

2012 Social Elections What's new?

NEWSLETTER, 15 JULY 2011

With a certain sense of urgency, the Belgian Government has prepared three bills relating to the 2012 social elections. On 14 July 2011 these were passed by the federal parliament. Although the publication thereof in the Belgian Official Journal is still pending, we would already like to inform you now about the most important and new aspects.

In this Newsletter we will chronologically explain the procedural steps that *do* change with respect to the last social elections in 2008. Although these changes cannot be qualified as 'fundamental', it is best to become familiar with them given how important it is to very strictly respect the procedure. Therefore, the goal of this Newsletter is to assist you with this procedure in a practical manner.



We hope you enjoy the read!

As already announced during our seminar in January, we will organize a second seminar in September, during which we will focus on the different procedural steps. Therefore, mark your calendars on the following days:

- **Thursday afternoon 15 September 2011: in Dutch (at the Square Brussels Meeting Centre);**
- **Thursday afternoon 22 September 2011: in French (at our office in Brussels).**

You will receive our invitation for these seminars soon.

More info:

www.claeysengels.be
info@claeysengels.be

1 Concept new regulation

Since the last social elections in 2008, the legislator has opted to include almost all the relevant regulations in three different Acts; the first Act to determine the thresholds, a second Act to regulate the election procedure itself and a third Act to properly guide any legal disputes.

For the 2012 social elections an ecological approach was pursued by 'recycling' these three Acts. Indeed, the substance remains the same, apart from the references to the year 2008 and the changes mentioned below. First of all, this implies that the thresholds for the establishment of a works council and/or a committee for prevention and protection at work - and thus the obligation to start the social elections procedure - remain unchanged. Due to a lack of agreement between the social partners, the

threshold of 100 employees for the works council and of 50 employees for the committee for prevention and protection at work is maintained.

We would also like to remind you that, following the social elections in 2008, the Supreme Court interpreted the Act of 24 July 1987 *on temporary work, temporary employment and the posting of workers to users* in such a manner that it obliges the companies holding social elections to take the temporary workers into account for the determination of the number of mandates. It appears as if no legislative initiative has been taken to adapt the current rules in this regard. Consequently, this case law will remain relevant for the 2012 social elections.

2 What's new?

2.1 Day X-60: information that must be provided

With regard to the information that must be provided on day X-60, the law provides that the employer must inform, amongst others, about the nature, the areas and the degree of independence or dependence of the "seat" vis-à-vis the legal entity. The new Act completes this requirement for companies whose technical operating unit is composed of several legal entities. For those companies, this information must concern the independence or the dependence of *the legal entities vis-à-vis the technical operating unit*.

2.2 Day X-60, X-35, X: notification by registered letter to the trade unions or upload it through the FPS

In order to simplify the administration and to reduce costs, the Act provides that, from now on, the notices which should take place

on the dates X-60, X-35 and X should be sent by registered letter to the trade unions and, if applicable, the executives' organization (which used to be the only option) *or* that this can be replaced by uploading a copy of this notice.

The Federal Public Service Employment, Labour and Social Dialogue (FPS) provides a web application to the companies, which will each receive a private and secured access.

2.3 Day X

a) Provisional electorate lists: numbering of the voters

From now on, the provisional electorate lists which are communicated on day X, must contain a number for each voter per category of employees. This will thus make it easier to determine the total number of voters from these lists.

b) The notice on day X must mention a date

Given the fact that this was rather unclear in the past, the new Act specifies that the notice on day X should not be signed, but that it should, however, mention the date on which the notice is displayed.

2.4 Day X +40: display of the candidate lists or electronic posting

The candidate lists should be displayed by the employer on day X + 40 at the same place as where the notice was displayed on day X. However, as the display on day X can - under certain conditions - be replaced by an electronic post, the Act is modified in such a way that the same possibility is provided for the notice on day X+40.

2.5 Day Y - 11: "clean-up" of the electorate lists advances to day Y -13

In order to provide two days extra to the employers to hand over the election convocations to the employees on day Y-10 at the latest, the term to clean up the electorate lists is advanced from day Y-11 to day Y-13. Therefore, the employees who are no longer a part of your company, can already be deleted from the electorate lists at that time.

2.6 Day Y - 10 (convocation for the elections)

a) Employees not present in the company

The Act now provides an alternative for the mandatory registered sending of the convocation letters to the employees who are not present in the company on the day(s) of the delivery thereof. From now on, as an employer, you may also send this convocation letter by any other means (e.g. e-mail, fax, etc.), *on condition that* you have a proof of the fact that you have sent it, as well as the fact that it has been received by the employee concerned. If you do not receive such confirmation, the convocation letter must still be sent by registered letter at day Y-8 at the

latest.

b) One envelope for the election of the works council as well as the committee for prevention and protection at work

The convocation letter for the works council elections and the one for the elections of the committee for prevention and protection at work elections may now be sent in one single envelope.

c) In the event of a vote by letter

If the vote in your company is organized by letter, the new Act clarifies that the convocation letter may be given to the employees present in the company together with the ballot paper(s). However, in that case, the recipient should sign to acknowledge receipt.

For the employees who are not present, the president of the polling station must send the convocation letters and ballot papers by registered mail, as in the past. However, now only a single registered letter is sufficient in the event that the elections are held for both a works council and a committee for prevention and protection at work.

d) Additional listings on the convocation letter

From now on, the convocation letter should also mention the following: the date and the location of the elections and the polling station where the employee should register himself.

2.7 Day Y: elections

a) Suspicious ballot papers

The procedure to be followed by the president of the polling station in case of suspicious ballot papers is modified. From now on, each president must initial each suspicious ballot paper. Thereafter, depending on the president's decision, this ballot paper has to be assigned to the appropriate category.

b) Ranking of non-elected candidates

After ranking the elected candidates for the effective mandates, the Act provides that in a second round, both the substitutes as well as the non-elected candidates are ranked. After removing all elected candidates for the effective mandates, a new distribution of the list votes will thus occur after which they are added to the individual candidate votes.

c) Minutes at the closing of the voting operations

The annexes to the new Acts contain a template of minutes which the president of the polling station must use for his communication of the results to the FPS. Furthermore, as is also the case for the displays on days X-60, X-35 and X, this document may also be uploaded by means of the web application of the FPS. In that case, the employer must no longer send a copy to the trade unions and, if applicable, to the executives' organizations.

d) Electronic vote

In the event that the elections for the works council and the committee for prevention and protection at work take place at the same time, the obligation to use different magnetic cards for the electronic vote has been removed.

2.8 Term for the display of the notices: day Y + 17 / Y + 86

The new Act provides that the different notices which must be displayed, must only be displayed in the company until day Y + 17 included. However, a new notice must then be displayed indicating where all the different announcements can be consulted. Upon request, the employees can consult these announcements until day Y + 86 included.

There is one exception though. The results of the elections (on day Y+2) must continue to be displayed until day Y+86.

2.9 New managerial positions

For companies, in which new managerial positions are being created, the Act has been modified. In the event that these positions are being created once the list of managerial positions became final, the employer will now also be able to apply the specific modification procedure. Indeed, during the last social elections this was only possible for new positions created after the display of the elections' results.

2.10 Suspension of the voting operations

The voting operations can be suspended in two specific events (*i.e.* a strike of the majority of a certain category of employees or temporary unemployment of at least 25% of a certain category of employees). These two suspension possibilities are maintained, but the new Act now also explicitly provides that each representative trade union can request this (while, according to the law in the past, this was reserved for trade unions which already nominated candidates, which is only possible as from day X+35).

2.11 Complete or partial termination of the election procedure

The new Act thoroughly rewrites the procedure to be followed in the event of a complete or partial termination of the election procedure and also provides the necessary templates.

The complete termination is still possible if not a single candidate list is being filed for not a single category of employees (or if all filed candidacies were withdrawn or declared void by the court). The employer will have to take the decision to terminate the procedure and fulfill certain formalities (display of the termination announcement, sending to the FPS or an upload by means of the web application, sending a letter to

the trade unions and, if applicable, to the executive organizations unless the employer used the web application).

The partial termination falls apart in two hypotheses:

- not a single candidate list was filed for one or more categories of employees: in this event, the polling station of the category of employees with the biggest number of voters should fulfill different formalities on the evening before the convocation letters are being sent or handed over (*i.e.* draft and communication of the above-mentioned minutes in the same way as in the event of a complete termination);
- a single candidate list for one or more categories of employees and for which the number of candidates is less than the number of effective mandates to be awarded: in this case a polling station will be composed for this category and this polling station will have to draft the minutes and take care of its communication.

2.12 Protection against dismissal of the only candidate-employees' representative

In the event that there is only a single candi-

date in the running, no works council and/or committee for prevention and protection at work must be established. However, this candidate does enjoy the special protection against dismissal provided by the Act of 19 March 1991. In a decision of 4 April 2011 the Supreme Court ruled that such an employee is not considered as being elected. As a consequence, he would only enjoy a protection as a candidate-employees' representative (see also our [Newsflash of 1 June 2011](#) in this regard). This would mean that, if this employee was the only candidate during consecutive elections, as from the second election, he will only enjoy a protection against dismissal during a period of two years. The legislation now puts aside the Supreme Court's interpretation on this specific point by explicitly providing the same protection for a single candidate as for the effectively elected employees' representative (thus always for a period of four years).

2.13 Templates

Given the various modifications to the rules, the templates are also modified in function thereof. These modified templates are annexed to the new Acts and will thus have to be used for the 2012 social elections.

3 Claeys & Engels: your partner for the social elections

Our "*Social elections team*" assists our clients in preparing the time-consuming social elections proceedings. This assistance can be provided through different formats: *screening* of the structure of the company to determine the 'technical operating unit' and the other key definitions such as 'management staff', 'executives', etc.

We also offer a *day-to-day assistance* during the proceedings itself as well as *training* for the directors, decision-makers and team

members responsible for the organisation of the electoral proceedings.

Of course we also assist our clients with the conclusion of *agreements* with the unions and in case of possible *law suits* before the labour courts all over the country: disputes of the determination of the 'technical operating unit', 'management staff', 'executives', validity of candidates, nullity of the proceedings, etc.



Ius Laboris BELGIUM

CLAEYS & ENGELS

Brussels

Vorstlaan 280
1160 Brussels
Tel.: 02 761 46 00
Fax: 02 761 47 00

Liège

boulevard Frère Orban 25
4000 Liège
Tel.: 04 229 80 11
Fax: 04 229 80 22

Antwerpen

Commodity House
Generaal Lemanstraat 74
2600 Antwerpen
Tel.: 03 285 97 80
Fax: 03 285 97 90

Ghent

Ferdinand Lousbergkaai 103 bus 4-5
9000 Ghent
Tel.: 09 261 50 00
Fax: 09 261 55 00

Kortrijk

Ring Bedrijvenpark
Brugsesteenweg 255
8500 Kortrijk
Tel.: 056 26 08 60
Fax: 056 26 08 70

Hasselt

Luikersteenweg 227
3500 Hasselt
Tel.: 011 24 79 10
Fax: 011 24 79 11