Ius Laboris Belgium Global HR Lawyers
Claeys & Engels

Newsletter: **2017: Quo vadis?**

April 2017

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Dear reader,

2017 promised to be a very exciting year, since the government worked on new legislation right up to year's end in 2016. The codification of all these measures into legislation took longer than expected.

We hereby provide you with an overview of the measures that have entered into force.

Needless to say, we will keep you informed of all further developments through our newsflashes.

We hope you enjoy the read!

1 Wage moderation

The Michel I government has set itself the task as from the beginning to close the wage gap with neighbouring countries that has been detected since 1996. To this end, a number of measures have already been taken: a clear wage moderation for the period 2015-2016 linked to an index jump and an array of measures to reduce charges (the so-called tax shift). A final point on this agenda was the modification to the Act of 26 July 1996, which lays down the procedural framework concerning the fixing of the maximum margin for increasing wages.

In accordance with the governmental agreement of 9 October 2014, the government has tackled this point with a new Act of 19 March 2017 modifying the Act of 26 July 1996 concerning the promotion of employment and the safeguarding of the competitiveness. The Act was published in the Belgian Official Gazette on 29 March 2017. Below, we discuss a number of basic principles and policy lines of the modified law.

The rationale of the Act remains unchanged: it will still be the social partners who negotiate and determine the new maximum available margin for the development of wages, within certain limits and on the basis of a (now biennial) report of the Central Council for Businesses concerning the maximum available margin for the development of wages (and the wage gap). However, the calculation method of the maximum margin will be significantly amended. From the theoretical available margin for the coming two years, created by wage growth in the three relevant neighbouring countries, the expected indexation will first be deducted, followed by a “correction term” and finally a “safety margin”. The correction term and safety margin essentially aim to correct the prediction errors in the wage development prospects in the neighbouring countries, to neutralise the negative wage gap (built in the past) and to prevent a slippage of wages. The safety margin is tantamount to a decrease of the maximum margin by 25%, with a minimum of a 0.5 percentage point. In this manner, the maximum available margin is automatically reduced so that a higher inflation or smaller wage development in the neighbouring countries than expected does not lead to a higher wage gap. Given this method of calculation, it is likely that in the future the available margins will generally be rather limited.

The agreement on the maximum margin will, as before, be laid down in an interprofessional agreement and subsequently in a collective bargaining agreement concluded in the National Labour Council which will be declared generally binding by the King. In the event that the social partners do not reach an agreement, a mediation procedure is still provided for, as well as the possibility to regulate this in a Royal Decree after consultation in the Council of Ministers. What was already done in practice has now been given a legal basis: the margin can be expressed in either two annual percentages or one biennial percentage.

After an agreement was reached in the interprofessional agreement 2017-2018, the collective bargaining agreement nr. 119 of 21 March 2017 has set the maximum margin for increasing wages at 1.1%.

The indexations and scale rises continue to be guaranteed. In this manner, one strives towards maintaining employees’ purchasing power and to not negatively impact the internal consumption and growth.

The thus determined margin for wage development may still not be overridden by agreement at intersectoral, sectoral, company or individual level. In itself, nothing changes here, albeit that the new Act implements and defines the term “wage costs”. The wage costs consist in the full compensation, in money or in kind, that is due by the employer to the employee for the work the latter has performed during a reported period, as mentioned in Annex A, Chapter 4, point 4.02 of the Regulation (EU) 549/2013 of 21 May 2013.

While this modification has the advantage that it finally provides a definition of the term wage costs, it is to be expected that it will give rise discussion. The aforementioned point 4.02 refers to benefits in money and benefits in kind, but also excludes a number of things that were generally accepted to be part of the wage cost according to Belgian law. Indeed, some allowances for, or reimbursements of expenses are excluded from the wage: these relate to travel, accommodation, removal or representation incurred by employees during the performance of their function and certain work-related allowances in a social insurance, in the form of allowances for child, partner or family, allowances for education or other allowances with regard to persons dependent on the employee and in the form of free medical services (with exception of the medical examination necessary because of the nature of the work) for employees and their families.

Also new is that the social partners who wish to monitor the conformity of a draft CBA with the maximum margin for wage development are advised to turn to the Belgian Federal Public Service Employment, Labour and Social Dialogue for advice.

A more radical change concerns the sanction mechanism. The mechanism that existed until recently was no more than a paper tiger: the maximum sanction was an administrative fine of EUR 250-5,000 in total that could not be imposed in practice as the sanction regulation referred to legislation on administrative sanctions dating back to 1971 and which was already repealed. The only sanction therefore was the nullity of the lower source of law, which was contrary to the higher source of law. The Act of 19 March 2017 again provides for an administrative fine of EUR 250-5,000 and also declares several provisions of the Social Criminal Code applicable. It concerns among others the designation of the administration and the civil servants of this administration competent to impose administrative fines, the chapter on administrative prosecution (by social inspectors) and the rules applicable to administrative fines. The administrative fine does not have to be increased with surcharges, but it must be multiplied by the number of employees concerned, with a maximum of 100 employees, which leads to a considerable increase in the maximum fine (EUR 500,000 instead of EUR 5,000). Here, it should be noted that it is the increase of the average hourly labour cost which may not exceed the determined norm and not the wage cost per individual employee. This implies that for each excess, the fine of EUR 250-5,000 will have to be multiplied by the number of employees in service, even if the margin is not exceeded for a certain individual employee.

Appeal against such a decision is possible within three months before the labour tribunal. In the explanatory memorandum, the civil servants responsible for the supervision are reminded that they can base themselves on the data of the Belgian National Office for Social Security, in particular heading 62, to trace undertakings that are in violation. The Michel I government seems to take the intention expressed in the governmental agreement, namely to provide efficient supervision, very seriously.

2 Novelties concerning UCA and UAA

2.1 UCA and UAA have become more expensive as of 1 January 2017: the government increases the employer's contributions

When drawing up the budget for 2017, the government had already indicated in October last year that the employer's contributions on the company allowance or the additional allowance that is paid by the employer in the context of unemployment with company allowance (the former "pre-pension scheme") (UCA) or unemployment with additional allowance (the former "Canada Dry" regimes) (UAA) would increase as of 1 January 2017. With the Programme Act of 25 December 2016, the government translates its words into action.

The official reason given for the increase of the employer's contributions is to further discourage workers from withdrawing early from the labour market. In addition, the difference in contribution rates between the profit and non-profit sector is further reduced.

For every UCA starting as of 1 January 2017 following the serving of notice or a termination of the employment contract notified after 31 October 2016 or for every UAA where an additional allowance is allocated due to notice or a termination of the employment contract after 31 October 2016, the following employer's contributions will be applicable:

Profit sector

– UCA

Age of access	%
< 55 y	142.50%
55 y < 58 y	75%
58 y < 60 y	75%
60 y < 62 y	37.50%
As of 62 y	31.25%

For companies in the profit sector that have been recognized as companies in difficulties or in restructuring, different percentages for UCA apply during the period of recognition. These contributions have also been increased by a Royal Decree of 24 February 2017. When the announcement of the collective dismissal and the recognition of the company in restructuring was done after 31 October 2016, the following contributions apply during the period of recognition:

Age of access	%
60 y < 62 y	30%
As of 62 y	30%

For employees who have not reached the age of 60 years at the start of the UCA, the normal contributions are applicable, also during the period of recognition.

When the company has been recognized as company in difficulties or in restructuring[1] after 31 October 2016, the following contributions[2] apply:

Age of access	%
< 55 y	16,88%
55 y < 58 y	12,50%
58 y < 60 y	8,13%
60 y < 62 y	4,38%
As of 62 y	4,38%

After the period of recognition, the ordinary contributions apply (see above) in function of the age of the person in UCA at the end of the period of recognition.

[1] The latter only if a number of additional conditions are met (a.o. the collective dismissal concerns at least 20% of the employees).

[2] According to the instructions of the National Office of Social Security only if the following cumulative conditions are met:

- the dismissal was performed after 31 October 2016 **AND**
- the first additional allowance was paid after 31 December 2016 **AND**
- the collective restructuring was not announced before 31 October 2016 **AND**
- the company has not been recognized as in difficulties or in restructuring before 31 October 2016.

– UAA

Age of access	%
< 52 y	150%
52 y < 55 y	142.50%
55 y < 58 y	75%
58 y < 60 y	75%
60 y < 62 y	58.24%
As of 62 y	48.53%

The applicable percentage is determined by the age of the person concerned at the start of the monthly company allocation or the complementary compensation. Hence, the percentage does no longer change during the UCA or UAA.

Non-profit sector

– UCA

Age at instalment	%
< 55 y	48.11%
55 y < 58 y	43.04%
58 y < 60 y	27.86%
60 y < 62 y	12.38%
As of 62 y	10%

– UAA

Age at instalment	%
< 52 y	50.63%
52 y < 55 y	48.11%
55 y < 58 y	43.04%
58 y < 60 y	27.86%
60 y < 62 y	12.38%
As of 62 y	10%

The applicable percentage is determined by the age of the person concerned at the time of the payment of the monthly company allowance or additional allowance. Hence, the percentage changes during the UCA or UAA.

2.2 UCA: special schemes

Under the general scheme, employees can benefit from UCA on the basis of the CBA nr. 17 as of the age of 62. In addition, there are special schemes by which accession to UCA is possible at a lower age. On 31 December 2016 various CBA's expired which were concluded in the National Labour Board ("NLB") concerning these special schemes. In the IPA 2017-2018 the social partners had already agreed to prolong these special schemes, albeit in certain cases with an increase of the age of access. This has now been implemented through the various CBA's that have been concluded on 21 March 2017:

UCA-regime	New CBA NLB	Age until 31/12/2016	Age & career 2017-2018	Particulars
Night work Heavy duty job Construction	Nr. 120	58y	*Age:* 2017: 58y 2018: 59y *Career:* 33y	The UCA regime needs to be confirmed in a sectoral CBA which refers to CBA nr. 120 Note: - also prerequisite concerning the period worked in night work or heavy duty job - construction: certificate working incapacity
Heavy duty job	Nr. 122	58y	*Age:* 2017: 58y 2018: 59y *Career:* 35y	Until 31-12-2016 this regime could be foreseen in a company CBA, without a sectoral CBA was required. For the period 2017-2018 the UCA regime needs to be confirmed in a sectoral CBA that refers to CBA nr. 122. Note: also the prerequisites concerning the period worked in a heavy duty job.
Disabled employees	Nr. 123	58y	*Age:* 58y *Career:* 35y	
Very long career	Nr. 124	58y	*Age:* 2017: 58y 2018: 59y *Career:* 40y	For the period 2017-2018 the UCA regime needs to be confirmed in a sectoral CBA that refers to the CBA nr. 124.
Company in difficulties or in restructuring	Nr. 126	55y	*Age:* 56y *Career:* 10y (within the sector in the 15 years preceding the termination) or 20y	The company CBA needs to refer to CBA nr. 126. Exemption of suitable availability is possible provided that one of the following conditions is fulfilled: - age 61 years; - career 39 years.

3 New surcharges: fines increased considerably

The Programme Act of 25 December 2016 increases the penal surcharges as from 1 January 2017. This is a system to adapt the existing fines to the current value of money. As labour law is almost completely subject to criminal sanctions (mainly based on the Social Criminal Code), this modification has consequences not only for the criminal liability of the employer but also for the criminal liability of its agents or employees who have the responsibility to ensure compliance with the labour legislation. Until 31 December 2016, the fines had to be multiplied by multiplier 6. For violations committed as from 1 January 2017, the multiplier will be 8. This means a fine increase of approximately 30%.

This increase applies not only to criminal fines in the strict sense, but also to the administrative fines which can be imposed as an alternative for criminal prosecution.

In social criminal law, there are four categories of violations depending on the severity of the violation. The legislation provides for the following fines:

Type of violation	Correctional penalties	Administrative penalties
Level 1	-	Fine of €10-100
Level 2	Fine of €50-500	Fine of €25-250
Level 3	Fine of €100-1,000	Fine of €50-500
Level 4	Fine of €600-6,000, imprisonment of 6 months to 3 years For legal entities, a fine of €3,000 to €72,000	Fine of €300-3,000

With the new surcharges x 8, an employer, agent or employee risks as from 1 January 2017 the following fines:

Type of violation	Correctional penalties	Administrative penalties
Level 1	–	Fine of €80-800
Level 2	Fine of €400-4,000	Fine of €200-2,000
Level 3	Fine of €800-8,000	Fine of €400-4,000
Level 4	Fine of 4,800 to €48,000 Imprisonment of 6 months to 3 years For legal entities, a fine of €24,000 to €576,000	Fine of €2,400 to €24,000

4 Mobility policy: Increase of the rejected expenses when providing a company car with fuel card

If an employer provides a company car to an employee and allows it to be used for private purposes, the employee needs to take into account a benefit in kind which is determined on a flat-rate base. If, in addition, a fuel card is provided to the employee, there is no need to take into account a separate benefit in kind.

Up to 31 December 2016, 17% of the calculated benefit in kind was a rejected expense (RE) for the employer, in other words, an expense that can not be deducted as a professional expense with respect to the company taxation. The benefit in kind is decreased with any applicable personal contribution of the receiving employee.
The method for calculating the benefit in kind remains unaltered in 2017, regardless of whether the employer provides the employee with a fuel card. So, the tax treatment of the benefit in kind remains unaltered for the employee.

On the other hand, the Programme Act of 25 December 2016 stipulates that as of 1 January 2017, the RE percentage increases to 40% (and no longer 17%) if the employer fully or partly pays the fuel expenses of the company car provided to the employee and which may be used by the employee for private purposes. In other words, the percentage of 17% will only be applicable if the company car may be used for private purposes without the employer contributing to the fuel expenses.
Moreover, any contribution of the employee for the private use of the company car will no longer have an impact on the amount of RE that needs to be taken into account.

Example:
an employee benefits from a company car with a fuel card of which the benefit in kind for the private use of the car amounts to EUR 2,000.
In a first scenario, the employee does not pay a personal contribution.

In 2016, the taxable amount for the employee was EUR 2,000. The RE for the employer was equal to EUR 340 (17% of EUR 2,000).

In 2017, the taxable amount for the employee remains unaltered. The RE for the employer will be EUR 800 (40% of EUR 2,000).
In a second scenario, the employee pays a personal contribution of EUR 2,000 for the private use of the car.

In 2016 the taxable amount of the employee was EUR 0. The RE for the employer was also equal to EUR 0.
In 2017, the taxable amount for the employee remains unaltered, and is thus EUR 0. However, the RE for the employer is equal to EUR 800 (40% of EUR 2,000) and this despite the personal contribution of the employee.

Amount of RE for the employer (in €)		
	2016	2017
No personal contribution of the employee	340	800
Personal contribution of the employee of €2,000	0	800

Taxable amount for the employee (in €)		
	2016	2017
No personal contribution of the employee	2,000	2,000
Personal contribution of the employee of €2,000	0	0

5 Abolition of the speculation tax on added values

As a reminder, with the Act of 26 December 2015, the legislator had, in Article 90, 1e paragraph, 13° of the Income Tax Code (ITC) introduced a tax on the added values of shares as of 1 January 2016.

As a consequence of this Act, the added values realised by physical persons following a swift sale (within a period of 6 months) of listed shares and units, but also of listed options, warrants and other financial products with the purpose of obtaining speculative profits, were taxed at 33%.

The Programme Act of 25 December 2016 simply abolishes the speculation tax on added values as of 1 January 2017. Hence, it was applicable for only one year.

The added values that were excluded from the abolished speculation tax on shares – namely those that were realised following the exercise and the cession of options on shares and warrants regulated by the Act of 26 March 1999 (and their underlying shares), the shares with discount as referred to in Article 609 of the Company Code, as well as the shares acquired under the Act of 21 May 2001 – retain their tax treatment; in principle, they continue to be exempt from taxation.

6 Increase of the standard rate of the withholding tax to 30%

The Programme Act of 25 December 2016 has, as of 1 January 2017, also increased the standard rate of the withholding tax from 27% to 30%.

For example, a company that pays a gross dividend of EUR 1,000 will, as of 1 January 2017, have to withhold EUR 300 in tax and no longer EUR 270. As a consequence, the shareholder receives a net dividend of EUR 700 instead of EUR 730.

However, a reduced tax remains possible on the interests of the saving accounts that exceed the tax-free part (EUR 1,880 for the income year 2016), on the interests of the government bonds signed into in 2011 (the so-called “Leterme-state notes”), as well as the dividends paid by SME’s in the framework of the “VVPR” regulation, the transitional arrangement with regard to the liquidation bonus and the liquidation reserve.

Moreover, also the revenues following the cession or the concession of copyrights and related rights do not fall within the scope of the general increase of the withholding tax.

7 Dimona: immediate declaration sporting events and sociocultural sector

Certain employers from the public and sociocultural sector (e.g., VRT, RTBF) and organisers of sporting events are, under certain conditions, exempt from social contributions for certain employees (for a maximum of 25 working days), the so-called Article 17 employees. Up until 31 December 2016, the employer had to use the online service “Article 17” to report the employees prior to their employment.

As of 1 January 2017, this electronic declaration is integrated in the Dimona declaration and the employer needs to file a declaration for each day he employs an “Article 17” employee by selecting the new “A17” type of employee in Dimona. In case of exceeding the authorised 25 working days, the employer will receive a notice.

An employer that only employs “Article 17” employees and who is not yet registered as an ONSS employer can identify himself in the online service WIDE and indicate that he only employs employees that are not subject to ONSS contributions. The employer then receives a temporary ONSS number. However, with this the employer can only declare certain types of employees.

8 Social fraud in the cleaning sector: fake self-employment cornered

The Programme Act of 25 December 2016 intensifies the battle against fake self-employment in the cleaning sector – upon request of the sector itself – with a new simple brief assimilation of self-employed cleaners with employees. The Programme Act adapts the social security law in that respect. The objective is that a rebuttable presumption of subordination will be included in the Act on employment contracts as well (which has not happened yet). Such presumptions already exist, notably in the road transport sector (there, it even concerns an irrebuttable presumption).

With this new regulation, the legislator implements a rebuttable assumption: everyone working in the cleaning sector is subject to the social security for employees, unless these persons can provide the following three proofs in rebuttal:

1) the self-employed person does not usually or mainly work for one co-contractor; the legislator hereby targets self-employed persons who are economically and socially fully dependent on one contractor;
2) the self-employed person performs the cleaning activities with his own equipment; the legislator observes that there are self-employed persons that do not invest in the purchase of equipment and even execute the activity in a contractor's uniform;
3) the self-employed person invoices for his own account; the Parliamentary preparatory works do not elaborate on this point.

While the law does not refer to the organisation of work, we read in the Parliamentary preparatory works that the assimilation is meant for self-employed persons who do not have any impact on the organisation of work.

According to the legislator, it is not the aim to consider every self-employed person in the sector as an employee.

The Parliamentary preparatory works further indicate that this strict new regulation is necessary, as the general system described in the Act concerning labour relations does not seem to work in the cleaning sector. This Act concerning labour relations already provided for a presumed existence of an employment contract if a number of conditions were fulfilled, which could also be modified at sector level (but with apparently limited effectiveness in the cleaning sector.)

The legislator extensively gives reasons for the new divergent regulation in the cleaning sector compared with other sectors, including the protection of the weakest and the lack of means for enforcement and control. If any other sectors should feel discriminated against, they can – according to the legislator – always request a similar regulation.

The new provisions entered into force on 8 January 2017.

9 Flexible and agile work

On 15 March 2017, you received our newsletter concerning the most important changes in terms of HR triggered by Minister Kris Peeters' law.

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