% of the arrears of social security contributions, and interest equal to 7%. In addition, the employer must pay an additional amount corresponding to the administrative costs for this regularization; and

⁴⁸ W. Van Eeckhoutte, *Sociaal Compendium*, Socialezekerheidsrecht, band 1, Mechelen, Kluwer, 2003, p. 451, at 13091.

⁴⁹ Cass., 27 November 2006.

⁵⁰ Labor Court of Liège, 6 December 1996, *J.T.T.*, 1997, p. 146.

⁵¹ Art. 26 of the Act of 27 June 1969.

- the Belgian tax authorities could pursue a claim for Belgian withholding taxes that were not withheld in addition to fines and indemnities being imposed.

§ 2.10(b)

Misclassification of an Employee as a Contingent Worker

The Act of 24 July 1987 prohibits the putting of employees at the disposal of third parties (except if these third parties are interim agencies—see above § 2.9). Specifically, an employee who is formally employed by one company (the “employer”) may not in actuality work under the authority of another party (the “user”), because this would be a prohibited transfer of the employer’s authority to the user.

However, the following are not considered an employer’s exercise of authority:

- Instructions on wellbeing at work that are given by the user to the workers.
- Instructions that the user, based on a written contract between it and the employer, has given to the workers, and this contract sets out precisely:
 1. what kind of instructions can be given;
 2. that such instructions do not prejudice the authority of the employer; and
 3. the user’s actual performance of the contract corresponds to what has been agreed in writing between parties.⁵²

In principle, there are some exceptions to this “personnel lending” prohibition. The lending of personnel is possible in these situations:

- in the framework of the collaboration between entities of the same economic or financial group, or for specific tasks that require specific training or qualifications (but the Social Inspectorate must have been informed about it at least 24 hours in advance);
- in the framework of a written contract insofar as the Social Inspectorate has previously approved in writing the contractually agreed upon situation. The situation must be also accepted by the trade union delegation or, in absence of one, by the union organizations represented in the joint committee.

If there is an illegal putting of employees at the disposal of another, the following sanctions can apply:

Civil sanctions:

- the user and the “lent out” employee will be considered to be bound by an employment contract for an open-ended term starting from the beginning of the performance of the work;⁵³
- the employee concerned will have the right to resign without having to serve or comply with any notice period,⁵⁴ and

⁵² Art. 31 of the Act of 24 July 1987, as modified per application of the Act of 27 December 2012.

⁵³ Art. 31, § 3 of the Act of 24 July 1987.

- the user and the employer will be held jointly and severally liable to pay all social security contributions, salary, allowances, and benefits that the above-mentioned employment contract entails.⁵⁵

Criminal and/or administrative penalties:

- A criminal fine from EUR 100 to EUR 1,000 (multiplied by a factor of 6) or an administrative fine from EUR 50 to EUR 500 (multiplied by a factor of 6).⁵⁶
- These fines must be multiplied by the number of workers (with a maximum of 100) who were employed in violation of the provisions of the Act of 24 July 1987.

§ 2.10(c)

Misclassification of an Employee as a Temporary Worker (One Recruited Through an Interim Agency)

In case of breach of the rules with regard to interim (agency) work, these civil, criminal, and administrative sanctions can apply:

- **Civil sanctions:** the user and the temporary worker are considered to be bound by an employment contract for an open-ended term starting from the beginning of the performance of the work,⁵⁷ and
- **Criminal and administrative penalties:** a criminal fine from EUR 50 to EUR 500 (multiplied by a factor of 6) or an administrative fine from EUR 25 to EUR 250 (multiplied by a factor of 6). These fines must be multiplied by the number of workers who were employed in violation of the provisions of the Act of 24 July 1987.⁵⁸ These criminal fines can be applied to the interim agency as well as to the user.

§ 3

III. EMPLOYMENT CONTRACTS

§ 3.1

A. Are written employment contracts required for certain employees?

Belgium law does not require that the employment contract be in writing. Where the employment relationship is in dispute, the parties may rely on testimony of witnesses and other relevant evidence to prove (or contest) the existence and the terms and conditions of an

⁵⁴ Art. 31, §3 of the Act of 24 July 1987.

⁵⁵ Art. 31, §4 of the Act of 24 July 1987.

⁵⁶ Arts. 101 and 177 of the Act of 6 June 2010 containing the Criminal Social Code.

⁵⁷ Art. 20, Articles 3, §1, 2 of the Royal Decree of 27 July 1967 governing the social security for self-employed and article 23, §1, 1° of the Tax Code on revenues 1992*loc. cit.* fn 47.

⁵⁸ *Loc. cit.* fn 50.

employment contract. The recommended practice is that all employment contracts be made in writing.

There are several types of employment contracts, and each type depends on the nature of the work undertaken, such as those for:

- blue-collar workers (who perform primarily manual labor);
- white-collar workers (who perform primarily intellectual activities);
- sales representatives (workers who solicit business for and on behalf of the employer);
- domestic workers; or
- students.

It is important to note that an employment contract must be in writing when the employment relationship will be:

1. for a fixed term;
2. for the execution of a specific task;
3. for part-time work;
4. for replacement of another worker;
5. with a student; or
6. for work to be done from the worker's home.

In all these cases, the employment contract must be made in writing, contain the required language, and be concluded no later than the time the worker starts to perform the work (except for noncompete clauses, as further explained in § 3.7(b) below). The required language for the contracts is discussed further below in § 3.3.

§ 3.2

B. Are there certain essential terms in employment contracts?

Most of the terms and conditions of employment are specified in applicable statutory provisions, CBAs, and work rules. Other terms and conditions are customary. As such, many of them do not need to be expressly stated in an employment contract. However, a contract is deemed for an indefinite term and for a full-time working time regime unless expressly stated otherwise.

For some job positions, the duties of both the worker and the employer and some aspects of the employment relationship are essential elements of the employment relationship, which are required to be expressly stated in the employment contract, requiring the consent of both parties:

- 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).

§ 3.3

C. In what language(s) must employment contracts be written?

The language in which the employment contract must be written is a sensitive matter in Belgium. Belgium has three official languages: Dutch, French, and German. Strict regulations apply to determine the language in which the employment contract—as well as any other document addressed to the employee—should be written. The language depends on the location of the principal place of business of the employee (not the registered office of the employer), i.e., the place where the employee receives instructions to perform his or her work. The language of the employee concerned has no relevance in determining which language applies. This means that parties may be obliged to use a language that neither of them understands.

- **For places of business located in Brussels, in the “municipalities with language facilities,” and in the German-speaking Community:** In Brussels, the employment contract must be drafted either in Dutch or in French, depending on the worker’s mother tongue.⁵⁹ Belgium has municipalities known as “municipalities with language facilities,” which are subject to constitutional mandates with respect to the use of the language of the designated population. For these municipalities, the employment contract must be drafted in the language of the community where the specific municipality is located. This will be Dutch, French, or German.

If the place of business is in the German-speaking Community, the employment contract must be drafted in German.

However, in each of the three aforementioned cases, violation of these language requirements does not nullify the employment contract.⁶⁰ Instead, the employee can require that a translation of the document concerned be made in the appropriate language, and this translation will replace the document that was not drafted in the applicable language. The signature of the employee is not required in such case.

Hence, in those locations, documents can be drafted in another language, such as English. However, the employee can seek the translation of those documents into the applicable language.

- **For places of business located in Flanders:** social relations must be conducted in Dutch.⁶¹ All documents destined for the employees must be drafted in Dutch, regardless of the language of the employee. The circumstance where the employee

⁵⁹ Act of 18 July 1966 with respect to the use of languages in administrative matters.

⁶⁰ Violation only entails “temporary unopposability” towards the worker. In practice, the employer can suffice by replacing the employment contract concerned

⁶¹ Decree of 19 July 1973 on the use of languages in social relations.

does not understand Dutch does not release the employer from the obligation to draft the documents in Dutch. All documents drafted in another language are null.

However, the nullity of such documents may not be detrimental to the employee. When a document is drafted in another language, the employee may invoke the nullity of the document and simultaneously invoke the provisions therein that are favorable to him or her, but the employer does not have such right.

The European Court of Justice has ruled that this regulation was not reconcilable with the freedom of movement within the European Union.⁶² As a result, the documents can be drafted in another official language of the European Union or the European Economic Area, insofar as the employee is domiciled in another Member State of the European Union or is domiciled in Belgium but has exercised his or her freedom of movement. However, if there are discrepancies between the different language versions of the document, the Dutch version will always prevail in Flanders.⁶³

- **For places of business located in Wallonia:** social relations must be conducted in French.⁶⁴ All documents must be drafted in French. The documents drafted in another language are null. Both parties can invoke the nullity of such documents. Employees may not invoke provisions of such documents that would be advantageous to them.

§ 3.4

D. 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 the execution of a specific task):** these contracts automatically end at expiration of the period agreed upon or the completion of the task in question,⁶⁵ or
- **open-ended term (or indefinite duration):** these contracts will only come to an end when one party terminates it by giving notice or paying a severance indemnity in lieu of notice (see below)⁶⁶ to the other party.

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

When parties enter into successive contracts for fixed periods or for a specific task without interruption, they are considered to have concluded a contract with an open-ended term unless the parties can demonstrate that this succession of contracts is justified by “legitimate reasons” to do so. This criterion is strictly interpreted by case law.

Successive contracts for a fixed-term or specific task are allowed, but under the following conditions:

⁶² ECJ, *Anton Las v. PSA Antwerp NV*, C-202/11.

⁶³ Decree of 14 March 2014.

⁶⁴ Decree of 30 June 1982 on the use of languages in social relations.

⁶⁵ As mentioned above, such contracts must be in writing (see above, §3.1.)

⁶⁶ Such contracts must not be in writing.

- a maximum of four successive employment contracts of at least three months each, over a maximum of two years; or
- successive contracts of at least six months each over a maximum of three years, with prior approval from the competent authorities.

§ 3.5

E. Are probationary periods allowed, and if so, what restrictions apply?

The mechanism of having probationary periods has been abolished in the framework of the reform of the rules concerning termination of employment contracts. This reform entered into force on January 1, 2014.⁶⁷ This abolishment of the probationary period is the counterpart of the serious reduction of the length of the notice periods, which came into effect since January 1, 2014.

However, the probationary period still exists for specific types of contracts:

- contract for students;
- contract for temporary work; or
- contract with temporary workers.

§ 3.6

F. Must employment contracts specify termination provisions, and if so with what degree of specificity?

There is no obligation to specify termination provisions in the employment contract. Since January 1, 2014, the law lays down the length of the notice period for all employees. This new law is perceived as a revolution, since for many years the length of the notice period applicable for white-collar employees whose annual gross income exceeded EUR 32,254 (amount in 2013) had to be negotiated between parties, and there was no certainty for either the employee or the employer about the notice period that would be decided by a judge should the parties not come to an agreement in that respect.⁶⁸

⁶⁷ Art. 71 of the Act of 26 December 2013. However, probationary periods that were agreed upon before January 1, 2014 remain applicable under the terms and conditions that were previously applicable. Since the probationary period was of maximum one year, there will be no valid probationary period as of January 1, 2015.

⁶⁸ Scholars have attempted to predict, based on statistics, a judge's likely decision regarding notice period; the "Claeys formula" was based on these statistics, but this formula led to new statistics about the rate of application of the Claeys formula for each tribunal.

§ 3.7

G. 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?

§ 3.7(a)

Intellectual Property Clauses Are Customary

Depending on the nature of the activity of the employer and the type of industry, employment contracts customarily contain intellectual property clauses, especially for contracts with white-collar employees. In the absence of any such clause, the employer does not become owner of the intellectual property rights with respect to the work that has been developed or invented in the framework of the employment contract.⁶⁹

§ 3.7(b)

Noncompete Covenants Are Also Customary in Some Industries and for Some Types of Employees

Belgian law distinguishes between “fair” competition and “unfair” competition. “Fair” competition is not prohibited by law. In Belgium, the worker may engage in a competing business or enter into the service of a competitor after the employment contract is terminated, unless the employee has agreed to be restricted by a noncompete clause.

Employees can waive their rights to fair competition and their freedom to compete with their former employer after the end of the employment relationship. Noncompete clauses govern such restrictions accepted by employees.⁷⁰ The noncompete clause is a serious restriction to one’s freedom of work. Hence, the validity of such clause is subject to very strict conditions. Which conditions apply depend on the type of noncompete clause. There are three types of noncompete clauses: (1) the regular noncompete clause; (2) the derogative noncompete clause; and (3) the clause that applies to sales representatives.

Regardless of the contents of the contract, employees are prohibited from participating in any unfair competition. Actions considered to be unfair competition include, but are not limited to, when the worker:

1. uses the knowledge of trade secrets, commercial secrets, or any confidential or personal information that he or she has gained during the employment; and
2. competes in a dishonest way, such as damaging his or her former employer’s name or reputation or contacting his or her former employer’s customers.

⁶⁹ Act of 30 June 1994 implementing into Belgian law the European Directive of 14 May 1991 on the legal protection of computer programs, and addressing intellectual property rights and related rights. With respect to software, employers automatically become owner of the rights to the works/creations developed by the worker in the framework of his or her employment contract.

⁷⁰ A *noncompete clause* is any clause by which the worker restricts himself or herself, after leaving the company, from doing similar activities in industrial or commercial matters, either by developing his or her own business or by joining an employer that is a competitor, that would enable the worker to harm the company that he or she has left by using for himself or herself or for a competitor the particular know-how that the worker has acquired.

§ 3.7(b)(i)

Regular Noncompete Clause

This type of noncompete clause is only valid insofar that the annual gross salary (including all benefits in-kind) of the employee concerned exceeds EUR 65,711.⁷¹

For a noncompete clause of this type to be valid, the clause must comply with the following conditions:⁷²

- The clause must be in writing (in the appropriate language; see § 3.3 above).
- The clause must concern similar activities. There is a requirement of “double similarity,” meaning that the clause must relate to: (1) competitors; and (2) activities similar to those described in the contract. It means that the clause does not prohibit the employee from joining a competitor by taking on another position than the position the employee had with the employer. For example, the finance director of an employer can thus validly leave his or her employer to join the employer’s competitor as marketing manager.
- The period during which this clause may apply is limited to 12 months starting from the expiration or termination of the employment contract.
- It must be geographically limited to the territory where the employee can effectively enter into competition with the employer but cannot be beyond the entire Belgian territory.
- The clause must stipulate that the employer must pay the employee an indemnity whose sum is equal to at least half of that employee’s gross remuneration corresponding to the duration of the noncompete obligation.
- This “noncompete” indemnity will not be due if the employer has waived the application of this clause within 15 days from the termination of the contract. According to case law, the clause may not stipulate that the employer is considered to have waived the application of the clause if the employer has not paid the noncompete indemnity.

This clause has no effect if the contract is terminated during the first six months after the commencement of the contract, or if the employer terminates the contract after the first six months without any grave misconduct on the employee’s part, or if the employee terminates the contract for grave misconduct on the part of the employer (employee resigns because of the employer’s grave misconduct, which hardly occurs).

The clause becomes effective in the event of the employee’s resignation (without grave misconduct on the employer’s part), the employee’s dismissal by the employer for grave misconduct, or contract termination by mutual consent. The clause does not apply in the event of dismissal without grave misconduct on the employee’s part as the employer is deemed in such scenario to have considered that the employee does not perform well so he or she in this context may not be prohibited from joining competitors.

⁷¹ Amount for 2014.

⁷² Art. 65 of the Act of 3 July 1978 on employment contracts.

Even when the clause has effect, the employer has 15 days to waive the clause's application. In this situation, the employer must not pay the noncompete indemnity (as detailed above) to the employee.

§ 3.7(b)(ii)

International Noncompete Clause

A type of noncompete clause known as an “international noncompete clause”⁷³ has a territorial scope of application that is not limited to Belgium.⁷⁴ This international noncompete clause may only be used:

- by undertakings having an international scope of activities or having significant economic, technical or financial interests on the international markets;⁷⁵
- by undertakings with an internal research and development division; or
- for workers entrusted with duties that allow them, directly or indirectly, to obtain knowledge of practices specific to the company, the use of which outside that company could harm it.

In order to be enforceable, an international noncompete clause must comply with the same conditions as a regular noncompete clause, but with the following differences:

- the territorial scope of application is not limited to Belgium; a broad territorial scope (e.g., Europe) likely will not be allowed and thus the countries to which the clause applies must be specified; and
- a duration exceeding 12 months after termination of the employment relationship is allowed, with a duration of two or three years generally being considered reasonable.

Unlike a regular noncompete clause, an international noncompete clause can apply if the employment contract is terminated by the employer without serious cause after the first six months of employment. An international noncompete clause also can apply if the contract is terminated during the first six months, in which case it will only have effect during a period equal to the period during which the employee performed work.

An international noncompete clause will not take effect if the worker terminates the contract for grave misconduct by the employer.⁷⁶

The employer can waive the application of an international noncompete clause. If the contract is terminated with a notice period given, the employer is considered to have informed the employee about whether or not it intends to waive the clause. However, based on the current status of case law, there is no sanction if the employer does not communicate its intention at that time, insofar that the employer informs the employee no later than 15

⁷³ This type of noncompete clause is also known as a “derogative” clause because it can derogate from some of the strict conditions of application of regular noncompete clauses.

⁷⁴ Art. 86 of the Act of 3 July 1978.

⁷⁵ The scope of activities is to be determined at the level of the legal entity actually employing the worker and not at the level of the group to which the employer belongs.

⁷⁶ In practice, it is really exceptional that the employee resigns because of a serious cause on the employer's part.

days after the actual termination of the contract about whether or not it will waive the application of the clause.

If the worker violates the provisions of an international noncompete clause, the worker must refund the lump sum compensation he or she received from the employer plus an amount equivalent to this indemnification.

§ 3.7(b)(iii)

Noncompete Clause for Sales Representatives

A noncompete clause for sales representatives must comply with the same conditions as a regular noncompete clause in order for it to be enforceable, but with the following differences:

- the worker's annual remuneration must exceed EUR 32,886 (amount for 2014) upon termination;
- the territorial scope of application can extend beyond Belgium, but it must be strictly limited to the territory where the employee actually carried out his or her activities; and
- the clause must not stipulate a payment of any specific noncompete indemnity.

The inclusion of a noncompete clause in a sales representative's contract creates a presumption that he or she has brought a client to the employer. The sales representative who brought in a client is entitled to a "client indemnity" if that representative is dismissed by the employer. This client indemnity amounts to three months' salary after one year of service. It is increased by an additional month for each period of five years of service beyond the first five years of service. The indemnity is not due if the employer can demonstrate that the sales representative suffered no damages as a result of the termination of the contract.

A noncompete clause for a sales representative does not take effect if the employment relationship is terminated:

- during the first six months of employment;
- by the employer without serious cause (e.g., with notice or indemnity); or
- by the worker for grave misconduct on the employer's part.

The lump-sum compensation that the employer can seek from a sales representative who has violated a noncompete clause may not exceed three months of remuneration. If the employer can prove that the actual damages exceed the standard lump-sum compensation amount, a labor court might grant a higher indemnification.

§ 3.7(b)(iv)

General Comment

According to case law, only the employee may invoke the nullity of the noncompete clause if the validity conditions are not met (including the level of salary). It is also only the employee who can invoke the nullity of the clause if the annual salary level does not reach the applicable threshold. Hence, if the clause does not comply with one of the above-mentioned conditions, the employee can decide either to invoke the clause's nullity (whereby the

employee can act as if there had been no noncompete clause in the contract) or not to invoke the nullity and, instead, seek payment of the noncompete indemnity from the employer. In this last scenario, the employee is then expected to be bound by and comply with the clause as stipulated in the contract.

The conditions of validity are verified when the clause is considered to become effective, i.e., when the contract terminates.

§ 3.7(c)

Nonsolicitation

Nonsolicitation clauses are not common practice and their validity is disputed. Pursuant to Article 17 of the Belgian Employment Contracts Act, a worker owes a duty of loyalty to his or her employer and has an obligation not to solicit or induce workers of the company to leave their employment with that company. However, the duty of loyalty applies only during the employment. Once a worker's employment contract has ended, the law does not prohibit the former employee from inducing his or her former co-workers from leaving the company. However, if the solicitation is done to harm the former employer, theoretically, it may be deemed unfair competition.

The enforceability of nonsolicitation clauses is uncertain. The courts have not conclusively ruled on the issue and legal scholars disagree about it. To prepare for any legal challenges as to their enforceability, these clauses should be limited to a reasonable time and scope, used only with respect to high-ranking employees, and crafted so as not to unreasonably restrict the worker's freedom. It is also recommended that the employee receive adequate consideration in exchange for executing the clause. If the employee receives a high salary, the compensation may serve as adequate consideration, except that the contract should expressly acknowledge this fact.

§ 3.8

H. Are the terms of employment contracts considered confidential?

No, the terms of the contract are not considered confidential. However, the best practice is for an employer not to disclose any terms of an employment contract. In Belgium, employees are reluctant to communicate about their salary, and this element is usually considered *de facto* as highly confidential.

§ 4

IV. DISCRIMINATION IN EMPLOYMENT

§ 4.1

A. What prohibitions against discrimination exist, and how are they defined?

Any form of discrimination in employment, whether at the recruitment stage, during the employment, at termination, or with respect to the terms and conditions of employment, is prohibited. Under Belgian law, the prohibition of discrimination is contained in many statutes and regulations, including a set of three acts (the "Discrimination Acts") specifically dedicated to the prohibition of discrimination. These acts are commonly known as the

General Act, the Gender Act, and the Racism Act.⁷⁷ These acts not only apply to the employment relationship, but they also have a general scope of application.

Pursuant to the Discrimination Acts, *discrimination* comprises both direct and indirect discrimination, committing or instigating an act of discrimination or intimidation, as well as the refusal to take reasonable measures to accommodate disabled persons. The prohibition against discrimination is expressly extended to a number of protected categories. Discrimination against any person is prohibited on any of the following grounds: age, sexual orientation, civil status, birth, property, faith or conviction, political conviction, trade union conviction, language, current or future health, handicap, physical or genetic property or social origin,⁷⁸ pregnancy, delivery, maternity, sexual transformation, nationality,⁷⁹ so-called race, color, origin, or national or ethnic descent.⁸⁰

Any contractual clause that is contrary to the prohibition of discrimination or whereby any party renounces in anticipation the protection afforded by the law is null. However, only the terms of a clause that contains discriminatory aspects will be null.

There are more specific prohibitions of discrimination in employment matters. For example, the working conditions of employees having a contract for part-time work cannot be less favorable than those applicable to their colleagues having a contract for full-time work.⁸¹ The same mechanism applies for employees having a contract for a fixed-term⁸² versus those having a contract with an open-ended term. Moreover, the employer who decides to grant benefits to the employees must grant them without any differentiation to all workers belonging to the same category.⁸³

In addition, the law applicable to the contractual relationship will not be a source of distinction between employees carrying out their work on Belgian territory. Indeed, regardless of the law that applies to the employment contracts, employees carrying out their activities on Belgian territory benefit from a set of core protective rules. The core protective rules concern:

- maximum work periods and minimum rest periods;
- minimum paid annual leave;
- minimum rates of pay, including overtime rates;
- conditions for the hiring-out of workers;

⁷⁷ Act of 10 May 2007 against certain forms of discrimination; Act of 10 May 2007 against discrimination between men and women; Act of 10 May 2007 changing the Act of 30 July 1981 against certain acts inspired by racism or xenophobia.

⁷⁸ Art. 4, 4° of the Act of 10 May 2007 against certain forms of discrimination.

⁷⁹ Act of 10 May 2007 against discrimination between men and women.

⁸⁰ Art. 7 Act of 10 May 2007 changing the Act of 30 July 1981 against certain acts inspired by racism or xenophobia,

⁸¹ Act of 5 March 2002 on the principle of nondiscrimination for the employees having a contract for part-time work.

⁸² Act of 5 June 2002 on the principle of nondiscrimination for the employees having a contract for a fixed-term.

⁸³ Art. 45 of the Act of 27 June 1969.

- health, safety, and hygiene at work;
- protective measures with regard of the terms and conditions for employment of pregnant women or women who have recently given birth, of children, and of young people; and
- equality of treatment between men and women.⁸⁴

It should be stressed that the Act of 5 March 2002 (on nondiscrimination regarding part-time workers) has extended this set of core protective rules to the employment, salary, and working conditions that are determined by legal, administrative, or conventional stipulations with criminal⁸⁵ sanctions. Most of the rules with respect to labor law have criminal sanctions.

Consequently, whatever the applicable law is, the employees may not be deprived of the protection afforded by the mandatory rules of Belgium with respect to work carried out on Belgian territory.

§ 4.2

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

Any discrimination based on one's faith or belief is prohibited under the General Act. However, the freedom of religion is not absolute or unlimited. Employers can decide that the place of work must remain neutral, serene, and peaceful and discourage any expression of religious belief. However, the rules must be the same for all employees and may not specifically aim at one religion.

In a recent case brought before a labor tribunal, a Muslim worker started to work for a retailer under an interim agency contract. Since the first day of her employment, she wore a veil. Several clients made remarks about her veil, and the retailer asked her not to wear it anymore to work. The interim agency then decided to send the worker to another user/employer. The Labor Tribunal of Tongeren followed the analysis of the worker, who considered herself a victim of discrimination based on her religious belief. The Tribunal ruled that the employer has the right to lay down rules with respect to the wearing or displaying of religious symbols, but these rules must be equally applicable to all employees. The circumstance that the rule was not fixed before her entry into service demonstrates that the prohibition to wear the veil was not justified by a legitimate goal.⁸⁶

⁸⁴ European Council and the European Parliament adopted on 24 September 1996 Directive 96/71/EC concerning the posting of employees in the framework of the provision of services.

⁸⁵ Article 5 of the Act of 5 March 2002.

⁸⁶ Labor Tribunal Tongeren, 2 January 2013, G.R. 11/2142.

§ 4.3

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

Discrimination against disabled persons, as well as the refusal to take reasonable measures to accommodate the needs of disabled persons, is prohibited under Belgian law.⁸⁷ However, treating disabled persons differently is not prohibited *per se* if the different treatment is based on a reasonable and objective justification and directly related to an “essential professional requirement” due to the nature of the professional activity or the context in which the work is performed, provided that the objective is legitimate and the requirement is proportionate to that objective (see § 4.5 below).

Indirect different treatment (i.e., a provision, criterion or practice that is facially neutral but may have an effect of creating distinctions between persons) based on disability is justified if one can prove that no reasonable accommodation is possible.

Although the Discrimination Acts do not define *disability*, European case law defines it as “a limitation resulting from a physical, mental or psychological impairment, which impairs the person’s participation in professional life.”⁸⁸ The European Court of Justice has further specified the notion of disability, stating that the concept of *disability* “must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from 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 with other workers, and the limitation is a long-term one.”⁸⁹

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

§ 4.4

D. What prohibitions are there against harassment?

Belgian law prohibits workplace harassment, including:

1. isolated acts of physical or psychological violence;
2. repeated acts of moral harassment (e.g., bullying at work,⁹⁰ and

⁸⁷ Art. 7 of Act of 10 May 2007 changing the Act of 30 July 1981 against certain acts inspired by racism or xenophobia.

⁸⁸ European Court of Justice, Case No. C13/05, *Sonia Chacón Navas v. Eures Colectividades SA* (July 11, 2006)

⁸⁹ European Court of Justice, Case No. C335/11, *Dansk almennyttigt Boligselskab* (April 11, 2013).

⁹⁰ A set of several similar or different behaviors, inside or outside the company or institution, that take place during a certain time, that aims at or result in the personality, dignity or physical or psychological integrity of an employee being affected, that his job is endangered or creating an intimidating, hostile, degrading, humiliating or offensive environment and who are particularly expressed in words, threats, actions, gestures or one-sided.

3. sexual harassment⁹¹ at work.⁹²

Belgian law also prohibits acts of aggression in the workplace or within the scope of employment, whether the acts are perpetrated by superiors, subordinates, or colleagues. To be actionable, however, the harassment must occur while performing the duties of the employment or on the premises of the employer.

Regardless of the number of employees employed by a company, the law requires the employer to establish a comprehensive prevention plan against workplace harassment and to appoint and consult with a prevention advisor specialized in organizational psychology.

§ 4.5

E. 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)?

In limited circumstances, the law allows employers to differentiate between persons if:

1. the distinction can be objectively justified by a legitimate goal; and
2. the means to reach the goal are adequate and necessary.

The law recognizes two types of distinctions:

- **Direct distinction:** A *direct distinction* exists when the employer differentiates between persons, through a policy provision or employment criterion on the basis of a protected category (such as age, sexual orientation, faith or religious conviction, or handicap). Generally, such distinction would be deemed discriminatory, except when the distinction can be justified on the basis of an “essential and determining professional requirement.” Moreover, the law provides some specific justifications when distinctions on the basis of age, faith, and belief are permissible.
- **Indirect distinction:** An *indirect distinction* exists when an employment-related provision, criterion or practice is facially neutral, but may have an effect of creating distinctions between persons. The indirect distinction is discriminatory, unless it is: (1) objectively justified by a legitimate goal; and (2) if the means for reaching this goal are adequate and necessary.

Finally, distinctions made to comply with a legal mandate or a legal affirmative action program do not constitute discrimination.

⁹¹ Any form of unwanted verbal, nonverbal or physical conduct of a sexual nature that has the purpose or effect of violating the dignity of a person affected or creating an intimidating, hostile, degrading, humiliating or offensive environment.

⁹² Art. 32^{ter} of the Act of 4 August 1996 on the well-being of employees at work

§ 4.6

F. What are the potential remedies for prohibited discrimination and harassment?

The employee, any union organization, or the Interfederal Centre for Equal Opportunities can launch summary proceedings in court before the President of the Labor Tribunal to obtain the immediate cessation of the discrimination.⁹³ The victim of discrimination can seek payment of an indemnity equal to EUR 1,300 for discrimination⁹⁴ or six months of remuneration⁹⁵ if the harm caused by the discrimination cannot be remedied, even by having the discriminatory measure nullified.

Alternatively, the employee may decide to inform the prevention advisor, the “person of trust” assisting this advisor, or the medical inspectorate about the situation. These individuals/bodies will try to resolve the complaint through conciliation with the parties.

The employee may also decide to start a formal judicial procedure.

§ 4.7

G. What prohibitions exist regarding retaliation/reprisal?

An employer is prohibited from retaliating or taking reprisal against an employee who has filed a formal request for psychosocial intervention for acts of violence, bullying or sexual harassment at work. Retaliatory conduct includes termination of the employment relation and modification of the terms and conditions of employment.⁹⁶

An employee who can establish that the employer has retaliated against him or her may be entitled to monetary damages and/or to seek the annulment of the retaliatory actions taken against him or her.

Employees who have filed a formal request for psychosocial intervention for acts of violence, bullying or sexual harassment at work, and individuals who are witnesses of acts of violence, bullying, or sexual harassment, cannot be dismissed during a period of 12 months because they have reported or filed a formal request about the facts of such incident. If a dismissal occurs, the employer must demonstrate that the dismissal was not retaliatory, which is a difficult burden of proof in practice.⁹⁷ In addition, if an employee brings a lawsuit as a result of the incident, the employee may not be dismissed within three months after the definitive court decision on the case has been rendered. During the relevant time, an employee may only be dismissed for reasons that are unrelated to the underlying complaint, which the employer may find difficult to prove in practice.

⁹³ Art. 20 of the Act of 10 May 2007.

⁹⁴ The amount is EUR 650 if the employer can demonstrate that the adverse employment action would have been taken even in absence of discrimination (Art. 18, 1 of the Act of 10 May 2007).

⁹⁵ It would be three months if the employer can demonstrate that the adverse employment action would have been taken even in absence of discrimination (Art. 18, 2 of the Act of 10 May 2007).

⁹⁶ Art. 32 *tredecies* of the Act of 4 August 1996.

⁹⁷ Art. 32 *tredecies* of the Act of 4 August 1996.

If the employer does not respect the protection provided to those employees, the dismissed employee may request reinstatement. If the employer rejects the request for reinstatement, the employee is entitled to a special compensation equal to a six-month remuneration or a higher indemnity corresponding to the actual damage.⁹⁸ This indemnity cannot be cumulative.

§ 4.8

H. May individual persons be liable for discrimination, harassment, or retaliation/reprisal?

Individual persons may be subject to civil and criminal penalties for instigating or committing acts of discrimination or intimidation or harming the well-being of others. Within the employment framework, criminal sanctions may be imposed on the individual person who perpetrated the wrongful act or on the employer's agents who were responsible for preventing the wrongful conduct or remedying the harm.⁹⁹ A term of imprisonment between six months and three years may be imposed.

An employee who is a victim of discrimination or harassment can launch court proceedings seeking damages directly from the perpetrator of the discrimination. According to civil liability principles, the victim must demonstrate the existence of discrimination, the specific damage that results from that discrimination, and a link of causality between the damage and the discrimination. In most cases, it will be difficult to demonstrate the value of the damage that results from the discrimination.

§ 5

V. COMPENSATION

§ 5.1

A. What restrictions are there on hours that may be worked?

Working time is strictly regulated under Belgian law: (1) daily and weekly limit; (2) prohibition to work on Sundays; (3) prohibition to work during the night; (4) obligation to respect the working time schedules; and (5) rest periods and interruption.¹⁰⁰

Some categories of employees are excluded from the scope of application of some of these restrictions:¹⁰¹

- sales representatives;
- teleworkers within the meaning of CBA No. 85, with respect to the time worked from home or any other place; and
- employees having a position of management or a position of confidence as defined by the Royal Decree of 10 February 1965. According to some case law, the list of

⁹⁸ Art. 32, § 4 *tredecies* of the Act of 4 August 1996.

⁹⁹ Arts. 119 to 121 of the Criminal Social Code.

¹⁰⁰ Act of 16 March 1971 on employment.

¹⁰¹ Act of 16 March 1971 on employment, art. 3.

positions should be updated to take into account the evolution of jobs and professions over recent years.

The weekly limit is in principle set at 40 hours. However, the average working time limit may not exceed 38 hours, or a lower limit fixed at the joint committee level or at company level. The actual weekly working time might be between 38 and 40 hours (or the applicable average weekly working time limit), but in that case, employees are entitled to days off so that the average number of hours is respected. When the actual weekly working time of the employee amounts to 40 hours, but the average is set at 38 hours, the employee is entitled to 12 days off on a yearly basis so that the average is respected yearly.

The daily limit is in principle set at nine hours.¹⁰²

Derogations from (exceptions to) those weekly and daily limits are only possible in certain situations specified by the law, but the conditions, limitations, and procedures stipulated must be respected. There are mainly two types of exceptions:

- *temporary derogations* to deal with some type of specific work, such as extraordinary increase of work, urgent repair to machines, inventories and balance sheets; and
- *structural derogations* related to the manner in which the work is organized, such as work in shifts, continuous work, etc.

Overtime work is work that exceeds the normal working time schedule and that exceeds either the daily working limit of nine hours or the normal weekly working limit of 40 hours. Overtime is only allowed in situations specified by the law.

In situations where overtime work is allowed, the overtime work must be paid for by a *supplementary compensation* amounting to 50% of the employee's normal salary. For overtime work on Sundays or public holidays, the supplementary compensation amounts to 100% of the employee's normal salary. In addition, if an employee works overtime, i.e., beyond the normal weekly working time, the employer will have to grant *compensatory time off* to that employee so that the normal weekly working time within a certain reference period is respected.

Sunday work and work during public holidays are, in principle, prohibited, except in specific circumstances, such as for specific jobs or in specific industry sectors.

Night work is in principle equally prohibited for men and women. There are, however, exceptions to this rule.

The employer might also implement new working time regimes that depart from the normal rules. However, such regimes are only allowed for specific sectors, and a strict procedure must be followed. The employer must in principle enter into a CBA with all trade union organizations represented within the company. In addition, such new working time regime applies exclusively on a voluntary basis, save to the extent this regime applies to any employees of the company, or a division of the company.¹⁰³ The weekend regimes where employees are working 12 hours on Saturdays and Sundays are implemented based on that legislation.

¹⁰² It is set at eight hours for employees working six days per week.

¹⁰³ Act of 17 March 1987 on new working time regimes and CBA No. 42.

§ 5.2

B. What minimum wage requirements exist?

The minimum wages are average gross minimum monthly amounts which can be set by CBAs concluded at national level, or at the level of the joint committees, or even at company level (for big companies). These wages are affected not only by the fixed monthly salary, but also by other variable remunerations and premiums.

§ 5.2(a)

Minimum Wages Set by Collective Bargaining Agreements

The minimum wages are determined by CBAs concluded at the level of the National Council for Employment. These minimum wages have thus been negotiated between social partners, i.e., union organizations and employers' federations.

The average gross minimum monthly wage¹⁰⁴ is as follows:¹⁰⁵

- EUR 1,501.82 for employees aged 21 or older;
- EUR 1,541.67 for employees aged 21 or older having at least six months of service with their employer;¹⁰⁶
- EUR 1,559.38 for employees aged 22 or older having at least 12 months of service.¹⁰⁷

Other minimum wages apply to employees younger than 21 years. The National Council for Employment agreed in March 2013 to amend the rules to increase incrementally the average monthly remuneration for employees younger than 21 years in view of reaching the same level of remuneration for employees of 18 years and 21 years.¹⁰⁸ The levels of remuneration can be summarized as follows:

Age	As of January 1, 2014	As of January 1, 2015
22 years	EUR 1,559.38	
21.5 years	EUR 1,541.67	EUR 1,559.38
21 years	EUR 1,501.82	EUR 1,559.38
20 years	EUR 1,442.34	EUR 1,559.38
19 years	EUR 1,384.08	EUR 1,541.67
18 years	EUR 1,327.01	EUR 1,502.82
17 years	EUR 867.47	
16 years or less	EUR 735.89	

These amounts are, however, increased from time to time.

¹⁰⁴ Amounts as of December 1, 2012.

¹⁰⁵ Collective bargaining agreement No. 43 pertaining to the guarantee of an average monthly minimum remuneration.

¹⁰⁶ The requirement of six months of service will be abolished starting January 1, 2015.

¹⁰⁷ The requirement of 12 months of service will be abolished starting January 1, 2015.

¹⁰⁸ Collective Bargaining Agreement No. 50.

§ 5.2(b)

Minimum Wages Set by Joint Committees

Minimum wages are also set at the level of most joint committees. It is important to check the minimum wages at the level of the joint committee since specific minimum wages apply depending on the industry sector. Most sectors have such specific collective bargaining agreements in this respect.

§ 5.3

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

Remuneration must be paid according to the terms and conditions that have been agreed upon. However, remuneration must be paid at least once every month, except that the parties may agree that some premiums are not paid monthly but after a longer period of time.

Blue-collar employees are entitled to an advance payment of their remuneration. They receive their monthly salary in two parts that are paid in a maximum interval of 16 days.

Employees are usually entitled to an end-of-year premium (also called thirteenth month salary for white-collar employees) based on CBAs concluded at the level of the joint committees. This premium is paid only once per year.

Remuneration is paid in the manner that has been agreed upon by the parties. Most employment contracts stipulate that remuneration is paid by wire transfer and that it may, in exceptional cases, be paid from hand to hand.

Strict rules apply with respect to the amounts the employer may deduct from the remuneration of the employees.¹⁰⁹

Remuneration that is agreed upon between parties is in principle the *gross amount*. The employer must deduct from that amount: (1) the employees' social security contributions (which, in principle, amount to 13.07% of the gross amount (calculated on 108% for blue-collar employees)); (2) the tax advance payment (tax withholding), which is determined based on specific wage scales; and (3) other additional tax or social security contributions. The amount paid to the employee after all these deductions is called the *net amount*. The gross amount does not correspond to the cost of the employer, since the employer's contributions amount to approximately 35% of the gross amount for white-collar employees and range between 45% and 60% for blue-collar employees.¹¹⁰

¹⁰⁹ Art. 23 of the Act of 12 April 1965 on protection of remuneration. Besides the deduction of applicable legal social and tax withholdings, the employer can deduct the amounts that have been paid by the employer as advance payments, fines, or damages resulting from intentional or grave faults, or light but repetitive faults. The total of these deductions may not exceed a fifth of the remuneration (legal, social, and tax deductions being excluded).

¹¹⁰ See also above, §2.1.

Only a limited part of the remuneration may be paid in kind, such as housing, gas, electricity, water, heating, accommodation, food, tools and/or clothes, materials.¹¹¹ The part that is paid in kind can in principle not exceed 1/5 of the remuneration. It may amount to 2/5 when the employer puts housing at the disposal of the employee. In specific exceptional cases, the part paid in kind might exceed 2/5.

The employer may not restrict the employee's freedom to spend the remuneration earned.

Remuneration must be paid in Euros when the work is carried out on Belgian territory. 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.¹¹²

§ 5.4

D. What overtime pay requirements exist?

§ 5.4(a)

Generally

The employee is in principle entitled to overtime pay for the work that exceeds either the daily limit of nine hours, or the weekly limit of 40 hours, or the actual weekly working time limit applicable (when lower than 40 hours). As mentioned in § 5.1, the average working time limit can be respected by either reducing the actual weekly working time to the average or keeping an actual weekly working time of 40 hours or less and granting compensatory rests to reach the average weekly working time.

The minimum overtime pay rate is 50% of the employee's salary, except that overtime is paid at a 100% rate for overtime work carried out on a Sunday or public holiday. There can be higher overtime pay rates agreed at the level of the joint committee or at the level of the company.

In addition to overtime pay, employees are entitled to compensatory rests so that the average working time limit is respected. There are some exceptions to this principle.

Overtime pay can be converted into additional compensatory rests by setting this in a CBA.

§ 5.4(b)

Exceptions

The hours that exceed the above-mentioned daily and weekly limit are not automatically considered compensable overtime if they are performed in the framework of specific derogations (see § 5.1), which are as follows:

- **Distance between the employee's domicile and the place of work:** The distance between the domicile of the employee and the place of work can justify that the daily limit can be set at ten hours per day. However, this justification does not impact on the weekly limit. This derogation applies to the employees who must be away from their home for at least 14 hours because of the schedules of public transportation.¹¹³

¹¹¹ Art. 6 of the Act of 12 April 1965 on protection of remuneration.

¹¹² Art. 4 of the Act of 12 April 1965 on protection of remuneration.

¹¹³ Article 22, §2 of the Act of 16 March 1971.

- **Work organized in successive shifts:** The working time limits of employees who work in shifts can be increased to 11 hours per day and 50 hours per week.¹¹⁴ This derogation is, however, limited to work organized in shifts, i.e., in a system where different groups of employees successively work at the same place of work and perform the same work.¹¹⁵
- **Continuous work:** The daily maximum limit can be set at 12 hours and the weekly limit at 50 hours when the work cannot be interrupted because of its nature.¹¹⁶ This derogation is limited to continuous work that, because of its nature, must be undertaken day and night and all days without interruption.¹¹⁷
- **Sector or categories wherein the normal limitations cannot be respected:** This derogation is limited to the sectors or industries for which specific derogations have been made.
- **Flexible working time:** This derogation relates to a system where the employer can plan an increase in work that can be compensated by a subsequent decrease in the work load.

§ 5.5

E. What rules apply to the payment of commissions?

Commissions are strictly regulated only insofar as these relate to work done by sales representatives (see § 3.1). A sales representative is the employee whose function consists of visiting and prospecting clients to make business on behalf of the employer.

There is no obligation to pay commissions to a sales representative. However, any variable remuneration that is agreed with a sales representative and the amount of which depends on the turnover is considered to be commissions for the application of the law.

Commissions are payable for every order the sales representative made that is accepted by the employer even if the order is not executed afterwards, unless the nonexecution of the order is attributed to the sales representative.¹¹⁸ Any order is considered accepted unless it has been refused by the employer in writing within a reasonable timeframe determined in the contract. In the absence of any specific timeframe, the employer has one month to refuse in writing any orders.

There are many discussions on the validity of the set conditions for the payment of commissions. These conditions cannot indeed bypass the protection mechanism under the law.

The sales representative who benefits from exclusivity is entitled to commissions even during the period of sick leave or annual leave.

After the contract has been terminated, the sales representative remains entitled to commissions for any order brought within three months from the termination date of the

¹¹⁴ Article 27 of the Act of 16 March 1971.

¹¹⁵ M. De Gols, *De organisatie van de arbeidstijd*, Brussels, Kluwer, p. 32.

¹¹⁶ Article 22, 2° of the Act of 16 March 1971.

¹¹⁷ Cass., 6 December 1977, *R.D.S.*, 1978, p. 175.

¹¹⁸ Art. 90, and following, of the Act of 3 July 1978 on employment contracts.

contract insofar as the sales representative can demonstrate he or she has had a direct contact with the client that resulted into the order. For an order relating to phased contracts, sales representatives are entitled to commissions for the services or goods delivered within a period of six months from the termination date of the contract.¹¹⁹

The commissions paid to employees who are not sales representatives must be paid at least every three months.¹²⁰

§ 5.6

F. What bonuses are mandated or customary?

Only a limited number of joint committees have imposed an obligation to pay bonuses as a term and condition of a CBA. However, it is common practice in Belgium to grant bonuses to employees.

There is no obligation to draft a bonus scheme, but it seems preferable since it ensures that the employees are informed beforehand about the terms and conditions, especially the targets they must reach to be entitled to a bonus payment. The bonus is part of the remuneration and, as such, is an essential element of the contract.

The employer may not change unilaterally the terms and conditions of the bonus plan. However, the bonus plans might be agreed upon for a limited period of time, in which case the plan definitively ceases to have effect at the end of that period. If this occurs, the employer can decide to prolong the bonus plan or to implement a new one or could even decide not to grant bonuses any longer.

The employer might decide to implement a bonus plan subject to a favorable tax and social security regime (called nonrecurring benefits). However, strict conditions apply to benefit from that specific regime,¹²¹ which we detail below.

§ 5.6(a)

Conditions in Terms of Contents

The attribution of the bonus must result from collective targets being reached. The targets must be common to the whole undertaking, to a group of undertakings, or to a group of employees that is well defined on the basis of objective criteria. In other words, that regime may not be used to compensate employees for reaching their individual targets. In this system, the employee will obtain the premium even if he or she does not individually make any effort in order to reach the target.

The attribution of the bonus must thus depend on the realization of the collective targets. Such targets must be clearly determined, measurable, transparent, and also verifiable. The employees must be able to verify whether or not the targets have been reached.

It should also be stressed that the attribution of the bonus may not be linked to a target the realization of which is certain at the moment the bonus plan is laid down. In other words, the payment of a bonus in the framework of the nonrecurrent benefits cannot be certain.

¹¹⁹ Art. 99 of the Act of 3 July 1978 on employment contracts.

¹²⁰ Art; 9, §1, 3° of the Act of 12 April 1965 on protection of the remuneration.

¹²¹ CBA No. 10 and Act of 21 December 2007.

The targets must be realized at the end of the reference period, which must be at least three months. There is no maximum reference period. Given the fact that the realization of the targets cannot be certain, the plan may not apply retroactively for more than a third of the duration of the reference period. For that reason, if the reference period is one calendar year, the plan for the attribution of the bonus must be filed with the competent authorities at the Federal Public Service Employment, Labour and Social Dialogue no later than April 30 of the year considered (it is then filed within the first third of the reference period).

The attribution of any such bonus cannot thus replace another component of the worker's remuneration. The nonrecurrent bonus may not be regarded as having the aim of replacing or converting remuneration, premiums, benefits in-kind, or any other type of remuneration regardless of whether or not it is subject to social security contributions.

However, a "premium" in the framework of nonrecurrent benefits can replace an existing bonus system provided that one of the following conditions is met:

- the bonuses are linked to collective targets of an undertaking or a group of undertakings or a well-defined group of employees. A bonus in the framework of CBA No. 90 may thus replace an existing system that was also dependent on collective targets only; or
- the bonus depends on both collective and individual targets. Such type of plan may be replaced by a bonus plan in the framework of CBA No. 90, but this means that the existing plan will have to be modified to meet all conditions required, including the fact that the bonus must be based exclusively on collective targets and no longer on individual targets.

§ 5.6(b)

Conditions in Terms of Form

The plan for the attribution of the bonus must be introduced by following a strict procedure. For the employees represented by a union delegation, the plan must be laid down in a CBA. When filed with the competent authorities, that CBA must be accompanied by a specific form that is a kind of systematic summary of the key elements of the plan.

For the employees who are not represented by a union delegation, the plan may either be laid down in a CBA or in an "adhesion act." An *adhesion act* is a special form that must be completed with information concerning the employer and the duration of the bonus plan.

The procedure applicable for an adhesion act can be summarized as follows:

First phase:

1. The employer prepares a draft adhesion act, as well as a draft attribution plan. The employer must actually fill in template documents.
2. The employer communicates the draft documents to the employees to whom the bonus plan applies. A register is at the disposal of the employees to express any of their comments to the plan in writing.
3. At the end of a period of at least 15 calendar days from the date the plan was communicated to the employees, the employer submits these draft documents, as well

as the register, to the social inspection. If there is no comment, the first phase is closed. If there are comments, the social inspection will organize a conciliation.

Second phase:

4. These documents can be filed with the Federal Public Service Employment, Labour and Social Dialogue, collective relations section. A message to the effect that the draft documents have been filed and have been transmitted to the committee must be posted on the employer's premises.
5. The documents are communicated to the joint committee for verification. The joint committee verifies that the documents contain all the compulsory data and that the plan is not more restrictive than is allowed. The joint c also verifies that the attribution plan does not contain modalities that would be based on discriminatory criteria. The plan may not contain any discriminatory measures. Under Belgian law, employees with part-time employment contracts may not be treated less favorably than the employees with full-time employment contracts solely because they are working part-time (see § 4.1 above). The plan's conditions can therefore be prorated to their working regime but cannot be less attractive than this. The same applies for the contract for a fixed term; the employees with a contract for a fixed term may not be treated less favorably compared to those with a contract for an open-ended term (see also § 4.1 above). These principles apply regardless of whether the bonus plan refers to the system under the Act of 21 December 2007 and CBA No. 90 or is a bonus subject to the regular tax and social security contributions.

§ 5.6(c)

Compulsory Information

The bonus attribution plan that details the conditions under which a bonus is awarded must contain at least the following:

- A provision defining the company and the category of employees concerned by the attribution plan.
- A provision determining the objectives that are measurable and controllable; in this respect, it should be stressed the targets, with respect to a specific exchange rate, are prohibited.
- A provision regarding the duration of the period of reference. As mentioned, the minimum reference period is three months; there is no maximum duration.
- A provision related to a method for the following up and the control of the attainment of the objectives determined.
- A provision related to the premium payable under the plan and with respect to the modalities of calculation of the premium. In this respect, the relevant regulation specifies that the calculation must be at least pro rata to the effective activity during the period of reference. A condition of seniority can be imposed but cannot exceed half of the period of reference. In this respect, all prior successive contracts must be taken into account. The payment can be excluded for employees who are dismissed for grave misconduct or who resign without grave misconduct on the part of the employer. The conditions of attribution cannot be more restrictive.
- A provision with respect to the time and modalities of payment.

- A provision with respect to the period of validity of the plan. The plan could be for an indefinite period of time, but in principle it is only applicable for the duration of the period of reference and does not create any further obligation.

§ 5.6(d)

Applicable Tax and Social Security Regime

The bonus paid in the framework of a plan concluded in accordance with the rules and conditions in the Act of 21 December 2007 and CBA No. 90 is exempt from tax and social security up to a maximum amount of EUR 3,131.¹²²

However, this amount is subject to a one-off contribution corresponding to 33% of the amount to be paid by the employer and to a specific withholding equal to 13.07%.

The amount that is exempt from social security contributions is also exempt from holiday pay. Holiday pay is indeed in principle due on the payment of bonuses.

This amount is also not considered when determining the remuneration of the employee concerned. For example, in case of termination of the contract, the amount exempt from social security contributions is not to be taken into consideration for the calculation of the indemnity in lieu of notice. It is also not taken into consideration when determining the remuneration of the employee concerned.

The amount is indexed each year.

This type of bonus is quite popular.

Restrictions apply to the attribution of bonuses to the managers of listed companies when the amount of the bonus exceeds 25% of their total annual package.¹²³ If it does, a maximum of 50% of the amount of the bonus must depend on the performance over a period of at least one year; at least 25% must depend on the performance over at least two years; and an additional minimum of 25% must depend on the performance over at least three years. In addition, the targets to be reached must be set in writing before the period of reference starts.¹²⁴

¹²² Amount for 2014. This amount is reviewed every year.

¹²³ Art. 14 of the Act of 6 June 2010 on corporate governance, amending Art. 520*ter* of the Belgian Companies Code.

¹²⁴ Art. 13 of the Act of 6 June 2010 on corporate governance, amending Art. 520*bis* of the Belgian Companies Code.

§ 5.7

G. What special rules exist for stock options or stock grants?

§ 5.7(a)

Stock Options

Stock options—whether or not they relate to stocks that have been issued or will be issued if they are exercised (technically *warrants*)—benefit from a specific regime insofar as they are accepted in writing within 60 days from the date of the offer.¹²⁵

The taxable benefit corresponds to a certain percentage of the value of the underlying stock. The percentage depends on the features of the stock option plan. Options are taxed at the moment of granting. There is no refund of the taxes, even if the employee can prove that the options will not be exercised or cannot be exercised.

Insofar that the conditions are respected, and the employee is still subject to Belgian tax law at that moment, the exercise of the options is not taxable. In addition, capital gains resulting from the sale of the shares acquired by the beneficiary are tax exempt under the normal Belgian tax rules applying to capital gains derived from an individual's management of his or her private investment portfolio.

The options must not necessarily relate to the shares of the employer or a parent legal entity.¹²⁶ There is no difference between options on listed or unlisted stocks.

Options that are accepted in writing within 60 days following the offer date and that benefit from the above mentioned tax regime are in principle exempt from social security contributions insofar as:

- **The option is not “in the money:”** If the option is “in the money,” the difference between the exercise price and the fair market value of the underlying stock at the offer date is considered remuneration on which tax and social security contributions are due.
- **There is no guaranteed benefit:** If the plan covers the employee against any loss, this guarantee will be considered a benefit on which tax and social security contributions are due.

The tax and social security regime that applies to stocks that are not accepted in writing within the applicable timeframe is still disputed.

§ 5.7(b)

Phantom Stock

Stock-based cash compensation (typically phantom stocks or SARs) is not attractive since it is not subject to any favorable tax or social security regime. The remuneration that is paid in cash, regardless of the manner the amount is determined, is subject to the regular tax and social security regime.

¹²⁵ Art. 41 of the Act of 26 March 1999.

¹²⁶ However, this impacts the percentage applicable in determining the value of the taxable benefit (Art. 43, §6, 3°, Act of 26 March 1999).

§ 5.7(c)

Attribution of Stock

The attribution of stocks is not very common since it does not—in principle—benefit from any specific tax and social security regime.¹²⁷ Stocks might be attributed to employees with a reduced discount,¹²⁸ which might, under strict conditions, benefit from a favorable regime.

Restricted Stock Awards or Restricted Stock Units, as they are known in other countries, do not benefit from any specific regime under Belgian law.

§ 6

VI. TIME OFF FROM WORK

§ 6.1

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

Under Belgian law, there are ten public holidays every year.

Holiday	Date
• New Year's Day	January 1
• Easter Monday	
• 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

When a public holiday coincides with a Sunday or another day of inactivity of the employee (usually Saturday, but it might be any other day of the week depending on the working time schedule agreed with the employee concerned), employees are entitled to an additional day off. This additional day off actually 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

¹²⁷ Except for the financial participations as governed by the Act of 22 May 2001 on Worker's Participation in the Capital and the Benefits of the Companies, which are not flexible and are therefore not much used.

¹²⁸ See Art. 609 of the Belgian Companies Code. Besides the conditions of that provision, a discount of 16.66% might be attributed insofar as the stocks cannot be transferred for a period of at least two years. This practice is accepted by the National Administration for Social Security.

work. The replacement day off is determined by the joint committee, the works council, or in mutual consent between the employee and the employer. In the absence of any agreement, the public holiday is replaced by the first working day following the public holiday.

Hence, employees working on a full-time basis are entitled to ten days off per year for public holidays.

Employees may not in principle work on public holidays. There are a limited number of exceptions to this prohibition.

In some joint committees, additional “public holidays” have been agreed upon.

§ 6.2

B. 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. Thereafter, the health insurance organization will pay the incapacitated worker an illness and disability allowance.¹²⁹ Guaranteed salary is not due, however, if the employee becomes newly incapacitated, an incapacity that is not related to the work, within 14 days after a first incapacity that entailed the payment of guaranteed salary.

§ 6.2(b)

Blue-Collar Employees

During the first month of work incapacity, blue-collar employees receive the following guaranteed salary:

- **On the 1st through the 7th day of incapacity:** 100% of the gross salary (at the expense of the employer).
- **On the 8th through the 14th day of incapacity:** 85.88% of the gross salary (at the expense of the employer), but not exceeding the salary limit that is taken into account for the calculation of the indemnities of the health insurance.
- **On the 15th through the 30th day:** 25.88% of the part of the usual salary (at the expense of the employer) but *not* exceeding the salary limit that is taken into account for the calculation of the indemnities of the health insurance; plus 85.88% of the part of the usual salary (at the expense of the employer) *exceeding* this salary limit; and additionally, 60% of the gross salary (at the expense of the health insurance).

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

¹²⁹ Art. 70 of the Act of 3 July 1978 on employment contracts.

§ 6.3

C. What are the requirements for paid vacation or annual leave?

§ 6.3(a)

Employees Are Entitled to Paid Vacation Days

Under Belgian law, employees are entitled to 20 days of leave based on full-time work performed during the preceding calendar year. The right to paid annual leave (vacation) is accrued on the basis of the days worked during the calendar year (and periods of legal suspension of the employment contract) immediately preceding the calendar year in which the worker will take his or her annual vacation.

The European Commission considered that this mechanism was not in line with European law and urged Belgium to adapt its laws. As such, an additional mechanism, called European vacation, has been implemented, which grants at least five days of paid vacation after the employee has accrued three months of providing services to the employer. The remuneration for those days of holiday is actually an advance payment of the “double vacation pay” premium for the following calendar year.

The rules in determining the exact number of days of holiday are different for blue- and white-collar employees. (See discussion in § 6.3(b)).

§ 6.3(b)

Employees Subject to Belgian Social Security Regime Are Entitled to Vacation Pay

A distinction must be made between blue- and white-collar employees concerning vacation pay.

The employer does not pay blue-collar employees when they are on their vacation/annual leave. They are paid by the Vacation Fund, which is financed by the employer’s social security contributions. This is the reason why the contributions are higher for blue-collar employees than for white-collar employees. The vacation pay for blue-collar employees amounts to 15.38% of the gross salary of the employee concerned over the preceding calendar year.

The employer must pay the white-collar employees when they are on their vacation/annual leave. They receive the same remuneration as if they had worked. This remuneration is called *single vacation pay*. It refers to the normal remuneration that is paid when the employees are on their vacation/annual leave.

White-collar employees are entitled to an additional indemnity, called *double vacation pay*. This indemnity amounts to 92% of a month’s salary and is paid when the employees take their principal leave for their vacation.

§ 6.3(c)

The Mechanism Is Based on Annual Leave Accruals

Since employees build their right to vacation/annual leave for 2015 by working in 2014, the employer has to pay *vacation pay upon leave* when the employees leave their employer for whatever reason in 2014. The vacation pay upon leave corresponds to amounts that have been accrued to finance the vacation/annual leave the next calendar year. The vacation pay upon leave amounts to 15.34% of the gross annual remuneration of the employee concerned for the calendar year the employment contract ends. If the contract ends in 2014, the vacation pay upon leave will be calculated based on the 2014 salary, and it will be an anticipated payment of the 2015 vacation pay and will therefore be deducted from the vacation pay due by the new employer in 2015.

§ 6.4

D. May the employer mandate when vacation is taken under any circumstances (e.g., year-end shutdown, furlough, prohibitions on vacation use in busy periods)?

§ 6.4(a)

Individual Annual Leave (Vacation)

Individual entitlement to annual leave (vacation) is governed either by a sector- or company-level CBA or an individual agreement between the employer and the employee.

The employer may exercise discretion with respect to when the employee may take the vacation/annual leave. Customarily, preference is given to employees with school-aged children. The employee is required to take the (legal) vacation/annual leave before December 31 of the calendar year during which the leave is available. Otherwise, the employee may lose entitlement to such vacation days as they may not be carried over to the following year nor would the employee be entitled to cash them out.

Employees may commence summary proceedings in a labor tribunal to dispute the employer's management of the annual leave (vacation days).

§ 6.4(b)

Collective Holidays (Yearly Shutdown)

Belgian law allows employers to shut down operations on an annual basis, provided the company consults with and obtains the consent of the employees or their representatives (such as the works council or trade union delegation). If a yearly shutdown is agreed upon, an individual employee may not choose to take his or her vacation in another period.

The maximum period for a yearly shutdown is four weeks. If the shutdown exceeds four weeks, employees are entitled to receive the normal salary for the days not worked and that are beyond the four weeks.

E. What requirements exist for paid or unpaid maternity and paternity leave?

In Belgium, an employee who is pregnant is entitled to maternity leave and to be protected from termination during such leave. (See discussion in § 6.6(c)). The law provides for a maternity leave period of 15 weeks, which can be divided into two periods of protection: prenatal rest (leave before the birth) and postnatal rest (leave after the date of delivery). The period of maternity leave may be extended.¹³⁰

Prenatal rest is the leave that is granted before the birth of the child. The employee is not allowed to work starting from the seventh day preceding the presumed date of delivery until the ninth week after the delivery. At the request of the employee, the prenatal rest may start at the earliest six weeks preceding the probable date of delivery (eight weeks for a multiple-birth delivery).

Postnatal rest starts from the day of delivery and lasts for at least nine weeks. At the request of the employee, postnatal rest can be extended by a period equal to the period during which the employee undertook work during the six weeks of the granted prenatal rest.

Paternity rest is the father's entitlement to ten days' leave within a period of four months after the birth of his child. The employer pays for three days, and the other seven days are paid by the Public Health Insurance.¹³¹

Paternity leave is the right of the father to convert the maternity leave into paternity leave in the event of death or hospitalization of the mother after delivery (provided that some conditions are met).¹³² Public Health Insurance pays for the days of paternity leave.¹³³

A similar *birth rest* of ten days within a period of four months after the birth exists for co-parents. This is targeted to the same-sex partner (woman) of the woman giving birth.¹³⁴

Adoption leave is granted to adoptive parents. It lasts four to six weeks, depending on the adopted child's age (whether the child is younger or older than three years of age).

Pregnant employees also are entitled to receive normal remuneration while absent from work to receive medical pregnancy checkups if any of these checkups cannot take place outside working hours.¹³⁵ During the period of maternity leave, the employee receives allowances from the Public Health Insurance. In some cases, the employer can be liable to pay a guaranteed salary for the period of work incapacity within the six weeks prior to the probable date of delivery.

¹³⁰ Art. 39 of the Working Time Act of 16 March 1971.

¹³¹ Art. 30, §2 of the Act of 3 July 1978 on employment contracts.

¹³² Royal Decree of 17 October 1994.

¹³³ Art. 39, § 7 of the Labor Act of 16 March 1971.

¹³⁴ Act of 13 April 2011 on the modification, with regard to co-parents, of the legislation on birth rest.

¹³⁵ Art. 28, *2bis* of the Act of 3 July 1978 on Employment Contracts; Art. 39*bis* of the Labor Act of 16 March 1971.

§ 6.6

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

§ 6.6(a)

Nursing (Breast-Feeding) Breaks

The CBA No. 80 of November, 27, 2001, introducing the right to nursing (breast feeding) breaks, grants the employee the right to take breaks for breast feeding, up to maximum nine months after the birth of the child.

The breast-feeding break lasts for half an hour. If the employee works less than 7.5 hours a day, she is entitled to one break. If she works more than 7.5 hours a day, she is entitled to two breaks on that day (which can be taken in one or two separate breaks).

The employee must conclude an agreement with her employer by which the moments for the breaks are determined. The employee must also provide evidence that she actually breast feeds her child. This evidence, which must be provided each month, is either a statement from a medical center for infants or a medical certificate.

The employer must not pay any salary for these breaks. The employee is entitled to an allowance from the Public Health Insurance for them. The employee benefiting from breast-feeding breaks is protected against dismissal. The employee may not be dismissed until one month after the expiration of the last medical certificate or statement from the medical center. But she may be dismissed for reasons not related to her breast feeding. The burden of the proof lies on the employer. Indeed, the employer must be able to demonstrate that the grounds for dismissal are not connected to the breast feeding. At the request of the employee, the employer must give its grounds for dismissal in writing. The sanction for dismissing the employee during the protection period is the payment of a protection indemnity of six months on top of the applicable severance indemnity to the employee.

§ 6.6(b)

Parental Leave

Upon expiration of the maternity leave or after, employees can also benefit from parental leave. The employee is entitled to parental leave until the child reaches the age of 12 (it being understood that the parental leave must have begun before the child's 12th birthday).

The following modalities of parental leave exist:

1. full suspension of the employment contract for a period of four months (available to both full-time and part-time employees);
2. reduction of the working hours to half-time employment during a period of eight months (to be taken in periods of at least two months) provided that the employee normally works full time (i.e., not available to part-time employees);
3. reduction of the working hours by 1/5 during a period of 20 months (to be taken in periods of at least five months) provided that the employee normally works full time (i.e., not available to part-time employees).

The employee benefits from allowances paid by the Belgian Unemployment Office covering the period of full suspension or working time reduction.

Employees on parental leave benefit from a protection against dismissal as from the notification date of the request for parental leave up to three months after the end of the parental leave. During this period, they may not be dismissed except for legitimate reasons or on grounds of grave misconduct. The sanction for dismissing the employee during this protection period is the payment of a six months' salary protection indemnity on top of the applicable severance indemnity to the employee.

For an employee who is on partial suspension of the employment contract for reason of parental leave, terminating his or her employment contract entitles him or her to severance indemnity (and indemnity protection), which should be calculated as if the employee were still working on a full-time basis.

§ 6.6(c)

Miscellaneous

Other specific rules apply to pregnant employees:

- a pregnant employee must be protected from having to undertake activities that may endanger her health or her baby's health;
- pregnant employees may not, in principle, be required to undertake night work;
- pregnant and breast-feeding employees may not perform overtime work;
- upon return to the company after the maternity leave, the employee has the right to return to her original job;
- a pregnant employee may not be discriminated against because of her pregnancy; and
- pregnant employees benefit from a special protection against dismissal: from the moment the employer is notified of the pregnancy up to one month after the end of the post-delivery leave, the employee may not be dismissed unless the employer can prove that the dismissal is unrelated to the employee's physical condition resulting from pregnancy or giving birth. Failure to provide adequate proof will entitle the employee to a protection indemnity equal to six months' salary in addition to the severance indemnity. This indemnity may not be cumulated with the protection indemnity for breast feeding.

§ 6.7

G. What requirements exist for paid or unpaid medical leaves of absence, and how do these differ from short-term sick pay?

If, due to the employee's illness, it becomes impossible for him or her to execute the employment contract, the employment contract will be suspended. Subject to certain

conditions, the employee will receive a portion of his or her salary while the contract is suspended (see § 6.2 above).

§ 6.8

H. What are the employer's duties if an employee requests a flexible working schedule?

The employer has no duty to accommodate an employee's request for a flexible working schedule. However, an employer could implement a flexible working schedule at the company level after having negotiated the terms with the competent employee representative body. The terms of the flexible working schedule must then form part of the company work rules.

§ 6.9

I. What other paid or unpaid leaves of absence must be provided by employers?

Under Belgian law, there are many specific leaves of absence.

§ 6.9(a)

Time Credit

One of the most used types of leave is the time credit (career interruption laid down in CBA No. 103), i.e., a suspension of the employment contract (full suspension or partial suspension) during a specific period of time with the right to an indemnity paid out from the Belgian Unemployment Office.

§ 6.9(a)(i)

Time Credit Without Specific Reasons

An employee with less than five years of professional career and at least two years' length of service with the employer is entitled to time credit (career interruption) according to the following modalities:

- either during maximum 12 months of full-time suspension; or
- during maximum 24 months of reduction of work to half-time work (provided that the employee is at least occupied at 3/4 time during 12 months preceding the time of notification for request of time credit); or
- during maximum 60 months of 1/5 reduction of work time (provided that the employee is employed full-time during 12 months preceding the time of notification for request of time credit); or
- a combination of the above-mentioned systems provided that it corresponds to the equivalent of a full-time suspension of 12 months.

§ 6.9(a)(ii)

Time Credit with Specific Reasons

An employee with two years' length of service with the employer has a complementary right to 36 months of full-time suspension (or 1/5 or half-time work reduction) if the leave is taken for the following purposes:

- to take care of a child until the child is eight years of age;
- to give palliative care;
- to assist or care for a family member who is seriously ill; or
- to follow a recognized training;

In addition, for part-time time credit (with 1/2 or 1/5 work reduction), the same modalities as the time credit without reasons apply. Furthermore, the possibility of time credit for one of these motives must be set out in a CBA at company- or sector-level.

The employee with two years' length of service with the employer has a complementary right to 36 months of full-time suspension (or half-time or 1/5 work reduction) if the leave is taken for the following purposes:

- to take care of a handicapped child until the child reaches the age of 21; or
- to assist or care for a minor who is seriously ill and who is part of the employee's family.

§ 6.9(a)(iii)

Time Credit at the End of Career

As from 55 years, the employee with at least 25 years of professional career as a salaried employee is entitled to a half-time or 1/5 work reduction until he or she reaches retirement age.

In addition, at the time of the employee's written request sent to the employer, the employee must have:

- at least 24 months of service with the employer (unless derogation from this is allowed by the employer); or
- during the 24 months preceding the request, the employee must be occupied 3/4 time with work for the time credit to be reduced to half-time or occupied full-time for the time credit to be reduced to 1/5.

Derogatory regimes (or exceptions to the rules) still exist for employees who still fall under the old regime of CBA No. 77bis, which was replaced by CBA No. 103.

The employee who is entitled to time credit as from the written request date until three months after the end of the time credit benefits from protection against dismissal. The employer may not dismiss the employee except for grave misconduct or for a reason not connected to the time credit. The sanction for dismissing the employee during the protection period is the payment of a six months' salary indemnity on top of the severance indemnity to the employee.

§ 6.9(b)

Other Types of Leave

- **Absence because of particular circumstances:** is a leave for a specified period of time for a qualifying family event (e.g., death of a close family member, civil duties, and legal matters).¹³⁶ The length of this type of leave depends on the specific situation. The employer must continue to pay all or part of the worker's salary during that period of absence.
- **Leave for compelling reason:** is leave because of an unforeseeable situation that is not work-related and that requires an urgent and necessary intervention by the employee. A leave for compelling reason is available only if the employment contract allows for this type of leave.¹³⁷ The worker can be absent from work for the amount of time required to deal with the compelling situation, but only for up to ten days per year. The worker is not paid for this type of leave.

§ 7

VII. BENEFITS

§ 7.1

A. What benefits must employers furnish to employees?

§ 7.1(a)

Required Benefits

The employer must pay a monthly remuneration that is in line with the minimum wages (see §5.2.). The employer must also pay the premiums that are laid down in CBAs concluded at the level of the joint committee, or at the level of the company (insofar as the employee is indeed covered by the scope of application of such CBA).

The employer must 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 joint committee, the distance, and the type of transportation means used by the employee.

The employer must also provide the employees with the equipment and tools required to carry out the agreed work.

§ 7.1(b)

Customary Benefits

In practice, the employer pays the monthly salary as well as an end-of-year premium according to the terms and conditions agreed upon at the level of the joint committee. Most joint committees stipulate the payment of such premium.

In addition, the employer pays the white-collar employees the double vacation premium. Hence, for white-collar employees, the fixed remuneration is actually paid in 13.92 installments. Since the vacation pay cannot be integrated into the remuneration, employers

¹³⁶ Act on Employment Contracts, art. 30; Royal Decree of 28 August 1963.

¹³⁷ CBA No. 45 of 19 December 1989; Royal Decree of 11 October 1991.

should not agree on a yearly gross remuneration, but on a monthly remuneration. The employer can indicate for informative purposes the amount of the yearly gross salary.

§ 7.1(c)

Other Fringe Benefits

Employees and employers usually include the following benefits in the compensation package (on top of the indemnities mentioned above), but none are legally compulsory:

- bonuses (see, however, our recommendations in § 5.6 above);
- meal vouchers,¹³⁸ or other vouchers, such as eco-cheques, sport cheques, etc.;
- group insurance benefits, which allow for additional retirement benefits at the moment the employee retires, and/or survivor benefits in the event of death of the employee before the retirement age; and/or disability coverage;¹³⁹
- medical insurance scheme;
- company car;
- portable PC, mobile phone, internet connection, etc. (generally for white-collar employees); and
- stock options, or other plans.¹⁴⁰

In some joint committees, employees are automatically affiliated to group insurance benefits.

§ 7.2

B. What health benefits must be provided to employees (and their families), and what is the employer's role in the provision of these benefits?

Health benefits are included in the social security contributions that must be paid for employees who are subject to the Belgian social security regime.

The employee's contribution for that benefit amounts to 1.15% of the gross remuneration; and the employer's contribution amounts to 2.35%.¹⁴¹

However, employers often offer employees additional benefits, such as additional health care or hospitalization insurance, to cover all or part of the difference between the actual costs and the amounts that are covered by Belgian social security.

¹³⁸ Which are in principle exempt from social security contributions insofar that the conditions in Art. 19*bis* of the Act of 28 November 1969 are met.

¹³⁹ Group insurance benefits are not flexible, since the rules must be determined in a plan that will apply to all employees belonging to the same categories. Categories can be distinguished only based on objective criteria.

¹⁴⁰ Usually only executives or key white-collar employees are eligible for such plans.

¹⁴¹ To compare the total contributions, see § 5.3.

§ 7.3

C. What pension contributions must be made and to whom?

Pension benefits are also included in the social security contributions that are paid for employees who are subject to Belgian social security contributions.

Pension benefits are financed by both employees' and employers' contributions. The employee's contribution amounts to 7.5% of the employee's remuneration, out of contributions amounting to 13.07% of the gross remuneration. The employer's contribution for pension benefits amounts to 8.86%.

Like for health benefits, it is common in Belgium to grant employees extra-legal pension benefits. Extra-legal pension benefits are usually type-defined contributions, i.e., the indemnity the employee will be entitled to will be calculated based on the monthly contributions paid by the employer.¹⁴²

§ 7.4

D. What percentage of overall compensation do benefits usually represent?

Employees benefit automatically from social security coverage:

- family benefits (allowance paid for children);
- unemployment (allowance paid in the event of unemployment);
- retirement benefits (see below §7.5);
- health and sickness benefits (costs of physicians, drugs, and hospitalization are partly paid by the social security). In addition, employees are paid by the social security in the event of absence from work because of illness (see § 6.2 above);
- maternity benefits (indemnities paid to employees during their maternity leave);
- accidents at work (these are partly covered by mandatory private insurance contracts); and
- occupational diseases (indemnities paid to employees who have developed a disease as a result of their professional activities).

Besides these social security benefits that are covered by mandatory social security contributions, employers often grant additional benefits to their employees.

Additional retirement and health benefits often range between 5% and 20% of the gross remuneration of the employee's salary. The percentage actually depends on the position of the employee and the sector he or she is employed in.

¹⁴² Defined benefits plans are clearly the exception.

Company cars are part of the compensation package of most companies; they represent about 15% of the total number of cars registered in Belgium. Mobile phones and portable PCs are also usually part of the compensation package. Most companies have bonus plans.

§ 7.5

E. What requirements exist for mandatory retirement?

The retirement age is currently set at 65. Retirees benefit from a monthly indemnity paid every month by the social security. The amount depends on the career of the employee, the remuneration of the employee, as well as the situation of the employee (level of income of the household, etc.).

The employment contract does not automatically end when the employee reaches the retirement age. The employee can continue to work. However, the employee will not benefit from illness-related benefits as from that age.

The employment contract may not validly stipulate that the contract will end when the employee reaches retirement age.

However, the employer can terminate the employment contract with a reduced notice period.¹⁴³

§ 8

VIII. TAXATION

§ 8.1

A. What taxes must be paid by the employer and employee, at what rates, and which taxes must the employer withhold from wages?

§ 8.1(a)

Overview

Employers are legally obliged to withhold taxes when salaries are paid out to employees. These payments are called *wage withholding taxes*.

The amount of the wage withholding tax is determined by the Royal Decree implementing the Belgian Income Tax Code. It is based on progressive scales and takes into account the personal situation of the employee. The tax basis is the gross salary after payment of the social contributions due by the employee on his or her own salary.¹⁴⁴

¹⁴³ Art. 37/6 of the Act of 3 July 1978: the notice period amounts to maximum 26 weeks when the employer terminates the contract for open-ended term and the contract will actually terminate at the earliest on the first day of the month following the month during which the employee reaches the pension age.

¹⁴⁴ See hereunder.

Said wage withholding tax is an advance on the final tax due by the employee after the income tax return is filed.

The final personal income tax is paid every year by the employee and is calculated based on the following progressive scales:¹⁴⁵

Annual Taxable Income (Amount in EUR)	Tax Rate
Under 8,680	25%
8,680 to 12,360	30%
12,360 to 20,600	40%
20,600 to 37,750	45%
Above 37,750	50%

§ 8.1(b)

Expatriate Workers

Depending on the circumstances, expatriate workers are subject to non-resident or resident income tax in Belgium. Non-resident taxpayers are subject to Belgian tax on their Belgium sourced income while resident taxpayers are taxable on their worldwide income.

Belgium has signed numerous bilateral tax treaties by virtue of which the power to tax income is allocated. In most circumstances, double taxation will be avoided on the basis of such treaty. In the event that no treaty is in force, double taxation could arise since Belgian income tax law contains some “catch all” provisions.

§ 8.1(c)

Social Contributions

Some deduction and/or deduction may be imputed for family charges on these amounts.

Social security contributions are due at a rate of 13.07% by the employee on his or her gross salary. At this gross amount, the social contribution due by the employer at a rate of 35% must be added. These rates are flat, so there is no cap on them.

An expatriate worker may not be subject to Belgian social contributions, depending on the amount of time he or she spends on the Belgian territory for job purposes.

¹⁴⁵ These income rates are applicable for income year 2014; tax year 2015 (Article 130 of the Income Tax Code). Please note that these rates have to be increased with communal and regional taxes.

§ 8.2

B. Are there specialized tax or pension requirements for expatriates?

§ 8.2(a)

Introduction

As such, there are no specific requirements regarding expatriates (other than the tax requirements applicable to any resident or non-resident worker). However, the Belgian administrative circular letter dated August 8, 1983¹⁴⁶ lays down a special tax regime for foreign executives who come temporarily to Belgium for employment purposes.

This special regime implies the recognition of the status of non-resident taxpayer by the Belgian tax authorities. The rationale behind this regime is to reduce the employment cost for the employer of expatriates assigned in Belgium. For this purpose, the taxable compensation for these expatriates does not include the reimbursement of costs and expenses properly attributable to the employer and the proportional portion of the compensation pertaining to work performed outside Belgium.

Different conditions have to be met to benefit from this special regime especially; the expatriate may not be a Belgian national and may not have his or her tax residency in Belgium.

An expatriate is considered to be a non-resident taxpayer for Belgian income tax purposes, irrespective of the fact that he or she effectively—although momentarily—resides in Belgium. If normal rules were applied, such expatriate would be treated as a Belgian tax resident.

If a change of circumstances occurs during the assignment of the expatriate, and his or her center of economic, social and family interest is located in Belgium, the tax authorities have the right to withdraw the benefit of the expatriate tax regime.

An expatriate is taxed on his or her Belgian source of income exclusively and not on his or her worldwide income. This means that foreign source income is not taxable in Belgium. Nonetheless, this status does not preclude the country of source from taxing a non-Belgian source income or the country of the expatriate's residence from taxing these same revenues. Since the expatriate is not considered a Belgian citizen, he or she does not benefit from the protection given by Belgian bilateral tax treaties.

Moreover, an employer can reimburse all additional costs and expenses of the expatriate that result from his or her recruitment or transfer to Belgium. These costs and expenses are regarded as “costs and expenses borne by the employer,” and, therefore, the reimbursement by the employer is exempt from Belgian income tax. These costs can be either recurring or nonrecurring.

The total compensation of the expatriate must be allocated between the work performed in Belgium and the work performed abroad. As explained above, the portion of work performed abroad is exempt from Belgian income tax.

¹⁴⁶ Ci.RH.624/325.294.

§ 8.2(b)

Formalities

The application of the regime implies the employer's filing of a one-time application with the Adjunct Director of the "*Services Etranger*" in Brussels. This application must be filled in within six months by a simple letter in the beginning of the month following the month in which the employment assignment starts in Belgium.

§ 8.2(c)

Pension Requirements

Mandatory Belgian legislation with regard to employee complementary pension schemes (Law of April 28, 2003) does not apply to foreign employees/expatriates who are temporarily sent to work in Belgium and who have not concluded an employment contract with a Belgian employer. Whether these foreign employees/expatriates can or have to remain affiliated to the foreign pension scheme depends on the specific provisions of this pension scheme. If the foreign employer continues paying contributions to this pension scheme, the tax treatment of these contributions is determined by the tax legislation of the country in which the foreign employer is established.

If there is an employment contract between a foreign employee/expatriate and a Belgian legal entity, the foreign pension scheme in principle will no longer apply to the Belgian employment relationship. If the Belgian legal entity is affiliated to the pension scheme, mandatory Belgian legislation with regard to employee complementary pension schemes applies. The tax treatment of the contributions to this pension scheme is specified in Belgian tax legislation.

§ 9

IX. INTELLECTUAL PROPERTY

§ 9.1

A. Who owns intellectual property created during the employment relationship?

Belgian intellectual property (IP) law grants different ownership rights depending on the form of the intellectual property involved.

§ 9.1(a) Patent

The employer and the employee are free to set forth any IP rights transfer clauses in the employment contract (or in a separate agreement).

Except where an agreement expressly states otherwise, invention is understood as follows:

- **Work invention:** invention developed inside the worker's attributions, as described in his or her job description and while using the resources of the employer. This kind of invention is in principle owned by the employer.

- **Free invention:** invention made by the employee on his or her own, with his or her own means and outside his or her attributions. Free invention is owned by the employee.
- **Dependent invention:** invention of hybrid type. Dependent invention is owned by the employee, although ownership of it is still debated in case law.

In any event, the ownership right on the invention always belongs to the inventor (natural person).

§ 9.1(b)

Copyright

Property rights on works created by the employee at work belong in principle to the employee. The transfer of such rights to the employer is possible if there is an explicit written authorization in the contract (or separately in another agreement) and only if the creation of the work falls within the scope of the employment contract or statute.

Moral rights on works always belong to the creator/author (natural person), yet partial transfer is authorized by law for determined, quantified, and specific materials.

§ 9.1(c)

Trademark

Trademark always belongs to the natural person and/or legal entity on behalf of which the trademark is registered.

§ 9.1(d)

Computer Software

Under Belgian law there is a legal presumption of transfer of IP rights on the computer software to the employer if the software is created in the employee's exercise of his or her job or following the instructions of the employer, unless otherwise agreed.

§ 9.1(e)

Database

Under Belgian law, a database can be protected either by copyright or by a *sui generis* right. The Belgian Copyright Act stipulates a legal presumption of transfer of IP rights on the database to the employer if the database is created in an employee's execution of his or her job, unless otherwise agreed.

According to the *sui generis* right system, IP rights on a database belong to the producer, meaning the person who invests in the creation of the database (in most cases, this is the employer).

§ 9.1(f)

Design

Design created in an employee's execution of his or her job belongs to the employer, unless otherwise agreed.

§ 9.2

B. What are the primary means that employers use to prevent theft of trade secrets?

Noncompetition clauses (conditions set forth in Article 65 § 1 Law on contracts of employment), as well as confidentiality clauses (during and after the contract term) are quite common under Belgian law.

Furthermore, Article 17 Law of July 3, 1978, provides that:

During the contract or after its termination, the worker is obliged (...) to refrain from:

- a. Disclosing trade secrets or business secrets, as well as any personal or business confidential information of which he or she was aware in the course of his or her employment;
- b. Engaging or cooperating in any act of unfair competition.

In addition, the worker is obliged to return the working tools in good shape and condition that he or she had received it.

Moreover, article 309 Belgian Penal Code sets forth that:

The one who communicates to others maliciously or fraudulently the secrets of his or her workplace (during or after the term of his or her employment) is punishable by imprisonment of three months to three years and fine from 50 euros to 2,000 euros.

Therefore, if an employee breaches confidentiality clauses, the employer can seek the following sanctions:

- compensation based on the employment contract if the contract contains a confidentiality and/or noncompetition clause (or other specific sanctions written in the contract);
- immediate dismissal (serious misconduct, Art. 17 of Law of July 3, 1978 on employment contracts);
- criminal sanctions (from EUR 50 to EUR 2,000 fine and three months to three years of imprisonment, Art. 309 Belgian Penal Code);
- compensation for unfair competition; and
- compensation based on Article 1382 of Civil Code (general civil liability).

§ 9.3

C. After employment ends, what restrictions exist on the employer's ability to impose covenants not to compete or covenants not to solicit customers or employees?

The validity of noncompete clauses contained in employment contracts is subject to very strict rules (see above § 3.7).

In the absence of a (valid) noncompete clause in the employment contract, it is possible to have the employee sign a noncompete agreement after the termination of his or her employment contract.

Contrary to a noncompete clause contained in the employment contract, a noncompete agreement that is negotiated and concluded separately and after the actual termination of the employment contract is not subject to the strict conditions of the Belgian Employment Contracts Act of July 3, 1978.

The only important restriction on noncompete agreements that are concluded after termination of the employment is the freedom of trade and industry, as protected by, among others, the d'Allarde Decree of 1791. Therefore, the noncompete commitment should be "reasonable" and thus limited in time and geographically restricted to places where competition can be expected, limited to specific activities, etc.

This means that a noncompete agreement can be entered into with former employees regardless of the nature of the work they performed for their former employer.

In principle, a noncompete indemnity, included in a noncompete agreement entered into after the termination of the employment contract, is subject to social security contributions if it is concluded any time during the 12 months following the termination of the employment contract¹⁴⁷.

§ 9.4

D. What duties do employees have to their present and former employers with respect to intellectual property?

See § 9.2 above.

§ 10

X. CODES OF CONDUCT

§ 10.1

A. What requirements exist for a code of conduct governing employees?

Belgian law does not regulate codes of conduct.

¹⁴⁷ Art. 19 of the Act of November 28, 1969 regarding social security for employees, §1, al. 5.

§ 10.2

B. What whistleblowing protections exist?

In Belgium, there is no specific legal framework with respect to whistleblowing. However, whistleblowing systems must comply with the Act of December 8, 1992 on the protection of privacy with respect to the processing of personal data (the Data Protection Act of December 8, 1992). In this respect, the Belgian Commission on Privacy published a recommendation related to the implementation of whistleblowing systems and the necessary compliance of such systems with Belgian law.¹⁴⁸

According to the Privacy Commission, a company that wishes to implement a whistleblowing system must comply with several principles that can be summarized as follows:

- **Admissibility:** The implementation of the system must be justified by a legal or regulatory framework or, if there isn't one, by a legitimate interest of the company.
- **Loyalty, legality, and purpose:** The system may not impose an obligation to report misbehavior. Anonymous complaints must be prohibited, as a matter of principle. However, disclosure of the identity of the reporter (whistleblower) during the handling of the complaint is prohibited. It is only when the report is dealt with and that the complaint is considered justified or ungrounded that the result may be communicated to the employer.

The person handling the complaint must operate with sufficient discretion and independence and must be bound by a “professional secrecy” duty (and should be liable for any violation of this confidentiality duty). Furthermore, the reporter and the person accused must be protected against potential faults of the person handling the complaint.

- **Proportionality:** The whistleblowing system must remain complementary to the normal procedures of hierarchical control, and it can only concern facts that are sufficiently serious so that they require a report for the general interest or for good governance within the company.
- **Accuracy and precision:** The person handling the complaints must see to it that personal data that will be processed are accurate and precise.
- **Transparency:** The company willing to implement a whistleblowing system must inform the works council or, if there isn't one, the Committee for Prevention and Protection at Work or, if there isn't one, the trade union delegation. In addition, certain information must be communicated personally to employees (i.e., the procedure to be followed, scope of application of the system, etc.)
- **Security:** The whistleblowing system must provide guarantees that personal data are not processed for another purpose and that they remain confidential. In addition,

¹⁴⁸ Recommendation no. 1/2006 of November, 29, 2006 related to the compatibility of whistleblowing systems with the Act of December 8, 1992, related to the protection of the private life with respect to the treatment of personal data, published by the Belgian Commission on the Protection of Privacy and accessible at: http://www.privacycommission.be/sites/privacycommission/files/documents/recommandation_01_2006.pdf

personal data may not be exported to countries outside the European Union unless the level of protection of data in that country is similar to the protection offered in Belgium.

- **Rights of the participants:** All participants in the whistleblowing system benefit from the rights guaranteed in the Data Protection Act of 8 December 1992 (e.g., right to have access to the data and correct it if necessary).
- **Prior Declaration:** Such system must be reported to the Belgian Privacy Commission prior to its implementation.

§ 10.3

C. How are codes of conduct (including whistleblowing protections) enforced?

Belgian law does not regulate codes of conduct. Concerning whistleblowing protection, see discussion in § 10.2, above, which outlines the recommendations of the Belgian Commission on the Protection of Privacy.

§ 11

XI. EMPLOYMENT INFORMATION & PRIVACY

§ 11.1

A. What rules protect the privacy of data about employees?

§ 11.1(a)

Belgian Legislation

Under Belgian law, the processing of personal data is regulated by:

- Act of December 8, 1992 on the protection of privacy with respect to the processing of personal data (the “Data Protection Act”);¹⁴⁹ and
- Royal Decree of February 13, 2001 implementing the Data Protection Act.

The Data Protection Act defines *personal data* as any information related to an identified or an identifiable natural person.¹⁵⁰

In 2012, the EU Commission has proposed a new regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data

¹⁴⁹ This legislation has been modified to transpose the European Directive no. 95/46/CE of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *O.J.*, L 281 , 23/11/1995 P. 0031 – 0050.

¹⁵⁰ Art. 1, § 1 of the Data Protection Act of December 8, 1992.

(General Data Protection Regulation). This proposal is still being discussed at the level of the EU institutions (Parliament and Council) and should be adopted in 2015.

§ 11.1(b)

Scope and Concepts Used in the Data Protection Acts

Processing is “any operation or set of operations that is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of personal data.”¹⁵¹

The one responsible for the data processing is the natural or legal person, factual association, or the public authority that, alone or jointly, determines the purposes and means of processing of personal data.¹⁵²

The Data Protection Act applies to any processing of personal data, wholly or partly by automatic means, as well as to any processing of personal data, other than by automatic means, which are contained or intended to be contained in a filing system.¹⁵³

The Data Protection Act applies to any processing of personal data within the context of actual activities of a fixed establishment of the one responsible for the data processing on the Belgian territory or on a place where Belgian legislation applies based on international public law.¹⁵⁴ It also applies when the one responsible for the data processing is not permanently established on the territory of the European Union but processes the data using means located in Belgium, unless these means are used only for transit purposes.¹⁵⁵ If the latter, the one responsible for the data processing must appoint a representative in Belgium.

§ 11.1(c)

Legal Conditions of Data Processing

In accordance with Article 4 of the Data Protection Act, personal data:

- must be legally and loyally processed;
- must be collected for determined, explicit, and legitimate purposes and may not be later processed in a way that is incompatible with those purposes;
- must be appropriate, relevant, and not excessive with respect to the purposes of the processing;
- must be accurate and, if needed, updated; and

¹⁵¹ *Ibid*, Art. 1, § 2.

¹⁵² *Ibid*, Art. 1, § 4.

¹⁵³ *Ibid*, Art. 3, § 1. A *filing system* is any structured set of personal data that is accessible according to specific criteria, whether centralized, decentralized, or dispersed on a functional or geographical basis.

¹⁵⁴ *Loc. cit.* fn 109, Art. 3*bis*, 1^o.

¹⁵⁵ *Ibid*, Art. 3*bis*, § 2.

- must be kept in a form allowing the identification of the people concerned for a duration not exceeding what is necessary for the accomplishment of the purposes of the processing.

In addition, data processing may only be performed in a limited number of cases defined by law, i.e., in the following instances:¹⁵⁶

- when a person has given his or her consent to the data processing—as the Belgian Privacy Commission has stated lately,¹⁵⁷ it is doubtful whether an employee is able to give a consent freely while being in a subordinate relationship;
- when the data processing is necessary for the execution of a contract or the execution of precontractual measures;
- when the data processing is a legal obligation; or
- when the data processing is necessary for the accomplishment of the legitimate interest of the one responsible for the data processing of the third party to whom data are communicated, provided that the interest or the fundamental rights of the person concerned that are protected by the Data Protection Act do not prevail.

When respecting the above-mentioned principles, the employer may process data, except for certain sensitive data (e.g., data on race, political opinion, etc.),¹⁵⁸ or data related to an individual's criminal record¹⁵⁹ or health¹⁶⁰ (which are subject to a very strict regime¹⁶¹), since they may in principle not be collected or processed except in the very limited instances set out by law.

In addition, the employer must give specific information on the data processing to the person concerned: (1) the name and one responsible for the data processing; (2) the purpose of the data processing; and (3) the existence of a right to oppose the data processing for marketing purposes, as well as a right to access and correct the data, unless these data are not necessary for ensuring a loyal processing of these data.¹⁶²

Also, in most of the instances, the one responsible for the data processing will have to make a specific declaration to the Belgian Commission on Privacy.¹⁶³

¹⁵⁶ Art. 5 of the Data Protection Act of 8 December 1992.

¹⁵⁷ See recommendation no. 08/2012 of May 2, 2012 related to the control by the employer of the use of electronic communication tools on the workplace, p. 16, published by the Belgian Commission on the Protection of Privacy and accessible at http://www.privacycommission.be/sites/privacycommission/files/documents/recommandation_08_2012_0.pdf

¹⁵⁸ Act of 16 March 1971 on employment, art. 6: this provision prohibits the processing of data that discloses the racial or ethnical origin, political opinions, religious or philosophical convictions, trade union membership, sexual life, etc. of a person.

¹⁵⁹ Loc. cit., fn 110, Art. 7, § 1.

¹⁶⁰ *Ibid*, Art. 8, § 1

¹⁶¹ For example, personal data of a “judicial/legal” nature cannot even be processed with the consent of the employee.

¹⁶² Act of 16 March 1971 on employment, art. 9, § 1.

¹⁶³ Act of 16 March 1971 on employment, art. 17.

§ 11.2

B. What restrictions are there on electronic surveillance of employees and on the employer's ability to monitor use of computers, personal digital assistants (PDAs), telephones, or other technology?

§ 11.2(a)

Video Surveillance

Video surveillance is permissible only for specific purposes and subject to a number of specific conditions¹⁶⁴ related to the protection of the privacy of employees.

Video surveillance is only authorized to serve four categories of objectives, and the employer must explicitly define those objective(s) for which the video surveillance is intended. These categories are:

- security and health of employees;
- protection of company goods;
- production process control: the control may concern machines or the employees. If it concerns the employees, the control aims at improving the organization of work; and
- employees' work control: the work rules must be adapted beforehand and set out the modalities of video surveillance at the workplace.

In any event, the employer must comply with the specific procedure of collective and individual information of employees as stipulated in CBA No. 68.

The works council (or, in the absence thereof, the Committee for Prevention and Protection at work, or, in absence thereof, the trade union delegation, or, in absence thereof, all employees) must be informed about the following before the video surveillance is set up:

- the video surveillance objective pursued by the employer: if the objective is to check its employees, the works council must be consulted about the motives justifying this control. For this, employees must also be informed individually when the images are kept by the employer;
- whether or not the images will be kept by the employer: if they are kept, the employer may only use them in good faith and in conformity with the objective being pursued;
- the quantity and the location of the cameras; and
- the period of functioning of the cameras: the functioning of the cameras may be either temporary or permanent when the objective being pursued is for one of the following purposes: security, health, protection of company goods, or control of the process of production related to the machines. The cameras may only be used temporarily when the employer's objective is to check the employees' work or to check the process of production related to the employees.

¹⁶⁴ As set forth in CBA No. 68 of June 16, 1998,

Work rules must be amended accordingly if the introduction of video surveillance impacts the rights of the supervisory personnel.

Furthermore, a declaration must be made and submitted to the Belgian Privacy Commission.

If some cameras are located in a place open to other people than employees (e.g., a hall accessible to external visitors), the company will have to comply with additional conditions contained in the Act of March 21, 2007 on installation and use of surveillance cameras. These conditions are:

- the video surveillance must be announced by a specific signage or notice placed at the entrance of the place under surveillance;
- the recorded data may be kept for a maximum of 30 days; and
- a specific declaration must be made and submitted to the Belgian Privacy Commission.

§ 11.2(b)

Monitoring of Computers (E-mail and Internet), Telephone Use, and Other Technology

The monitoring of and use of computers (e-mail and Internet), telephone, and other technology is covered by pieces of legislation, as well as CBAs, some of which are summarized as follows:

- **Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms** protects each individual's right to privacy. This right to privacy is not absolute and a breach might be permitted if certain conditions are present (under principles of legality, finality, and proportionality).
- **Article 314bis of the Belgian Criminal Code** guarantees the privacy of (tele)communications. Eavesdropping, intercepting, or recording private (tele)communications during the transmission is prohibited, unless the consent of all participants is obtained.
- **Article 124 of the Electronic Communications Act of 13 June 2005** concerns interception of electronic communication of data. This Act prohibits: (1) gaining knowledge of the existence of data addressed to another person; (2) identifying the persons involved in the transmission; (3) gaining knowledge of the data; or (4) altering, deleting, revealing, storing, or making any other use of such data. Article 124 applies to stored communications as well as to communications in transmission. Article 124's prohibitions do not apply to: (1) data registration with the consent of all persons involved; (2) data registration solely intended to monitor the network's performance; (3) data registration performed in the legal business in order to retain evidence of a commercial transaction or other professional communication; (4) acts permitted by law; and (5) emergency situations.
- **The Data Protection Act of 8 December 1992** strictly regulates employers' processing of personal data. Under this Act, employers must notify the Privacy Commission of such processing, and noncompliance with the Act's provisions could result in criminal sanctions. Moreover, the employee whose privacy has been violated

could seek civil damages. In its recent recommendation No. 8/2012 of 2 May 2012, the Belgian Privacy Commission does not limit the employer's inspection of employee's e-mails to the prior consent of the employee before or during employment. According to the Belgian Privacy Commission, the employee cannot actually give consent freely within the context of an employment contract. Even though the prior consent of the employee is not required, the employer must have a legitimate objective justifying the checking of employees' e-mails. In addition, the means used by the employer to do this must be reasonable and proportionate. For instance, there must be plausible allegations or evidence that a legitimate interest of the company is put in danger by the employee.

- **CBA No. 81 of 26 April 2002 on the protection of the privacy of employees with respect to control of electronic communication data within a network** also governs the use of professional e-mails and Internet at the workplace. CBA No. 81 sets up specific rules and procedures when controlling private electronic data, e.g., data from e-mails (identity of the participants, size of the messages and attachments), visited websites, etc. It does not concern electronic data of which the professional character is not challenged (these data may be controlled by the employer), but only private electronic data. The employer must inform employees (or their collective representatives) beforehand about certain aspects of the control and monitoring that are only allowed for limited purposes. In principle, monitoring by the employer should be "statistical" in a first phase, and monitoring of individual employees is allowed only in a second phase and in accordance with the specific prior information to be given to employees. Any review of the content of the e-mails must comply with the parameters set forth by the Data Protection Act of December 8, 1992, Article 314*bis* of the Belgian Criminal Code, and Article 124 of the Electronic Communications Act of June 13, 2005.
- **Admissibility of evidence obtained in breach of the above-mentioned rules.** Evidence presented to the court should have been obtained lawfully. One of the basic traits of the law of evidence has always been that the court has to rule out the use of evidence that was illegally obtained. However, this opinion has changed significantly in recent years and has given way to the following premise: the mere qualification of evidence as unlawfully obtained does not necessarily rule out its use in court. Based on a landmark decision of the Belgian Supreme Court of Cassation on the admissibility of criminal evidence (the decision commonly referred to as "Antigoon"), a strong tendency in civil—as well as in criminal—case law exists in holding that unlawful evidence should only be discarded when: (1) a formal requirement to which a sanction of nullity is attached has been violated; (2) the unlawful gathering of the evidence has affected its reliability; and (3) the use of the evidence would violate the fair trial principle. Evidence unlawfully obtained is increasingly being admitted by Labor Courts to prove the existence of grave misconduct, but provided that the above-mentioned specific conditions are complied with. However, there is still case law rejecting evidence obtained in violation of the privacy rights of the employee.

§ 11.3

C. What restrictions apply to the export of data to related companies in the United States?

With respect to the transfer of personal data to countries located outside the European Union, it is in principle prohibited to transfer such data to a country not offering an adequate level of

personal data protection.¹⁶⁵ The Data Processing Act gives the Belgian government the possibility to maintain a list of countries that do not offer an adequate level of data protection.

The European Commission has issued a list of countries that offer an adequate level of protection similar to the level provided in the EU. The United States has been listed as one of the countries that offer such protection, provided that the data processor in the United States has adopted the Safe Harbor Principles. Also, if a country is not on this list, a transfer of data to that country is possible in limited cases set out in the Data Protection Act of December 8, 1992 (i.e., cases with consent, necessity for the conclusion of a contract in the interest of the person concerned, or for the execution of the contract between the person concerned and the one responsible for the data processing)¹⁶⁶ or by way of adding appropriate contractual clauses.

The European Commission has drafted model contractual clauses that offer sufficient safeguards as required by the EU Directive. By incorporating the model contractual clauses into a contract, personal data can be transferred to a data processor that is established in a country that does not ensure an adequate level of data protection.

§ 11.4

D. What information must the employer provide to employees before processing (e.g., collecting, storing, using, disclosing, etc.) their personal data?

Prior to or at the time of collecting personal data, the employer must inform the employee regarding: (1) the categories of data to be collected and processed; (2) the purpose for which the data will be used; (3) the identity of the person responsible for the data file.¹⁶⁷

§ 11.5

E. What access do employees have to records kept about them by the employer?

An employee has the right to access his or her personal data contained in the employer's records. In order to access this data, the employee must apply in writing and provide verification of his or her identity.

The employer must provide the requested data to the employee within 45 days of the request.

¹⁶⁵ Art. 21 of the Data Protection Act of December 8, 1992.

¹⁶⁶ Art. 22 of the Data Protection Act of December 8, 1992.

¹⁶⁷ Council Directive No. 95/46/EC of October 24, 1995 on the protection of individuals with regard to the processing of personal data. Note that the person responsible for the data file must provide certain other information to the employee, including the recipients (or categories of recipients) of the data and the existence of the rights to access and rectify the data.

An employee also has the right to request (free of charge) the correction or deletion of his or her personal data contained in the employer's records. The correction or deletion must be made within one month following the request.

§ 11.6

F. What record-retention duties does the employer have with respect to information about employees?

Belgian law requires an employer to retain several types of “personal social documents” relating to its employees in order to comply with its obligations towards tax authorities, social authorities, and its employees.

The following *personal social documents* must be retained by the employer:

- individual accounts;
- general and special personnel register;
- employment contracts for students or interns; and
- employment contracts for employees who work from home.

The employer must keep these documents for a period of five years.¹⁶⁸ Noncompliance with these obligations can result in criminal sanctions.

§ 12

XII. REPRESENTATION OF WORKERS

§ 12.1

A. Do workers have a freedom of association and representation?

Employees have freedom of association, which is one of the most important legal principles contained in the Constitution.¹⁶⁹ This fundamental right includes the right to become a member of a union organization. Employees may not be forced to become members of a union organization.¹⁷⁰

¹⁶⁸ The start date of the five-year record retention period is as follows: (1) for the special and general personnel register: the date of the last mandatory registration; (2) for individual accounts: the expiration of the period for keeping this document; (3) for the student contract: the day following the end of the execution of the contract. The starting date is not indicated for interns and for those who work from home.

¹⁶⁹ Arts. 26 and 27 of the Constitution.

¹⁷⁰ Labor Tribunal of Antwerp, 22 April 2008, G.R., 08/2354/A; Labor Tribunal of Nivelles, 18 April 2008, G.R. 08/970/A and 08/971/A.

§ 12.2

B. How may workers obtain trade union representation?

The right to obtain employee representation actually depends on the workforce. Belgian law requires employers in the private sector to hold *social elections* to establish a works council and/or a committee for prevention and protection at work (CPPW). The CPPW monitors issues of workplace safety and health and seeks to protect the workplace environment. (See discussion in § 12.4(c) below.) The objectives of the works council is to be informed of the company's economic, financial and employment issues; to be consulted on a range of matters, including terms and conditions of employment, training, use of technology, work policies and collective redundancies; and to play a decision-making role with respect to a limited number of matters, such as designation of auditors. (See discussion in § 12.4(a) below).

Companies employing more than 100 employees are required to establish a works council and a CPPW, while enterprises employing 50 to 100 workers are required to establish only the latter¹⁷¹. The social elections occur every four years during the same period, during which employees will elect representatives for the works council and CPPW. The next elections will be held in May 2016.

The obligation to organize social elections depends on the workforce at the level of the technical business unit. The technical business unit corresponds to a kind of “factual undertaking.” The assessment of what constitutes a technical business unit is based on economic and social criteria. If there is any doubt between those two types of criteria, the social criteria prevails. A single legal entity may therefore comprise several technical business units if these units are sufficiently economically and socially independent from one another. Several legal entities could also constitute one single technical business unit if all those units depend on each other and actually function together as one undertaking.

The social elections process must be started when the average workforce during the calendar year preceding the year of the social elections amounts to at least 50. Each union organization communicates a list of candidates. The employees' representatives in the CPPW and the works council are elected among the list of candidates filed by the union organization in the framework of the social elections. The process of social elections is strictly regulated.¹⁷²

The establishment of a trade union Delegation does not 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. In most joint committees, the members of the union delegation are designated by the union organization. The threshold for setting up a union delegation can vary from one joint committee to another. The procedure must be started by one union organization once the conditions for setting up a joint committee are met.

¹⁷¹ These companies might have the obligation to set up 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.

¹⁷² Act of 4 December 2008 on social elections.

§ 12.3

C. Are there workers who, by law, must be represented by one or more trade unions?

There are no workers who, by law, must be represented by a trade union. However, all workers can be represented by a member of a trade union, except for management. The members of the union delegation negotiate the CBA at company level. Such CBAs apply to all employees, regardless of whether or not they have joined a union.

§ 12.4

D. What is the role of unions or works councils on a day-to-day basis?

There is a clear distinction in the role of the works council, the CPPW, and the union delegation.

§ 12.4(a)

Works Council

The works council is the forum where the employer informs the employees' representatives about social matters, i.e., matters that relate to employees, working conditions, or employment perspectives. The employer must also inform the employees' representatives about the economic, business, and financial situation of the company. The employees' representatives must be able to assess the situation of the company.

The works council must also consult the employees' representatives about any decision or intention that could have an impact on employment. Consultation means that the employees' representatives have the right to issue an opinion and make counterproposals. However, the employees' representatives have no veto right. Management retains the decision-making power.

As a matter of principle, the works council has no codetermination rights. The works council has the right to make decisions only on a limited number of matters, such as the designation of the auditors.¹⁷³ The works council is composed of representatives from both the management and employees' representatives.¹⁷⁴

The works council meets every month to follow up on the development of the company with respect to employment matters. There is an informal expectation that the works council can meet only once during the period July-August. The works council also meets every quarter to discuss economic and financial matters. In addition, the works council meets every year in the presence of the auditors to discuss and comment on the annual accounts and have better insights in terms of company positioning and evolution. Shortly after the social elections, the new members of the works council must be provided with basic information containing a set of economic and financial information with respect to the employer. The yearly informational meeting aims to obtain updated information about the employer.

¹⁷³ Art. 156 of the Belgian Companies Code.

¹⁷⁴ Those who have been elected in the framework of the social elections.

The works council must be summoned any time the employer intends to make decisions or has made decisions that have an impact on employment matters.¹⁷⁵

§ 12.4(b)

Trade Union Delegation

The trade union delegation is considered a “claiming” body. The trade union delegation monitors the employer’s observance and application of labor regulations, CBAs, and company work rules. As a result, the trade union delegation plays an important role in preventing and settling individual and collective conflicts. The trade union delegation assists individuals in their disputes with the employer.

The trade union delegation is also the body that negotiates working conditions with the employer. CBAs concluded at company level are negotiated with the trade union delegation. However, such CBAs are signed by the permanent secretaries from the union organizations. In practice, the members of the union delegation usually also sign CBAs, but their signature has a purely moral value.

The employer must seek the consent of the trade union delegation on several topics, such as overtime justified by temporary increase of work or the use of interim workers.

The trade union delegation takes over some competencies of the works council if there is no works council.¹⁷⁶ The trade union delegation is exclusively composed of employees who have been designated by the union organizations represented within the company. There is no legal timeframe for meeting among members of the trade union delegation. The delegation meets as many times and as often as required.

§ 12.4(c)

Committee for Prevention and Protection at Work (CPPW)

The CPPW monitors issues of workplace safety and health and seeks to protect the workplace environment. The Committee is composed of representatives from management and employees, respectively, and a prevention advisor. The Committee meets every month. If the employer has no works council or trade union delegation, the CPPW takes over some competences of these two bodies.¹⁷⁷

§ 12.5

E. What is the scope of the employer’s duty to bargain?

There is no statutory duty to bargain. However, there is a practice to bargain every two years on the working conditions that will apply for the next two years. Such negotiations usually take place in the framework of the agreement concluded on the same topic at the level of the joint committee.

¹⁷⁵ See § 15.5 below.

¹⁷⁶ Art. 24 of CBA No. 5.

¹⁷⁷ Art. 65bis, Art. 65ter, Art. 65quater, Art. 65quinquies, Art. 65sexies, Art. 65septies, Art. 65octies, Art. 65novies, Art. 65decies, and Art. 65undecies of the Act of 4 August 1996.

§ 12.6

F. Must the employer pay for time spent on union business or allow leaves for union business?

The time spent by employees' representatives in meetings of the works council, CPPW, trade union delegation, or for the preparation of those meetings is considered working time. It is not considered overtime, even when the daily or weekly limit are exceeded as a result of such meetings. Employees are entitled to their normal remuneration for that work they did for those meetings and can in principle not seek overtime pay.

Different rules¹⁷⁸ apply concerning the permitted duration of those activities depending on the representation body. However, as a matter of principle, the employer must provide the employees' representatives with the time they need to perform their union activities. Some provisions set forth the maximum time for some union activities, such as union trainings.

§ 12.7

G. What restrictions exist on picketing, strikes, lockouts, and secondary action?

Only in certain identified sectors is the employee's right to industrial actions limited or restricted.¹⁷⁹ The term *industrial actions* refers to all measures the employee can undertake to put pressure on the employer with the aim of obtaining concessions, withdrawing measures, or revoking decisions.

§ 12.7(a)

Strikes

The strike is the most common type of industrial action. There is a strike when a group of employees temporarily refuse to carry out their normal work against the will of the employer.¹⁸⁰ However, there is no strike when the employees refuse to work overtime.¹⁸¹

Since the abolition in 1921 of the prohibition to strike, there has been complete freedom to hold strikes in Belgium. In 1991, Belgium ratified the European Social Charter, which sets forth the right to strike (and the right for the employer to lockout). Since this ratification, the strike is considered by case law as a fundamental right, despite the fact that Belgian law contains no specific provision in that respect to confirm this.

The employer has in principle no course of action against those on strike:

¹⁷⁸ The Act of September 20, 1948, the Royal Decree of November 27, 1973, National CBA No. 9 and possible sector-level CBAs for the Works Council; the Act of August 4, 1996, the Royal Decree of May 3, 1999 and possible sector-level CBAs for the Health and Safety Committee; and sector-level CBAs for the Trade Union Delegation.

¹⁷⁹ Act of August 19, 1948 on public interest work in periods of peace.

¹⁸⁰ R. Thonon, « La grève, le droit et le pouvoir judiciaire », in *La doctrine du judiciaire ou l'enseignement de la jurisprudence des juridictions du travail*, Brussels, Larcier, 1998, 120-122; R. Blanpain, *Labour law and industrial relations in Belgium*, Brugge, Vanden Broele, 2008, 381, n° 865.

¹⁸¹ R. Blanpain, *Labour law and industrial relations in Belgium*, Brugge, Vanden Broele, 2008, 381, n° 865.

- **No injunction or cessation:** The employer may not obtain a court injunction to obtain the cessation of the strike, except for rare exceptions (e.g., abuse of the right to strike,¹⁸² which is hardly recognized by case law, and has only been recognized once when the workers of the National Railway decided to strike on the day of the wedding of the then Prince Philippe).
- **Even if procedural rules are violated:** In most joint committees, rules and procedures have been agreed upon concerning how the right to strike is organized. The union organizations must in principle respect a *notice period* before starting a strike. However, there is no sanction when such rules are not respected. In addition, the Belgian Supreme Court of Cassation considers that no legal provision prohibits an employee from participating in a strike that is not recognized by a trade union organization.¹⁸³ Hence, the employer may not obtain an injunction to stop a strike based on the fact that the applicable procedure has not been respected.

The strike has some important consequences:

- **Impact on the remuneration:** The employer has no obligation to pay the employee's salary for the time of a strike. The employer also has no obligation to pay the salary to the employees who cannot work because of a strike, even if they are not taking part in the strike.¹⁸⁴ However, employees are entitled to the normal remuneration if they cannot work because of a decision of the employer. If there is a strike, the employees can be paid their normal remuneration only if they can prove that they worked as normal during a strike.
- **Prohibition of interim workers:** An interim agency may not place or keep interim workers at the service of the employer when there is a strike.¹⁸⁵ If the interim worker continues to work despite the interim agency's notification about the strike and about its decision to withdraw the interim worker from where he or she is working, the interim worker concerned is then considered to have a fixed contract with the user.

¹⁸² There is an abuse of the right to strike if the strike does not seem the best way to reach the aimed goal, if it is not necessary to reach this goal, or if the damage caused to the employer by the strike is not proportional to the benefit that might be gained by the employees (Pres. Civ., Antwerp, 1 December 1999, *Chr. D.S.*, 2000, p. 443).

¹⁸³ Cass., December 21, 1981, *Pas.*, 1982, I, p. 531.

¹⁸⁴ Art. 27, 2° of the Act of July 3, 1978.

¹⁸⁵ Art. 19 of CBA No. 108 of July 16, 2013 related to temporary work and interim work.

The employer may not enter into an agreement for engaging employees to replace those on strike.¹⁸⁶ This prohibition does not apply to external subcontractors. In other words, suppliers, customers, or any other third party can still continue to provide their services to the employer during a strike (e.g., suppliers may load and unload their products at the employer's premises, and the employer can continue to use the services of service providers insofar as the service agreement complies with legal conditions in this respect).

§ 12.7(b)

Limitations on the Right to Strike

The right to strike does not mean that every form of industrial action is allowed. Employees must also respect the rights of the employer as well as of other third parties, such as the right to use property, the right to work, etc.

In principle, the employer may seek the cessation of certain actions or assaults committed by employees, e.g.:

- **Picketing/Occupation of company or sit-ins:**¹⁸⁷ - when the employees take control of the premises and refuse access to management.
- **Acts of violence and/or destruction of material:** when the employees damage equipment or products of the company. The sabotage of equipment is also a criminal offense. The employer could seek damages insofar as the reality and the extent of the damage can be proven and evaluated with a certain precision. It will be up to the employer to gather evidence of the damage suffered. Any fines to which the employees concerned would be condemned will not be paid to the employer.

Sequestration of clients/management: when employees block or sequester some members of the management to exert pressure on the management. The sequestration constitutes a criminal offense. As a consequence, a lawsuit could be brought before the President of the Tribunal of First Instance to obtain an injunction against the identified perpetrators of the sequestration. The employer cannot seek a general injunction; rather, it must be specific to the identified perpetrators. Fines may also be imposed on the perpetrators of criminal conduct.

§ 12.7(c)

Lockouts

Lockouts can validly be applied by employers in exceptional circumstances. There are no legal provisions governing the conditions for such right. However, based on case law, it appears that lockouts can only be implemented if justified by *force majeure* or *exceptio non adimpleti contractus* (exception of an unperformed contract).¹⁸⁸ Employees could seek

¹⁸⁶ Art. 11ter of the Act of 3 July 1978.

¹⁸⁷ B.Adriaens, D. DeJonghe, *De rechterlijke tussenkoms bij stakingen. Een analyse van de rechtspraak inzake de oktoberstakingen tegen het generatiepact*, *J.T.T.*, 2006, pp. 69-80; F. Saelens, S. Marquant, *Stakingen en stakingspiketten, een stand van zaken*, *Or.*, 2002, 134-137; President of the Civil Court Brussels, 9 June 1992, *J.T.*, 1993, 315; President of the Civil Court, Liège 3 January 1996, *J.L.M.B.*, 1996, 311; President of the Civil Court Bruges, 10 December 1997, *TWVR*, 1997, 172; President of the Civil Court Liège, 15 May 1995, *A.J.T.*, 1994-1995, 540; President of the Civil Court Brussels, 26 September 2001, *Chron. D.S.*, 2002, 220-222; President of the Civil Court Liège, 18 June 1998, *J.T.T.*, 1998, 447.

¹⁸⁸ Cass., 7 May 1984.

damages corresponding to their salary if the employer applied a lockout in a situation where such measures were not justified.

§ 12.8

H. How are disputes with union-represented workers or with unions resolved?

Typically, disputes with unions or union-represented workers are discussed between management and the trade union delegation with an aim of resolving them. If no agreement or conciliation is reached in those discussions, the trade union delegation can suggest to the employees that a strike be held. If no agreement is reached between the employer and the trade union delegations, the dispute can be brought before the conciliation office of the joint committee.

The employee concerned can also bring the dispute to court and be assisted in that framework by union representatives. This service is usually reserved for employees who belong to unions. The employer in principle has no information with respect to the identity of the employees who are union members, but it knows the number of employees who belong to them.

§ 13

XIII. WORKPLACE SAFETY

§ 13.1

A. What general health and safety rules apply in the workplace?

The employer must take all necessary steps to ensure the safety and protect the physical and mental health of its employees, including, e.g., temporary employees and interns.

Necessary steps include: (1) implementing risk prevention measures;¹⁸⁹ (2) providing workers with information and training; and (3) implementing appropriate policies and procedures.

The required steps to safeguard employees' health and safety will vary by employer. Each employer must evaluate, within the context of the nature of its business: (1) the risks to the health and safety of its employees (and other persons covered by this legislation such as interns or temporary staff); (2) provide preventative policies and procedures; and (3) evaluate a worker's ability to implement the appropriate health and safety measures when the employer assigns tasks to him or her. Each employer must adapt its measures in light of past experiences, changing circumstances, and work procedures.¹⁹⁰

Employers also must:

¹⁸⁹ The Belgian Act of 4 August 1996 on the wellbeing of employees specifies the general risk prevention principles on which preventative measures must be based.¹⁸⁹

¹⁹⁰ Art. 5, § 2 of the Belgian Act of August 4, 1996, on the well-being of employees.

- Prepare specific reports on labor accidents involving workers (“notification to social inspectorate” and/or “work accident form”¹⁹¹).
- Provide training sessions on security matters to all employees (including those newly hired, temporary workers, etc.).¹⁹²
- If the company employs an average of over 50 employees, arrange for election of a CPPW.¹⁹³ (See discussion in §§ 12.2 and 12.4(c) above). The role of this representative body (composed of employer and employee representatives who are elected every four years during the social elections) is to involve the staff in risk-prevention actions and to contribute to and to promote a healthy and safe working environment. The CPPW also has a general advisory function with respect to 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 wellbeing. The CPPW also takes over some information and consultation duties in the absence of a works council or trade union delegation.
- If certain thresholds are met (e.g., number of employees), the employer must have an Internal Service for Prevention and/or 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’ wellbeing.

§ 13.2

B. What kinds of specialized workplace safety rules apply in certain industries?

Additional specialized workplace safety rules can apply depending on the industry sector. For instance, safety and protection measures (e.g., providing protective clothes) exist for blue-collar employees working in the cleaning sector. These measures must be discussed in the CPPW, in accordance with the necessities of the tasks to be performed and with advice from the competent bodies.¹⁹⁴

§ 13.3

C. What compensation is provided for workplace injuries and illnesses?

Under Belgian law, all employers must be insured against workplace injuries. In the event of an accident at work or on the way to or from the workplace, the employee has the right to medical, surgical, pharmaceutical, and nursing allowances, to be paid by the employer’s insurance company or the Fund for Work Accidents.¹⁹⁵

¹⁹¹ Art. 26 of the Belgian Royal Decree of March 27, 1998, on the well-being of employees.

¹⁹² Arts. 17 and 21 of the Belgian Royal Decree of March 27, 1998, on the well-being of employees.

¹⁹³ Art. 49 of the Belgian Act of August 4, 1996 on the well-being of employees..

¹⁹⁴ Art. 5 of CBA of May 5, 1993, concerning workplace security, concluded at the level of Joint Committee No. 121 and applicable to companies in the cleaning sector.

¹⁹⁵ Art. 28 of the Act of 10 April 1971 on work accidents.

Incapacity to work on account of workplace injury is partially covered, at least during the first month of incapacity (see however specific rules for blue-collar employees, §6.2. above), by the provisions governing guaranteed salary during work incapacity.

If the work incapacity persists after the period covered by the guaranteed salary, two situations must be distinguished:

- **In the event of temporary incapacity:** the worker will, in principle, receive 90% of his or her average daily salary during the temporary incapacity.
- **In the event of a permanent incapacity:** the indemnity will take the form of an annuity.

In both of these situations, the expense is borne by the employer's insurance company or the Fund for Work Accidents.

It should also be noted that periods of incapacity for longer duration than the period covered by the guaranteed salary are also governed by the Disease Insurance Act of 14 July 1994. This legislation governs the indemnification by the social security of employees suffering an incapacity of work. The indemnification is subject to the respect of strict conditions. Indeed, the employee must have ceased performing his or her work, and the incapacity must be at least 66%. Allocations for work incapacity must be at least 60% of the lost salary (with a maximum limit fixed by law) during the first year, and 65%, 55% or 40% (depending on whether the employee has dependents, is living alone, or is in cohabiting couple) starting in the second year of incapacity.¹⁹⁶ Save in certain exceptions, in principle, the worker will not be able to cumulate the indemnities paid to him/her at the expense of the employer's insurance company or the Fund for Work Accidents (see above) and the indemnities paid by the social security based on the Disease Insurance Act of 14 July 1994. However, if the amounts granted based on the Work accidents legislation are inferior to those granted based on the Disease Insurance Act, the employee may ask to the competent social security authorities the payment of the difference between both indemnities at the cost of the social security.

§ 13.4

D. What reassignments or "light duty" is required for injured or ill workers?

If a work accident occurs or an occupational disease is contracted, resulting in a partial incapacity to work, the supervising medical doctor will advise the employer regarding how to restructure the employee's work according to his or her incapacity. This advice must be given in advance of the employee's return to work.

An employee's temporary complete incapacity to work does not automatically terminate the employment relationship. There is a specific procedure involving the doctors, providing that the employer must contemplate the possibility of giving the individual some accommodation with respect to the work to be performed under the employment contract.

¹⁹⁶ Disease Insurance Act of 14 July 1994, art. 87 and 93.

§ 14

XIV. TERMINATION OF EMPLOYMENT

§ 14.1

A. What grounds for dismissal are permitted?

Belgian law does not require the employer to have grounds to terminate an employment contract. In addition, employers are not required to ask a court or the works council for permission to dismiss, except in very exceptional circumstances (see §15.3 below).

However, even when exceptional circumstances exist requiring prior approval for the dismissal, 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.

§ 14.1(a)

General Notice Requirements

The employer who wants to terminate the employment contract unilaterally can serve a notice on the employee, establishing a period during which both parties continue to respect the contract and the contract terminates at the end of that period. Alternatively, the employer can terminate the contract with immediate effect and pay the employee an indemnity in lieu of notice (see §14.3 below), but it can only do so if the contract is terminated for reason of grave misconduct committed by the employee.

Grave misconduct is any serious fault that makes it immediately and definitively impossible for the parties to continue their collaboration. The employer must terminate the contract within three working days (any day except for Sundays and public holidays) as from the moment the serious fault is made known to it. The employer must detail in the dismissal letter the grave misconduct. Only the elements mentioned in the letter can be invoked before court if the employee challenges the dismissal for grave misconduct.

§ 14.1(b)

Categories Protected from Dismissal

Some employees benefit indeed from a special protection against dismissal if they are in a particular personal situation. Protected categories include, but are not limited to pregnant employees; employees who benefit from a system of time-credit (career interruption); and employees who have filed a complaint for violence or harassment at work.

If the dismissal takes place during the period of protection, the employee's dismissal is considered to be caused by the circumstance justifying his or her protection, so he or she is in principle entitled to an additional indemnity of six months' remuneration (on top of the normal indemnity in lieu of notice) if the employee is dismissed. Such protection indemnity corresponding to six months' remuneration is not due if the employer can prove that the dismissal was actually not because of the circumstances justifying the protection.

§ 14.1(c)

New Notice Requirements

A new law setting out a major exception to the principle that the employer does not need to

have grounds to terminate the employment contract entered into force on April 1, 2014. Since that date, employees having at least six months of service can request their employer to give them the reasons or grounds for their dismissal. Such request must be made in writing and delivered to the employer by registered mail within six months from the termination notice (if the employer provided a notice period to work), but no later than two months after the date of termination.¹⁹⁷

The employer who does not respond to this notice 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 open-term contract have the right to challenge before court the grounds for their dismissal if they believe the dismissal is blatantly unreasonable. It is "blatantly unreasonable" when a normal employer placed in the same situation would not have decided to terminate the employment contract. Depending on the situation, the judge can condemn the employer to pay an additional indemnity between two and 17 weeks of the employee's salary.¹⁹⁸

This indemnity and the two-week fine are calculated the same way as the indemnity in lieu of notice.

§ 14.2

B. Under what circumstances may the employee claim that the employer has breached its contract with the employee or that the employer has "constructively dismissed" the employee?

Any unilateral and significant change made by the employer to the essential elements of the employment contract amounts to "constructive dismissal" of the employee. If this occurs, the employee is entitled to the payment of an indemnity in lieu of notice.

The job position, place of work, working time schedule, and remuneration are usually considered essential elements of employment that may not be changed unilaterally.

The employer can invoke the theory of "constructive dismissal" only when the four conditions below are met:

1. there is a change to the contract, and the announcement of an intention to change it is not sufficient;
2. the change is unilateral (if the employee agrees to the change, there is no "constructive dismissal");
3. the change is significant and substantial; and

¹⁹⁷ Art. 4 of CBA No. 109.

¹⁹⁸ Blue-collar employees benefiting from a derogatory notice period regime cannot benefit from this indemnity. They still fall under the regime of abusive dismissal foreseen by former article 63 of the Act of July 3, 1978 on employment contracts (up to December 31, 2015) for the employees benefiting from a temporary derogatory notice period.

4. the change relates to essential elements of the employment contract.

In practice, employees are reluctant claim constructive dismissal, as it can be burdensome and risky: first to the employee must take the initiative of stating that the employer terminated the employment contract by having changed it, and then he or she must start a lawsuit before court to seek the payment of an indemnity in lieu of notice. However, if the court considers that the change is not significant or it does not relate to an essential element of the contract, the court will find that the termination does not result from the behavior of the employer, but from the behavior of the employee. The employee might then be ordered to pay an indemnity in lieu of notice to the employer.

Rather than claiming constructive dismissal, employees prefer seek judicial termination of the employment contract. The employee seeks the court to declare that the employer terminated the employment contract by changing it unilaterally. The judge will decide whether or not the contract is terminated. If the judge considers that the change does not justify the termination, the employment contract will continue to be valid. The employment contract remains valid and applicable during the judicial procedure. In practice, employees are often on sick leave during the judicial procedure.

§ 14.3

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

§ 14.3(a)

Generally

The employer wishing to terminate an employment contract with open-ended (indefinite) term (for both white- and blue-collar employees) may: (1) terminate the contract by serving a notice period during which the employee continues to work and at the end of which the contract automatically terminates; or (2) terminate the contract with immediate effect, without notice period, by paying the employee an indemnity in lieu of such notice. This indemnity is equal to the gross salary the employee would have earned during the term of notice that should have been given.

The employer may also terminate an employment contract—on grounds of serious misconduct—without notice period or indemnity in lieu thereof (see §14.1 above).

The employer wishing to terminate a fixed-term employment contract or contract for a specific task (see §3.4 above) must pay an indemnity in lieu of notice. The indemnity corresponds to the remuneration up to the expiry date of the contract. However, such indemnity is limited to a maximum of twice the remuneration corresponding to the notice period that would have been required if the contract had been entered into for an open-ended term. During the first half of the duration of the contract (with a maximum of six months), the contract can be terminated as if it were concluded for an open-ended term.¹⁹⁹ This new rule has been negotiated and put into place to compensate the abolition of the probationary period (see § 3.5 above).

¹⁹⁹ Art. 40, §2 of the Act of July 3, 1978, as modified by the Act of December 26, 2013, and Art. 15.

§ 14.3(b)

Notice Periods Prior to the Act of December 26, 2013

Concerning the length of the notice period (and corresponding indemnity in lieu thereof), an important distinction has to be made between blue- and white-collar employees. The Belgian Constitutional Court ruled on July 7, 2011 that the differences between blue- and white-collar employees in terms of notice periods and indemnification for sick leave were discriminatory towards blue-collar employees. The Court ordered the Belgian government to remedy this discrimination by July 8, 2013. After many discussions with the social partners, i.e., union organizations and employers' federations, the Minister of Employment elaborated and submitted a Bill on July 5, 2013. This Bill became the Act of December 26, 2013 on the alignment of the distinctions between blue- and white-collar employees in terms of notice periods, indemnification for disability leave, and outplacement. This new Act entered into force on January 1, 2014.

The Act of December 26, 2013 is really seen as a revolution to the rights with respect to employment termination. This Act impacts mainly the length of the notice period that must be served for employment contract termination.

Before that Act came into force, for white-collar employees whose gross annual salary (including all benefits in kind) exceeds EUR 32,254, the length of the notice period had to be agreed between parties after the contract had been terminated. If the parties failed to reach an agreement on it, the notice period had to be determined by a judge, but it could not be less than three months per started period of five years of service. To do this, the judge had to base his or her calculation on the reasonable amount of time for the employee to find another equivalent job while taking into account the employee's remuneration, length of service, age, and position.

§ 14.3(c)

New Notice Period System Under Act of December 26, 2013

The new Act lays down the length of the notice period for employment contract termination. The system is totally adapted and is better proportioned with the length of service. The new system applies to both blue- and white-collar employees.²⁰⁰

Length of service	Notice period (in weeks)
<3 months	2
<6 months	4
<9 months	6
<12 months	7
<15 months	8
<18 months	9
<21 months	10
<24 months	11
<36 months	12

²⁰⁰ Derogatory notice periods might apply for employees of Joint Committees No. 109, 124, 126, 128.01, 128.02, 140.04, 142.02, 147, 301.01, 311, 324, 330 up to December 31, 2017. As from January 1, 2018, above-mentioned new rules will apply. However, for some blue-collar employees within the Joint Committees No. 124 and 126, derogatory notice periods might be applicable for an indefinite period, even after December 31, 2017, provided that specific conditions are fulfilled.

Length of service	Notice period (in weeks)
<48 months	13
<60 months	15
	+ 3 weeks per started year exceeding 5 years
>19 years but < 20 years	60 weeks
>20 years but < 21 years	62 weeks
	+ 1 week per additional started year of service

The new Act also governs the situations of employees who entered into service before January 1, 2014. The application of the new system to the termination of contracts for blue-collar employees would have caused a significant increase of the costs. A compromise has been found in this respect and applies to both blue and white-collar employees. For all employees who entered into service before January 1, 2014, the notice period is equal to the sum of two notice periods, i.e., the notice period for the years of service up to December 31, 2013 (Part 1), plus the notice period calculated based on the new system for the years of service starting January 1, 2014 (Part 2).

- **Part 1:** The notice period with respect to “Part 1” is determined as if the employment contract had been terminated on December 31, 2013. For blue-collar employees, the length of notice period with respect to the years of service up to December 31, 2013 is determined at the level of the joint committee. For white-collar employees whose annual gross salary on December 31, 2013 did not exceed EUR 32,254, the notice period amounts to three months per started period of five years of service. For white-collar employees whose annual gross salary on December 31, 2013 exceeded EUR 32,254, the notice period is equal to one month per started year of service, with a minimum of three months.
- **Part 2:** A new length of service is considered started as from January 1, 2014 and the notice period is determined based on the table mentioned above. If the employee is dismissed during the fourth trimester of 2014, the notice period is seven weeks. If the employee is dismissed during the second trimester of 2015, the notice period is nine weeks.

§ 14.3(d)

Reduced Notice Periods

A reduced notice period can be applied when the employer terminates an open-ended contract shortly before the employee reaches the pension age. The reduced notice amounts to maximum 26 weeks, and can be applied to the extent the contract would terminate at the earliest on the first day following the month during which the employee will reach the pension age. The pension age is currently set at 65. If the employee reaches the age of 65 years on April 10, 2015, the employer can serve a notice period of 26 weeks at the earliest in the week of October 27, 2014.²⁰¹

²⁰¹ If the notice period would be served on October 27, 2014, the notice period would start on Monday, November 3, 2014, and the notice period would last 26 weeks (or six months). The notice period would end on Sunday, May 3, 2015 (see §7.5 above).

§ 14.3(e)

Outplacement Programs Requirements

Employees whose notice period amounts to 30 weeks are entitled to be placed on an outplacement program regardless of their age. When the employer terminates the contract by serving a notice period, outplacement is to take place during the employee's days off for job seeking, which he or she is entitled to.

When the employer terminates the contract by paying an indemnity in lieu of notice, the indemnity calculation can be reduced by four weeks. This four-week calculation is considered to cover the value of the outplacement that corresponds to one-twelfth of the total annual gross salary of the employee, with minimum EUR 1,800 and maximum EUR 5,500. The indemnity amount is to be calculated *pro rata* for part-time employees.

Up to December 31, 2015, employees can waive their right to outplacement; if such waiver is given, the employer may not reduce the amount of the indemnity in lieu of notice by the above-mentioned four weeks.

Employees who are not entitled to outplacement based on the length of their notice period are entitled to outplacement if they have reached the age of 45. No amount can be deducted from their indemnity in lieu of notice.

The employer must not offer outplacement to employees who are dismissed for grave misconduct or employees who can access retirement or unemployment and are granted a company bonus.

§ 14.3(f)

Formalities for Notice of Termination

No formal requirements are prescribed for the immediate termination of an employment contract. However, in order to avoid any (subsequent) problems with evidence regarding the termination date, it is advisable to hand over to the employee a dismissal letter, a copy of which he or she would sign "for receipt." If the employee refuses to sign it, the letter should be sent to him or her by registered post (the same day), "confirming the meeting at which the employment contract was terminated with immediate effect."

If the employer terminates the contract by serving a notice period during which the employee has the obligation to continue to work, the notice can be given only by registered letter or by having a writ served by a bailiff. The letter sent by registered mail is considered to have effect from the third working day of the postmarked date. The notice period served starts to run the Monday following the week during which notice was given. Hence, the letter of notice must be sent at the latest on Wednesday so that the notice period can start to run on the following Monday.

For it to be valid (regardless of whether it is served to a blue- or a white-collar employee), the written notice must indicate:

- the duration of the notice period; and
- the starting day of the notice period.

§ 14.4

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

§ 14.4(a)

Calculation of the Indemnity in Lieu of Notice

The indemnity in lieu of notice is calculated based on the actual annual salary of the employee.

All benefits such as a company car, meal vouchers, group insurance, portable PC, mobile phone, etc. have to be taken into account.

For many years, there have been disputes with respect to defining the “actual annual salary” in the context of variable remuneration: (1) remuneration of the last 12 months; or (2) average amount over a period from two to five years. The new 2013 Act clarifies the situation and mentions that the actual annual salary is composed of the variable salary of the last 12 months. Unfortunately, it is still unclear whether it refers to the variable salary paid or earned in the period of 12 months preceding the termination of the contract. *Variable remuneration* encompasses bonuses, commissions, or any other premium granted to the employee in addition to the fixed salary.

Stock options are also part of the actual annual salary.²⁰² However, the valuation of such benefit is still disputed. Most jurisdictions consider that this benefit cannot be valued with certainty so that the relevant amount equals zero.²⁰³ In most cases, the indemnity in lieu of notice will correspond to a certain number of months (for Part 1), and to a certain number of weeks (for Part 2) as defined in 14.3.(c).²⁰⁴

The indemnity in lieu of notice must be paid immediately.

§ 14.4(b)

Social Security and Tax Implications

The indemnity in lieu of notice is considered remuneration that is subject to social security contributions. The indemnity is also subject to tax advance payment (tax withholding). The indemnity is taxed separately and is not included in the global remuneration of the year of termination; the indemnity is taxed at the average tax rate of the individual concerned for the income tax year preceding the date of termination.

²⁰² Cass, February 4, 2002.

²⁰³ However, one could consider that case law pursuant to which the value of stock options cannot be determined is no longer relevant because the Act of April 6, 2010 on corporate governance sets out the methodology for determining the value of the compensation package including stock options.

²⁰⁴ Employers are not obliged to convert the entire period into months. One month does not correspond to four weeks. The rule is that 13 weeks correspond to three months. In practice, the indemnity is calculated in two steps: the first step relates to the period expressed in months (for white-collar employees) and in days or weeks (for blue-collar employees); and the second to the period expressed in weeks.

§ 14.4(c)

Additional Termination-Related Benefits

In addition to the indemnity in lieu of notice, employees whose contracts of employment are terminated are in principle also entitled to the following amounts:

- **Thirteenth-month salary:** also known as “end-of-year premium,” is paid *pro rata temporis* (i.e., in relation to the number of months actually worked during the year of the dismissal).²⁰⁵
- **Vacation pay upon departure:** is paid at the moment the employee leaves the company. It applies only to white-collar employees, but is not applicable when the employee is not subject to Belgian social security. The vacation pay upon departure corresponds to the number of days of vacation/annual leave accrued by the employee for the year concerned but that will not be taken as a result of the termination, as well as the entitlements to vacation/annual leave already accrued for the following year. The philosophy of the system of vacation/annual leave is that the employee is entitled to this leave based on the work performed over the preceding calendar year. It also means that employees are building up their rights to annual leave for the following year.
- **Public holidays:** An employee whose employment contract is terminated is in principle entitled to his or her normal 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. There are some exceptions to this principle.
- **Outplacement Programs:** As mentioned above, outplacement must be offered to employees who are entitled to a notice period of at least 30 weeks, regardless of his or her age. Employees aged 45 or older must also be offered outplacement assistance if they are dismissed by the employer, on condition that they have performed at least one year of service. This obligation is not valid if the employee has already reached retirement age. Such outplacement assistance costs around EUR 5,000 depending on the service provider the employer opts for. (See § 14.3(e) for discussion related to outplacement program requirements).
- **Commissions:** See § 5.5 above.
- **Noncompete indemnity:** See § 3.7 above.
- **“Pre-pension” or unemployment with bonus paid by the employer:** See § 14.4(e) below.

§ 14.4(e)

Special Rules Concerning “Pre-pension” Termination Benefits

“Pre-pension,” which has been renamed “unemployment with bonus paid by the employer,” is a regime accessible to older employees in the event that they are dismissed. Pre-pension is 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

²⁰⁵ This indemnity is not due in the event of dismissal on grounds of serious misconduct.

monthly basis. Both indemnities are paid as from the end of the notice period or period covered by the indemnity in lieu thereof up to the age of 65 years of that employee.

The indemnity paid by the employer actually corresponds to half of the difference between the unemployment allowance and the last net remuneration of the employee. In this respect, it should be stressed that such last net remuneration is to be calculated on the gross remuneration of the employee, which is capped. The employer can of course agree to increase the amount of the monthly pre-pension indemnity to be paid up to the age of 65 years. For the sake of completeness, it should be stressed that the pre-pension indemnity is adapted each year to the evolution of the consumption price index.

The pre-pension regime is accessible to employees who are aged 60 or older and who can demonstrate they have had a professional career of at least 35 years for male employees or of 28 years for female employees. As from January 1, 2015, the period of professional career for male employees will be 40 years, and 31 years for female employees, and each is to be increased by one year every year up to January 2024.

The pre-pension age can be lowered through a CBA concluded at the level of the joint committee or of the company under several conditions. In most companies, employees aged 58 who are dismissed are given the right to access the pre-pension regime insofar as they have had a professional career of 38 years. As from January 2015, the right to pre-pension as from the age of 58 for employees having a long career will disappear, and the above-mentioned normal regime will apply. There are some other specific derogations that might still apply.

One of these derogations is that in the framework of a restructuring, the age eligible for unemployment with bonus can be lowered according to a CBA insofar as the company is recognized by the Federal Minister for Employment as a company undergoing restructuring or difficulties. The decision to lower the age is made based on the advice of a special commission.

The age can be lowered to 55 years if the company is recognized as a company undergoing restructuring. Under specific conditions, the age can even be lowered to 53 years if the announcement of the restructuring is made in 2014.

§ 14.5

E. Are there rights to severance pay and how is severance calculated?

See, generally, discussion on pay in lieu of notice in § 14.3 above.

If the employer decides to terminate the contract with immediate effect, the employee is entitled to an indemnity in lieu of notice. A contract concluded for a fixed-term or specific task can in principle only be terminated with payment of an indemnity in lieu of notice (see applicable exceptions discussed in §14.4 above).

When the employee invokes the theory of constructive dismissal, and the judge agrees with the employee's analysis/arguments, the employee is entitled to an indemnity in lieu of notice. (See discussion in § 14.2 above). However, if the judge agrees with the analysis/arguments of the employee who sought the court for judicial termination of the contract, and the court consequently terminates it, the judge will condemn the employer to pay damages (and not an indemnity in lieu of notice) to the employee. These damages will be calculated by reference to the mechanism applicable to the calculation of the indemnity in lieu of notice.

§ 14.6

F. What reasons for dismissal/termination of contract are prohibited, and what remedies does the former employee have?

The employer may not base its decision to terminate the contract on discriminatory grounds (see §4.1 above).

The employer may not justify its decision to terminate the employment contract on grounds relating to union activities or any other grounds that justify the protection of the employee.

The dismissal is not null if it is based on prohibited grounds, but the employer will have to pay an additional indemnity depending on the grounds invoked/concerned. (See §14.1 above).

§ 14.7

G. How may former employees bring claims on behalf of other workers (i.e., a collective or class action)?

Former employees may bring claims against their employer. The statute of limitations stipulates one year from the end date of the employment contract. However, when the claim is based on a legal provision that has criminal sanctions,²⁰⁶ the statute of limitations stipulates five years.

Employees may not bring claims on behalf of their colleagues. As a matter of principle, the plaintiff must have standing to make the claim.²⁰⁷ Former employees can draft written statements or testimony to support their colleagues in their claims against the employer.

However, employees, including former employees, can be assisted by members of the union delegation. The union delegation can discuss the disputed issue with the management.

The employee can also be assisted and represented in court by the union organization. However, in such cases, the initiative of taking the case to court is taken by the employee concerned and not by the union organization.

In Belgium, union organizations have legal standing in limited circumstances. Hence, union organizations can initiate proceedings in a limited number of matters, i.e., those that relate mainly to CBAs. Even in those cases, the union organization must defend the interests of the employees and not their own interests. Here is an illustration of this: A company decided to grant the blue-collar employees white-collar status. A CBA was signed in that respect. The union organization representing blue-collar employees initiated a legal procedure against such CBA. However, the union organization was not supported by any employee as they were all happy to be promoted to white-collar employees. The court held that the union

²⁰⁶ Most provisions have criminal sanctions. See § 1.3 above.

²⁰⁷ Arts. 17 and 18 of the Judicial Code.

organization had no legitimate standing to initiate the procedure.²⁰⁸ The only reason for the union organization to sue was that it lost its affiliation fees.

§ 14.8

H. May employers compel employees to arbitrate claims of wrongful dismissal?

As a matter of principle, arbitration clauses included in the employment contract are null.²⁰⁹ Such type of clause is only valid if: (1) the employee is in charge of the daily management of the company or a division of the company; and (2) the employee's annual gross remuneration exceeds EUR 65,771 (amount for 2014).²¹⁰

Once the contract is terminated, parties can agree to submit their claim to arbitration. However, this is really unusual.

Such prohibition of arbitration clauses does not exist for the contracts concluded with independent contractors (i.e., self-employed individuals) who do not benefit from the protective labor law mechanisms.²¹¹

§ 14.9

I. What restrictions exist on obtaining a release of claims from a former employee?

Settlement agreements are common practice in Belgium. However, parties may not agree on a release of claims during the term of the employment contract.

When the employer has served the notice period for contract termination, or once the contract has terminated, the employee is no longer considered to be under the authority of the employer. So the employee recovers 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.

A settlement agreement never guarantees valid release of claims for rights that are considered as being of public order.

²⁰⁸ Labor Court of Appeal, Brussels, June 6, 2011, G.R. 2006/AB/49.285.

²⁰⁹ Art. 13 of the Act of July 3, 1978.

²¹⁰ Art. 69 of the Act of July 3, 1978.

²¹¹ See § 1.5 above.

§ 14.10

J. 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. There is no specific procedure to follow to ensure the enforceability of a settlement agreement. The employee does not need to be assisted by “external counsel” (such as a legal advisor or union delegate) in order for the settlement agreement to be valid.

The settlement agreement must comply with the requirements of the Civil Code. It must be agreed in writing.²¹² Scholars consider that a valid settlement agreement must contain reciprocal concessions.²¹³

§ 14.11

K. What are the best practices employers should observe regarding dismissals of employees?

§ 14.11(a)

Record of Employee Performance

Employers should have written records of the employee’s shortcomings or of inadequate behavior in general. Employers should thus send at least an e-mail or letter to confirm their conversations when such topics are discussed with employees.

In addition, evaluations should be conducted with care. Evaluation forms should contain the actual assessment of the employment and should thus mention negative aspects when there are any. Managers usually want to avoid any conflict and are often too positive in making and filling out the evaluations.

In practice, employers tend to complain about an employee’s behavior when the time comes for dismissal, but there is usually not a single element in writing to confirm such reason for dismissal; even evaluations do not contain or refer to shortcomings that have been discussed with employees in the past.

§ 14.11(b)

Conduct to Avoid

There is no pleasant way to dismiss an employee, and it is important not to mistreat the employee by conduct such as:

- informing the employee about the dismissal decision by sending him or her an SMS or e-mail; and

²¹² Art. 2044 of the Civil Code.

²¹³ Cass., October 31, 2005, *J.T.T.*, 2006, 131; H. DE PAGE, *Traité élémentaire de droit civil belge*, V, n° 483, 3°.

- informing the employee in the canteen in the presence of colleagues about the decision that he or she will be dismissed.

Managers are usually attentive when it comes to corporate branding, but they are often not prepared enough for conversations concerning dismissals that could cause damage to the company's brand or reputation. Employers should encourage managers to think about the way they would like to be treated should they be dismissed by their own boss.

§ 15

XV. COLLECTIVE DISMISSALS (LAYOFFS), BUSINESS CESSATION & SALE OF A BUSINESS

§ 15.1

A. What rules apply to collective dismissals?

§ 15.1(a)

Generally

The employer who envisages proceeding to a collective dismissal must follow a strict procedure to inform and consult with the employees' representatives and with certain authorities and organizations.²¹⁴ The procedure must be started when the employer has the definite intention to proceed with a collective dismissal.

This procedure is laid down in various regulations, including the Act of February 13, 1998, commonly known as the "Renault Act."²¹⁵ The specific procedure of information and consultation of employees in case of a collective dismissal only applies to companies employing on average more than 20 employees during the calendar year preceding the dismissals.²¹⁶ The concept "company" refers to the technical business unit,²¹⁷ but the procedure also applies to any division employing on average more than 20 employees when the number of dismissals at that level reaches the threshold described below.

A *collective dismissal* within the meaning of the regulation concerning information and consultation in case of a collective dismissal is a dismissal for one or more reasons that is not related to the person of the employee and that affects an uninterrupted period of 60 calendar days if:

- at least ten employees will be dismissed in a company employing more than 20 but less than 100 employees during the calendar year that precedes the collective dismissal;

²¹⁴ This procedure is laid down in various regulations: (1) CBA No. 9 of 9 March 1972 regarding the Works Council; (2) CBA No. 24 of 2 October 1975 with respect to the procedure of information and consultation of employees in case of collective dismissal; and (3) the Royal Decree of 24 May 1976 on collective dismissal, the Act of 13 February 1998 containing various provisions in favor of employment.

²¹⁵ Save to the extent the company is considered to be undergoing restructuring and wants to reduce the unemployment-with-bonus allowance (former pre-pension regime) age.

²¹⁶ Article 3 of CBA No. 24, Article 2 of the Royal Decree of 24 May 1976, and Article 63 of the Act of 13 February 1998.

²¹⁷ See § 12.2 above for this concept.

- at least 10% of the workforce will be dismissed in a company employing an average of at least 100 but less than 300 employees in the calendar year preceding the collective dismissal; and
- at least 30 employees will be dismissed in a company employing an average of at least 300 employees in the calendar year preceding the collective dismissal.

§ 15.1(b)

Procedures

The applicable procedure actually comprises three different phases: a first phase of information and consultation, a second phase of notification of the intention and negotiation of a social plan, and a third phase that consists of implementing the collective dismissal.

§ 15.1(b)(i)

Phase I: Prior Information and Consultation

The employer who envisages proceeding with a collective dismissal has an obligation to inform and consult about such a contemplated project with the employees' representatives, i.e., the representatives of the employees in the works council or the trade union delegation. The information and consultation must relate to the possibilities to prevent or limit the envisaged collective dismissal, as well as to the possibilities to alleviate the consequences thereof.²¹⁸

If no such works council or trade union delegation exists, the information and consultation must take place with the CPPW. (See discussion on CPPW in § 12.2). If there is no works council, trade union delegation, or CPPW, the information and consultation must take place with the personnel or with their representatives.²¹⁹

The employer must meet with the employees' representatives to discuss the possibility to avoid the envisaged collective dismissal or to reduce its impact. The employer must be able to give evidence that it met the employees' representatives concerning the envisaged project. It must allow the employees' representatives to ask questions with regard to the envisaged dismissals, and it must allow them to develop arguments in that regard or to make counterproposals. Finally, the employer must have examined and responded to these questions, arguments, and counterproposals.²²⁰

The first phase is best terminated by a report (minutes) of the meetings signed by all members in which they declare that they have been adequately and properly informed and consulted. However, the employees' representatives are not always willing to sign such a report. As a consequence, it is important to keep all the minutes regarding the first phase so that the first phase can be terminated unilaterally by the employer if the employees' representatives refuse to sign such report.

§ 15.1(b)(ii)

Phase II: Notification of the Envisaged Collective Dismissal

As soon as the first phase is completed, and if the employer intends to persist with the

²¹⁸ Art. 6 of CBA No. 24.

²¹⁹ It is highly recommended to get the employees to appoint representatives to conduct the procedure.

²²⁰ Art 66, § 1 of the Act of February 13, 1998.

contemplated collective dismissal, it must notify this intention (still no formal decision on it yet) by registered letter sent to the Director of the Sub-Regional Employment Office of the city/municipality where the company is located.²²¹

The employer sends the employees' representatives a copy of this notification of the envisaged collective dismissal. A copy of this document must also be posted up on the company's premises and a copy has to be sent by registered post to: (1) the employees who are concerned by the envisaged collective redundancy; (2) and whose employment contracts have already been terminated at the time of the notification's posting up as well as; (3) the trade unions; and (4) the President of the Joint Committees. A copy must also be sent to the President of the Federal Public Service Employment.

The social plan is usually negotiated during this phase.

§ 15.1(b)(iii)

Phase III: Dismissals

The employer may not dismiss the employees envisaged by the collective dismissal before the expiry of a period of 30 days, starting from the beginning of Phase II. The period of 30 days can be extended to a maximum of 60 days except for when the closure of a plant or company is contemplated. It should be stressed that the period of 30 days can be shortened in the event of closure.²²²

§ 15.1(c)

Collective Dismissal Indemnity

Employees are entitled to a collective dismissal indemnity during a certain period of time starting at the end of the period covered by the indemnity in lieu of notice and ending seven months after the dismissal date. Employees are entitled to that indemnity during a maximum period of four months. The indemnity amounts to half of the difference between the last net monthly salary and the unemployment allowance. When the employee has found another job, the collective dismissal indemnity may be, under certain conditions, equal to the difference between the net salary before dismissal and the new net salary.²²³

§ 15.1(d)

Special Obligations

Additional obligations or indemnities can be laid down in CBAs concluded at the level of the joint committees. The employer might also have the obligation to follow a specific procedure in the event of multiple dismissals.

§ 15.2

²²¹ This notification must indicate (Royal Decree of May 24, 1976, art. 7): (1) the name and address of the company; (2) the nature of the activities of the company; (3) the competent joint committee under which the company falls; (4) the number of employed employees; (5) the reasons for the dismissal; (6) the number of employees who qualify for dismissal, classified by expertise, age, professional category, and department; (7) the period during which the dismissals will take place; and (8) the proof of the fact that the employer has respected the information and consultation procedure.

²²² Art. 10 of the Royal Decree of May 24, 1976, regarding collective dismissals.

²²³ CBA No. 10.

B. Are there special rules that apply when an employer ceases operations?

§ 15.2(a)

Generally

Additional obligations apply if the contemplated restructuring qualifies as a closure.²²⁴ The Act of June 26, 2002 on company closure only applies to companies having employed an average of at least 20 workers (both blue-collar workers and white-collar workers counted all together) during the previous calendar year.

Pursuant to this Act, a company or a division is closing down when the two conditions below are met:

- there is a final termination of the main activity (of the company or a division); and
- 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 above), the following formalities must be complied with. The employer must give additional notice²²⁵ when the decision (and not the intention) to close down the company or the division is made. These notices are given to:

- the employees through the putting up of a duly dated and signed notice that is visibly posted up on the company's premises;
- the works council or, if there is none, the trade union delegation; and
- the following authorities by means of a letter sent by registered post, fax, or e-mail, on the day the aforementioned notice is posted up:
 - the President of the Management Committee of the Federal Public Service Employment, Labour and Social Dialogue (i.e., the Ministry for Employment);
 - the Regional Minister for Employment;
 - the Regional Minister of Economy; and
 - the Plant Closure Fund,²²⁶ which must receive specific information.

²²⁴ Act of June 26, 2002.

²²⁵ The information relates to the following: (1) the name and address of the company; (2) the nature of the activities of the company; (3) the anticipated date of cessation of the main activity of the company; (4) a full list of personnel employed on the date of notification, indicating for each worker: (a) full name and address; (b) date of birth; date of commencement of employment; (c) statutory notice period the worker is entitled to; (d) family status; and (e) his or her job within the company and any other job he or she is able to execute.

²²⁶ Article 20 of the Royal Decree of 23 March 2007.

§ 15.2(b)

Closure Indemnity

Employees are entitled to a closure indemnity. The closure indemnity is composed of two parts: the first part relates to the years of service and amounts to EUR 153.80²²⁷ for each completed year of service of the employee, with a maximum of EUR 3,076, and the second part relates to the age of the employee. For each completed year of service after the age of 45, the employee is entitled to an additional EUR 153.80.

§ 15.2(c)

Special Obligations

At the level of the joint committee also, additional conditions or obligations may be imposed.

§ 15.3

C. Are certain employees protected from collective dismissal?

§ 15.3(a)

Generally

Protections against dismissal are in principle lifted for employees who are dismissed in the framework of a collective dismissal. However, the protection against dismissal of social election candidates is not automatically lifted in case of collective dismissal. This aspect is discussed in the framework of the negotiations for the social plan. For a general overview of social elections, see discussion in §12.2 above.

§ 15.3(b)

Protection for 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. The protection implies that they may not be dismissed, except in two limited situations: (1) economic and/or technical reasons approved by the joint committee; or (2) serious misconduct recognized as such by the Labor Court.

All decisions of the joint committee must be made unanimously, but the joint committee is composed of representatives from both the union and employers' federations. In practice, the unions' representatives often refuse to recognize the economic or technical reasons if no (generous) social plan has been negotiated. In the absence of any decision from the joint committee, the protection may not be lifted for those individuals.

There is one important exception to this principle, and that is in the event of closure. If there is no decision from the joint committee, the employer can proceed with the dismissal of protected employees whose contract is terminated in the framework of a closure of the company or a division of the company. Protected employees might challenge that they have been dismissed in the framework of a closure of division.

²²⁷ Amount per December 1, 2012.

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.

Violation of the protection procedure results in the obligation for the employer to pay a protection indemnity to the employee. The protection indemnity consists of two parts: the fixed part and the variable part.

The fixed part amounts to two, three, or four years of the employee's salary depending on the employee who would have a seniority of less than ten years, between 10 and 20 years, or more than 20 years, respectively.

The employee is also entitled to a variable part if he or she has asked that he or she 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 candidate (June 2016 for candidates to the social elections of 2012).

This indemnity is not paid on top of the regular indemnity in lieu of notice but replaces it.

§ 15.3(c)

Protection for Trade Union Delegation Members

Members of the trade union delegation also benefit from a protection against dismissal. They may not be dismissed because of their mandate, and there is a specific procedure of dismissal to be followed. If the procedure is not properly followed, the employer will have to pay the trade union member a protection indemnity. The amount of the protection indemnity depends from one joint committee to another, but usually amounts to one year's salary. This indemnity is additional to the regular indemnity 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.

§ 15.4

D. How long does the collective dismissal process usually take?

The collective dismissal procedure is composed of three main phases. The law only specifies the length of phase II and, to a certain extent, Phase III, which relates to the execution of the dismissals. See discussion of Phases I, II and III in §15.1(b) above.

The duration of Phase I depends mainly on the willingness of the employees' representatives to cooperate. According to statistics with respect to restructuring announced in 2013, Phase I

lasts for an average of 86 days.²²⁸ Phase II lasts, according to the law, a maximum of 60 days. Phase III in principle ends two years after the beginning of Phase II.²²⁹

§ 15.5

E. What rules govern the transfer of undertakings (including employment and labor agreements) when a business is sold?

§ 15.5(a)

Generally

Under Belgian law, the consequences of a transfer of undertaking are governed by CBA No. 32*bis*, which implements the European Directive of February 14, 1977 (“Transfer of Undertakings Directive”), addressing the harmonization of employees’ rights in case of transfers of undertakings, businesses or parts of businesses.²³⁰ CBA No. 32*bis* stipulates that the Transfer of Undertakings Directive:

shall apply to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger. (...) There is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not this activity is central or ancillary.

The existence of a transfer of undertaking must be assessed in the light of the case law of the European Court of Justice since Belgian provisions implement a European directive. The question of whether or not there is a transfer of business that retains its identity is key and is often disputed.

§ 15.5(b)

Implications

The following mechanisms apply when there is a transfer of undertaking within the meaning of CBA No. 32*bis*.

§ 15.5(b)(i)

Automatic Transfer of Employment Contracts

In the event of a transfer within the meaning of CBA No. 32*bis*, the employees who are in scope of the transferred business are automatically transferred. This automatic transfer applies to persons employed immediately before the transfer by the transferor in the

²²⁸ Phase I lasts about 57 days when the most extreme situations are removed from the statistics with respect to the period from January 1, 2013 until December 31, 2013.

²²⁹ This results from the fact that the period of recognition as a company undergoing restructuring for unemployment with company bonus is limited to two years. Art. 18, §1 of the Royal Decree of May 3, 2007.

²³⁰ This Directive has been modified by the Directive No. 98/50 of June 29, 1998 and by Directive No. 2001/23 of March 12, 2001.

undertaking (or part of the undertaking) to be transferred.

The transferred employees keep their working conditions such as their length of service or remuneration. The extra-legal pension schemes are not automatically transferred, but the new employer must have a system similar to the initial one because the transfer may not justify a change of working condition.

§ 15.5(b)(ii)

Liability for Debts Existing on the Transfer Date

After the transfer date, the transferee becomes solely liable for all debts that originate after the transfer or that can only be claimed or that only exist after the transfer (e.g., vacation pay).²³¹ For debts already existing on the date of transfer (e.g., arrears of salary), the transferor and the transferee will both be liable²³² (*in solidum*). This implies that the transferor and the transferee can both be held liable for the entire debt.

§ 15.5(b)(iii)

Prohibition to Dismiss

The transfer (also the transferor or the transferee) may not form in itself a reason to dismiss. This stipulation does not prohibit that dismissals take place for economic, technical, or organizational reasons that imply changes to the employment situation.

The European Court of Justice is of the opinion that employees dismissed before the transfer took place must be regarded as still employed by the undertaking on the date of the transfer.²³³

§ 15.5(b)(iv)

Refusal of the Transfer by an Employee

The European Court of Justice considers that local law must govern the situation of employees who refuse to transfer.²³⁴

Belgian law does not explicitly indicate the fate of the employment contract if the employee refuses to transfer. However, since the contract is automatically transferred without any intervention of the employer and employees, the employees' contracts are transferred even if they refuse. As a consequence, the new employer could regard the employees' refusal to transfer as a resignation or could dismiss them for grave misconduct.

²³¹ This is the majority viewpoint.

²³² In the internal relationship between the transferor and the transferee, each party is liable for its part of the debt.

²³³ ECJ June 15, 1988, *Bork International and Others v. Foreningen af Arbejdsledere I Danmark*, case 101/87, <http://www.curia.eu.int>; ECJ 12 March 1998, *Jules Déthier Equipment SA and J. Dassyl, Sovam SPRL*, Case C-319/94, <http://www.curia.eu.int>.

²³⁴ E.C.J., December 16, 1992, *Chr.D.S.*, 1993, 105.

§ 15.5(b)(v)

Information and Consultation Obligations

In companies that have a works council, a trade union delegation, or a CPPW²³⁵ the employees' representatives must be informed about the intended transfer in due time and before any communication is issued about the intended transfer. The information provided to the works council must relate to the economic, financial, and technical reasons for the transfer. In addition, the employees' representatives must be consulted about the impact of the intended transfer on employment perspectives, organization of work, and employment in general.²³⁶

In companies that have no works council, trade union delegation, or CPPW the employer must inform the employees in scope about: (1) the date of the intended transfer; (2) the reasons for the transfer; (3) the legal, economic, and social consequences of the transfer; and (4) the impact of the transfer on employees and measures envisaged to minimize the impact on affected workers.²³⁷ In these companies, there is no obligation to consult with the workers with respect to the transaction itself.

§ 16

XVI. KEY TRAPS TO AVOID

§ 16.1

A. What are the five most common mistakes foreign employers make and what can be done to avoid them?

1. Failing to respect the strict language rules with respect to the communication with employees

A strict legislation applies with respect to the language applicable for the documents to be addressed to employees (see §3.3 above). These documents must be drafted in French or Dutch depending on the principal place of business of the company (not necessarily the same place as the place of the registered office). The principal place of business is where the employees actually carry out their work.

The European Union Court of Justice ruled on April 16, 2013 that the rules with respect to the obligation to conclude an employment contract in Dutch in the Dutch-speaking region is contrary to freedom of movement of workers guaranteed by EU law. The Court ruled that Belgian rules on the use of Dutch are too strict in a transnational situation, i.e., when an EU national moved from another EU country to Belgium to work.²³⁸

The solution would be to comply with the language rules and have a translation in English.

²³⁵ Act of August 4, 1996, art. 65*decies*.

²³⁶ Art. 11 of CBA No. 9,.

²³⁷ Art. 15*bis* of CBA No. 32*bis*,

²³⁸ ECJ, April 16, 2013, *Las/PSA Antwerpen*, n° C-202/11.

2. Dismissing an employee who benefits from a protection against dismissal without respecting the legal requirements/procedures in this respect

This is a typical mistake that can cost a lot of money to the employer since those employees benefit from a protection indemnity in the event of illegal dismissal. Indeed, for instance, all employees who are candidates to the social elections benefit from a special protection against dismissal, including those who are not elected.

The protection against dismissal applicable to the candidates to the social elections implies that the employee cannot be dismissed, except in two limited situations: (1) economic and/or technical reasons approved by the joint committee; or (2) serious misconduct recognized as such by the Labor Court. Violating the protection against dismissal results in the employer's payment of a protection indemnity that consists of two parts: (1) the fixed part amounting to two, three or four years of salary, depending on the employee who has a length of service within the company of less than ten years, between 10 and 20 years, or more than 20 years, respectively; (2) the employee is also entitled to a variable part if he or she has asked to be reintegrated in the company, and the employer has refused this reintegration. The variable part corresponds to the remuneration up to the end of the mandate for which the employee was a candidate (June 2016 for candidates to the elections of 2012).

In order to avoid such costs, one should always verify whether an employee benefits from any protection against dismissal and keep a list of all employees who were candidates to the social elections (see §§ 14.1 and 15.3 above).

3. Garden leave and other special statuses are not recognized under Belgian law

Some concepts present in other European countries, such as England's concept of "garden leave," do not exist under Belgian law.

In addition, CEOs do not benefit from a specific status. They are either occupied within the framework of an employment contract as any other employee or within the framework of a service agreement (independent relationship).

Under Belgian law, we do not know the concept of *employment at will*.

4. Risk of litigation if an employment contract is terminated

Either an employer should dismiss the employee on grounds of grave misconduct, or there is a serious risk of litigation. After the termination of the employment contract, both parties to the contract can start a judicial procedure against with respect to any issue related to the employment contract within a period of one year as from the termination of the employment contract. Even if the employee waits for the last day before the one-year period, his or her procedure will be admissible before a Belgian Labor tribunal.

There is also a risk of litigation if the collaboration is within the framework of an independent contractor, given the possibility of seeking an indemnity as if he or she were an employee (see §2.10 above). Independent contractors frequently threaten to claim the recharacterization of their contract into an employment contract when the contract is terminated, except when the contract is concluded between two legal entities as this recharacterization might have too severe tax implications

Therefore, it is advisable to conclude settlement agreements with employees, or the independent contractor after terminating their contract (especially when there could be an issue with the employee) by which both parties renounce their right to start a judicial procedure against each other.

5. Importance of agreements at the level of joint committees

There are a lot of rules laid down at the level of the joint committee. Most rules related to the employment relationship (including sometimes specific dismissal procedures) are also defined at the level of the joint committee. In this context, it is very important to be well-informed in this respect: an affiliation to an employer's federation can be a solution for receiving relevant information.

Our recommendation to avoid all these trips is to consult a lawyer specialized in employment law.