Ius Laboris Belgium Global HR Lawyers
Claeys & Engels

Newsletter: Update – **FAQs about the impact of Corona on your company**

February 2021

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Dear reader,

The COVID-19 virus continues to have an impact on our private and working lives. On Wednesday 18 March 2020 at noon, stringent measures were introduced in Belgium with far-reaching consequences for companies and their employees. Since then, these measures have been amended several times.

More than 1,000,000 Belgians have been made temporarily unemployed. Many companies are being faced with a substantial decrease in activity while others are short-handed 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 months. 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 31 January 2021 at 8 am.** We hope these are helpful to you and we aim to send updates on a regular basis whenever a new HR legal topic arises 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 What is the current state of progress in the fight against the spread of the coronavirus?

The current measures are laid out in the Ministerial Decree of 28 October 2020 concerning urgent measures to reduce the spread of the coronavirus COVID-19. In the meantime, this Ministerial Decree has been updated several times and will – to date – remain in force until 1 March 2021. After the phased exit strategy was shaped in late April and gradually implemented this summer, the government had to scale back the measures at the end of October.

A first important measure that is still applicable is that telework is **obligatory** for all companies, associations and services for all employees, **except** if this is impossible because of the nature of the function or the continuity of executing the business, the activities or the services. It is important to note that these are the only exceptions to the application of the telework obligation: sufficient prevention measures being in place at the workplace in order to respect the rules concerning social distancing does not qualify.

If telework cannot be applied due to one of the aforementioned exceptions, it is the obligation of companies, associations and services to take the necessary preventive measures to guarantee maximum compliance with the rules concerning social distancing. In this case, companies need to provide their employees with a certificate or some other proof that confirms the necessity of their presence at the workplace.

By “necessary preventive measures”, the government refers to the security and health prescriptions as determined in the Generic Guide, supplemented with the guidelines at sectoral and/or business level, as well as any other measures which offer equal protection. You can find the link to this guide here. Various sectors also have taken specific measures in addition to the Generic Guide. The sector-related guides you will find here.

Companies need to develop their preventive measures at the business level in consultation with the internal and/or external service for prevention and protection at work, in accordance with the rules of the social dialogue. It is important to note that the Ministerial Decree, in line with the so-called hierarchy of prevention included in the well-being legislation, explicitly states that collective measures always precede individual measures. Furthermore, companies need to inform (and if necessary train) their employees, including third parties, in good time about the applicable measures. Employees and third parties, together with the employers, are obliged to apply the applicable preventive measures within the company.

The most recent amendment to the Ministerial Decree also explicitly imposes a general obligation on all persons present at the workplace to comply with the applicable obligations imposed by the competent authorities. On its website, the Federal Public Service Employment includes in this the rules concerning quarantine, testing and contact tracing, but also to the rules concerning the so-called *Passenger Locator Form* (see below). Furthermore, the labour medical doctors and the inspection services are given the authority to ask, at the workplace, any person involved to provide proof of compliance with these obligations.

The situation today can be summarised as follows:

- Shops and stores may – after a closure of the non-essential shops during the month of November - reopen their doors, but they still need to take various preventive measures, such as providing hand sanitiser and limiting the number of customers. In order to take preventive measures, business owners can rely on a specific generic guide for opening of shops (available on the website of the FPS Economy), as well as to the general generic guide for employers (see below).
- Also shopping malls may – subject to conditions – reopen their doors.
- Shops may remain open during normal opening hours, with the exception of night shops, which must close at 10 p.m. at the latest. The sale of alcoholic beverages is forbidden after 8 p.m.
- Establishments or parts of establishments belonging to the cultural, festive, sports, recreational and event sectors remain closed, including casinos, discotheques and dance halls, swimming pools, cinemas, etc. Exceptions to these rules are provided for libraries, places of worship, outdoor areas of natural parks, etc.
- Cities and towns are allowed – subject to conditions – to organise markets, under the condition that in essence they offer essential goods and subject to approval of the competent town. This does not include annual markets, antique markets, flea markets and (previously) Christmas markets.
- Establishments belonging to the catering sector and other food and drink outlets are closed, except for takeaway meals and non-alcoholic drinks to take away until 10 p.m. at the latest. Takeaway meals may be offered and/or delivered together with alcoholic beverages until 8 p.m. An exception is made for hotels, among others, with the exclusion of their restaurants, drinking establishments and other common facilities.
- Wearing a face mask (or alternative) is – with a few exceptions - compulsory from the age of 12 when it is impossible to guarantee the compliance with the rules concerning social distancing. Wearing a face mask is, again with the exception of children until the age of 12, mandatory in certain places (e.g., shops and shopping malls, libraries, auditoriums, etc).

Compliance with these measures is still actively controlled and monitored. Initially, this monitoring was carried out by means of a telephone or e-mail enquiry on the implemented measures. Today, the Inspection often carries out checks in the workplace, whether announced or not. The Inspection uses within the framework of these controls a specific checklist. You can find the most recent checklist that is used within the framework of general controls here (not available in English). For specific sectors, there are individual checklists, which you can find here (not available in English). As extensively announced in the media, the Inspection explicitly checks on the compliance with the rules concerning teleworking. In this case the employer will have to be able to show that the persons that are present at the workplace on the time of the control, cannot work from home because this is impossible due to the nature of their function or due to the continuity of the executing of the business, the activities or the services.

If (permanent) serious violations are detected, the Inspection is empowered to 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 Criminal Code.

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

In addition to the measures imposed by the government (see point 1.1), the general legal obligations of the employer under welfare legislation, of course, also apply. 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 these legal obligations, each employer is therefore obliged to examine in parallel with/in addition to the government's 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. In other words, it is not enough, in these times of corona, to simply observe the imposed government measures. Employers can still make use of the checklist that is provided by the FPS Employment. You can find the most recent checklist here: Checklist prevention COVID 19, as well of the aforementioned Generic Guide and sectoral guides.

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 to be 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 always agree to any 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 to the holiday planning).

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 point to note here is 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 is made temporarily unemployed due to force majeure. However, the employee will have to take his holidays during the year and therefore at the latest in December. If he does not do this, he will not be entitled to temporary unemployment benefits for the balance of his days of leave.

2.2 Could I assign alternative work to the employee?

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

The function carried out 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.

However, parties can depart 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 that you 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, for example, 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 exercises some employer authority over these employees. The employer who violates this prohibition risks both civil and criminal penalties.

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

During the first quarter of 2021, employers belonging to any sector can post their workers to employers from the care sector, the education sector or to institutions and centres that carry out contact tracing, provided that the worker was already permanently employed by the employer before 1 October 2020. Also in this case, a tripartite agreement must 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.

2.4 Can I reduce the working hours of the employees?

On the basis of Royal Decree No. 46 of 26 June 2020, companies undergoing restructuring or companies in difficulty, can take three specific measures relating to the reduction of working time, namely (i) collective reduction of working time, (ii) "corona time credit" and (iii) "corona landing jobs".

It concerns a rather strict scope of application, in particular companies that have made a loss in the last two financial years or announced a collective dismissal and have obtained recognition from the FPS Employment, Labour and Social Dialogue.

The **collective reduction of working hours** entails a temporary reduction of working hours by 1/4 or 1/5, possibly in combination with a four-day working week and this on the basis of a company collective agreement or an amendment to the labour regulations. This form of collective reduction of working time

may be applied for a maximum period of one year during the period in which the company is recognised as undergoing restructuring or in difficulty (which commenced on 31 December 2020 at the latest). This measure is accompanied by a reduction in social security contributions, which varies according to the type of reduction in working time. However, the employer is obliged to pay a certain amount of wage compensation to the workers concerned.

In addition, on the basis of this Royal Decree, the employer may propose a form of "corona time credit" to the employees, who will have to agree to this. Such a time credit means that the employee reduces the work performance to a half-time job or by a fifth and will receive a benefit from the National Employment Office for this. The corona time credit can be taken up for a minimum of one month and a maximum of six months, which must all fall within the period in which the company is recognised as being in restructuring or in difficulty (which commenced on 31 December 2020 at the latest). This period will not be charged on the maximum "normal" reasoned time credit.

Finally, the employee could, in the context of a "corona landing job", reduce his work performance to a half-time job or by a fifth and receive an interruption benefit from the age of 55, whereas in the "normal" system he is, in most cases, only entitled to this benefit from the age of 57. However, the worker must have a professional history of 25 years and the landing job must start during the period of recognition that the company is undergoing restructuring or is in difficulty (by 31 December 2020 at the latest). By way of derogation from the "normal" landing job system, the minimum period for this corona landing job is limited to one month.

2.5 What are the possibilities regarding flexible employment?

1-
Workers in **temporary unemployment and with career breaks, time credit or thematic leave** can, as from 1 October 2020 until 31 March 2021, temporarily work for another employer (employer in the care sector, the education sector or an employer who carries out contact tracing). In this case, they retain 75% of their NEO benefit.

Unemployed persons with company allowance can temporarily return to work for their former employer (employer in the care or education sector, or an employer who operates a contact tracing service) during the same period, retaining 75% of their NEO benefit. The supplementary allowance is paid at 100% and is exempt from social security contributions.
Workers with career breaks, time credit or thematic leave who are already employed by an employer in the care sector, the education sector or by an employer who carries out contact tracing can return to full-time work for their own employer during the same period. During this period, the worker will not receive any benefit from the NEO, but at the end, the time credit, career break or thematic leave will automatically continue for the remaining duration.

2-
In the *critical sectors*, the number of **hours of voluntary overtime** is **increased to 220 hours** for the first quarter of 2021. The 120 additional voluntary overtime hours do not entitle workers to overtime rest and do not count for the internal overtime limit (i.e., the maximum number of overtime hours that a worker may have worked at one time). Nor do they entitle the worker to overtime pay

3-
During the last quarter of 2020 and the first quarter of 2021, successive fixed-term contracts may be concluded, in the care and education sectors and in contact tracing centres, in order to allow temporarily unemployed persons to work in a flexible manner without the traditional restrictions.

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 stop its activities as a preventative health measure, temporary unemployment due to force majeure cannot be invoked.

However, from 1 October 2020 to 31 March 2021 inclusive, a flexible application of the principle of force majeure is accepted by the National Employment Office (NEO, also RVA/ONEM) (this flexible application was already in place between March and August 2020). In this regard, all forms of temporary unemployment attributable to the coronavirus can be declared as temporary unemployment due to corona force majeure, also when it is, for example, still possible to work on certain days, even if it is strictly speaking economic unemployment.

3.3 What are the consequences of the flexible application of the temporary unemployment regime for reasons of force majeure under COVID-19?

The main consequence of the broad application of temporary unemployment due to corona force majeure is that, in practice, some workers may be temporarily unemployed and others not. Workers may also alternate between working days and days of temporary unemployment.

Corona temporary unemployment always applies for a full day. It is therefore not possible to be unemployed in the morning and work in the afternoon (or vice versa).

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

According to the National Employment Office (NEO), 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 quarantine certificate from his or her treating physician, due to the fact that he or she has been in close contact with an infected person, that he or she is infected without symptoms, or that his or her medical situation involves a risk (e.g., if his or her immune system is weakened). In the case of quarantine, only if the worker is unable to work can he or she be temporarily unemployed. Therefore, if teleworking is possible, the NEO will not intervene;
- When the employer is contaminated and is no longer able to provide work for his workers because of his illness, the workers can be put on temporary unemployment;
- The worker is in quarantine due to his return from abroad and is in the possession of a quarantine certificate, provided he is not incapacitated and is unable to work. However, the NEO points out that there is no right to temporary unemployment when, at the time of the worker's departure abroad for a non-essential journey, either his destination was classified as a red zone by the FPS Foreign Affairs (https://diplomatie.belgium.be), or his destination is not one of the EU Member States, Iceland, Liechtenstein, Norway, the United Kingdom or Switzerland.

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 intervene).

The NEO also states that "when an employer wants to send workers home 'preventively' on his own initiative, without an order from the authorities (...) or without a certificate from the occupational physician of the worker(s) in question, no force majeure may be invoked".

3.5 Can temporary unemployment due to force majeure be invoked for the care of a child due to the impossibility for that child to attend a childcare centre, school or a disabled persons centre?

On this day and until 31 March 2021 temporary unemployment due to force majeure can also be invoked when an employee is absent from work or has to stop teleworking to take care of a child, in particular:

- A minor child living with him who cannot attend his day-care centre or school because the day-care centre, class or school is closed as a result of a measure to restrict the spread of the corona virus (to be proved by means of the document "corona closure certificate"). The extension of school holidays following a Community decision is considered as a closure for this purpose;
- A minor child living with him who cannot attend his day-care centre or school because he is obliged to attend distance learning courses as a result of a measure to restrict the spread of the corona virus (to be proved by means of the "corona closure certificate" document);
- A minor child living with him who cannot go to kindergarten or school because he has to be placed in quarantine or isolation to restrict the spread of the coronavirus (to be proved by means of the "corona closure certificate" document and a medical certificate that proves the quarantine or the isolation, or on the basis of a quarantine recommendation issued by the competent authority);
- A disabled child that he is in charge of, irrespective the age of the child, that cannot go to a care centre for disabled persons or who is unable to benefit from in-patient or out-patient services or

treatment organised or approved by the Communities as a result of a measure intended to restrict the spread of the coronavirus (to be proved by means of the document “corona closure certificate”).

The employee has no right to temporary unemployment due to force majeure on the grounds of taking care of a child when the child returns from a holiday in a country that at the time of departure was situated in a red zone.

Temporary unemployment due to force majeure is only accepted for the aforementioned reasons on days where the company is usually open and on days where the employee is contractually supposed to work.

The right to be absent from work and the coherent right to temporary unemployment can only be granted to one person for the corresponding period.

The NEO further determines that if a child has to go in to quarantine or cannot go to school/kindergarten because it has been with his or her parent(s) on holiday to a red zone abroad, the parent(s) are not entitled to request an allowance for temporary unemployment because the departure abroad does not consist of a force majeure.

3.6 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, which specifies 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 C.3.2A control document to the employees concerned and must make an electronic DRS declaration (Scenario 2).

However, since 1 October 2020 and until 31 March 2021, the aforementioned procedural steps do not need to be followed if the Corona unemployment scheme can be used (between 1 and 30 September 2020 you temporarily had to follow these steps again for the ordinary system of force majeure unemployment, for example for employees with a quarantine certificate). You only have to make a scenario 5 declaration as soon as possible.

In this application, you indicate that the temporary unemployment results from force majeure, by selecting code 5.4 “type of 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).

This declaration must be made each month in which there has been temporary unemployment, in the course of the month, as soon as all the data up to the end of the month are known (so there is no need to wait until the end of the month).

Furthermore, companies claiming “Corona” unemployment are obliged to inform their employees in advance in writing of the days of suspension and the working days which are applicable to them.

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

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

In September 2020, a "stricter" distinction was again made between temporary unemployment due to force majeure and temporary unemployment for economic reasons. Taking into account the flexible "Corona" temporary unemployment scheme, which is currently applicable until 31 March 2021, this "stricter" ordinary scheme of temporary unemployment for economic reasons is less relevant, although it still (theoretically) applies. If you would like more information on this temporarily inapplicable scheme, you can consult our previous newsletter.

In order to invoke temporary unemployment for economic reasons, the company must face a shortage of work.

In this respect, 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 Ministry of Labour as a company in difficulties.

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

Until 31 March 2021 employees may be temporarily unemployed on the grounds of corona force majeure, as explained above. Apart from an additional extension, the traditional temporary unemployment scheme for economic reasons will again apply after 31 March 2021.

We therefore discuss this scheme below. In order to be able to introduce economic unemployment for employees, a company must first meet certain preconditions.

There are four possibilities:

- A decrease in turnover or production of at least 10% in one of the four quarters preceding the application for the introduction of the scheme compared with the same quarter of one of the two calendar years preceding the application;
- Temporary unemployment for economic reasons for blue-collar workers up to at least 10% of the total number of days declared to the NSSO during the quarter preceding the quarter of the application;
- A fall of at least 10% in orders during one of the four quarters preceding the request for introduction of the scheme compared with the same quarter of one of the two calendar years preceding the request;
- Recognition by the Minister of Employment.

In addition to these conditions, 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 of a CBA. This business plan must be sent to the FPS ELSD:

- If it concerns an "existing" regime, the plan must be transferred to the Business Plan Commission, which will decide on the plan within two weeks (approval or not).
- If it concerns the "transitional regime", no approval is required and the plan must only be deposited with the Collective Labour Relations Department.

Subsequently, the company has to send a C106A form[2] by registered post and by e-mail to the NEO. The procedures to be followed for the introduction of temporary unemployment for economic reasons are as follows:

- Except in exceptional cases, the employer must inform the NEO (unemployment office of the company's head office), at least 7 days before the first day of planned unemployment, of the economic reasons justifying the use of temporary unemployment;
- Each month, the employer must inform the NEO of the first day of actual unemployment for each worker placed on temporary unemployment for economic reasons;
- the employer must issue a C3.2A control card to the workers concerned and must keep a validation book;
- At the beginning of unemployment, the employer must also make a DRS declaration scenario 2, via the following portal: https://www.socialsecurity.be/site_fr/employer/applics/drs/onem/index.htm;
- At the end of each calendar month and for each temporarily unemployed worker, a DRS declaration scenario 5 must be made by the employer via the following portal: https://www.socialsecurity.be/site_fr/employer/applics/drs/onem/index.htm.

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

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

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

- The "complete suspension" regime (where they no longer work at all), which can be implemented for a maximum duration of 4 weeks (maximum 8 weeks from 1 September 2020). Thereafter, the blue-collar workers have to work again for at least one week.
- The "large suspension" regime (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 (maximum 18 weeks from 1 September 2020). Thereafter, the blue-collar workers have to work again for at least one week.
- The "small suspension" regime (where they work at least 3 days per week or at least every other week) which can be introduced for a maximum of 12 months.

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

- The complete suspension regime (where they no longer work at all), which can be implemented for a maximum duration of 16 calendar weeks per calendar year, this scheme may be introduced for a maximum of 24 weeks. As of 1 September 2020, this regime may be introduced for a maximum of 34 weeks in the framework of the transitional regime.
- The large suspension regime (where they work at least 2 days per week), which can be implemented for a maximum duration of 26 calendar weeks per calendar year, this scheme may be introduced for a maximum of 34 weeks as of 1 September 2020, in the framework of the transitional regime.

For the sake of completeness, please note that if the company does not apply economic unemployment but instead applies the simplified corona unemployment, these regimes are not applicable. In that case, the company will be able to switch workdays 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 increased from 65% to 70% of the salary, whereby the average monthly salary is capped to EUR 2,754.76 gross.
This scheme applies (for now) until 31 March 2021.

In principle, a withholding tax of 26.75% is deducted from the benefit. However, this rate has been decreased to 15% for legal unemployment benefits which are granted or paid to employees in temporary unemployment to the extent that these benefits are granted or paid between 1 May and 31 March 2021 and concern days of temporary unemployment during this period.

4.2 Can the employee claim a supplement from 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%, which has been decreased to 15% for supplements which are granted or paid to employees in temporary unemployment to the extent that these supplements are granted or paid between 1 May and 31 March 2021 and concern days of temporary unemployment during this period.

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). Specifically in the context of corona, a supplement has now been provided in other sectors as well.

4.4 What about the calculation of annual leave?

In principle, days of temporary unemployment due to force majeure are not taken into account for the calculation of holiday entitlements. However, an exception was introduced by the Royal Decree of 4 June 2020 in response to the pandemic. The days of temporary unemployment due to corona force majeure are assimilated to working days for the calculation of annual leave, both for the duration of the holiday and for holiday pay. This exception applies to the periods of temporary unemployment from 1 February to 31 December2020.

4.5 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 nil.

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 2019). 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.

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In principle, these supplements are exempt from social security contributions since they are a supplement to a social security benefit (temporary unemployment benefit). However, this requires that the supplement does in fact constitute a real supplement. In brief, this implies that the employee receives unemployment benefits, that there is a clear link between the supplement and the unemployment benefits and that the supplement does not compensate for more than the actual loss of net income. Therefore, the payment of the supplement cannot put the employee in a more beneficial financial situation than the one in which he would have found himself in 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 of “category”, the NSSO states that this has to be determined based on objective criteria such as, 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 (e.g., whether an employee has taken all of his/her days of compensatory time-off).

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.

4.6 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 with 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. Employees should themselves file a request for the encouragement premium with 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 a 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 a guaranteed salary due to illness. The medical certificate will not indicate whether or not the employee suffers from COVID-19. This information is subject to medical confidentiality.

Employees who are not incapacitated for work but who can provide a quarantine certificate attesting that they cannot go to work are not entitled to a guaranteed salary. These employees can, however, be placed in temporary unemployment due to force majeure. Such a certificate is issued by the general practitioner if the employee (i) has been in close contact with an infected person, (ii) is himself/herself contaminated while showing no symptoms or (iii) his/her medical situation is a risk (e.g., if his/her immune system is weak). The employee concerned may be temporarily unemployed for reasons of force majeure for the period covered by the certificate if it is impossible for him or her to work (e.g., because he or she is unable to telework).

Employees who go into quarantine after returning from abroad may also receive benefits as temporarily unemployed if they are not incapacitated for work but are unable to work (e.g., telework). Please note that quarantine resulting from a non-essential journey (holiday) to a red zone (at the time of departure) does not grant the right to temporary unemployment because it is not a situation of force majeure. Indeed, there is a travel ban to such countries.

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

Whether or not the employer has to pay the 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 his/her 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 their guaranteed salary and receives disability benefits from the health insurance funds.

6 Corona parental leave

Corona parental leave ended on 30 September 2020. However, when employees have children who can no longer attend a childcare centre, school or a disabled persons centre because of a corona measure, they can resort to temporary unemployment due to “corona force majeure” (see 3.5).

7 Bridging right for the self-employed

7.1 Can freelancers/self-employed persons active in my company claim an allowance as a consequence of the corona crisis?

Self-employed persons who have to interrupt their activities as a result of the corona crisis can, under certain conditions, claim the so-called bridging right.

This bridging right, which previously existed under stricter conditions but has been adjusted in light of the corona crisis, consists in a monthly financial allowance, varying according to whether or not this person has family responsibilities.

The criterion for eligibility for the bridging right is that the self-employed person must pay social security contributions in Belgium. The following categories of self-employed persons fall within the scope of application:

Full allowance

- Self-employed persons, helpers and assisting spouses;
- Self-employed persons in secondary occupation (or equated to that; see Art. 37 GRS) and students or retirees who are still active who pay at least the minimum contributions for self-employed persons in primary occupation.

Partial allowance

- Self-employed persons in secondary occupation and students of which the statutory provisional contributions are calculated on an annual taxable income of between EUR 7,021.29 and EUR 14,042.57;
- Self-employed persons in primary occupation, equated to secondary occupation (see Art. 37 GRS) of which the statutory provisional contributions are calculated on an annual taxable income of between EUR 7,021.29 and EUR 7,356.08;

  Retirees who are still active on a self-employed basis and of which the statutory provisional contributions are calculated on an annual taxable income higher than EUR 7,021.29.

7.2 What type of bridging right can a self-employed person claim and under which conditions?

On 22 December 2020, the legislator adopted, together with the Programme Act (I), the Law on various measures in favour of self-employed persons in the context of the COVID-19 crisis, in which the bridging right in the context of the crisis was again extended from January to March 2021. The Council of Ministers approved on 15 January 2021 a preliminary draft bill that would again adjust the bridging right for self-employed persons. However, this preliminary draft bill is until today, 8 February 2021, not legislation: while preparing this newsletter we took into account what the Council of Ministers communicated concerning the content of this preliminary draft bill, more specifically the prolongation of the double corona-bridging right until February 2021 and the delay of the entry into force of the first pillar – the corona bridging right until March 2021.

In 2021, self-employed persons, helpers and assisting spouses can claim one of the following allowances of the bridging right:

1. The double corona bridging right;
2. The corona bridging right – pillar 1;
3. The bridging right as a consequence of loss of turnover – pillar 2;
4. The bridging right as a consequence of quarantine/child care.

7.2.1 The double corona-bridging right (January – February 2021)

Self-employed persons who must interrupt their activities completely or partially as a result of a closure measure imposed by the federal government can claim the “double corona bridging right” for January – February 2021. No minimum duration of interruption is required.

Also, self-employed persons who are mainly dependent on a sector that is compulsorily closed can claim this double bridging right. To measure this dependence, it is required that at least 60% of the self-employed activities are linked to a sector that is compulsorily closed.

The Double corona-bridging right amounts to (per month):

	With family responsibilities	*With no family responsibilities*
Full allowance	EUR 3,228.20	EUR 2,583.38
Partial allowance	EUR 1,614.10	EUR 1,291.69

7.2.2 The corona bridging right – Pillar 1 (March 2021)

Self-employed persons who have to interrupt their activities completely in March 2021 as a result of the closure measures imposed by the federal government can claim the "corona bridging right". Self-employed persons who continue their activities partially, for example by providing a take-away service, are not eligible. For this type of bridging right, the amount of the allowance depends on the duration of the interruption of the activities (which is more or less than 15 days).

The corona bridging right amounts to (per month):

	Duration of interruption per calendar month	*With family responsibilities*	*With no family responsibilities*
Full allowance	> 15 consecutive calendar days	EUR 1,614.10	EUR 1,291.69
	< 15 consecutive calendar days	EUR 807.05	EUR 645.85
Partial allowance	> 15 consecutive calendar days	EUR 807.05	EUR 645.85
	< 15 consecutive calendar days	EUR 403.53	EUR 322.93

7.2.3 Bridging right as a consequence of loss of turnover – Pillar 2 (January until March 2021)

Self-employed persons whose turnover dropped by at least 40% can, under the following cumulative conditions, claim the bridging right for loss of turnover:

1) The self-employed person must prove that the turnover dropped by at least 40% in the calendar month preceding the calendar month of the request compared with the same calendar month during reference year 2019;
2) The self-employed person must have paid his statutory provisional contributions for at least 4 quarters during the past 16 quarters.

The bridging right for loss of turnover amounts to (per month):

	With family responsibilities	*With no family responsibilities*
Full allowance	EUR 1,614.10	EUR 1,291.69
Partial allowance	EUR 807,05	EUR 645.85

7.2.4 Bridging right as a consequence of quarantine/child care (January until March 2021)

Self-employed persons in one of the following situations can claim the classic bridging right:

a) The self-employed person is in **quarantine or isolation** for at least 7 consecutive calendar days which interrupts his/her activities. A quarantine certificate by name is required. The self-employed person who deliberately travelled to a destination which was a red zone on the date of departure will not be eligible for the allowance.
b) The self-employed person takes **care**, for at least 7 calendar days, of (a) **minor child(ren)** with whom he/she cohabits and who cannot attend the nursery, class or school because the child is in quarantine or isolation, because the nursery, class or school is compulsorily closed as a result of the corona measures taken by the government, or when the child has to attend classes remotely as a result of the corona measures taken by the government;
c) The self-employed person shall provide for at least 7 calendar days the **care** of **a handicapped child** on his/her own account, irrespective of the child's age, for example because the child cannot go to a centre for handicapped persons or because that centre has been temporarily closed.

The bridging right quarantine/child care amounts to (per period of 7 consecutive calendar days of interruption):

	With family responsibilities	*With no family responsibilities*
Full allowance	EUR 405.53	EUR 322.92
Partial allowance	EUR 201.77	EUR 161.46

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

A self-employed person who is a **director** of a company is also entitled to the bridging right. The condition is that the company's activities meet the conditions set for the type of bridging right.

It is irrelevant in this respect whether this self-employed person still receives remuneration from this company or not.

7.4 How to request the bridging right

The bridging right must be requested from the social insurance fund of the self-employed person. The fund usually provides an application form or a web page where the bridging right can be requested directly.

7.5 Within which period will the financial allowance be paid?

The social security funds will pay the financial allowance as soon as possible and at the latest at the beginning of the month following the interruption.

The payment of the bridging right for the month of January 2021 will thus be made no later than the beginning of February 2021.

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

In a circular of 8 July 2020, the Federal Public Service Finance explains the tax system that will be applied to the financial allowances received under the crisis bridging right (i.e., the bridging right received due to the complete or partial interruption of the self-employed activity, or due to the complete interruption of the self-employed activity for at least seven consecutive calendar days as a result of the corona crisis).

The tax system to be applied depends on the nature of the interrupted self-employed activity and the category of income to which the income from the interrupted self-employed activity belongs.

Income qualifies as profit or income

The crisis bridging payment will in principle be subject to a tax rate of 16.5% (plus municipal taxes) and not to the progressive tax rates.

However, it is required that the bridging right, together with any other benefits and reimbursements obtained by the self-employed person, does not exceed the taxable net income earned by the self-employed person from this interrupted activity in the past four years. To the extent that the benefits exceed the taxable net income of the past four years, they are taxable at the progressive assessment rates.

Income qualifies as employee or manager's remuneration

The crisis bridging right will be subject to the progressive tax rates as remuneration.

Income qualifies as remuneration of assisting spouses

The financial benefits obtained under the crisis bridging right are not taxable.

7.7 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. However, the allowances received in the context of the crisis bridging right by a self-employed person who has taxable profits or income do not qualify as replacement income for tax purposes; as a result, the self-employed person will have to pay social contributions on these allowances.

8 Wages and working conditions

8.1 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 into listed warrants (or non-listed options on shares of a SICAV), which are in principle exempt from social security contributions. Even taking into account the blockage period of a few hours for warrants (and of 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, if 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 of warrants to a point in time at which the stock exchanges have stabilised, or grant a bonus in cash instead in the form of warrants.

As salary, either fixed or variable, is 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 or by signing a letter “for agreement”.

8.2 How is teleworking best organised?

For the duration of the corona measures imposed by the government, many employers are forced to impose teleworking structurally and regularly on their employees. However, it seems likely that teleworking will continue – probably to a lesser extent – after the period of corona measures.

As far as employment law is concerned, the necessary agreements should be made regarding telework, including the provision of equipment and whether or not to contribute to the expenses. The new CBA No. 149 of 26 January 2021 provides that these agreements can be laid down by contract but also in a company policy. Due attention must be paid to the welfare of the teleworker.

Concerning the contribution by the employer to the expenses of teleworking, the NSSO at the beginning of the corona crisis published new “Instructions” that specifically relate to teleworking due to the coronavirus crisis.

The NSSO indicates that the following lump-sum indemnities (exempt from social security contributions) can be granted 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 one’s own PC;
- max. EUR 20 per month for the professional use of one’s own Internet connection.

Of course, the award of the lump-sum interventions of EUR 20 is only justified if the employer does not already bear the costs in some other way (e.g., by making laptops available to the employees concerned).

The NSSO also indicates in its Instructions that if the employee incurs 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 (which is the Service for Advance Decisions in tax matters), at the beginning of the corona crisis, made a simplified application form available on its website with which one could obtain an accelerated preliminary decision to validate the home office lump-sum allowance as envisaged by the NSSO Instructions, which amounts to EUR 129.48 per month as of 1 April 2020 (https://www.ruling.be/nl/nieuws/aanvragen-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).
In Circular 2020/C/100 of 14 July 2020, the tax authorities set out the applicable conditions regarding the granting of a lump-sum allowance for structural and regular telework. The main points of attention are the following:

- The maximum amount is equal to the amount as validated by the NSSO (EUR 129.48 per month).
- Teleworking is structural and regular if the employee works at least 5 days per month from home.
- The same amount (currently maximum EUR 129.48) has to be granted to all employees, without distinction between the function categories to which the employees belong.
- The stipulations of the circular take retroactive effect as of 1 March 2020.

The circular also indicates that those who want to depart from the rules as set out in the circular (e.g., granting different amounts to different function categories) can apply for a ruling from the Service for Advance Decisions in tax matters.
The Ruling Commission now refers to this Circular of July 2020 (and to the conditions stipulated). In other words, the simplified procedure referred to above no longer applies.

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

9 Public holidays

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

The employee is entitled to 10 public holidays a year. 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 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, 1 May 2020, 21 May 2020, 1 June 2020, 21 July 2020, 15 August 2020, 1 November 2020, 11 November 2020, 25 December 2020 and 1 January 2021 – will not be replaced, but the employer should let them be taken.

9.2 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 (e.g., 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 falls in the period of 14 days following the start of the temporary unemployment. If the public holiday falls 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 falls 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.

10 Occupational pension plans and risk insurances

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

Pension plans

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

On 26 March 2020, Assuralia, the association of the insurance companies, announced a few measures in order to avoid the suspension of the accrual of occupational pension rights and the risk covers related to professional activity during the corona unemployment. However, a legal framework was required to implement this, especially since the measures taken by Assuralia could only target the pension plans and risk covers managed by insurance companies and not those managed by pension funds (institutions for occupational retirement provision).

It is in this context that the Act of 7 May 2020 providing for exceptional measures relative to the COVID-19 pandemic in relation to pensions, occupational pensions and other additional benefits related to social security was adopted.

The scope of application of the Act of 7 May 2020 was initially limited to the date of 30 September 2020. The program Act of 20 December 2020 amended the Act of 7 May 2020 and extended the measures provided by the latter up to 31 March 2021. A new modification to the Act is not excluded in order to take into account an extension of the period of temporary corona unemployment that would go beyond this date of 31 March 2021.

This Act of 7 May 2020, amended by the program Act of 20 December 2020, provides the automatic continuation, without any modification or formality, during the whole period of temporary corona unemployment of the accrual of pension rights and of death cover. This continuation applies in a situation of temporary corona unemployment in the period between 13 March and 31 March 2021.

The Act of 7 May 2020, amended by the program Act of 20 December 2020, also provides for the possibility, on simple request from the organiser, to postpone the payment of the corresponding premiums until 31 March 2021 (without any possible contestation). If the organiser wishes to use this possibility to postpone, it has to forward the relevant information to the pension provider. This possibility to postpone concerns both employer and personal premiums.

Information

The Act of 7 May 2020 imposes on the pension providers an obligation of information towards the organisers in order to inform them about the impact of the temporary unemployment on the different forms of risk covers, as well as about the measures that the Act sets out to limit the effects of this temporary unemployment. The pension provider is thus required to forward certain information (listed in the Act) to the organisers.

Opt-out

The Act of 7 May 2020 also provides for the possibility for the organiser to nevertheless suspend the accrual of the pension rights (opt-out). If the organiser makes this decision, he has 30 days to inform the pension provider thereof. This 30-day period runs from the day after the notification by the pension provider, or from the day after the beginning of the first period of temporary corona unemployment (if this period starts after the notification of the information).

The program Act of 20 December 2020 also provides, effective as of 1 October 2020, for a new possibility for the organisers who did not use this possibility before 30 September 2020 to suspend the pension rights (opt-out). If the organiser wishes to make use of it, this possibility must be implemented within a 30-day period following a specific communication that the pension provider has to make on this subject.

This suspension will then cover the period of temporary corona unemployment that runs after 30 September 2020.
All the measures/modalities that are applicable to a suspension that has been decided before 30 September 2020 are also applicable to the suspension that would be decided for the period after 30 September 2020 (information to the plan members, etc).

This opt-out possibility available to the organiser does not concern death cover, which is mandatorily maintained, as applicable on the day before the temporary corona unemployment, until 31 March 2021 (as long as the scheme member stays in temporary corona unemployment until this date).

Return

The Act of 7 May 2020 also regulates the impact of postponing the return on the premium, which is granted by the pension provider. If the pension provider has a best-efforts obligation, the return on the premiums will only be granted as of the time of actual payment of those premiums. If the pension provider has an obligation of results (a branch 21 product), a distinction has to be made depending on the type of contract:

- If it is a classic contract with fixed premiums, the return will be granted as of the due date of the premium (even though the payment of this premium is postponed).
- If it is a universal life contract (for which the payment of the premium is not fixed in advance), the return on the premiums will only be granted as of the time of actual payment of those premiums.

On the other hand, the Act sets out that postponing the premiums has no impact on the guaranteed return due by the organiser (the minimum guaranteed return of Article 24 of the Act on Occupational Pensions (1.75% in 2020 and 2021) in case of a cash balance or defined contributions plan with guaranteed return). This return will be immediately granted, independently of the actual time of payment of the premiums.

Modification to the pension plan / the solidarity rules

The continuation of the accrual of pension rights and of death covers as well as the postponing of the premiums directly result from the Act. It is thus not required to follow the modification procedure of the pension plan or solidarity rules set out in the Act on Occupational Pensions. The formal modification to the pension plan rules or of the solidarity rules must nevertheless intervene, where appropriate, by 31 December 2021 at the latest. Furthermore, the organiser is required to inform the scheme members

about, among other things, the continuation or the suspension of the accrual of the pension rights and/or the risk covers.

Entry into force and point of attention

The Act of 7 May 2020 retroactively entered into force on 13 March 2020. It was initially applicable until 30 September 2020 (except for the obligation to modify the plan rules, which must intervene by 31 December 2021 at the latest). The program Act of 20 December 2020 (amending the Act of 7 May 2020 and extending the measures provided by the latest) has retroactive effect as of 30 June 2020 (for the mandatory maintenance of the death cover for the period from 30 June 2020 to 30 September 2020), 30 September (for the extension of the measures until 31 March 2021) and 1 October 2020 (for the new opt-out possibility)(see above).

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 (not postponed) employee contributions will be withheld. Employee contributions are based on the net salary, which is no longer due in the event of temporary unemployment.

10.2 What is the impact of temporary unemployment on 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.

Even if pandemics are excluded from coverage, the Act of 7 May 2020, as amended by the program Act of 20 December 2020, provides, just as for the continuation of the accrual of pension rights and of death cover, for the continuation of the occupational health insurances, according the same terms and conditions as for the accrual of pension rights.

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

Occupational disability insurances and disability cover 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. The aforementioned Act of 7 May 2020, as amended by the program Act of 20 December 2020, applies the same principles as for accrual of pension rights. 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 contributions until 31 March 2021 can be obtained.

11 International employment

11.1 Is it possible to travel to and travel abroad from Belgium?

From 27 January 2021 until 1 March 2021, non-essential travel to and from Belgium is again prohibited.

These temporary travel restrictions do not apply to essential travel. The Ministerial Decree of 26 January 2021 distinguishes two categories of persons:

1. For nationals and residents of the EU/Schengen states, as well as residents from third countries as listed here https://reopen.europa.eu/nl/, the following travels are, among others, considered as essential movements:
    - Travel for purely professional reasons, including travel by professional sportsmen and women with a top sport status, professionals from the cultural sector and journalists, in the exercise of their professional activities;
    - Travel by diplomats, ministers and Heads of State or Governments:
    - Travel by the staff of international organisations and institutions, and by people invited by international organisations and institutions whose physical presence is required for the well-functioning of these organisations and institutions;
    - Travel by the staff of diplomatic missions and consular posts and people invited by these missions or posts whose physical presence is required for the well-functioning of these missions or posts;
    - Travel by members of the European Parliament undertaken in the performance of their duties;
    - Travel for study purposes:
        - Travel by pupils, students and trainees attending a course in the context of their studies;
        - Researchers with a hosting agreement;
    - Transits.

These persons must complete and sign a digital or paper declaration of honour (model form on the info-coronavirus.be website) before their departure, and they must carry this declaration of honour during the essential travel. Non-completion or a false completion of this declaration of honour may result in refusal of entry into the territory.

2. For travellers from a third country to Belgium who are not citizens of one of the EU/Schengen states and have their main residence in a third country that is not listed on the website https://reopen.europa.eu/nl/, the following travels are, among others, considered essential:
    - Professional travel of healthcare professionals, health researchers, and elderly care professionals;
    - Professional travel of frontier workers;
    - Professional travel of seasonal workers in agriculture;
    - Professional travel of transport personnel;
    - Travel by diplomats, staff of international organisations and institutions and people invited by international organisations and institutions whose physical presence is required for the well-functioning of these organisations and institutions;

- Professional travel of military personnel, customs personnel, intelligence services and magistrates, and humanitarian aid workers and civil protection personnel in the exercise of their functions;
- Professional travel of seafarers;
- Passengers in transit outside the Schengen States and the EU;
- Travel for study purposes:
  - Travel by pupils, students and trainees following a course in the context of their studies;
  - Researchers with a hosting agreement;
- Travel by qualified persons, if their work is necessary from an economic point of view and cannot be postponed, including travel by professional sportsmen and women with a top sport status, professionals from the cultural sector – if they hold a combined licence – and journalists, in the exercise of their professional activities;
- Travel by persons who will be employed in Belgium including young au pairs, regardless of the duration of this activity, provided they have been authorised to do so by the competent Region (work permit or proof that the conditions for an exemption have been met);
- Travel by persons to perform a self-employed activity in Belgium regardless of the duration of that activity, provided they have been authorised to do so by the competent Region (valid professional card or proof that the conditions for an exemption are met).

These persons must hold an essential travel certificate, unless the essential nature of the travel is proven by official documents in the possession of the traveller. This attestation is issued by the Belgian diplomatic mission or consular post if it is demonstrated that the travel is essential. Without this essential travel certificate, entry to the territory may be refused.

However, it is strongly advised to check the applicable rules and obligations at the time of departure, since this matter is constantly subject to change.

11.2 When are quarantine and testing mandatory?

It is up to each country to decide if quarantine is necessary for travellers arriving on its territory. Before departing from Belgium, it is recommended to consult the travel advice of Foreign Affairs: https://diplomatie.belgium.be/nl/Diensten/Op_reis_in_het_buitenland/reisadviezen

The following rules are currently applicable with regard to quarantine and testing after a stay abroad:

- For Belgian residents returning from a red zone after a stay of more than 48 hours: mandatory quarantine of 10 days and a mandatory test on day 1 and day 7. The duration of the quarantine can be shortened to a minimum of 7 days provided that a negative test is obtained on day 7;
- For non-Belgian residents returning or travelling to Belgium from a red zone after a stay of more than 48 hours and with the exception of travellers from the United Kingdom, South Africa and South America, there is a mandatory quarantine of 10 days and they must be tested on day 7. The duration of the quarantine can be shortened to a minimum of 7 days provided that a negative test is obtained on day 7. In addition, non-residents must have a negative test result of maximum 72 hours old (irrespective of the length of their stay abroad and their stay in Belgium). There are some exceptions, e.g., for travellers who are not coming to Belgium via a carrier if they have been abroad for no more than 48 hours or will be staying in Belgium for less than 48 hours.

- For all travellers travelling from the United Kingdom, South Africa and South America to Belgium, there is a mandatory quarantine of 10 days, a negative test result of maximum 72 hours old and a mandatory PCR test on day 1 and day 7;
- In addition, all employees or self-employed persons residing or staying abroad who will stay in Belgium for more than 48 hours to perform activities are obliged to have a negative test result from a test that was taken no more than 72 hours before their departure to Belgian territory (regardless of whether they come from a red zone or not).

These rules do not apply to frontier workers.

There are some (limited) exceptions to this mandatory quarantine:

- Since 4 January 2021, an adjustment has been provided for Belgian residents and certain categories of non-Belgian residents who resided abroad for professional reasons (see under 11.3). For them, there is a possible exception to the mandatory quarantine.
- According to the current information on the website www.info-coronavirus.be, the quarantine can be temporarily lifted in order to fulfil a necessary activity, to the extent that this activity cannot be postponed. Thus, the quarantine may only be lifted to fulfil the essential purpose of the travel (e.g., a meeting) and only to the extent that this activity cannot be postponed. Social distancing and other protective measures must be scrupulously respected while carrying out this activity.

However, it is strongly advised to check the applicable rules and obligations at the time of departure, since this matter is constantly subject to change.

11.3 Mandatory “Public Health Passenger Locator Form” and mandatory “Business Travel Abroad (BTA) Form”

Public Health Passenger Locator Form

The Public Health Passenger Locator Form allows tracers to contact travellers if an infection is detected and to initiate contact tracing if necessary.

Anyone returning to Belgium by plane, boat, train or bus must complete this form within 48 hours prior to arrival in Belgium.

In case of travel by other means of transportation, the form should only be completed if the stay in Belgium lasts more than 48 hours or if the previous stay outside Belgium lasted more than 48 hours. If the traveller is travelling to Belgium from outside the EU and the Schengen states, this form must be completed in any case (regardless of the length of the stay abroad and in Belgium; even if it is less than 48 hours).

Failure to fill in this form may lead to refusal of entry into the territory and may result in civil or criminal penalties.

Business Travel Abroad (BTA) Form

The *Business Travel Abroad (BTA) Form* must be completed online by the Belgian employer, the Belgian principal or the international organisation established on Belgian territory if it concerns travel abroad for

professional reasons and this before the departure of the employee concerned. This form can only be used for:

- Travel abroad by Belgian residents: Travel for files or projects that require limited on-site intervention (no time limit).
- Travel to Belgium: This form cannot be used by non-residents of Belgium for travel to Belgium for the purpose of temporary or permanent employment, but it can be used for a limited business contact related to a concrete project or file, with a maximum duration of 5 days.

This form generates a certificate number that must be entered in the customised Public Health Passenger Locator Form in order to activate the professional travel section. For such professional travel, an adjusted score applies, on which the decision is based on whether or not the mandatory quarantine must be respected.

Failure to fill in this form, or to do so incorrectly, will result in the travel not being considered as professional.

However, it is strongly advised to check the applicable rules and obligations at the time of departure, since this matter is constantly subject to change.

11.4 Additional obligations for employers or users in the case of temporary employment on Belgian territory of employees living or residing abroad

In the framework of the combat against the consequences of the coronavirus, employers and users who temporarily use employees or self-employed persons living or residing abroad to perform work in Belgium in the sectors of construction, cleaning, agriculture, horticulture and the meat sector have been obliged since 24 August 2020 to keep an up-to-date register from the start of the work until the fourteenth day after the end of the work.

The Ministerial Decree of 12 January 2021 extended this obligation to all sectors: all employers who temporarily rely on employees or self-employed persons from abroad in Belgium must therefore keep such a register, with the following data:

- Identification data of the employee or self-employed person living or residing abroad:
  - Surname and first name
  - Date of birth
- National register number or NISS number
- Temporary residence during work in Belgium
- Telephone number of the employee or self-employed person
- If applicable, the designation of the persons with whom the employee or self-employed person cooperates during his work in Belgium.

The obligation to register does not apply to the employment of frontier workers, nor does it apply if the stay in Belgium of the employee or self-employed person living or residing abroad is less than 48 hours. In addition, all employers and “users” are obliged to check whether the Public Health Passenger Locator Form (see above 11.3) has been completed by the employee or self-employed person residing or staying abroad. If this is not the case, the employer or user must ensure that the form is completed before the start of employment in Belgium.

Furthermore, a new general obligation was imposed on all persons present at the workplace to comply with the COVID obligations imposed by the government.

At the workplace, the occupational physician and the labour inspectorate may ask all those involved to provide proof that they are complying with these obligations.

These measures currently apply until 1 March 2021.

11.5 What happens to visa applications?

Worldwide, the submission and processing of Visa C and D applications are gradually being resumed. The absolute condition for this resumption is that the outsourcing partner with which the embassy or consulate cooperates is operational again.

The embassy or consulate verifies the essential nature of the journey (see 11.1) and whether the conditions for issuing visa C or D have been met.

11.6 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 his authorisation to stay is no longer valid, this residence permit may be temporarily extended. In order to obtain an extension, an application must be submitted to the municipality, 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 letter explaining why return to the country of origin was not yet possible and why an extension of the short stay is still necessary, the documents confirming the impediment, a copy of the new return ticket or any evidence (issued by the government or the embassy of the country of origin) proving that the person cannot return to the country of origin for the time being. and travel and sickness insurance valid for the duration of the desired extension, with a minimum coverage of EUR 30,000 and valid for the entire Schengen area.

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.

11.7 Can new applications for single permits/work permits be submitted?

Yes, it is 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 issuing of type D visas is gradually being resumed worldwide. If an employee has been authorised by the competent region to work on Belgian territory, this is considered an essential journey.

11.8 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 it 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 until 31 December 2020 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. Besides that, the Walloon Region announced that for posted workers whose contract has been suspended due to COVID-19, the period between 1 March and 31 December 2020 will not be taken into account to control compliance with the wage thresholds. However, certain documents still have to be submitted to the administration:

- modification to the letter of secondment including all changed elements as a result of the suspension;
- modification to the foreign labour agreement or the agreements concluded with the foreign employer;
- (when available): the individual account and pay slips.

These documents must be sent to the account manager (by e-mail) as soon as possible.

11.9 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 is suspended until 31 March 2021. However, in order to prevent abuses, this only applies if their asylum application was registered before 8 December 2020. Moreover, the employer has to provide accommodation to the asylum seeker in order to limit the number of movements by employees.

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

The periods of teleworking carried out on Belgian territory by frontier workers as a result of the coronavirus 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 until 30 June 2021, but this date can be revised in view of the COVID-19 measures.

11.11 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 EU Member State but who work from home as a result of the measures to combat 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 COVID-19 are in force.

11.12 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.

These frontier workers must submit their application to the following office of the NEO:

- employees residing in France: Mouscron;
- employees residing in the Netherlands: Turnhout;
- employees residing in Germany: Verviers;
- employees residing in the Grand Duchy of Luxembourg: Arlon;
- other cases: free choice.

11.13 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 state during the COVID-19 crisis, without these teleworking days being counted in the 24-day tax rule.

11.14 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.

11.15 What is the impact of homeworking on the tax situation of frontier workers?

In recent weeks, Belgium has concluded bilateral agreements with its neighbouring countries, namely Luxembourg, France, the Netherlands and Germany. These agreements stipulate that the days for which the employee received remuneration and during which the work was carried out at home may be

regarded as days worked in the state in which the frontier worker would have performed his work in the absence of the government measures taken in the context of the COVID-19 pandemic.

This means that an employee residing in Belgium who normally performs part or all of his services in a neighbouring country and who is taxable in the latter country on the remuneration for these services (e.g., because he has an employment agreement with an employer who is a resident of that country or because he resides there for more than 183 days a year), remains taxable in the usual working country, and not in Belgium, even if he performs his professional services at home (in Belgium) during the quarantine period.

This is a derogation from the general rule according to which an employee is taxable in the state where the benefits are provided. However, this rule continues to apply to non-neighbouring countries, as well as to foreign executives benefiting from the special tax status provided for in the circular of 8 August 1983 but residing in Belgium (for the calculation of “travel exclusion”).

Moreover, this fiction only applies to the extent to which the remuneration relating to days worked at home is effectively taxed in the neighbouring country in which the employee would have provided his professional services in the absence of the quarantine measures. Moreover, frontier workers are obliged to apply this fiction coherently in each country and to keep the relevant information up to date.

Which information is concerned? The tax administrator clarifies this in Circular No. 2020/C/81 of 17 June 2020 concerning FAQ COVID-19 and cross-border employment. The administration indicates that it is advisable to keep the following information available:

- a certificate from the employer stating the number of days worked at home, due to COVID-19;
- proof of effective taxation of remuneration for working from home in the state in which one would normally have worked in the absence of quarantine measures.

The employer’s certificate must be individualised and must contain the following:

- all the information necessary for full identification of the employee (surname, first name, address, date of birth);
- the nature of the function performed by the employee;
- overview of the number of days worked at home solely because of the measures to prevent COVID-19;
- if applicable, the overview of the number of days worked at home provided for in the employment agreement;
- an overview of any days of illness, leave and/or recovery;
- sworn statement that the certificate is true and sincere;
- date and signature of the employer, as well as the co-signature of the employee.

12 Corona and the right to privacy and data protection

12.1 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, for example, through questionnaires on recent travel destinations or on medical symptoms. They can but they 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 (e.g., 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 or tested positive for COVID-19). 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 complemented on 19 March 2020), the European Data Protection Board (EDPB) 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, though, 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 themselves 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 (see below). 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.

12.2 Are measurements of body temperature allowed for the purpose of the prevention of COVID-19?

On 5 June 2020, the DPA published on its website a more detailed position on the measurement of body temperature. The DPA confirms that the GDPR does not apply when body temperature is only directly read and not recorded in a file. In that case, there is no processing of personal data. This remains the case if a person is denied access to the buildings, without any additional registration of an identifiable person. For employees, however, according to the DPA, it will be inevitable that additional processing

takes place (in order to justify the intervention, to process the consequences of the measuring, etc.), so that there will still be processing after all. Moreover, the DPA seems to assume that also with advanced digital measuring (e.g., via thermal imagers or digital fever scanners) the GDPR is always applicable because the data are not only read, but also previously (electronically) processed.

If the GDPR applies, an exception will have to be invoked for the processing of temperature data, given that this constitutes sensitive data (i.e., health data). However, the DPA confirms that employees will not be able to freely give their consent (in view of the employer–employee authority relationship) and no other exception will be possible for the time being, given that there is currently no law or collective labour agreement explicitly allowing temperature measurement. However, the DPA does not address the question whether welfare legislation could provide a sufficient basis (it only refers to the general provision of the Employment Contracts Act on safe and healthy working conditions, which in its opinion is not sufficiently precise). In this respect, the DPA seems to agree with the strict position of the French Data Protection Authority, contrary to, for example, the British ICO, which considers that the welfare legislation can indeed constitute an exception to the prohibition on processing health data.

The DPA therefore concludes its opinion by stating that data controllers – until there is a sufficiently clear legal basis (e.g., a law or collective labour agreement) – are currently not allowed to take someone's temperature if:

- the measurement results or the consequences of the measurement (e.g., refusal of access) are recorded in a file; or
- this is done by using advanced electronic measuring devices such as fever scanners, heat cameras or other automatised systems.

The only measurement that the DPA currently seems to allow is the manual measurement of the temperature without recording the measurement results or their consequences (e.g., refusal of access). As temperature measurements of employees will, according to the DPA, in practice always involve processing, such measurements would, strictly speaking, be contrary to data protection legislation. However, the DPA invites the legislator to develop specific legislation on this issue if these temperature measurements are deemed necessary in the context of the COVID-19 crisis. Such legislation could, according to the DPA, create a legal basis for the processing of temperature data.

According to a position of the Federal Public Service Employment, Labour and Social Dialogue, an employer cannot, in principle, measure someone's temperature himself as this would be in conflict with, among other things, the regulations on health surveillance. Exceptionally, however, according to the FPS Employment, Labour and Social Dialogue, this would still be possible during the COVID-19 pandemic if the decision to introduce and the modalities are included in the work rules (according to the usual amendment procedure). The FPS Employment, Labour and Social Dialogue here refers by analogy to the procedure for the introduction of alcohol and drug tests regulated in CBA No. 100 (although there does not really seem to be a legal basis for this). If an employer takes temperature measurements, it is in our opinion very important to follow all the steps of the prevention legislation (advice from the occupational physician and internal prevention advisor, consultation with the committee for prevention and protection at work, etc.) and to comply with the GDPR when processing personal data.

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.

12.3 Is medical testing and rapid testing allowed for the purpose of the prevention of COVID-19?

The strict view of the DPA on temperature measurements seems to apply equally to medical tests, including rapid tests. According to the DPA, these will not be possible without an explicit legal obligation.

The FPS Employment has taken a more pragmatic view and, as with temperature measurements, believes that this is possible for some high-risk jobs, provided that the work rules are adapted.

A new royal decree temporarily assigns additional competences to internal prevention advisors-occupational physicians, allowing them to direct workers to tests in certain circumstances or to carry out tests themselves. This seems to be a step towards employers being able to introduce rapid tests in the event of a high risk.

12.4 Can I oblige my employees to be vaccinated against COVID-19?

No obligation, only awareness and facilitation

There is today no legal obligation in Belgium to be vaccinated against COVID-19, also not in certain sectors such as the healthcare sector. An obligatory vaccination and the corresponding prohibition on employment will be no part of the policy to restrict the further spread of the COVID-19 virus on the work floor.

On the other hand, it is allowed for the employer to encourage its employees via a free vaccination campaign (under supervision of the company doctor) to be vaccinated. This free vaccination will be exempted from taxes and social security contributions.

However, it is also possible to encourage its employees via awareness campaigns to be vaccinated. The employer could, as an incentive, for example give the possibility to its employees to get vaccinated during working hours. It is possible that this will be legally arranged. Minister of Work Dermagne has already proposed to the social partners to allow leave of absence due to circumstances for employees willing to take the vaccine.

Prohibition on processing

The processing of data concerning the question if employees were vaccinated or not falls within the legislation concerning data protection as a processing of sensible personal data and is by consequence forbidden. In the absence of a legal basis for admission in Belgium, it will not be possible for employers to record which employees have been vaccinated and which employees refuse to be vaccinated. This is also the case if an employee spontaneously shares information about this with his employer. In that case, too, these data may not be registered.

13 General Assembly and governing bodies during and after the COVID-19 pandemic

13.1 The remote General Assembly: written and digital meetings made easier

On 20 December 2020, the legislator enacted a law introducing various temporary and structural provisions as part of the fight against the spread of the coronavirus. These include changes to the organisation of the remote general meeting within companies and associations.

In the spring of 2020, when the COVID-19 pandemic was in full swing, the government had already issued a royal decree temporarily adapting the organisation of general meetings within companies and associations to the government regulations on social distancing. With the law of 20 December 2020, the legislator now also provides for more structural changes to the organisation of general meetings where shareholders do not have to meet physically, which will continue to apply after the COVID-19 pandemic.

The law thereby amends certain articles of the Code of Companies and Associations (CCA).

13.1.1 Written general meeting quasi-generalised

Shareholders in the BV, CV and NV could already unanimously adopt all resolutions that fall within the authority of the general meeting in writing, insofar as these were not resolutions that had to be passed by authentic deed.

The legislator is now softening this provision with the Act of 20 December 2020 by from now on only excluding amendments to the articles of association from the possibility of a written general meeting. Therefore, only these resolutions will still require a physical meeting (or remote meeting); all other resolutions will be able to be passed in writing.

For members of non-profit associations and international non-profit associations, the possibility of holding general meetings in writing did not yet exist, but the Act of 20 December 2020 introduces this possibility for them.

13.2 Possibility of electronic general meeting, even if not provided for in the articles of association

From now on, the managing body of a BV, CV, NV, vzw and ivzw can, even without providing for this possibility in the articles of association, offer the participants in the general meeting the option of participating in the meeting remotely by means of an electronic means of communication provided by the company. Some articles of association already provide for this possibility, but with the arrival of this Act, companies and associations without any provision in their articles of association will also be able to apply this method of meeting. This electronic means of communication may include video or teleconferencing programmes such as Teams, Zoom, Skype, and even telephone calls (e.g., in companies with a limited number of shareholders where the capacity and identity of the shareholders can easily be verified because everyone knows each other). Only the members of the general meeting's bureau may not participate in the general meeting electronically.

It is therefore no longer the articles of association that determine whether or not a general meeting can be organised remotely, but the managing body that can make the decision. The managing body must

include a clear and precise description of the procedures relating to remote participation in the notice convening the general meeting. If the company has a website, the procedures for remote participation in such a general meeting shall also be made accessible on the company website.

The electronic means of communication used must enable the company to check the capacity and identity of the shareholder using it and must at least enable shareholders to take direct, simultaneous and uninterrupted notice of the proceedings at the meeting and to exercise their voting rights on all items to be discussed.

13.3 Course of the board meetings

The Act of 20 December 2020 did not change the organisation of the (remote) meetings of the governing body of companies and associations.

If the directors do not wish to hold a physical meeting, the existing rules apply:

- The meeting of a governing body of a BV, CV, NV, vzw or IZW can be held in writing by adopting decisions by unanimous written consent of all directors, except for those decisions for which the articles of association exclude this possibility. This possibility of a written board meeting exists for companies and associations whose articles of association have already been adapted to the Code of Companies and Associations. Companies who did not yet adapt these can only organise a written board meeting if the articles of association do not exclude it. It is also possible that the articles of association limit the possibility of a written board meeting to exceptional cases, for example, when urgent necessity and the company's interests so require. In this case, the wording of the articles of association must, of course, be respected.
- The governing body of a BV, CV or NV can organise a digital meeting (via tele- or videoconference), as long as the articles of association do not explicitly exclude this possibility.

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

Partners with you.