

New rules on dismissal as of 2012 A first step towards harmonisation

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As we announced in our *Newsletter* of 24 February 2011, the first draft law and royal decree to implement the mediation proposal of the federal government regarding the draft Inter-professional Agreement 2011-2012 (IPA) were approved by the Cabinet on 25 February 2011.

On 25 March 2011, the draft law implementing this government compromise was published. Thursday night, 7 April 2011, it was approved by the Belgian Parliament (the *House of Representatives* and the *Senate*) after voting. The next step is the publication of the new law in the *Belgian Official Gazette*.

The new law obviously does not mark the end of the different treatment of blue-collar and white-collar workers. Nevertheless, it is the first step towards having a common approach for the two categories. This first step is intended to lead to common rules for blue-collar and white-collar workers and this in all matters where there still are substantial differences between the two categories, particularly with regard to partial unemployment and notice periods.

This *Newsletter* will deal with the latter point: the notice period for blue-collar and white-collar workers.

It is striking that the new law has no provisions on any transitional period and therefore makes a clear distinction between the current and the new rules. For the 'higher' white-collar workers that already entered into service and 'higher' white-collar workers who are going to be employed before 1 January 2012 under the current regulation, the *Claeys Formula* will retain its value as a guide for the determination of the notice periods.



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We hope you enjoy the read!

1. New rules on notice periods as from 2012

1.1 To whom do the new rules apply?

As stipulated in the draft IPA, the new rules for notice periods will apply to employment contracts of which the execution commences on **1 January 2012 or later**.

The date of execution of the contract as agreed by both parties will determine whether the new rules are applicable. The date on which the contract was concluded is not decisive.

It is possible that an employment contract starting after 1 January 2012 was preceded by another contract between the same parties. If there is a break of more than seven days between both contracts, the new rules will apply. If the second contract immediately follows the first contract, or if the break between contracts is at most seven days, the date of the first contract will determine if the current or new rules are applicable. If the first contract entered into force before 1 January 2012, then the current rules remain relevant.

For example: an employee with a fixed-term contract from 1 March 2011 to 31 March 2012 and for an indefinite period as from 3 April 2012, will not be covered by the new regulation.

1.2 Calculation of seniority

The notice period will be calculated according to the seniority (years of service) acquired at the time the notice takes effect.

Temporary work for the same employer will be taken into account to determine the seniority relevant for the notice period. However, this additional seniority is only included in the event of termination of the employment contract by the employer and under specific conditions:

1. the employee was recruited by the employer immediately after the temporary work or after a break of at most seven days, and
2. the employee is recruited for the same function he/she previously executed as a temporary worker, and
3. the previous period of temporary work was continuous. A period of inactivity for a week or less is nonetheless regarded as a period of employment.

Not only must the periods of activity be taken into account, periods between temporary contracts are also included when these breaks lasted no longer than seven days. Thus, a temporary worker employed for five months with consecutive employment contracts from Monday to Friday, will acquire an additional seniority of five months.

This means that multiple periods of temporary work are added to the total period of seniority if the same function is concerned.

This additional seniority accumulated by the temporary worker may not exceed one year.

1.3 The new law is not a comprehensive settlement

To the extent that the rules under the new law do not differ from the current rules, the current rules remain applicable. For example, the provision on the prohibition of arbitrary dismissal of blue-collar workers continues to apply, as well as the provisions on the service and the commencement of the notice period.

1.4 The new rules for blue-collar workers

The new law provides for the current notice periods for blue-collar workers increased by a factor of **1.15**. If the employment contract is terminated by the employer, the following notice periods will apply:

Seniority of blue-collar	Notice period
< 6 months	28 days
≥ 6 months and < 5 years	40 days
≥ 5 years and < 10 years	48 days
≥ 10 years and < 15 years	64 days
≥ 15 years and < 20 years	97 days
≥ 20 years and more	129 days

If the employment contract is terminated by the blue-collar worker, the notice period is 14 days. This period is doubled when the employee has been continuously employed for 20 years or more by the same employer.

The possibility to deviate from the regular notice period during the first six months of execution of the employment contract remains in effect, provided that the employer and employee each observe a notice period of at least seven days and half of that period respectively.

Alternative notice periods that were adopted before 1 January 2012 by Royal Decree on the proposal of a joint committee continue to apply for the present. The existing sector-wide derogations that amongst other things guarantee financial advantages to soften the consequences of dismissal also continue to apply. Nevertheless, the social partners in the joint committees should examine if these derogations should not be adjusted to accommodate the above-mentioned 1.15 coefficient. The social partners may thus propose to maintain or adjust the sector-wide derogations. Only if these negotiations fail will the 1.15 increase be applied to dismissals served as from 1 January 2013.

If the contract is terminated without regard to the relevant notice period, an indemnity in lieu of notice is due (as provided for in Article 39 of the Law on Employment Contracts), equal to the employee's salary during the relevant notice period.

1.5 The new rules for white-collar workers

The difference between 'lower' and 'higher' white-collar workers will remain in place under the new rules. Also the possibility to mutually agree on a different notice for the 'highest' white-collar workers remains.

- For **'lower' white-collar workers** (gross annual remuneration less than EUR 30.535¹) nothing changes at all. For them, the so-called 'legal minimum' continues to apply (three months notice for every started period of five years seniority).
- For the **'higher' white-collar workers** (gross annual remuneration in excess of EUR 30.535²) the new rules will have a significant effect. A convergence coefficient of **97%** is applied leading to a conversion of the notice period in days.

The starting point is a notice period of 30 days per started year of seniority. The period may, however, not be shorter than that of the 'lower' workers (three months notice for every started period of five years seniority).

This means that a notice of three months (or 91 days) must be respected as long as the employee has not acquired three years of seniority. Likewise, a notice period of six months (or 182 days) must be respected if the 'higher' white-collar worker has acquired five years or more but less than six years of seniority.

In the event of termination of the employment contract by the employer, the following notice periods thus apply:

Seniority of white-collar	Notice period
< 3 years	91 days
≥ 3 years and < 4 years	120 days
≥ 4 years and < 5 years	150 days
≥ 5 years and < 6 years	182 days

For employees with at least six years of seniority, the notice period that must be observed by the employer is fixed at 30 days per started year of seniority.

The ability to determine the notice period between parties in common agreement or by the court in accordance with its power to decide on an appropriate notice period, no longer exists under the new rules governing notice periods.

In the event of termination of the employment contract by the white-collar worker, the notice periods have been adjusted starting from the current principle that an employee has to respect a notice that amounts to half of the notice that the employer must respect (albeit with a ceiling).

¹ Amount as of 2011. This amount is subject to indexation annually.

² Amount as of 2011. This amount is subject to indexation annually.

Consequently, the following notice periods will apply in case of termination by the employee:

Seniority of white-collar worker	Notice period
< 5 years	45 days
≥ 5 years and < 10 years	90 days
≥ 10 years	135 days
≥ 15 years and a gross annual remuneration of > EUR 61.071 ³	180 days

- As provided by the government's mediation proposal, as from **1 January 2014**, a convergence coefficient of **94%** will be applied to notice periods for 'higher' white-collar workers in case of termination by the employer. This coefficient will result in the following notice periods:

Seniority of white-collar worker	Notice period
< 3 years	91 days
≥ 3 years and < 4 years	116 days
≥ 4 years and < 5 years	145 days
≥ 5 years and < 6 years	182 days

For white-collar workers who are at least six years in service, the notice period to be respected by the employer will be fixed at 29 days per started year of seniority.

- With regard to the **'highest' white-collar workers** (with a gross annual remuneration of more than EUR 61.071⁴ at the time of entry into service), the possibility to fix the notice period in mutual agreement (with a minimum of three months per started period of five years seniority) is maintained. If this agreement is not concluded at the latest at the moment the employee enters into service, the notice periods of the 'higher' white-collar workers will apply.
- The new rules prohibit sector-wide CBA's to "level-up" the notice periods of white-collar workers. This prohibition is justified by the objective of the new rules, i.e. to converge notice periods for blue-collar and white-collar workers. Therefore, the possibility for notice periods to be made longer by joint committees at the level of the industry sector is excluded.

- When the employment contract is terminated without regard to the relevant notice period, an **indemnity in lieu of notice** is due (as provided for in Article 39 of the Law on Employment Contracts).

The new law includes a formula that the employer is to use when calculating an indemnity in lieu of notice. Because remuneration of white-collar workers is usually expressed as a monthly amount, the formula allows one to calculate the daily salary to serve as a basis for the calculation of a notice indemnity. The formula involves the calculation of the salary per quarter, divided by the number of days in a quarter:

$$\text{Daily salary white-collar employee} = \text{monthly salary} \times 3/91$$

(The monthly salary also includes "*benefits acquired by virtue of the employment contract*")

The explanatory memorandum to the new law states that the new rules would not affect the principles with regard to the determination of the yearly salary to calculate a notice indemnity. The "*current remuneration*" thus still means the remuneration that the employee is entitled to at the time of termination of the employment contract, including benefits acquired by virtue of the employment contract.

Otherwise the new law explicitly states that, in the event the current monthly salary also includes variable pay, the average variable salary of the previous twelve months is taken into account. This gives some clarification on the way variable pay is to be included in the calculation of a notice indemnity. While this provision only applies to dismissals under the new rules, we presume that this method of calculation will probably influence the current rules on the termination of employment contracts. Hence, as of 2012 only variable salary of the previous twelve months will be included in the notice indemnity, while some courts to date take into account an average over several years. The new law does not provide an answer to the question which variable salary must be included in the notice indemnity: *variable salary earned* or *paid out* in the previous twelve months.

³ Amount as of 2011. This amount is subject to indexation annually.

⁴ Amount as of 2011. This amount is subject to indexation annually.

2. The so-called “dismissal allowance” paid by the National Employment Office

As mentioned in the draft IPA, the new law also provides for a so-called *dismissal allowance* in the event of dismissal (chapter 5 of the new law).

When the employer dismisses a blue-collar worker (or an employee with an employment agreement based on *service cheques* or a domestic worker) as of 1 January 2012, the employee has the right to a **dismissal allowance** which is paid by the **National Employment Office (NEO)**.

The right to a *dismissal allowance* exists for dismissals under the new rules as well as for dismissals under the current rules.

The amount of this *dismissal allowance* however varies depending on whether the dismissal takes place under the new or the current rules:

- if the dismissal takes place under the new rules, the amount of the *dismissal allowance* is 1.250 EUR.
- if the dismissal takes place under the current rules, the amount of the *dismissal allowance* depends on the employee’s seniority with the employer:

Dismissal allowance in the event of a dismissal under the existing rules	
Seniority with the employer	Amount of the allowance
< 5 years	1.250 EUR
≥ 5 years and < 10 years	2.500 EUR
≥ 10 years	3.750 EUR

The amount of the *dismissal allowance* for part-time workers will be reduced in accordance with working time under the employment contract.

The *dismissal allowance* is not due if the employment contract is terminated by the employer for the following reasons:

- serious cause;
- during the trial period;
- in view of the employee accessing the statutory (state)pension regime;
- in view of the employee accessing a bridging pension;
- before the employee acquires a seniority of six months with the employer.

Further, the *dismissal allowance* is not due when, in the framework of restructuring, the NEO partially repays the activation fee paid by the employer to the blue-collar worker in application of Articles 36 and 37 of the Act of 23 December 2005 on the Generation Pact.

Finally, the new law states that the *dismissal allowance* can only be paid to an employee following a dismissal by the same employer once each calendar year. This provision was included in order to prevent abuse.

3. Conclusion and summary

- The new rules clearly preserve the distinction between blue-collar and white-collar workers. Therefore, Title II and Title III of the Act on Employment Contrats treat the new sections separately.

Therefore the explanatory memorandum – very much influenced by the Council of State – explains that the new law should only be considered as a first step towards harmonization of statuses of blue-collar and white-collar workers

and that therefore the new rules should not be considered as being the final phase.

The question remains whether the convergence, as was envisaged in the original draft of the IPA, will indeed be able to find a way through and, in other words, whether the new rules will be completed and strengthened in the future by more pronounced convergence measures.

- There is a clear distinction between the current and new rules as is illustrated by the lack of transitional rules. This means that, for the dismissal of a 'higher' white-collar worker under the current rules, the *Claeys Formula* will still maintain its value as a guidance tool for the years to come. Nevertheless, it is possible that the labour courts

will be inspired by the new notice periods when assessing the appropriate notice period for 'higher' white-collar workers under the current rules.

- We can summarize the new rules with regard to notice periods for blue-collar and white-collar workers as follows:

BLUE-COLLAR WORKERS	Seniority	Notice period
Termination by the employer	< 6 months	28 days
	≥ 6 months and < 5 years	40 days
	≥ 5 years and < 10 years	48 days
	≥ 10 years and < 15 years	64 days
	≥ 15 years and < 20 years	97 days
	≥ 20 years	129 days
Termination by the blue-collar worker	< 20 years	14 days
	≥ 20 years	28 days

WHITE-COLLAR WORKERS	Seniority	Notice period	
		As of 2012	As of 2014
"Lower" white-collar worker			
Termination by the employer	3 months per started period of 5 years seniority		
Termination by the white-collar worker	< 5 years	1,5 months	
	≥ 5 years	3 months	
"Higher" white-collar worker			
Termination by the employer	< 3 years	91 days	
	≥ 3 years and < 4 years	120 days	116 days
	≥ 4 years and < 5 years	150 days	145 days
	≥ 5 years and < 6 years	182 days	
	≥ 6 years	30 days per started year of seniority	29 days per started year of seniority
	(possibility to determine an alternative notice period ⁵ in mutual agreement at the latest at the moment the employee enters into service, given that he/she has a gross annual remuneration of more than EUR 61.071 ⁶)		
Termination by the white-collar worker	< 5 years	45 days	
	≥ 5 years and < 10 years	90 days	
	≥ 10 years	135 days	
	≥ 15 years and gross annual remuneration > 61.071 EUR ⁷	180 days	

- Finally, we point out that the new law provides for a specific contribution to be paid to the *Compensation Fund for Redundant Employees of Closed Businesses* when an employer decides to dismiss an employee with a gross annual remuneration of more than EUR 61.071⁸. The contribution is equal to 3% of "*the cost of the dismissal*". To date, it is not clear what is meant by "*the cost of the dismissal*". The term will, however, be defined by royal decree. The same goes for procedures and terms of payment of the contribution and the entry into force of the provisions (at the earliest on 1 January 2012).

⁵ With a minimum of three months notice per started year period of five years seniority.

⁶ Amount as of 2011. This amount is subject to indexation annually.

⁷ Amount as of 2011. This amount is subject to indexation annually.

⁸ Amount as of 2011. This amount is subject to indexation annually.



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