Ius Laboris BELGIUM
CLAEYS & ENGELS

THE NEW DISMISSAL RULES APPLYING AS OF 1 JANUARY 2014

NEWSLETTER, 20 DECEMBER 2013

CONTENT:

Following its previous judgement of 8 July 1993, the Constitutional Court ruled on 7 July 2011 that the differences between blue-collar employees and white-collar employees with regard to *notice periods* and the first day of sick leave are discriminatory and, therefore, violate articles 10 and 11 of the Constitution. However, for reasons of legal certainty, the Constitutional Court granted the legislator two years until 8 July 2013 at the latest to clear away those differences in treatment and thus to create a *single employment status*. Although the IPA Act of 12 April 2011 was already a step in the direction of this single employment status, this Act was found "insufficient" by the Constitutional Court.

After intense negotiations with the social partners, the Minister of Work was finally able to present a "final compromise proposal" on 5 July 2013 and this was approved by the core of the Federal Council of Ministers.

The Act "*concerning the introduction of a single employment status for blue-collar employees and white-collar employees with regard to the notice periods and the* first day of sick leave *and related measures*" (hereafter called the SES Act), which was finally voted in the Chamber of Representatives on 12 December 2013 and approved by the Senate on 19 December 2013, has to be considered to be the implementation of this compromise proposition. The draft will now be presented to the King for signature. It will soon be published in the *Belgian Official Gazette*.

Given the fact that, in its judgement of 7 July 2011, the Constitutional Court only ruled on the discrimination with regard to the *notice periods* and the first day of sick leave, in essence, the SES Act only concerns these topics.

The other differences which exist between blue-collar employees and white-collar employees, for example, with regard to annual holidays, temporary unemployment, joint committees, social elections, occupational pensions, etc. for the moment remain as they are. In the "final compromise proposal" of 5 July 2013, it was written that the social partners would take care of the other differences "in accordance with a compulsory timeframe". At the moment, this remains to be seen.

With this detailed *Newsletter*, we would like to provide you with an overview of the new dismissal rules which are provided in the SES Act as of 1 January 2014. We also discuss the important transitional provisions which you will have to respect for the calculation of the notice period in the event of terminating an employment contract that started before 1 January 2014. At the end of this *Newsletter*, we also briefly discuss the related measures the legislator has foreseen in this regard, and of which some provisions will only become operational in a few years. This overview does not concern the first day of sick leave.

We would also like to inform you that we have created a *new website* which will allow you to calculate the new entitlements with respect to dismissal for all dismissals as of 1 January 2014: www.dismissal.be (or www.opzegging.be / www.préavis.be). These sites will go on-line in the next few days.

We hope that you enjoy the read!

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1 What to do with employment contracts which begin on or after 1 January 2014?

1.1 Rules applicable as of 1 January 2014

The SES Act enters into force on 1 January 2014 and therefore applies as a whole to all employment contracts which begin after 31 December 2013, irrespective of the date the employment contract was signed.

1.2 New notice periods

The new notice periods, which henceforth apply to both blue-collar and white-collar employees, only depend on the seniority of the employee. The amount of the remuneration or the age of the employee will no(t) (longer) be of any importance for determining the correct notice period entitlement.

The new notice periods foreseen by the SES Act, are no longer expressed in days or months, but in weeks. Furthermore, the periods are fixed, which means that employer and employee no longer have to agree on the notice period after the dismissal, as it used to be the case when employment contracts of the so-called "higher" white-collar employees were terminated.

1.2.1 The seniority for determining the notice period

It is the seniority at the moment the notice periods begins which is relevant for determining the notice period entitlement. The seniority still has to be defined as "*the period during which the employee uninterruptedly remained in the service of the same undertaking*". This definition formulated by case law will now be written in the SES Act itself. The *Explanatory Memorandum* clarifies that "*same undertaking*" means "the economic operating unit which is the undertaking", as is now generally accepted by case law.

If applicable, any previous period during which the employee worked as a temporary worker for that same employer has to be taken into account for the calculation of the seniority, with a limit of one year, if the notice is given by the employer. As was foreseen by the IPA Act, the following cumulative conditions apply to this:

- the recruitment of the employee followed a period of temporary work immediately or with an interruption of maximum seven days;
- the function exercised with the employer is identical to the function which was exercised as temporary worker;
- the period of temporary work may not be interrupted for more than seven days.

1.2.2 The beginning of the notice period

Although nothing has changed with regard to the formalities and the obligatory details to be mentioned in the dismissal letter, the SES Act stipulates that the notice period begins on Monday following the week during which the notice period was notified. If the notice period was notified by registered letter, as a rule, this letter will have to be sent on Wednesday at the latest for the notice period to begin on the following Monday, taking into account the fact that the notice letter will only have its effect on the third working day after dispatch.

1.2.3 The notice periods in the event the employer gives notice

The following table gives an overview of the notice periods which apply in the event it is the employer who gives notice:

Seniority	Notice period
less than 3 months	2 weeks
between 3 months and < 6 months	4 weeks
between 6 months and < 9 months	6 weeks
between 9 months and < 12 months	7 weeks
between 12 months and < 15 months	8 weeks
between 15 months and < 18 months	9 weeks
between 18 months and < 21 months	10 weeks
between 21 months and < 24 months	11 weeks
between 2 years and < 3 years	12 weeks
between 3 years and < 4 years	13 weeks
between 4 years and < 5 years	15 weeks
as of 5 years	+ 3 weeks per started year of seniority
between 20 years and < 21 years	+ 2 weeks per started year of seniority
as of 21 years	+ 1 weeks per started year of seniority

The aim of the legislator was to foresee relatively short notice terms in the early stages of employment, to clear the barrier to recruitment and in that way to facilitate better mobility on the labour market. Subsequently, the duration of the notice period progressively increases as the seniority ascends. With this progressivity, the legislator wants to offer the employee job security. The building-up of the notice period entitlement however slows down as of 20 years of seniority.

1.2.4 The notice periods in the event the employee gives notice

The SES Act also foresees new notice periods which apply in the event the employee gives notice. These are more or less equal to half of the notice periods applicable in the event of notice by the employer (see point 1.2.3), however limited to 13 weeks:

Seniority	Notice period
less than 3 months	1 week
between 3 months and < 6 months	2 weeks
between 6 months and < 12 months	3 weeks
between 12 months and < 18 months	4 weeks
between 18 months and < 24 months	5 weeks
between 2 years and < 4 years	6 weeks
between 4 years and < 5 years	7 weeks
between 5 years and < 6 years	9 weeks
between 6 years and < 7 years	10 weeks
between 7 years and < 8 years	12 weeks
as of 8 years	13 weeks

1.2.5 The notice periods in the event of counter-notice by the employee

The SES Act further introduces new notice periods which apply in the event of counter-notice by the employee whose employment contract was previously terminated by the employer and who wishes to leave the employer sooner because he/she finds new employment. This is limited to four weeks.

Seniority	Notice period
less than 3 months	1 week
between 3 and < 6 months	2 weeks
between 6 months and < 1 year	3 weeks
as of 1 year	4 weeks

1.2.6 The notice periods in the event of retirement

The SES Act also introduces new notice periods in the event of dismissal of employees who have reached the statutory pension age. Those notice periods therefore apply if the employer terminates the employment contract at the earliest on the first day of the month following the month in which the employee reaches the statutory pension age (currently 65 years).

The new arrangement is, however, inspired by the 'old' arrangement, which also had the purpose of setting a maximum notice period. The SES Act now provides that the employer has to respect the normal notice period (see point 1.2.3) limited, however, to a maximum of 26 weeks.

1.2.7 Specific deviations foreseen by the SES Act

The SES Act confirms the rule that the employee can terminate the employment contract without notice during periods of complete suspension of the employment contract and of temporary unemployment because of economic reasons. The employee can also terminate the employment contract without notice in the event of suspension because of bad weather which lasts more than one month.

If the employer was recognised as an undertaking in difficulties or in restructuring, the notice periods in the event of notice by the employer in view of the regime of unemployment with extra company allowance, can be shortened to minimum 26 weeks. However, the terms and conditions for this still have to be determined by Royal Decree.

1.2.8 Other possible deviations?

The new SES Act stipulates that, as of 1 January 2014, it will not be possible to deviate from the new notice periods by industry-level CBA. This applies in both events of notice by the employer and notice by the employee.

Based on the *Explanatory Memorandum* of the SES Act, it can be assumed that the prohibition on deviation only applies for industry-level CBA's. This means that it would be possible to deviate from the new notice periods on an individual level or even on company level. However, in any event, no notice periods may be determined which are less favourable for the employee than the new statutory notice periods.

1.3 The indemnity in lieu of notice

The SES Act does not affect the principle that both the employer as well as the employee have the possibility to terminate the employment contract unilaterally ("breach") with immediate effect and with payment of an indemnity in lieu of notice.

However, since the new notice periods are expressed in weeks, the indemnity in lieu of notice will also correspond to the remuneration (and advantages acquired by virtue of the employment contract) for a certain number of weeks. The SES Act foresees a conversion rule for the calculation of the weekly remuneration for employees who are paid on a monthly basis:

- the gross monthly remuneration has to be converted to a trimestral basis by multiplying it by 3;
- then, the trimestral remuneration has to be divided by 13 (number of weeks in a trimester).

For the rest, the SES Act does not modify the principles with regard to the indemnity in lieu of notice and the calculation basis of the remuneration (and the advantages acquired by virtue of the employment contract). The SES Act, however, does determine explicitly (just as the IPA Act) that - for the calculation of the variable remuneration - the average of the last twelve months of employment has to be taken into account. The *Explanatory Memorandum* clarifies that it concerns the remuneration "*of which the payment fell due in the twelve months which precede the dismissal*". Therefore, only the variable remuneration that was paid (or had to

be paid) within the last twelve months of employment will have to be taken into account.

1.4 Abolition of the trial period

The relatively short notice period applying in the event of dismissal at the beginning of the employment, made the legislator decide to simply abolish the trial period. For employment contracts which begin after 31 December 2013, it is therefore no longer possible to agree on a trial period in the employment contract.

On the other hand, a transitional arrangement is foreseen for trial periods which were inserted in employment contracts which began before 1 January 2014: the 'old' rules which apply until 31 December 2013 remain applicable to these trial periods, of which the consequences are also maintained until the expiration of the trial period (see also paragraph 2.3).

The abolition of the trial period also has consequences with regard to the non-compete clause and the education clause. Where both clauses used not to have effect when the employment contract was terminated during the trial period, the SES Act foresees for the employment contracts which begin after 31 December 2013 that those two clauses will have no effect when the employment contract is terminated during its first six months.

The SES Act does maintain the existing arrangement with regard to the trial period for agency work and temporary work. Besides that, the trial period is maintained for student contracts, but the existing rules are modified. From now on, the first three days are also for student contracts considered to be a trial period. During this period, both parties can terminate the employment contract without notice period or indemnity in lieu of notice. This trial period applies automatically and therefore doesn't have to be inserted explicitly in the employment contract.

1.5 The application leave

The new legislation confirms the principle that an employee who is dismissed with a notice period is entitled to so-called "application leave": the right to stay away from work for some time during the notice period to search for a new job. The *Explanatory Memorandum* hereby recalls that the application leave can only be used for the purpose for which it is legally intended, namely the search for new employment.

The 'old' arrangement which applied to the so-called 'higher' white-collar employees is now extended to all employees: during the last 26 weeks of the notice period, the application leave amounts to one day or two half days a week.

Employees who benefit from outplacement are entitled to one day (or two half days) application leave a week during the full extent of the notice period. The outplacement support will then be taken during the application leave.

For part-time employees, the application leave entitlement always has to be applied proportionally.

1.6 Motivation of the dismissal?

The "final compromise proposal" of 5 July 2013 determined that "*an arrangement with regard to the motivation of the dismissal and a good HR policy*" would be foreseen in a CBA of the *National Labour Council (NLC)* "*with entry into force on 1/1/2014*". It was also stipulated that the existing arrangement with regard to arbitrary dismissal of blue-collar employees as foreseen by article 63 of the Employment Contracts Act, would expire with the entry into force of this CBA.

Although the social partners were meant to come to an agreement by the end of October 2013, this deadline was not respected. At the moment, it isn't yet clear how the motivation of the dismissal will be arranged exactly, what sanctions may apply, and when the new rules concerning the motivation of dismissal will enter into force.

1.7 Termination of the employment contract for a definite duration/a clearly described task

The new legislation maintains the existing possibility to unilaterally terminate the employment contract concluded for definite duration (or for a clearly described task) before the expiration of the contract's term with payment of an indemnity equal to the amount of the remuneration due until the end of the term. Similar to the 'old' arrangement, the indemnity can never amount to more than the remuneration which corresponds to the notice period which would have been applicable in

the event the employment contract would have been concluded for an indefinite duration.

As a consequence of the abolition of the trial period, the legislator found it necessary to introduce a new possibility to terminate the employment contract for a definite duration (or a clearly described task): during the first half of the agreed term of the contract (limited to six months), both the employer as well as the employee can end the contract with respect of the new notice periods as foreseen by the SES Act (or with payment of an indemnity in lieu of notice to compensate the notice period). The term during which each party can end the employment contract in this way, is a fixed term which cannot be suspended in the event of incapacity to work, holidays, etc.

To be able to use the possibility to end the employment contract during the first half of the contract, the effective end of the employment contract has to take place within this period. If the employment contact is terminated with a notice period, the last day of the notice period (which will possibly be suspended because of incapacity to work, illness...) will therefore have to fall within the period during which notice is possible.

In the event of a succession of different employment contracts for a definite duration (or a clearly described task), the new possibility for terminating the contract can only be applied to the first employment contract. The possibility for early termination during the first half of the term of the contract therefore does not apply to the subsequent contracts.

1.8 Dismissal and incapacity to work

The SES Act explicitly foresees that, if the employee becomes incapable of working during the notice period which was notified earlier by the employer, the employer can terminate the employment contract with payment of an indemnity in lieu of notice which corresponds to the remaining part of the notice period. The guaranteed remuneration paid by the employer, can be deducted from this indemnity in lieu of notice. In the event in which several periods of incapacity of work occur during the notice period, only the period of guaranteed remuneration at the beginning of the incapacity to work during which the employer proceeds to dismissal, can give rise to this deduction.

Although this is not stipulated in the SES Act itself, it can be read in the Act's *Explanatory Memorandum* that in that case, the employer can only terminate "because of valid reasons". It is not clear what this means. Besides the question whether or not it is possible at all to foresee a condition for dismissal in the *Explanatory Memorandum* which is not recalled in the Act itself, the requirement of a "*valid reason*" for the termination of the employment contract is in any case strange, since already a previous act of dismissal took place in the form of a notice.

The SES Act further confirms the possibility for the employer to terminate an employment contract for a definite duration of less than three months without notice period or indemnity in lieu of notice in the event of incapacity of work of more than seven days. This possibility only applies after expiration of the period during which notice is possible (cf. *supra* paragraph 1.7).

The SES Act also confirms the possibility for the employer to terminate an employment contract of definite duration of at least three months in the event of incapacity to work of more than six months. In that case, the employer can terminate the employment contract with payment of an indemnity equal to the remuneration that still had to be paid during the agreed term, with a maximum of three months and with deduction of what was paid since the beginning of the incapacity to work. This possibility already existed for white-collar employees and is now extended to all employment contracts.

1.9 Outplacement support

One of the pillars of the "final compromise proposition" was the extension of the right to outplacement support. The SES Act foresees a right to outplacement support for all employees dismissed with a notice period or indemnity in lieu of notice equal to at least 30 weeks. For those who fall completely within the scope of the new dismissal regime, it concerns employees with a seniority of at least nine years. It has to be noted that the extended outplacement right also applies to employees with an 'old' employment contract (who thus began working before 1 January 2014) who are dismissed after 31 December 2013 with a notice period or indemnity of at least 30 weeks.

The new arrangement therefore applies irrespective of the age of the employee at the moment of dismissal. However, the SES Act determines that the existing out-

placement arrangement remains valid for the employees with at least one year of seniority who have reached the age of 45, but for whom the notice period or indemnity in lieu of notice doesn't amount to 30 weeks.
With regard to the new outplacement arrangement, the SES Act makes a distinction between two options:

1. The employee is dismissed with an *indemnity in lieu of notice*:
   The employee is entitled to a dismissal package which consists of:
   - outplacement support of 60 hours, with a value of 1/12th of the gross annual salary of the calendar year which proceeds the dismissal, subject to a minimal value of 1.800 EUR and a maximum value of 5.500 EUR. This is evaluated at four weeks of remuneration;
   - an indemnity in lieu of notice equal to at least 30 weeks of remuneration, of which four weeks are deducted for the value of the outplacement support.

   However, until 31 December 2015 included, the employee is entitled to choose to have the indemnity in lieu of notice paid in full and therefore not to avail of the outplacement offer.

2. The employee is dismissed with a *notice period*:
   The employee is entitled to a dismissal package which consists of:
   - outplacement support of 60 hours. The time dedicated to this will be deducted from the application leave;
   - notice period of at least 30 weeks.

Rules exist to partly restart the outplacement support in the event the employee would lose his/her subsequent job with a new employer. Also specific formalities apply with regard to the way in which the employer has to make a valid outplacement offer, the way in which the employee has to accept this, etc.

2 What about the notice period for employment contracts which began before 2014?

The SES Act foresees a series of transitional measures which apply for the calculation of the notice period in the event a contract which began before 1 January 2014 is terminated after 31 December 2013.

2.1 Notice notified before 1 January 2014

The SES Act foresees that notice periods which were notified before 1 January 2014 will maintain all their effects and are not shortened or extended.

2.2 Notice clause for blue-collar employees with a seniority of less than six months

The former article 60 of the Employment Contracts Act allowed shorter notice periods to be set for white-collar employees (e.g. in the employment contract or in the work rules) in the event of the unilateral termination of the employment contract during the first six months of employment. The SES Act determines that such clause maintains its effect when it concerns an employment contract of which the execution started before 1 January 2014.

2.3 Termination of the employment contract during the trial period

The trial period included in the employment contract of which the execution began before 1 January 2014, maintains its effects until the expiration of the clause. This means that the dismissal rules which would apply on 31 December 2013 to the trial period, remain applicable until the end of the trial period. For example, when an employment contract for a white-collar employee with a trial period of six months started on 1 December 2013, the employer or the white-collar employee will be able to terminate the employment contract unilaterally in April 2014 with a notice period of seven days.

2.4 The rule of the "double picture"

For employment contracts which began before 1 January 2014 the SES Act foresees the calculation of the notice period in two distinct steps. The results obtained in each step have to be added. The principle is that in event of a dismissal after 31 December 2013, a '**double picture'** has to be taken of the seniority of the employee: a first picture concerns the seniority on 31 Decem-

ber 2013 ('**step 1**'); the second picture concerns the seniority acquired by the employee as of 1 January 2014 ('**step 2**').

Step 1:

For 'step 1', the duration of the notice period will first be determined according to the legal, statutory and conventional rules which apply to the employee concerned on 31 December 2013. In other words, the dismissal rights of the employee have to be examined as if the employment contract would have been terminated on 31 December 2013.

In this first step of calculation, it concerns therefore a picture on 31 December 2013 of:

1. the statute of the employee: blue-collar employee or white-collar employee;
2. the seniority of the employee;
3. the former applicable dismissal rules.

This means specifically that the employer in the event of dismissal of a blue-collar employee will have to examine which (industry-level) notice periods where applicable on 31 December 2013.

For white-collar employees, the employer will have to know whether or not his/her gross annual remuneration on 31 December 2013 amounted to more or less than 32.254 EUR to determine whether the employee concerned is a so-called 'lower' or 'higher' white-collar employee:

- for the *lower* white-collar employee, the rule of three months notice per started period of five years of seniority applies. When a white-collar employee terminates the employment contract, he/she has to respect a notice period of 1,5 months if he/she has less than five years of seniority. As of five years, the notice period amounts to three months.
- For the *higher* white-collar employees, the SES Act ends the rule in the Employment Contracts Act that the notice period either has to be agreed upon by the parties after the notice is given, or has to be determined by the judge. The SES Act thereby also abolishes the Claeys formula, which was based on case law. The SES Act now foresees fixed determined notice periods:
  - if notice is given by the employer: one month per started year of seniority, with a minimum of three months;
  - if notice is given by the white-collar employee: 1,5 months per started period of five years of seniority, with a maximum of 4,5 months if his/her gross annual salary wasn't higher than 64.508 EUR, or six months if his/her gross annual salary was higher than that amount.

We specially developed a **calculation module** to allow you to easily determine the "picture" of your personnel on 31 December 2013 and print it and keep it in your personnel files. You *can* download this module for free under the heading 'Take a snapshot' at www.claeysengels.be.

Based on a strict reading of the SES Act, the above-described fixed rule of one month per started year of seniority (with a minimum of three months) in the event of notice by the employer also applies to the higher white-collar employees with whom a valid notice clause was agreed. The agreed notice clause would therefore not have any effect. However, the contrary appears from the *Explanatory Memorandum* (which was completed after the opinion of the Council of State) and - mostly - the *Report in the name of the Commission for Social Affairs*. The *Explanatory Memorandum* makes clear that all valid clauses which exist on 31 December 2013, apply unaltered, so the dismissal rights of this white-collar employees are determined based on such a notice clause. In the *Report in the name of the Commission for Social Affairs*, it even can be read that for the higher white-collar employees, "*it is decided that the employment contracts in force on 31 December 2013, will maintain their effects, irrespective of the fact that the notice period determined in the contract is more or less favourable than the new legal regulation*". It remains to be seen if the labour tribunals will follow this "interpretation" or if they will set aside the notice clause, given the silence on the subject in the text of the SES Act itself.

Step 2:

The second part of the notice period is calculated based on the seniority acquired by the employee as of 1 January 2014. In other words, the seniority is reduced to zero on 1 January 2014 for the application of step 2. For this second part, the new notice periods will apply to all

new employment contracts which begin on or after 1 January 2014 (cf. *supra*: point 1.2). For the calculation of 'step 2', it doesn't matter if the employee has the statute of blue-collar employee or white-collar employee, since the same notice periods apply for both categories.

The SES Act contains two specific rules for the *white-collar employee* who ends the employment contract himself/herself:

1. When the applicable ceiling is reached in 'step 1', nothing has to be calculated for 'step 2', namely:
   - ceiling for the 'lower' white-collar employee: three months
   - ceiling for the 'higher' white-collar employee: 4,5 months if his/her gross annual salary is not higher than 64.508 EUR, or six months if his/her gross annual salary was higher than such amount.
2. If this ceiling is not reached in 'step 1', also 'step 2' has to be calculated, but the sum of both parts may not exceed 13 weeks.

Examples:

♦ Dismissal by the **employer**:

John entered into service as a white-collar employee on 1 July 2010. He is dismissed by the employer in September 2016. The annual salary of John on 31 December 2013 amounts to less than 32.254 EUR gross. What notice period has to be notified by the employer? Since the employment contract began before 1 January 2014, the rule of the 'double picture' has to be applied:

Step 1: Since the gross annual salary of John on 31 December 2013 amounts to less than 32.254 EUR, for the determination of the notice period, John will be considered to be a 'lower' white-collar employee. He therefore falls within the scope of the rule of 'three months notice period per started period of five years of seniority". For the seniority period until 31 December 2013 included, the notice period for the employer of John amounts therefore to three months.

Step 2: At the moment of his dismissal (September 2013), John is in his third started year of seniority, calculated as of 1 January 2014. The notice period therefore amounts to 12 weeks (cf. *supra*: paragraph 1.2.3).

> The total notice period therefore amounts to three months plus 12 weeks.

♦ Dismissal by the **employee**:

Sarah entered into service as white-collar employee on 1 July 2012. She resigns in September 2016. The annual salary of Sarah on 31 December 2013 amounts to more than 32.254 EUR gross. What notice period does Sarah have to respect? Since the employment contract began before 1 January 2014, the rule of the 'double picture' has to be applied:

Step 1: Since the gross annual salary of Sarah on 31 December 2013 was higher than 32.254 EUR, for the determination of the notice period, she will be considered to be a 'higher' white-collar employee. The notice period which Sarah has to respect is 1,5 months per started year of five years of seniority, with a maximum of 4,5 months since her gross annual salary on 31 December 2013 was less than 64.508 EUR. For the seniority period until 31 December 2013 included, the notice period of Sarah amounts therefore to 1,5 months.

Step 2: Since the ceiling of 4,5 months which applies to Sarah, was not reached, Step 2 has to be calculated, but with a total maximum of 13 weeks for both steps combined. At the moment of her resignation (September 2016), Sarah is in her third started year of seniority, calculated as of 1 January 2014. The notice period therefore amounts to six weeks (cf. *supra*: paragraph 1.2.4).

> The total notice period therefore amounts to 1,5 months plus six weeks. (The threshold of 13 weeks is not reached.)

3 Exception for certain industries and activities

The SES Act foresees specific *temporary* transitional measures for blue-collar employees who are employed in certain industries. Besides that, exceptional measures are also foreseen - for an indefinite period - for blue-collar employees who execute certain activities on so-called temporary and mobile work places. The legislator justified the existence of those special arrangements by, among other things, the negative impact the new notice periods could have on employment in the sectors of industry concerned. However, it cannot be excluded that this motivation will give rise to new debates for the courts.

3.1 Temporary transitional arrangement for blue-collar employees in certain industries

The SES Act foresees a specific *temporary* transitional arrangement for blue-collar employees who are employed in certain industries. It concerns the industries in which on 31 December 2013, a Royal Decree applies that determines notice periods which the employer has to respect which are lower than those mentioned in the following table (which are mostly the same as those of CBA n° 75).

This transitional arrangement does not apply:

- when the Royal Decree only determines a lower notice period for seniority up to one year (e.g. hospitality sector);
- for the notice periods determined by Royal Decree in the framework of restructuring, in view of retirement or in the framework of a regime of unemployment with extra company allowance.

In those industries, the *employers* have to respect the following notice periods in the event of notice being given *between 1 January 2014 and 31 December 2017*:

Seniority	Notice period
less than 3 months	2 weeks
between 3 and < 6 months	4 weeks
between 6 months and < 5 years	5 weeks
between 5 and < 10 years	6 weeks
between 10 and < 15 years	8 weeks
between 15 and < 20 years	12 weeks
more than 20 years	16 weeks

In those industries, the *blue-collar employees* have to respect the following notice periods in the event of notice being given **between 1 January 2014 and 31 December 2017**:

Seniority	Notice period
less than 3 months	1 weeks
between 3 months and < 5 years	2 weeks
between 5 and < 10 years	3 weeks
between 10 and < 15 years	4 weeks
between 15 and < 20 years	6 weeks
more than 20 years	8 weeks

Those industries[1] will therefore only fall within the scope of the new regulation as of **1 January 2018**[2]. For employment contracts which began on or after 1 January 2014, the new notice periods will apply as of 1 January 2018. Employment contracts which began before 1 January 2014 fall within the scope of the above-mentioned arrangement of the "double picture".

[1] The report of the parliamentary committee social affairs refers to the following industries: 'tailors, clothing and confection, furniture and carpentry, tannery, shoemakers, recovery of rags, manual gunsmiths, diamond industry, dental technical undertakings and fuel trade in East Flanders.'

[2] In the event of a collective bargaining agreement concluded within a joint (sub)committee, the notice periods can sooner evolve in the direction of the new notice periods.

3.2 Exception for blue-collar employees who execute certain activities on so-called temporary and mobile work places

The SES Act determines that the notice periods mentioned in the two above-mentioned tables (see paragraph 3.1) apply (for an indefinite period) to the employers and employees, if the following *cumulative* conditions are fulfilled:

1. The employer and employee fall within the scope of a Royal Decree that foresees on 31 December 2013 notice periods which are shorter than those mentioned in above-mentioned tables (see paragraph 3.1);
2. The employee has no fixed workplace;
3. The employee usually executes one of the following activities on temporary and mobile work places: digging; groundwork; works relating to foundations and reinforcement works; hydraulic engineering works, road works; agricultural work; placement of utility lines, construction; assembly and disassembly of, in particular, prefabricated elements, beams and columns; furnishing or equipment works; rebuilding works, renovation, repair; dismantling; demolition works; conservation works; maintenance, painting and cleaning work; sanitation work; finishing work concerning one or more of the above-mentioned works.

4 Related measures

4.1 Collective dismissal notified before 1 January 2014

If the decision pertaining to a collective dismissal was notified before 1 January 2014, the SES Act determines that the legal, statutory and conventional rules which apply on 31 December 2013 continue to apply when the employer proceeds to the termination of the employment contract on or after 1 January 2014. The following cumulative conditions apply:

- the employee is subject of a collective dismissal of which the decision was notified in accordance with the so-called Renault Act before 1 January 2014;
- the employee falls within the scope of a CBA social plan filed with the registry of the *General Direction Collective Labour Relations* of the *FPS Employment, Labour and Social Dialogue* before 1 January 2014.

4.2 Repayment activation fee

The employer in restructuring who proceeds to a collective dismissal, has to pay a so-called "activation fee" to the dismissed employees with at least one year of seniority with the employer and who subscribed to the employment cell. The employee then is entitled to a so-called 'activation fee' which replaces in part or completely the normal indemnity in lieu of notice. When the normal indemnity in lieu of notice of the blue-collar employee is lower than the cost of the activation fee, the employer can recuperate the additional cost from the National Employment Office (NEO). The SES Act extends this repayment to *all* employees.

4.3 Dismissal compensation indemnity for blue-collar employees with an employment contract dating from before 1 January 2014

Given that the rule of the 'double picture' implies that blue-collar employees with an employment contract that entered into force before 1 January 2014 still have less generous dismissal rights than under the new rules, the SES Act foresees a compensation arrangement. This, however, does not apply to blue-collar employees who fall within the scope of the above-mentioned arrangement described in paragraphs 3 and 4.1.

In particular, the NEO will pay the blue-collar employee a net indemnity to compensate the difference between on the one hand the dismissal rights of the blue-collar employee based on the rule of the 'double picture' and, on the other hand, his/her dismissal rights assuming the total seniority of this blue-collar employee was completely acquired after 31 December 2013. This so-called "dismissal compensation indemnity" will be paid in accordance with the following "time path".

The blue-collar employee must meet the following conditions cumulatively:

- the start date of his/her uninterrupted employment contract as blue-collar employee falls before 1 January 2014;

- he/she is dismissed after 31 December 2013;
- his/her seniority amounts to:
  - at least 30 years on publication date of the SES Act in the *Belgian Official Gazette*;
  - at least 20 years on 1 January 2014;
  - at least 15 years on 1 January 2015;
  - at least 10 years on 1 January 2016;
  - less than 10 years on 1 January 2017.

4.4 Gradual abolition of the dismissal allowance for blue-collar employees

The SES Act foresees a gradual abolition of the so-called "dismissal allowance" (formerly called the 'crisis bonus') which is paid by the NEO to dismissed blue-collar employees. This will no longer be paid to the blue-collar employee whose employment contract began on or after 1 January 2014.

The regime of dismissal allowance will fade out as the above-described system of the dismissal compensation indemnity gradually enters into force. In other words, as soon as the blue-collar employee will be entitled to the dismissal compensation indemnity, he/she no longer falls within the scope of the dismissal allowance. In that way, the dismissal allowance will *no* longer be allocated to a blue-collar employee who meets the following cumulative conditions:

- the start date of his/her uninterrupted employment contract as blue-collar employee falls before 1 January 2014;
- he/she is dismissed after 31 December 2013;
- his/her seniority amounts to:
  - at least 30 years on publication date of the SES Act in the *Belgian Official Gazette*;
  - at least 20 years on 1 January 2014;
  - at least 15 years on 1 January 2015;
  - at least 10 years on 1 January 2016;
  - less than 10 years on 1 January 2017.

4.5 Special compensating contribution on the indemnity in lieu of notice

The SES introduces a special compensating contribution which is due on the indemnity in lieu of notice of the employee which is built up based on service periods as of 1 January 2014. The proceeds of this contribution are destined for the *Compensation Fund for Redundant Employees of Closed Businesses*. The amount of this contribution depends on the gross annual salary of the employee[4]:

Contribution	Gross Annual salary
1%	between 44.509 EUR and 54.508 EUR
2%	between 54.509 EUR and 64.508 EUR
3%	over 64.508 EUR

4.6 Additional industry-level indemnities

Since the new dismissal rules for employers may lead to an increase in the dismissal cost for blue-collar employees, the SES Act foresees that existing additional industry-level indemnities (besides those in the framework of unemployment with company allowance) which are paid to guarantee the income security of the employee after the dismissal, can be deducted from the notice period or the indemnity in lieu of notice. The industries have time until 30 June 2015 to modify their collective bargaining agreements for this. It has to be seen how this measure will be implemented in practice by the social partners.

[4] To determine this annual salary, a formula was created which is based on the remuneration in the quarter in which the last performances are declared. This will further be arranged by Royal Decree

4.7 Measures to boost employability

With regard to employees who are entitled to a notice period or an indemnity in lieu of notice of at least 30 weeks, industries have until 1 January 2019 at the latest to conclude a CBA that foresees in the realisation of 1/3rd of this notice period in the form of measures which increase the employability of the employee on the labour market. This is possible, for example, by oriented education, outplacement, etc. The other 2/3rd of the notice period or indemnity in lieu of notice (with a minimum of 26 weeks) will have to be worked or paid.

To encourage employers and employees to actually take those measures, the SES Act foresees a special social security contribution of 1% at the expense of the employee and of 3% at the expense of the employer. This contribution is levied on the remuneration which corresponds to 1/3rd of the notice period or indemnity in lieu of notice.

4.8 Tax

To conclude, the SES Act also contains a number of modifications to the tax legislation:

- the partial exemption of the remuneration during the notice period or of the indemnity in lieu of notice is abolished;
- the dismissal compensation indemnity paid by the NEO is exempted from taxes;
- a tax exemption is introduced for a so-called "social reserve" for the dismissal cost for an employee who reached five years seniority under the single employment status. This means that the exemption can be applied for the first time at the beginning of fiscal year 2020. It concerns the exemption of profit and income corresponding to three weeks of remuneration per started year of employment under the single employment status, and this as of the sixth year of employment under the single employment status with the same employer. After 20 years of employment under the single employment status, the exemption is valid for one week of remuneration per started year of employment.

5 Conclusion

It is clear that the SES Act means an important change in the Belgian dismissal legislation as of 1 January 2014. Given the transitional measures which apply to the termination of the employment contracts which started before 1 January 2014, the existing difference between blue- and white-collars will only gradually disappear.

In addition, the specific exception regimes require special attention and in this regard the question arises if they will withstand judicial review in the light of the expected disputes before the labour courts and possibly also before the Constitutional Court.

Further, also the future arrangement with regard to dismissal motivation will have an important impact on company HR policies. This hopefully will become clear soon so that employers can prepare themselves well when making dismissal decisions.

It remains to be seen how the above-mentioned transitional measures which will in accordance with the SES Act only enter into force in a few years, will take shape since the social partners will have to complete and elaborate them themselves.

To conclude, it has to be kept in mind that the SES Act is only a first step in the process to harmonise the status of blue-collar and white-collar employees. There is still much work to be done to also eliminate the other remaining differences.

To be continued...!

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