Ius Laboris Belgium Global HR Lawyers
Claeys & Engels

Newsletter: Update - **FAQ about the impact of Corona on your company**

April 2020

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Dear reader,

The coronavirus COVID-19 is having an impact on our lives as never before. As of 12 noon on Wednesday 18 March 2020, stringent measures are in force in Belgium with far-reaching consequences for companies and their employees.

More than 1,000,000 Belgians are currently temporarily unemployed. Many companies are being faced with a substantial decrease of activities where others are short of hands and dealing with a high absenteeism due to illness. These are extremely complex times for company directors and HR professionals.

The Claeys & Engels team has been inundated with questions these past weeks. We wish to share our knowledge with our clients in these FAQs, which we have drafted based on the current legislation. This newsletter gives an overview of the information on **29 April at 8am**. We hope these are helpful to you and we aim to update these on a regular basis whenever there is a new HR legal topic in this matter. We are also happy to keep you updated via our newsflashes and webinars.

In the meantime we are – as always – ready to help you with any HR-related legal questions you may have!

We wish you all the best and most of all, stay safe!

The Claeys & Engels team

1 Prevention and wellbeing

1.1 Which measures have been taken by the government to prevent the coronavirus from spreading?

On 17 March 2020, the Wilmès government planned urgent measures to limit the spread of the COVID-19 coronavirus. These measures were confirmed by a Ministerial Decree of 23 March 2020, which in the meantime have already been modified in certain points by the Ministerial Decrees of 3 and 17 April 2020.

These government measures have important consequences for the organisation of work. They can be summarised as follows:

- All shops and stores are closed with the exception of food stores, pet food stores, pharmacies, bookstores and petrol stations. Telecommunications stores and medical device stores have also recently been allowed to reopen, but only in cases of emergencies and with a limit of one customer at a time (by appointment). Since Saturday 18 April 2020 DIY stores with a general assortment and that mainly sell construction material, garden centres and tree nurseries that mainly sell plants and/or trees and wholesalers for professionals (limited to those) can again open their doors.
- Food stores can – again – remain open depending on normal business hours. Night shops can be open from the usual opening time to 10 pm.
- Companies, whatever their size, are required to organise teleworking for the functions allowing it. When the company cannot organise teleworking, it must put measures in place aimed at respecting the rules of social distancing, both for practising the profession as for transport. This means that a distance of 1.5 metres must always be maintained between people. Companies that cannot follow these rules will have to close. If social distancing is not respected, the company risks a heavy fine. In the event of a repeat offence, the closure of the company may be imposed. “Essential” companies and crucial sectors are not targeted by these sanctions, but they are nevertheless required to respect social distancing “whenever possible”. The Ministerial Decree of 17 April 2020 insists again on this. Closure based on the Ministerial Decree is not possible for these companies, but similar sanctions may be imposed on the basis of Wellbeing legislation and the Social Penal Code (see below). These companies would therefore do well to apply the rules as best as possible!
- Public transport must also guarantee social distancing.
- Deliveries of meals and take-away remain available.
- Nurseries remain open.

Since all gatherings are prohibited and citizens are required to stay at home, except going out for essential reasons (food shopping, doctor visits, work when telework cannot be applied, bank or post office visits, pharmacy, petrol or in case of taking care of people in need), teleworking appears essential at this stage in the evolution of the coronavirus.

These measures are applicable from Wednesday 18 March 2020 at noon until 3 May 2020.

Compliance with these measures is actively monitored. Monitoring is done through a phone or email survey on the implemented measures and, sometimes, followed by an on-site visit. Non-essential companies will, in case of infringement, receive a warning. In case a follow-up inspection shows that the measures are still not being respected, closure can be imposed, as has occurred already in certain cases. Critical businesses are also subject to active surveillance, either by the police or by the Inspection of Well-being Control at Work. If (permanent) violations are determined, the inspection can also order

the cessation of activity or the closure of the workplace of these companies for non-compliance with Well-being legislation, based on the possibilities provided by the Social Penal Code.

During the National Security Council of 24 April 2020, it was decided that as of 4 May 2020, the urgent measures can be gradually softened in phases if the evolution of the virus in our country allows it.

1.2 What obligations does the employer have to protect the health of its employees?

In addition to the measures imposed by the government (see point 1.1), the general legal obligations of the employer under welfare legislation also apply of course. This means that every employer has a "duty of care" towards his workers, implying that appropriate preventive measures must be taken to ensure that the safety and health of workers are not compromised during the performance of their work.

In view of the aforementioned legal obligations, each employer is therefore obliged to examine in parallel with/in addition to government measures – which are the absolute minimum – what additional preventive measures must still be taken at company level, at the level of any departments, as well at the level of the respective workstations. These preventive measures must be determined based on risk analyses, if necessary, after consulting the competent prevention service (internal or external) and information and consultation of the Committee for Prevention and Protection at Work ("CPPW"). In short, it is not enough, in these times of corona, to simply observe the imposed government measures.

The FPS Employment also provides a specific checklist that can assist employers with the above. We note that this checklist is now also used by the Inspection of Well-being Control at work as an instrument for organising controls (by phone or e-mail). You are therefore advised to prepare yourself as an employer, now that in practice the inspection imposes very short deadlines for providing information and documents. You can prepare for this by analysing the checklist as soon as possible and, if necessary, ask/keep the necessary notices handy. In the event of such controls, photos are always requested, such as suitable workplaces, so it is also recommended to take a few photos already. You will find the checklists in its most recent version here in French and in Dutch.

The sectors and enterprises are invited to conclude agreements on the measures that can be taken as part of a progressive restart. In the meantime, the Group of Ten has validated a Generic Guide of Best Practices as an inspiration. You can find the link to this guide here.

2 Questions about employment during the Corona crisis

2.1 Can the employee unilaterally withdraw his planned holiday?

As a rule, the normal rules regarding holidays (and taking holidays) continue to apply.

This means that leave is taken on the basis of an agreement between employer and employee. It will therefore not be possible for the employee to unilaterally "cancel" or "withdraw" his holiday leave. The employer must therefore always agree to the change of the holiday planning or the "withdrawal" of planned holidays. Moreover, the employer does not have to justify this refusal.

In this context, however, the employer may choose to contact the employee in order to find a solution by mutual agreement (e.g. the modification of the holiday planning).

We wish to point out that there is a chance that many employees will still have holidays after the crisis if all employees are allowed to “withdraw” holidays.

Note that there might be the “risk” that many employees will still have holidays after the crisis, which will have to be taken after the corona crisis and before the end of the year, if all employees are allowed to “withdraw” holidays.

The above means that employees who are not temporarily unemployed cannot, without the employer’s agreement, withdraw their holidays.

Employees who are temporarily unemployed, on the other hand, will not be able to withdraw their holidays either, without the employer’s agreement. In this context, please note that temporary unemployment is not possible on “planned” holidays; also, the employee cannot be obliged to take his holiday leave before he can be temporarily unemployed due to force majeure.

2.2 Could I assign alternative work to the employee?

If homeworking is technically impossible for an employee concerned, one could consider changing the employee’s function. However, unilaterally changing the function of an employee is not automatically allowed.

The function executed by an employee is – in addition to wage, workplace and working time – considered as one of the essential elements of the employment contract. Making an important change to an essential element comes down to an implicit termination of the employment contract, as a result of which the employee could claim an indemnity in lieu of notice.

Parties can however deviate from this rule. If the employment contract provides that the employee’s function is not an essential employment condition and can be modified based on the company’s needs, you have more flexibility in this respect. It is essential therefore to carefully check your employment agreements.

In order to exclude the risk of a wrongful termination, it is advisable to determine important changes to the function in mutual agreement, e.g. by adding an addendum to the employment contract stipulating that the function is temporarily changed. If the employee refuses to agree to this, it could still be an option to invoke temporary unemployment due to force majeure.

2.3 Can I let my employees work for another employer who still has work to offer?

Aside from some strictly organised cases, it will not be possible to “hire out employees” to an employer where it is still possible to perform, due to the prohibition of lease of personnel. Indeed, it is forbidden to put employees at the disposal of a “user company” (i.e. the other employer, where there is still work) who executes some employer’s authority over these employees. The employer who violates this prohibition risks both civil and criminal penalties.

There is a classic exception in case of intra group posting of staff. Within an economical group of companies a short-term posting of staff is permitted if a tripartite agreement is closed between the parties and on condition the labour inspectorate is informed at the latest within 24h before the posting starts.

In addition, a specific corona exception was introduced for the period from 1 April 2020 to 30 June 2020, allowing the posting of staff to employers belonging to the critical sectors. Also in this case, a tripartite agreement has to be concluded but the labour inspectorate does not have to be informed.

Given the strict sanctions, we strongly advise against letting your employees work for another employer without prior legal consultation.

3 Temporary unemployment

3.1 What types of temporary unemployment are possible in relation to the coronavirus?

Traditionally, two types of temporary unemployment can be considered in relation to the lack of work or the impossibility to provide work due to the coronavirus:

- temporary unemployment due to force majeure;
- temporary unemployment for economic reasons.

We explain both regimes in more detail below.

3.2 When can temporary unemployment due to force majeure be used?

There is “force majeure” if the lack of work is due to a sudden, unforeseeable event beyond the control of the contracting parties. In addition, it must be a temporary situation.

In principle, the important thing is that the employer can demonstrate that it has no influence on the decision to place employees in temporary unemployment due to force majeure. Thus, where the company is for example forced by the government to stop production/activities, temporary unemployment due to force majeure could be invoked. On the other hand, if the company itself decides to do this as a preventative health measure, temporary unemployment due to “force majeure” cannot be invoked.

However, a flexible application of the principle of force majeure is accepted with retroactive effect as of 13 March 2020 until 31 May 2020 (so far) . This means “force majeure” will be applicable, for example, for companies which close (partially or fully) because they cannot organise telework and cannot respect the rules of social distancing at the workplace and in transport, but also for companies facing a decrease in work due to a drop in revenue, orders, production, etc. It is then not required that the company is completely closed. Taking into account the fact that the concept of “force majeure” has been broadened (covering not only classic force majeure situations, but also difficult economic circumstances due to Corona), we now speak of “Corona force majeure”.

As long as this broader application of temporary unemployment is in force, this means that in practice, some workers may be temporarily unemployed and others may not. Employees may also alternate days of work and days of temporary unemployment. Incidentally, temporary unemployment always applies for a full day. It is therefore not possible to be unemployed in the morning and to work in the afternoon (or vice versa).

3.3 Can temporary unemployment be invoked for medical/health reasons?

According to the National Employment Office (hereinafter "NEO", "*RVA/ONEM*"), temporary unemployment due to force majeure may also be invoked in the following cases:

- When the authorities decide to place a person in quarantine because he or she is (clearly) contaminated.
- When the occupational physician is of the opinion that an employee should be removed from the workplace.
- When the worker has a certificate from his or her attending physician clearly indicating that the employee cannot work (e.g. because there are serious indications of a contamination, or because a family member residing under the same roof as the employee is contaminated), and that there is a risk of contamination for other employees.

However, the NEO specifies that "*the worker cannot be ill*", because in this case the employer has the responsibility to pay the guaranteed salary (and then, possibly, the health insurance funds to intervene).

The NEO also specifies that "when an employer decides to send employees home "preventively" on its own initiative, without an order from the authorities, or without a decision from the occupational physician, or without a certificate from the general physician of the employee(s) in question, no force majeure can be invoked".

3.4 What are the formalities to be carried out in case of temporary unemployment due to force majeure?

If a company wants to invoke temporary unemployment because of force majeure, an electronic declaration must be submitted via the social security portal. This is an online tool in which it is specified what needs to be completed.

At the same time, an e-mail then must be sent to the NEO office explaining why you believe this is a case of force majeure. There are no standard forms/documents which can be used for this purpose. The aim is to explain to the NEO why you believe there is force majeure.

Not later than the first day of actual unemployment, the employer must give a control document C.3.2A to the concerned employees and must make an electronic DRS declaration (Scenario 2).

However, until 31 May 2020 (so far)**with retroactive effect as of 13 March 2020**, the aforementioned procedural steps must not be followed. You now only have to make at the end of each month a "scenario 5 declaration" on the website socialsecurity.be (https://www.socialsecurity.be/site_fr/employer/applics/drs/onem/scen5/about.htm). In this application, you indicate that the temporary unemployment results from "force majeure", by selecting the code 5.4 "type of the day" and specify "coronavirus" as the reason. As regards the entry of salary data, you must also use the correct salary codes (which will be communicated to you by your social secretariat).

In the meantime, the Group of ten has reached an agreement on a prior notification obligation which was transmitted to the competent ministers.

Furthermore, for the period from 1 March to 30 June 2020, you as an employer are not obliged to issue a C3.2A control form to the employees concerned.

The employees concerned must contact their payment institution (FGTB, CSC, CGSLB, CAPAC) in order to apply for an allowance. A simplified form "C3.2-WORKER-CORONA" is available on the websites of the payment institution.

3.5 When can temporary unemployment due to economic reasons be used?

When a company faces a shortage of work, employment contracts can be suspended by the introduction of temporary unemployment for economic reasons.

The regime is different for blue-collar and white-collar workers:

- In the case of blue-collar workers, it is "sufficient" to show that the normal work regime cannot be maintained due to economic reasons.
- With regard to white-collar workers, the company must in principle meet stricter pre-conditions. Either, there should be a 10% reduction in turnover, production or orders or an economic unemployment rate of the blue-collar workers of at least 10%; or, the company must be recognised by the Minister of Labour as a company in difficulties.

As far as white-collar workers are concerned, it was for some companies at the moment of the outbreak of the Corona crisis impossible to prove a reduction in turnover, production or orders by 10%. After all, at that moment you had to look at the figures for the last quarter of 2019 and logically a reduction was not yet noticeable during that quarter (as there was no coronavirus yet). In those circumstances, many companies lodged an application to the Minister of Labour in order to obtain a recognition as a company in difficulties.

In the meantime, it was announced that – taking into account the now existing "Corona force majeure" – the submitted applications to be recognised as a company in difficulties, as well as any applications which would still be submitted during the period of Corona force majeure, will no longer be treated. This decision was justified by the fact that the companies can now also invoke "Corona force majeure" because of economic reasons.

3.6 What if the company wants to invoke temporary unemployment for economic reasons for white-collar workers?

Until 31 May 2020 (so far) and this with retroactive effect from 13 March 2020, employees may simply be temporarily unemployed on the grounds of Corona force majeure, as explained above.

However, we are of the opinion that the "traditional" temporary unemployment scheme for economic reasons for white-collar employees will be relevant again after 31 May 2020 (which is the current expiry date of the Corona force majeure, although it may be extended). (Below, we describe this "traditional" scheme.

As explained above, a company first has to meet the abovementioned conditions (see point 3.5) in order to be able to apply temporary unemployment for economic reasons for white-collar workers.

In addition, the company must in principle first conclude a company CBA, unless a specific CBA was concluded at the sectoral level.[1] This implies that negotiations, concerning among others the amount of the supplement that the employer will pay, the measures to maintain employment as much as possible and the maximum duration of the suspension, have taken place. If the negotiations with the trade union delegation do not lead to an agreement within two weeks or if there is no trade union delegation within the company, the company can draw up a business plan instead or a CBA. This business plan must be sent to the FPS ELSD where it will be treated by the Business Plan Commission, which will decide on the plan within two weeks.

An interprofessional collective bargaining agreement was concluded at the level of the National Labour Council (CBA n° 147) on 18 March 2020, on the basis of which all employers (regardless of the industry) can invoke temporary unemployment because of economics reasons for white-collar workers. In this way, the above set-out necessary negotiations at company level or the drawing up of the company plan become redundant; at least for as long as CBA n° 147 is valid, i.e. until 30 June 2020.

If the company is recognised as a company in difficulties, each white-collar worker will receive an allowance from the employer amounting to EUR 5 per day of unemployment. This allowance will be higher if the blue-collars workers employed by the company would receive a higher allowance in case of temporary unemployment, or if the joint committee under which the company would fall if it would employ blue-collar workers provides in a higher allowance for these blue-collar workers. The white-collar workers are then entitled to the same amount.

Existing collective bargaining agreements and approved business plans which have already been concluded in this context will remain in force.

3.7 What are the suspension possibilities in case of economic unemployment?

A distinction is made between the regime that is applicable to the blue-collar workers and the regime that is applicable to the white-collar workers.

For blue-collar workers, there exist three different regimes:

- The regime of “complete suspension” (where they no longer work at all), which can be implemented for a maximum duration of 4 weeks. Thereafter, the blue-collar workers have to work again for at least one week.
- The regime of “large suspension” (where they work one or two days per week or less than every other week), which can be implemented for a maximum duration of 3 months. Thereafter, the blue-collar workers have to work again for at least one week.
- The regime of “small suspension” (where they work at least 3 days per week or at least every other week).

For white-collar workers, there exist two different regimes:

[1] Currently, the following sectors have concluded such a CBA:

- JC 209 - metal industry
- JC 214 - textile industry
- JC 221 - paper industry
- JC 222 - paper and cardboard processing
- JC 315.01 - technical maintenance, assistance and training in the aviation sector
- JC 315.02 - airlines
- JC 324 - diamond industry and trade
- JC 327 - Flemish sector of sheltered workplaces, social workplaces and tailor-made companies.

- The regime of complete suspension (where they no longer work at all), which can be implemented for a maximum duration of 16 calendar weeks per calendar year.
- The regime of large suspension (where they work at least 2 days per week), which can be implemented for a maximum duration of 26 calendar weeks per calendar year.

For the sake of completeness we remark that if the company does not apply economical unemployment but the simplified “Corona-unemployment”, these regimes are not applicable. In that case the company will be able to switch work days with unemployment days in a flexible way.

4 Financial allowances for employees

4.1 Is the employee entitled to temporary unemployment allowance?

Every employee in temporary unemployment due to the Coronavirus receives a temporary unemployment allowance from the National Employment Office (NEO), both in a system of economic unemployment and in case of unemployment due to force majeure. This benefit was recently increased from 65% to 70% of the salary, capped to EUR 2,754.76 gross. A withholding tax of 26.75% is deducted from the benefit.

This scheme applies (for now) until 30 June 2020.

4.2 Can the employee claim a supplement of the National Employment Office?

Only if an employee is temporarily unemployed due to force majeure will the NEO grant an additional increase of EUR 5.63 per day for both blue-collar and white-collar workers. This supplement is also subject to a withholding tax of 26.75%.

The NEO specifies that the force majeure may not be the result of incapacity for work. An incapacitated worker who receives temporary unemployment benefits because he was found unfit for work by the health insurance fund and (i) contests this decision or (ii) does not contest the decision but is temporarily unfit for his position is not entitled to this supplement.

4.3 Does a sectoral supplement exist?

Depending on the joint committee to which the company belongs, an additional supplement may be granted to workers in a temporary unemployment scheme.

Such sectoral arrangements exist, for example, for blue-collar workers in the food industry (JC 118) and for white-collar workers in the metalworking industry (JC 209).

We expect that other sectors will follow.

4.4 Is there compensation for water and energy bills (gas, electricity and heating)?

The Flemish government will cover the energy bills for one month of families living in Flanders where at least one person is temporary unemployed. The allowance amounts to EUR 202.68, based on an average household bill (EUR 30.77 for water, EUR 95.05 for heating and EUR 76.86 for electricity). This compensation applies automatically and is provided per worker in the temporary unemployment scheme.

If the situation persists for more than one month, a system of delay of payment will be introduced.

4.5 What about the calculation for annual leave?

The days of temporary unemployment due to force majeure will be assimilated to working days in terms of annual leave, both for the duration of the holiday and for the holiday pay. However, the legislation still needs to be adapted in this respect.

4.6 Can I, as an employer, pay a supplement to cover the loss of wages of the temporarily unemployed employee?

Many employers have announced that they will pay supplements to cover the loss of wages of their temporarily unemployed employees.

The (mandatory or voluntary) supplements granted by the employer to temporarily unemployed employees paid on top of the temporary unemployment benefit (and whether or not paid on top of a potential supplement paid by a Fund for Social Security) have their own tax and social security treatment.

1.
The supplement qualifies for tax purposes as a replacement income. In principle, the employer must withhold withholding tax on this income. The employer must mention the supplement on tax form 281.18 under code 271. The amount of the withholding tax should be mentioned under code 286.

The supplements are finally taxed (i.e. on receipt of the tax assessment) at the progressive rates along with other sources of income that are taxable at the progressive rates, such as ordinary wages and unemployment benefits etc. The supplement (and the unemployment benefits) are not subject to a lump-sum deduction for professional expenses. The unemployment benefits and the supplement (both of which qualify as a replacement income for tax purposes) give rise to the application of a tax reduction. This tax reduction is calculated on the basis of the type and the amount of the other sources of income of the beneficiary of the supplement and of the legally cohabitating partner/spouse. However, if certain limits are exceeded, this tax reduction can be 0.

The beneficiary must include the amount of the received supplement in his declaration under code 1271/2271 (on the basis of the declaration form for income year 2018). The withholding tax that was deducted from the supplement must be mentioned under code 1286/2286.

It should be noted that, in certain cases, the withholding tax will not be sufficient to cover the final tax bill. Upon receipt of the tax assessment, there can be a (high) balance that still must be paid. However, it can be agreed with the employee to withhold a higher withholding tax in order to avoid unpleasant surprises. In any case, we advise you to point this out to your employees.

2.
In principle, these supplements are exempt from social security contributions since they are a supplement to a social security benefit (unemployment benefit). However, this requires that the supplement does in fact constitute a real supplement. In brief, this implies that the employee must

receive unemployment benefits, that there is a clear link between the supplement and the unemployment benefits and that the supplement does not compensate more than the actual loss of income. Therefore, the payment of the supplement cannot put the employee in a more beneficial financial situation in comparison to the financial situation that would have been applicable if he had continued to work. The NSSO initially clarified in this respect that with regard to the amount of the supplement, the sum of the unemployment benefit from the Unemployment Office and the supplement (granted by the employer) cannot lead to a situation in which the employee would receive a higher *net* income than when he would have continued to work.

However, there was discussion about what exactly is to be understood by "net".

In this respect, the NSSO clarified on 2 April 2020 that for the calculation of the supplement, "net" is to be understood as the "taxable gross", i.e. the gross amount less the 13.07% personal social security contributions (if applicable), but before deduction of the withholding tax.

In concrete terms, it is therefore necessary to check whether the taxable income of the employee during the period of temporary unemployment (consisting of the unemployment benefit paid by the NEO, any supplements paid by the NEO or an Existence Security Fund and the supplement paid by the employer) does not exceed, on a monthly basis, his last gross taxable monthly remuneration (i.e. his gross monthly remuneration minus personal social security contributions).

The NSSO also specifies that account must be taken of the remuneration subject to social security contributions. Benefits, such as luncheon vouchers, cannot therefore be taken into account in the calculation of the supplement. Furthermore, if the employee receives a variable remuneration, the average remuneration of the previous months should be taken into account, according to the NSSO.

The NSSO also points out that the employer must treat all employees within the same category equally, but that he can do so either by compensating up to a certain percentage of the gross taxable remuneration or by paying each employee a lump sum (without exceeding the last gross taxable monthly remuneration).

More specifically, with regard to the concept 'category', the NSSO states that this has to be determined based on objective criteria, such as, for example, according to the NSSO, the function, the seniority and the first date of employment. On the other hand, the NSSO does not accept the determination of a category based on the regime of employment (full time *versus* part time), age or certain behaviour of the employee (such as, for example, the fact whether an employee has taken all of his/her days of compensatory time off).

Finally, the NSSO specifies that if the supplements calculated for the month of March are too high, the employer may compensate thereafter by reducing the amount of the supplements for the next few months (bearing in mind also that the final amounts of unemployment benefits are not yet known).

It should be pointed out that the NSSO could claim payment of social security contributions on the total amount of the supplements granted by the employer if these exceed the above-mentioned limits.

4.7 Are my employees eligible for an encouragement premium?

The Flemish encouragement premium that already existed for employees of companies in difficulty to encourage them to work part-time and therefore avoid redundancies was extended to companies that, as a result of the corona crisis, experience a **substantial fall of at least 20%** in turnover, production or orders in the month in which the reduction in working hours starts, compared to the same month of the previous year.

The employer must demonstrate this by drawing up a **plan** showing this reduction and what the labour redistribution measures are. This plan must be approved by the works council or in the absence thereof, by the trade union delegation or in the absence thereof, by the CPPW or, in the absence thereof, be included in the work rules.

The employee's monthly premium amounts to between EUR 68 and EUR 172 gross and can start on 1 April 2020 at the earliest and end on 30 June 2020 at the latest.

Please note that this is not an additional premium on top of the temporary unemployment benefits.

The employee should file a request for the encouragement premium himself/herself to the Flemish government (for more information, see https://www.vlaanderen.be/aanmoedigingspremie-bij-onderneming-in-moeilijkheden-privesector (not yet available in English).

5 Illness

5.1 Do I have to pay guaranteed salary to all employees who are absent with a medical certificate?

Employees who can prove with a medical certificate that they are incapacitated for work are entitled to guaranteed salary due to illness. The medical certificate will not indicate whether the employee suffers from COVID-19. This information is subject to medical confidentiality.

Employees who have to stay at home on the advice of the occupational physician or of the attending physician because there is a suspicion of infection, or because a family member is infected with COVID-19, but for whom it has not been established that they themselves are incapacitated for work, are not entitled to guaranteed salary. These employees can, however, be placed in temporary unemployed due to force majeure.

5.2 Do I have to pay guaranteed salary to employees who are ill during the period of temporary unemployment?

Whether or not the employer has to pay guaranteed salary to an employee who is ill during a period of temporary unemployment depends in the first place on whether the temporary unemployment is:

- complete, in which case the employees are no longer working at all, or;
- partial, in which case days of unemployment alternate with working days.

In case of **complete temporary unemployment** the employee is not entitled to guaranteed salary during a period of temporary unemployment but he/she will be entitled to incapacity benefits paid by the health insurance funds.

In case of **partial temporary unemployment** the unemployment planning determines whether an employee is entitled to guaranteed salary:

- for the planned days of unemployment, the employee is entitled to incapacity benefits paid by the health insurance funds;
- for the planned working days, the employer pays the guaranteed salary.

The FPS Employment, Labour and Social Dialogue and the National Institute for Sickness and Disability Insurance have taken this position.

If an employee has been incapacitated for work for more than 30 calendar days, he or she is in any case no longer entitled to guaranteed salary and receives disability benefits from the health insurance funds.

6 Bridging right for the self-employed

6.1 Can freelancers/self-employed persons active in my company claim an allowance from the NISSE?

Recently, a new law came into force that considerably alters the legislation on the **bridging right**, making it easier for self-employed persons who are obliged to interrupt their activities as a result of the coronavirus, to claim this right.

The bridging right, which previously existed under stricter conditions, consists of a **monthly financial allowance** corresponding to the monthly minimum pension of a self-employed person, this amount varying according to whether or not this person has family responsibilities:

- Monthly allowance for a self-employed person without family responsibilities: EUR 1,291.69;
- Monthly allowance for a self-employed person with family responsibilities: EUR 1,614.10.

Measures in times of Corona (March–April 2020)

First and foremost, the law introduces specific measures for self-employed persons who, as a result of the corona crisis, have to interrupt their activities in the months of March and April 2020. This period was provisionally set at these two months but can be extended if the crisis lasts longer.
Self-employed persons, helpers and assisting spouses who find themselves in one of the following 3 situations, and who are not entitled to any other replacement income, will receive the **full monthly financial allowance**:

1. if the self-employed person has to interrupt his activities **completely** according to the Ministerial Decree of 18 March 2020 and those who would follow (bars, restaurants, leisure centres, etc), regardless of the duration of closure;
2. if the self-employed person has to interrupt his activities **partially** according to the Ministerial Decree of 18 March 2020 and those that would follow (shops that are obliged to close at the weekend, restaurants that only sell takeaway meals etc); regardless of the duration of closure;
3. if the self-employed person interrupts his activity **completely**, not because the government has forbidden it, but because he is experiencing serious difficulties due to COVID-19, for example, a substantial drop in reservations or in occupation because employees have been placed in quarantine,...The interruption of the self-employed activity must last at least 7 consecutive calendar days.

The following adjustments to the conditions of application of bridging right were also adopted:

- It is no longer required that the self-employed person exercises his activity as his main occupation;
- Starting self-employed persons who have not yet actually paid 4 quarterly contributions are also entitled to the bridging right;
- The self-employed as a secondary occupation, the self-employed as a main occupation, assimilated to a secondary occupation, the student-independent and the actively retired self-employed may, depending on their provisional social security contributions due, be entitled to a partial financial allowance of EUR 807.05 per month (family responsibilities) or EUR 645.85 per month (without family responsibilities);
- The benefits for the months of March and April are not taken into account for the 12 or 24 months of financial allowances to which a self-employed person may be entitled throughout his career. The financial allowances that a self-employed person will receive as a result of the forced interruption due to the corona crisis are considered separately from the financial benefits already acquired;
- This specific bridging right is also granted to self-employed persons who have already benefited from the maximum amount of financial allowances within the context of bridging right during their career.

Measures after the corona crisis

When the corona crisis has passed (in theory for the time being after April 2020), the normal rules will apply again. The law also alters the legislation on the bridging right from then on. The self-employed person who is forced to interrupt his activities will be entitled to a financial allowance when this interruption lasts at least 7 consecutive calendar days (and no longer only when it lasts a full calendar month as was the case before the law came into force). The financial allowance will also be calculated pro rata per period of 7 days. In this way, the self-employed person will be able to claim:

- 25% of the financial allowance if the interruption lasts at least 7 days;
- 50% of the financial allowance if the interruption lasts at least 14 days;
- 75% of the financial allowance if the interruption lasts at least 21 days;
- 100% of the financial allowance if the interruption lasts at least 28 days.

6.2 What if the self-employed/freelancer operates through a company?

Self-employed persons who are **directors** of a company are also entitled to the bridging right. However, this is subject to the condition that **the company's activities must have been interrupted** as a result of the corona crisis. In the event of a forced interruption of activities on government orders, no minimum duration is linked to the interruption; in the event of interruption on the company's own initiative, a minimum interruption of 7 calendar days per month is required (*supra*, 6.1).
It is irrelevant in this respect whether this self-employed director has a remunerated or unremunerated mandate and still receives remuneration from this company.

6.3 Is there a specific application form for bridging right in the event of a forced interruption due to the coronavirus?

Each social security fund is obliged to provide the affiliated self-employed with a specific application form for bridging right in the event of a forced interruption as a result of the corona virus. These are available on their respective websites (https://www.ucm.be/, https://www.acerta.be/nl, ...).

6.4 Within what period will the financial allowance be paid?

The social security funds will have to proceed with the payment of the financial allowance as soon as possible and at the latest at the beginning of the month following the interruption.

For example, the payment of the financial allowance for the month of March 2020 will have to take place at the latest at the beginning of April 2020.

6.5 How is the bridging right treated from a tax perspective?

The bridging right qualifies for tax purposes as replacement income.

In principle, 26.75% withholding tax is deducted from the bridging right.

The bridging right is taxed at the progressive rates, together with the other income that is taxable at the progressive rates, such as profits, income, etc. No fixed deduction for professional expenses can be applied to the bridging right.

However, it is possible that the bridging right gives rise to the application of a tax reduction. This tax relief is calculated on the basis of the type and amount of the other income of the beneficiary of the bridging right and the legally cohabiting partner/spouse. However, if certain limits are exceeded, this tax credit may be 0.

6.6 How is the bridging right treated from a social security perspective?

In principle, no social security contributions for self-employed persons are due on the bridging right.

7 Wages and working conditions

7.1 I have agreed with my employees to grant their annual bonus in the form of listed warrants or non-listed options on shares of a SICAV, but the stock exchange risk is of such a nature that my employees could lose a significant amount of money due to the operation in question. Now what?

A certain number of employers have concluded annexes to the employment contracts with their employees providing for the conversion of their (potential) yearly bonus in listed warrants (or non-listed options on shares of a SICAV), which are in principle exempted from social security contributions. Even taking into account the blockage period of a few hours for warrants (and one year for non-listed options on shares of a SICAV), the stock exchange risk during this period is of such a nature that the value of the warrants could drop significantly during the blockage period, rendering the operation financially dangerous for the employees.

If the warrants have already been the subject of a formal offer (accepted by the employees in question), unfortunately it is no longer possible to go back on this. The fact that warrants are a speculative product by nature, means that the employees in question have knowingly accepted the risk of stock exchange fluctuations. Nonetheless, to the extent that no formal offer has been made to the employees in question, or if no employees have accepted the offer of warrants, it is still possible to go back on this and either

postpone the offer at warrants to a point in time at which the stock exchanges have stabilised, or grant a bonus in cash instead of in the form of warrants.

As salary, either fixed or variable, are part of the essential elements of the employment contract, it will in any case be necessary for the employees to agree with the proposed alternative, for example by signing a new annex to the employment contract, by signing a letter “for agreement”, etc.

7.2 How is telework best organised?

For the duration of the corona measures imposed by the government, many employers are forced to impose telework structurally and regularly on their employees.

As far as employment law is concerned, the necessary provisions regarding telework, including the provision of equipment and whether or not to intervene in the expenses, are best determined in an agreement. The FPS Employment has confirmed that, given the current circumstances, no strict formalities must be complied with and these agreements can even be confirmed by e-mail.

Concerning the intervention by the employer in the expenses of telework, the NSSO has very recently published new “Instructions” that specifically relate to telework performed during the coronavirus crisis.

The NSSO indicates that the following lump-sum indemnities (exempted from social security contributions) can be awarded to employees who work from home during the crisis (and therefore also if these employees did not work from home before the crisis and with whom the employer has not concluded a formal telework agreement):

- EUR 129.48 per month (amount applicable as of 1 April 2020; previously EUR 126.94 per month) for office costs (the costs of heating, electricity, small office equipment, etc.);
- max. EUR 20 per month for the professional use of the own PC;
- max. EUR 20 per month for the professional use of the own Internet connection.

Of course, the award of the lump-sum interventions of EUR 20 are only justified if the employer does not already bear the costs in some other way (for instance. by making (portable) PCs available to the employees concerned).

The NSSO also indicates in the new “Instructions” that if the employee has to make other expenses (use of own phone, purchase of a screen or a scanner, etc.), the employer can reimburse these costs as well. The reimbursement must occur based on the actual costs.

On the other hand, the Ruling Commission has made a simplified application form available on its website in order to obtain - for the duration of the corona measures – an accelerated preliminary decision to validate the home office lump sum allowance as envisaged by the “Instructions” of the NSSO, which amounts to EUR 129.48 as op 1 April 2020 (https://www.ruling.be/nl/nieuws/aanvraag-thuiswerk-covid-19). Although the Ruling Commission does not refer to this explicitly in the context of the “Corona” template, the combination of this lump sum indemnity of EUR 129.48 per month and the lump sum allowances of EUR 20 per month is also possible from a tax point of view (provided that the costs concerned are not covered otherwise).

Of course, the aforementioned lump sum allowances validated by the tax and social security authorities during the coronavirus crisis cannot be cumulated with other lump sum allowances that the employees already receive, covering the same expenses (e.g. within the framework of a ruling regarding “costs proper to the employer”).

8 Public holidays

8.1 What happens to public holidays that fall on a day of temporary unemployment?

The employee is entitled to 10 public holidays. However, if a public holiday coincides with a Sunday or 'normal inactivity day', a replacement day must be provided. A 'normal inactivity day' means a day on which, taking into account the organisation of the work in the company or sector, is normally not worked (e.g. on Saturdays in many companies).

A day of temporary unemployment based on “force majeure” is not considered to be a “normal inactivity day”. Hence, the official Belgian public holidays that fall on a day of temporary unemployment based on “force majeure” – i.e. 13 April 2020 and) 1 May 2020 – will not be replaced, but the employer should let them be taken up.

8.2 Do I have to pay the public holiday pay for public holidays that fall on a day of temporary unemployment?

As a general rule, the law provides that an employee retains the right to public holiday pay for public holidays that fall within a period of 14 days following the start of the suspension of the employment contract due to force majeure (such as temporary unemployment due to Corona force majeure).

Applied to an employee in **complete temporary unemployment**, this means that the employee is entitled to public holiday pay insofar as the public holiday takes place in the period of 14 days following the start of the temporary unemployment. If the public holiday takes place after this period, the employee is not entitled to public holiday pay (but is entitled to temporary unemployment benefits).

In case of **partial temporary unemployment** - where unemployment days and working days alternate - the date on which the employee last worked must be taken into account. If the public holiday takes place within 14 days of this date, the employee is entitled to the public holiday salary. If this is not the case, the employee is not entitled to public holiday pay (but is entitled to temporary unemployment benefits). In case of partial temporary unemployment, the aforementioned period of 14 days will therefore start again each time the employee has worked.

If the employee has received public holiday pay, this will also have to be reported via the electronic declarations. Since the employee received public holiday pay for this day, he / she will not receive any temporary unemployment benefits for it.

9 Occupational pension plans and risk insurances

9.1 What is the impact of temporary unemployment on the occupational pension accrual and the death cover?

Group insurances

In most group insurances, temporary unemployment is not assimilated to active service. As a result, there is in principle no pension accrual during this period. The death cover may no longer be applicable or may be reduced to the accrued pension reserves.

On 26 March 2020, at the initiative of Assuralia, the professional association of insurance companies, a sector agreement was reached in which it was agreed (contrary to the general conditions of most

insurance contracts) to maintain the pension accrual and the death cover during periods of temporary unemployment, unless the employer would indicate that he would not want this. Employers can obtain a postponement of the payment of employer's contributions for temporarily unemployed employees until 30 September 2020.

In some cases, it may be recommended to clarify certain matters in an annex to the pension plan rules (e.g. pensionable salary) or to determine how employee contributions will be withheld. Employee contributions are indeed based on the net salary, which is no longer due in the event of temporary unemployment. In principle, a modification of the pension plan rules requires a preliminary advice of the competent consultative body (works council, committee for prevention and protection at work or the trade union delegation). In the absence of such a body the employees must be informed individually. In the current circumstances, we propose to apply this procedure in a pragmatic way and to inform/consult the competent social consultative body through skype, conference call or by e-mail. The individual employees can be informed by e-mail as well.

Pension scheme managed by a (multi-)employer pension fund

If your occupational pension scheme is managed by a pension fund, you should first check the pension plan rules. If an annex is required for the continuation of the various coverages (pension, death, disability), then, in addition to the above (pragmatic) information/consultation procedure, it should also be approved by the board of directors of the pension fund (OFP). In some pension funds, the general assembly will also need to ratify the annex. The board of directors can be organised in writing. In that event, the annex will be approved provided that all directors give their consent in writing. A skype meeting would also be possible. Taking into account the current difficult financial situation of the pension funds, the approval of the board of directors is an important step. In our opinion, the general assembly meeting can also be organised in writing in these exceptional circumstances. A skype meeting or meeting by conference call is also exceptionally possible, even if this is not explicitly provided in the bylaws. Although not ideal, things can be arranged informally and be formally ratified afterwards. Please note that a death cover managed by a pension fund is often reinsured. Maintaining this cover during periods of temporary unemployment may give rise to a revision of the reinsurance agreement or to an additional solvency margin.

Industry-wide pension schemes

Finally, if you participate in a so-called social industry-wide pension scheme, or if you are the organiser of a social industry-wide pension scheme, we recommend verifying whether or not a continued pension accrual during periods of temporary unemployment for economic reasons or based on force majeure is part of the so-called "solidarity" benefits. Also, verify if there is a death cover, and if so, in which circumstances.

9.2 What is the impact of temporary unemployment on the hospitalisation insurance?

Occupational health insurances (hospitalisation, out-patient care) generally continue to apply during periods of temporary unemployment. Pandemics are usually not excluded from coverage. This means that employees who are temporarily unemployed and are hospitalised (for COVID-19 or any other reason) are entitled to a (partial) reimbursement of medical expenses.

9.3 What is the impact of temporary unemployment on the disability cover?

Occupational disability insurances and disability covers managed by pension funds generally no longer apply when the employment agreement is suspended for a reason other than illness. The timing of the cancellation of the disability cover depends on the policy conditions/pension plan rules of the pension fund. In some cases, the cover is cancelled on the first of the month following the suspension of the

employment agreement. Other policies/pension plan rules stipulate that the cover is immediately cancelled. When an insurance company manages the disability cover, the employer must inform the employee of the right of individual continuation within 30 days after the termination of the disability cover.

In the aforementioned sector agreement, it was agreed to apply the same principles as for group insurances (life and death cover). This means that with regard to disability insurances, the cover will be maintained for the temporarily unemployed employees, unless the organiser (employer) indicates that he does not want this. Here too, a postponement of payment of employer's contributions until 30 September 2020 can be obtained.

When the disability cover is managed by a pension fund, a similar approach may be adopted, but usually an annex to the plan rules will be required to do so. Pension funds that manage a disability cover are usually reinsured and therefore should better contact the reinsurer before extending the disability cover.

10 International employment

10.1 Is it still possible to travel to Belgium or be repatriated?

Upon proposal from the European Commission, the external borders are temporarily closed to third country nationals making non-essential travel. Non-essential travel to and from Belgium via the internal borders is also temporarily prohibited.

Subsequent movements are considered, inter alia, as non-essential movements:
- tourism;
- leisure time;
- shopping;
- refuelling;
- visiting an acquaintance;
- visiting a family member abroad.

The following movements are considered, inter alia, as essential movements:
- professional travel;
- co-parenting arrangements;
- assisting a vulnerable person living abroad;
- attending a funeral within the family;
- picking someone up within your family at an airport in one of our neighbouring countries; taking care of animals abroad.

Persons who have to cross borders because of essential movements are strongly advised to keep a document justifying their movement at hand at all times.

On 30 March 2020, the European Commission also adopted a guidance (C(2020) 2050) on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy. This guidance covers in particular:
- **Criteria for refusing entry**: the restriction on non-essential travel to the EU applies to non-resident third-country nationals who present relevant symptoms or have been particularly exposed to risk of infection and who are considered to be a threat to public health. Any decision to refuse entry must

be proportionate and non-discriminatory. Certain employees who are not EU citizens are also exempt, e.g. healthcare professionals and frontier workers;
- **Exceptions**: nationals of all EU Member States and Schengen associated countries, their family members as well as third-country nationals holding a long-term residence permit in the EU are exempted from the temporary restriction on movement for the purpose of returning to their homes;
- **Other measures**: the guidelines include certain measures to facilitate subsequent transit of nationals of all EU Member States and Schengen associated countries, exit checks (see below) and visa applications (see below).

On 8 April 2020, the European Commission invited the Schengen Member States and Schengen Associated States in a Communication (COM(2020) 148) to prolong the temporary restriction on non-essential travel to the EU until 15 May 2020.

10.2 Is it still possible to travel abroad from Belgium?

Non-essential travel from Belgium are expressly prohibited until 3 May 2020 (provisional date).
For the distinction between non-essential and essential travel, reference is made to point 10.1.

The European Commission's Guidance (C(2020) 2050) specifies that with regard to possible exit checks, cases of concern should be referred immediately to the relevant health services.

10.3 What happens to visa applications?

- **New visa applications:** The Immigration Office has announced that, for the time being, visa applications can no longer be submitted and visas can no longer be issued, with the exception of visas for travellers with an essential function or need. With regard to visa applications relating to family reunification, the Immigration Office will take into account the measures taken to combat COVID-19 and the negative impact they may have on the conditions and deadlines for family reunification (e.g. age requirement, proof that the sponsor has stable, regular and sufficient income, housing or insurance).

- **Visa applications already submitted:** The Immigration Office will further examine visa applications already submitted. However, in the event of a positive decision, the visa will not be issued immediately, except in the case of an applicant with an essential function or need. A distinction has to be made between:

    1. **Short stay**: The visa may be issued after the situation has been normalised, provided that the applicant still meets the entry conditions.

    2. **Long stay**: The visa may be issued after the situation has been normalised and without any additional formalities. In case of family reunification, the condition is that the administrative situation of the relevant person still allows it.

- **Visa application already granted:** Persons who have already been granted a visa are strongly advised to postpone non-essential travel. It will be possible to apply for a new visa if the validity period of the visa issued for the postponed travel is not sufficient for the duration of the new travel. The following documents must be submitted:

1. **Short stay**: visa application form with the new dates of the travel, proof of payment of the handling fee, copy of the travel document with the visa issued for the postponed travel, proof of the provisions for the new travel (e.g. new date of a conference) and travel sickness insurance covering the duration of the planned new travel.

2. **Long stay**: visa application form with the new dates of the travel, proof of payment of handling fee, copy of the travel document containing the visa issued for the postponed travel and proof of the provisions for the new travel.

10.4 What about frontier workers who have to cross borders to get to work?

Several official certificates have been introduced to demonstrate the need for frontier workers to cross borders to work.

With regard to employees crossing the Belgian-French borders

The following certificates must be completed:

- A French certificate must be completed by the employer. This document is sufficient to justify professional travel for both commuting and travel between the various places of work when the nature of the employee's tasks so requires. This certificate can be found at the following website: https://interieur.gouv.fr/justificatif_de_deplacement_professionnel
- For employees who reside in France and work in Belgium, an additional certificate must also be completed and signed by the employer and the employee. This certificate can be found at the following website: https://werk.belgie.be/sites/default/files/content/news/certificat%20pour%20les%20travailleurs%20frontaliers.pdf

With regard to employees crossing the Belgian-Luxembourg borders

The following certificates must be completed:

- A Luxembourg certificate must be completed by the employer and the employee. This certificate can be found at the following website: https://gouvernement.lu/dam-assets/documents/actualites/2020/03-mars/form-be.pdf
- A Belgian certificate proving the need to cross the border must also be completed by the employer and the employee. This certificate can be found at the following website: https://emploi.belgique.be/sites/default/files/content/news/Certificateneedtocrosstheborder.pdf

With regard to employees crossing the Belgian–German borders

We are not aware of any official certificate required by the German authorities.

However, the employer and employee must prove, by means of a declaration from the employer, that they are crossing the border to work.
Such a certificate can be found at the following website:
https://emploi.belgique.be/sites/default/files/content/news/Certificateneedtocrosstheborder.pdf

With regard to employees crossing the Belgian–Dutch borders

We are not aware of any official certificate imposed by the Dutch authorities.

However, both the employer and the employee must prove, by means of a declaration from the employer, that they are crossing the border to work.

You can find such a certificate at:
https://emploi.belgique.be/sites/default/files/content/news/Certificateneedtocrosstheborder.pdf.

In addition, frontier workers “in vital sectors and crucial professions” can make use of a sticker to make it easier for them to cross the border between Belgium and the Netherlands.

This sticker can be found at the following website:
https://crisiscentrum.be/sites/default/files/20200321_vignette_bel_vital_sector_e.pdf

It must be printed and stamped with the stamp of the employer or institution that justifies the essential border crossing.

Commission guidelines concerning the free movement of workers during the epidemic

On 30 March 2020, the Commission adopted a Guidance C(2020) 2051 to ensure more uniform criteria and conditions for the crossing of borders by employees. The main guidelines are the following:

- **Critical occupations**: workers exercising critical occupations, including frontier workers and posted workers, must be able to continue to move freely and have free access to their workplace. The Guidance contains a non-exhaustive list of critical occupations. These include, for example, health professionals, workers in the food manufacturing and processing sector, persons working on critical or otherwise essential infrastructures, workers in the transport sector.
- **Other occupations**: Member States must allow frontiers workers and posted workers to continue to cross their borders in order to reach their workplace, as long as the host Member State still allows work in the sector concerned.
- **Other measures**: other guidelines cover health screening, seasonal workers and the maintenance of social security in case of pluriactivity in two Member States (see below).

10.5 What about third-country nationals who are temporarily unable to leave Belgium and who are no longer in possession of a valid authorisation to stay in Belgium?

If a third-country national is temporarily unable to leave Belgium for reasons of force majeure and authorisation to stay is no longer valid, it may be temporarily extended. In order to obtain an extension, the application must be submitted to the municipality or, in case of emergency, to the Immigration Office via e-mail, mentioning the applicant’s e-mail address and his provisional address in Belgium. The following documents must be attached to the application: a copy of the passport, a copy of the declaration of arrival (Annex 3), a letter explaining why the third-country national cannot leave the Schengen area on the scheduled date, the documents confirming the impediment and a travel sickness insurance valid for the duration of the desired extension.

It is important that the application is submitted as soon as possible. Not submitting such an application may lead to penalties in the event of the third-country national’s subsequent return to the Schengen area. The European Commission does, however, encourage Member States to be accommodating and to take into account the difficult circumstances when dealing with the consequences of an overstay.

10.6 Can new applications for single permits/work permits still be submitted?

Yes, it is still possible to submit such applications. The three Regions took measures to allow applications to be submitted electronically, without the need to send the originals in parallel. However, the regional authorities each provide certain clarifications and recommend that the originals be kept available in case of any subsequent inspections. The Immigration Office has announced that, for the time being, visa applications can no longer be submitted and visas can no longer be issued, with the exception of visas for travellers with an essential function or need.

10.7 Is it possible for third-country nationals who are temporarily no longer able to travel from Belgium to continue working in Belgium?

The Flemish Region, the Brussels Capital Region and the Walloon Region have announced measures so that third-country nationals who are temporarily unable to leave Belgium due to force majeure can still be employed in certain situations.

Flemish Region

A distinction is made between:

1. Temporary extension of stay and authorisation to work for persons who are unable to return to their home country (maximum 3 months): extension of stay and employment authorisation/work permit B

As regards stay, an extension of the authorisation to stay can be applied for (see above). With regard to the employment authorisation/work permit B, the employer must submit an application to obtain an employment authorisation/work permit B with the approval of the extension of stay as an annex. The Economic Migration Office ("Dienst Economische Migratie") will issue an employment authorisation/work permit B to the employer (by e-mail) via an accelerated procedure. The duration of the employment authorisation/work permit B is linked to the validity of the extended authorisation to stay and this employment authorisation/work permit B cannot be extended.

2. Extension for a longer period (more than 3 months): "single permit" application

Anyone who will stay in Belgium for more than 3 months must apply for an extension of the "single permit". This application must be submitted at the latest two months before the expiry date of the current permit. The Economic Migration Office ("Dienst Economische Migratie") sends the authorisation to work to the employee. The employee can start working based on this authorisation to work. The employee must present himself at his municipality with this authorisation. The employee will receive an Annex 49 mentioning *"authorisation to work: limited"* from his municipality pending the final decision regarding the "single permit".

Brussels Capital Region

The Brussels Capital Region has announced that if all the legal conditions are met and the conditions for employing a foreign employee are observed, the employer can apply for an employment authorisation/work permit B for a maximum period of 90 days on the basis of the employee's extended short stay.

The duration of the employment authorisation/work permit B is linked to the validity of the extended stay, with a maximum of 90 days.

Walloon Region

The Walloon Region has also announced that it is granting an employment authorisation/work permit B if the stay of the employee is temporary extended due to force majeure. This employment authorisation/work permit B will be granted for the duration of the validity of the temporary stay of the employee.

10.8 What impact does temporary unemployment have on the wage thresholds to be respected for certain categories of employees?

The Flemish Region has announced that a period of temporary unemployment is not taken into account when calculating the wage threshold, regardless of whether the person concerned receives a benefit from the NEO because of temporary unemployment. In other words, in the calculation, the gross annual salary will be reduced pro rata with the period of unemployment concerned.

The Brussels Capital Region has announced that they will be flexible with regard to wage thresholds and will take the exceptional situation into account, on condition of a clear justification at the time of the application for renewal or annual check. It is recommended to add certain supporting documents such as certificates from the NEO.

The Walloon Region has also announced that the periods of temporary unemployment in the period from 1 March 2020 until 31 March 2020 (to be extended if necessary) will not be taken into account when calculating the wage thresholds if a certificate of the NEO together with the individual account of 2020 is submitted.

10.9 Is there any easing of restrictions on some foreign workers in view of the shortage in the labour force in some sectors due to the borders being closed?

In order to cope with the shortage in the labour force in some sectors, the condition for asylum seekers that they can only work 4 months after submitting their asylum application has been suspended until 30 June 2020. However, in order to prevent abuses, this only applies if their asylum application was registered before 18 March 2020. Moreover, the employer has to take care of the accommodation of the asylum seeker in order to limit the number of movements by employees. Insofar as these conditions are met, these asylum seekers can already start working now (as of 1 April 2020).

10.10 What impact does teleworking have on the applicable social security?

The periods of telework carried out on Belgian territory by frontier workers as a result of the coronavirus COVID-19 are not taken into account for the determination of the applicable social security legislation.

The neutralisation of the teleworking periods performed as a result of the coronavirus will continue to apply as long as the federal measures to combat the spread of the coronavirus COVID-19 are in force.

10.11 Should a teleworker or self-employed person be reported in Limosa?

Employed and self-employed persons who are normally subject to the social security system of another Member State, but who work from home as a result of the measures to combat the coronavirus COVID-19 in Belgium are exempt from the Limosa notification obligation.

This measure applies as long as the federal measures to control the spread of the coronavirus COVID-19 are in force.

10.12 Can a frontier worker living in a neighbouring country but working in Belgium be eligible for the system of temporary unemployment?

Yes, frontier workers who work in Belgium but live in a neighbouring country are subject to Belgian social security and may be eligible for the system of temporary unemployment.

10.13 What is the tax situation for Belgian–Luxembourg frontiers workers who telework in Belgium?

From a tax point of view, Belgium and Luxembourg also agreed on a rule of tolerance under which frontier workers can telework in their residence during the COVID-19 crisis, without these teleworking days being counted in the 24-day tax rule.

10.14 What is the tax situation for French frontier workers who telework in France?

In the framework of the Belgian-French double taxation treaty, a protocol provides for special arrangements for French frontier workers. One of the conditions to fall under this frontier worker status is that French frontier workers may not work outside the Belgian border region for more than 30 days per calendar year.

In case of force majeure, days worked outside the Belgian border region are not taken into account for the application of the so-called 30-day rule.

The Belgian and French authorities are of the opinion that in the current context there is force majeure, which means that the days on which French frontier workers have to work from home (i.e. in France) due to the current Corona crisis should not be taken into account for the calculation of the 30-day period.

This measure shall apply until further notice.

11 Corona and the right to privacy and data protection

11.1 Which employees' personal data can I process for the prevention of COVID-19?

The question regularly arises whether, in the context of their prevention policies, employers can collect information about their employees in the context of COVID-19 prevention, e.g. through questionnaires on recent travel destinations or on medical symptoms have to comply with data protection legislation, in particular with the General Data Protection Regulation (GDPR).

The GDPR provides that any processing of personal data requires a legal ground (e.g. a legal obligation or the legitimate interests of the employer). In addition, if sensitive data (e.g. health data such as medical symptoms) are processed, the employer will have to rely on a specific exception as such processing is in principle prohibited.

It can be argued that an employer can invoke a valid legal ground for collecting information about recent travel destinations or about recent contacts with people at risk. Indeed, on the basis of the well-being legislation, the employer has the obligation to analyse the risks arising from the coronavirus and, to take all necessary and adequate measures (such as a questionnaire) to ensure the health, safety and well-being of the employees. Such a legal obligation in the field of employment law could constitute an exception for the processing of health data (e.g. by asking workers if they experience COVID-19 symptoms). For the processing of ordinary data, the employer could also invoke legitimate interests (instead of a legal obligation), i.e. the interest to protect the (health of the) employees and his economic interests (preventing all employees from being ill at the same time).

In a general statement of 16 March 2020 (as further completed on 19 March 2020), the European Data Protection Board also indicated that the GDPR does not hinder the fight against COVID-19, also by employers, but that, even in these times, it is necessary to ensure that data protection legislation is respected. With respect to the processing of personal data by employers, the EDPB mainly refers however to the applicability of national laws.

However, on 20 March 2020, the Belgian Data Protection Authority (DPA) published on its website a rather strict position stating, among others, that:

- the health risk assessment should not be carried out by the employer, but by the company doctor. This position seems contestable because, although the company doctor has an advisory function, the responsibility for the welfare policy still lies with the employer;
- employers cannot oblige their employees to fill in medical questionnaires or questionnaires about recent trips. According to the DPA, it is advisable to encourage employees to spontaneously report risky trips or symptoms to the company doctor.
- in the context of preventing the further spread of the COVID-19 virus, an employer may not disclose the names of infected persons/employees. The employer may only inform the employees without mentioning the identity of the person(s) concerned;
- the mere measuring of the body temperature does not constitute any processing of personal data (and consequently the GDPR does not apply), to the extent that this measuring does not involve any additional recording or processing of personal data. Moreover, the DPA states that the employer cannot take any measures which go beyond the regulatory framework regarding employment;
- furthermore, all other GDPR obligations have to be respected in the processing of personal data, which means, among other things, that the employees have to receive all relevant information, only

the minimum necessary amount of data has to be processed, the necessary security measures have to be taken, etc.

Please note that the views of national authorities on the processing of personal data for the prevention of COVID-19 are particularly divergent. Therefore, the above position of the Belgian DPA cannot automatically be applied to other countries.

12 What is the impact of Corona on the social elections?

We informed you already that the social partners in the National Labour Council have decided to suspend the social elections procedure due to the COVID-19 pandemic. The suspension is now enshrined in law by an Act that has been adopted on 23 April 2020 in the House of Representatives and soon will be published in the Belgian State Gazette. The new election dates will be set later by Royal Decree and will depend on the development of the pandemic. To the extent possible, the dates from 16 until 29 November 2020 will be maintained, but for the time being this is subject to a favourable development of the COVID-19 crisis. We will of course inform you as soon as the Royal Decree is in place.

12.1 What does this exactly mean for your company?

12.1.1 When will your social elections take place?

You will have to resume the election procedure on the new day X+36. This date will depend on the new election date (day Y). The Act stipulates that the new election dates are to be set by Royal Decree. Although the NLC had proposed the period of 16 to 29 November 2020 inclusive, it is not yet certain whether the elections will effectively be held in that period. In the parliamentary explanation of the Act it states that they want to wait until they have a better idea of how long the pandemic and its consequences will last. It is therefore not excluded that the social elections would be further postponed to for instance 2021. We will, of course, keep you informed.

The new day Y results automatically from the logical integration of the originally chosen (first) day Y. Example: if you had planned to hold elections on Thursday 14 May 2020, the new election date will be Thursday 19 November 2020 (subject to confirmation of these dates by Royal Decree).

However, the Royal Decree may well provide that other arrangements can be made at company level about a new election date, timetable and the election calendar.

You can download your new election calendar here free of charge (to be updated if the Royal Decree postpones the elections to later than November 2020).

12.1.2 What about your current election procedure?

All steps of the procedural calendar are postponed as from day X+36. This means that the current day X+35 (the final date for the submission of candidate lists) is maintained according to the current procedural calendar (i.e., in the period from 17 to 30 March 2020 inclusive, or later for the companies that started the election procedure later or when the election procedure has been delayed by a procedure before the labour tribunal).

Consequently, you may not yet proceed with, for instance, the posting of the candidate lists, the composition of the polling stations, updating the voters' list, etc. The Act stipulates expressly that all actions you would carry out or have already carried out since the original day X+36 are null and void. Furthermore, you cannot yet take into account any withdrawals of candidates. Nor is it possible to lodge a complaint or appeal against an application. Of course, we can assist you if you wish to verify whether the submitted candidate lists meet the statutory eligibility conditions and/or whether there are certain abusive applications.

Example: if you were planning to hold elections on Thursday 14 May 2020, your first next step, more specifically the posting of the candidate lists (the new date for X+40) will now – provisionally – be on Wednesday 30 September 2020.

The act states that the agreements and decisions already made up to and including day X+35 are definitively acquired (e.g., decision on electronic voting or the (increased) number of mandates). However, an agreement that you have concluded up to and including day X+35 at company level and that explicitly relates to the consequences of the coronavirus COVID-19 pandemic (e.g., an agreement that you have concluded over the past few weeks to organise postal voting because you have introduced telework in your company on a large scale or because you had many absences) has become invalid, unless the parties who concluded the agreement agree otherwise.

12.1.3 What if you have not received candidate lists?

Only if you have not received a single candidate list (and this for any personnel category) may you stop the current election procedure as from day X+36. However, you will have to complete the formalities in this respect: posting of the message regarding termination and uploading this on the web application of FPS Employment. Appeals against the decision on complete cessation can be lodged after the period of suspension of the election procedure.

If you have received at least one candidate list (even if there is only one candidate), you should have suspended the election procedure as from day X+36. For now, you may not take any further steps. You will have to resume the procedure as from the new day X+36.

12.1.4 What about the eligibility conditions for the candidates?

The Act confirms that all eligibility conditions for the candidates must be assessed on the originally scheduled day Y. This also applies to the replacement candidates nominated at the latest on the new day X+76.

The candidate should have reached, for instance, six months' seniority on the originally scheduled day Y. This also applies for instance for the age condition of the "young candidate": it suffices that this candidate was not 25 years old on the originally planned day Y, even if he has reached the age of 25 in the meantime on the new day Y.

12.1.5 What about the second seniority condition for temporary agency workers?

For the first time in social elections, temporary agency workers are entitled to vote at the user's premises. The temporary agency worker must meet a double seniority condition, which must be fulfilled during two reference periods. The first period ran from 1 August 2019 up to and including day X. The second period runs from day X up to and including day X+77. During this second period, the temporary agency worker must be employed for a total of at least 26 working days. The Act stipulates that this second seniority condition be neutralised during the suspension of the election procedure. In other words, the second seniority period runs from day X up to and including day X+35 and resumes from the new day X+36 up to and including the new day X+77. The temporary agency worker must therefore be employed for at least 26 working days at the user in the two periods taken together.

12.1.6 What about the existing bodies and the currently protected employees?

The existing WC and the CPPW continue to function until the newly elected bodies are installed (at the latest on the new day Y+45). The employees' representatives will continue, of course, to benefit from their protection until that date. This also applies to the candidates nominated in 2016 but not elected (with the exception of the non-elected candidates who were not elected at the previous elections, since their protection normally ended in May 2018).

12.1.7 What about the protection against dismissal for candidates of 2020?

The candidate on the candidate list on day X+35 benefits from protection against dismissal from day X-30 until the date of the first meeting of the WC or the CPPW of the social elections of 2024 (normally in June 2024).

12.1.8 Is the hidden protection period "extended" because of the suspension of the social elections procedure? Or is there a new hidden period?

The hidden protection period that ran from day X-30 up to and including X+35 has ended. A new hidden protection period, applicable to replacement candidates (until day X + 76), now applies.

The Act stipulates that a new hidden period starts on your new "fictional" day X, i.e., 36 days prior to the new day X+36, up to and including your new day X+76. A candidate nominated at the latest on the new day X+76 to replace a candidate nominated on day X+35 therefore only benefits from the protection against dismissal as from the new day X.

In concrete terms, this means that employees dismissed in the period from your current day X+36 until before your new day X (normally between 18 and 31 August 2020 according to the proposed new election calendar) cannot be designated as a replacement. Consequently, these dismissed employees will not benefit from protection because the new hidden period only runs from the new day X up to and including the new day X+76.

12.1.9 What about the protection of the employee who was a candidate in 2016 but no longer in 2020? How is the protection indemnity calculated in the event of dismissal?

This employee benefits from protection until the newly elected bodies are installed (at the latest on the new day Y+45). This also applies to the candidate not elected in 2016 (with the exception of the non-elected candidate not elected in the previous elections, since his protection normally ended in May 2018).

In the event of dismissal during the protection period, the employee will be entitled to a protection indemnity, consisting of a fixed part depending on seniority on the dismissal date. In this respect, the legislation does not change.

In addition to this, the employee is also entitled to the "variable" part of the protection indemnity when his request for reinstatement is not (validly) accepted by the employer. For the calculation of the variable part, the Act makes a distinction depending on the dismissal date:

- in the event of dismissal before 17 March 2020: the variable part must be calculated based on the remuneration from the dismissal date up to and including the date of the first meeting of the newly elected WC or CPPW if the election procedure had not been suspended. So, the period until the originally scheduled day Y+45 (normally in June 2020) should be taken into account.

- in the event of dismissal as from 17 March 2020: the variable part must be calculated based on the remuneration from the dismissal date up to and including the date of the first meeting of the newly elected WC or CPPW according to the resumed election procedure. So, the period until the new day Y+45 (normally in December 2020/January 2021) should be taken into account.

12.1.10 What about the protection of the currently protected employees if you did not have to start an election procedure in December 2019?

If you no longer reached the legal thresholds of 50 or 100 employees during the statutory reference period and therefore did not have to organise a social elections procedure for the CPPW and/or the WC and if the existing bodies therefore do not have to be renewed, the candidates elected in 2016 will continue to benefit from their protection until six months from the first new day Y (i.e., provisionally from 16 November 2020). This also applies if you do not have to organise new elections in 2020 because of the lack of required candidates.

13 General assemblies and governing bodies during the Covid-19 pandemic

The quarantine measures taken in the context of the health crisis caused by the COVID-19 coronavirus have been banning 'gatherings' for several weeks now. The organization of the physical meetings of the shareholders of a company or of the members of an association or pension fund during a general meeting or the holding of a meeting of the governing body is covered by this prohibition.

A Royal Decree with special powers (No. 4) of 9 April 2020 addresses this issue and specifies the measures applicable to Belgian companies, associations and other legal entities that have to or should convene such meetings.

Pension funds (or IORPs) which must take the form of an OFP in Belgium are subject to the measures described below concerning the organisation of the general meeting and the board of directors. With regard to the timing of the general meeting and the approval of the annual accounts, a separate law is said to be in preparation.

The retroactive measures were initially intended to apply from 1 March 2020 to 3 May 2020. The Royal Decree of 28 April 2020 extended them until 30 June 2020. A further extension of the measures is of course possible if the crisis persists.

In addition to the possibilities already offered by the Code of Companies and Associations, and notwithstanding any legal, regulatory or statutory provision to the contrary, Royal Decree no. 4 organizes alternatives for (listed or unlisted) companies, associations and legal entities established by special legislation, with regard to organizing their general meetings and holding their board meetings.

13.1 Course of the general meetings: alternatives

13.1.1 General meeting behind closed doors

The governing body may prohibit persons normally invited to attend a general meeting from attending in person.

The "general meeting behind closed doors" system can be used for a special or extraordinary general meeting, even if the convocation has already been sent.

It is important that the decision to act behind closed doors is effectively communicated to shareholders or members, for example via the website. Listed companies are invited to publish this change via a press release on their website, at the latest on the sixth day prior to the meeting.

In this "behind closed doors" scenario, participants are offered the choice between (1) a vote cast in writing in advance or (2) participation by proxy.

(1) Votes are cast before the General Meeting via a voting form or via a dedicated website. The voting form must contain the agenda of the meeting as well as the decisions submitted to a vote.
(2) Proxies should contain specific voting instructions for each agenda item. The managing body may require that the power of attorney be granted to a specific person designated by the managing body.

The documents thus completed and signed may be communicated by any means (post, scanned copy by e-mail, photo).

In any event, if compliance with the measures to combat the spread of the COVID-19 pandemic cannot be guaranteed, the physical presence of the proxy or proxies may also be prohibited; only remote voting remains possible.

In addition, any company or association may hold a general meeting via electronic means of communication (even if this is not provided for in the articles of association.).

Participants have the right to ask questions. The governing body may require that only written questions be asked. Answers shall be given either in writing before the vote or orally during the general meeting if this general meeting is broadcast live or deferred.

In listed companies, any questions must be submitted to the administrative body at least four days before the date of the general meeting. Listed companies are generally exempt from the obligation to send the convocation and certain other documents by ordinary mail and to make the documents available at their registered office. Other entities are exempted from the obligation to send the documents by ordinary mail; if possible, they should still send them by e-mail.

In practice, the members of the bureau (chairman and secretary), the directors, the statutory auditor and the proxy may also not be physically present. They may participate by telephone- or videoconference. For decisions to be taken by notarial deed, the proxy holder, or if there is no proxy holder, a member or representative of the administrative body, must turn to the notary to sign the instrument.

13.1.2 Postponement of the general meeting

The governing body may, even if the interested parties have already been summoned, choose to postpone the general meeting. Listed companies can announce the postponement until the fourth day before the scheduled meeting by means of a press release on their website.

The postponed meeting will require a new convocation, applying the usual convocation formalities (unless an exception applies at that time).

The postponement applies in particular to the annual general meeting. It is therefore possible to postpone the annual meeting until 10 weeks after the statutory end date. *Example: closure of their accounting year on31 December 2019: the annual meeting can be postponed until 8 September 2020. The approved annual accounts must then be deposited with the National Bank of Belgium no later than 8 October 2020.*

N.B.: There is no possibility to postpone the general meeting in the framework of the alarm bell procedure (negative net assets or threat thereof, or the request of a shareholder representing at least 10% of the shares/capital). In this case, the Board of Directors may hold the meeting behind closed doors (option 1).

If you need to hold a general meeting during quarantine, you can postpone it or decide to hold a meeting behind closed doors, taking into account the practical aspects outlined above. To avoid decisions being questioned for formal reasons, it is essential in this case to actively inform participants and allow them to fully exercise their rights.

13.2 Course of the board meetings

The rules for the organization of the meetings of the governing body such as a Board of Directors have also been relaxed. The procedure for written decisions of the members by unanimity is possible, even if the statutes exclude it. Moreover, until 3 May 2020, it will be possible to hold meetings by telephone- or videoconference, even without authorisation in the articles of association.

For decisions to be taken by notarial deed (e.g. the use of authorised capital or a change of registered office), it is sufficient for a member or representative of the governing body to be physically present at the notary's office in order to sign the deed.

Brussels
Boulevard du Souverain 280
1160 Brussels
T 02 761 46 00

Liège
Parc d'affaires Zénobe Gramme
Square des Conduites d'Eau 7
Bat. H - 2nd floor
4020 Liège
T 04 229 80 11

Antwerp
City Link
Posthofbrug 12
2600 Antwerp
T 03 285 97 80

Ghent
Ferdinand Lousbergkaai 103
box 4-5
9000 Gent
T 09 261 50 00

Kortrijk
Ring Bedrijvenpark
Brugsesteenweg 255
8500 Kortrijk
T 056 26 08 60

Hasselt
Kuringersteenweg 172
3500 Hasselt
T 011 24 79 10

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