NOVEMBER 2022

Newsletter: BELGIAN LABOUR DEAL

Dear reader,

On 15 February 2022, the federal government announced that it had reached an agreement on labour market measures, the so-called “labour deal”. The government transmitted the finalised texts to Parliament on 7 July 2022 for approval. On 29 September 2022, the final texts were approved by Parliament. Meanwhile, the Various Labour Provisions Act was published in the Belgian State Gazette on 10 November 2022.

What will this labour deal change in the field of human resources and which impact will this labour deal have on the daily practice of companies?

We hope you enjoy the read!

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1 Measures regarding working time

The first set of measures is related to providing more flexibility for employees in terms of working time, which should result in a better work–life balance.

1.1 Flexible part-time working schedules

No later than 20 August 2023

Deadline to amend the work rules.

For part-time employees with a flexible work schedule, the notification periods for their specific working schedule are extended:

- A part-time employee with a flexible work schedule must now be informed 5 working days in advance of this schedule. As a result of the labour deal, the notification period would become 7 working days.
- It is still possible to deviate from this notification period by means of a collective labour agreement that is declared generally binding, but in that case the notification period is also increased from 1 to 3 working days.

A transitional measure is provided for sectors that concluded a collective agreement before the labour deal came into force and for which the notification period is less than 3 working days. These sectoral collective bargaining agreements remain in force until a new sectoral bargaining agreement is concluded and this at the latest until 31 December 2022. A special regime is also provided for the hotel sector (JC n° 302), textile industry (JC n° 110) in which in the absence of a new sectoral agreement prior to 1 January 2023 the minimum period will be set at 3 instead of 7 days. Existing sectoral agreements in horticulture (JC n° 145), cleaning (JC n° 121) and driving schools (within JC n° 200) will remain applicable (even after 31 December 2022).

Furthermore, companies need to update their work rules and make them compliant with these provisions within 9 months after these articles enter into force (unless the transitional measure as set out above applies), i.e., by 20 August 2023. Until the amended work rules come into force and no later than 20 August 2023, the old notification periods will continue to apply.

1.2 Four-day work week

From 20 November 2022

Working in a four-day work week becomes possible for full-time employees at their request and after amending the work rules / concluding an enterprise collective agreement and an individual agreement.

The labour agreement provides the possibility for employees to perform their normal full-time work week in 4 days. This four-day work week can be introduced by:

- Amending the work rules: In a 38-hour work week, the daily working time limit can be raised to 9½ hours by amending the work rules.
- Concluding a collective bargaining agreement and amending the work rules: If the effective weekly working time within the company is more than 38 hours (with a maximum of 40 hours), a collective agreement may allow the daily limit to be equal to the effective weekly working time divided by 4 (i.e., 9¾ hours in case of a 39-hour work week and 10 hours in case of a 40-hour work week). The work rules will be automatically amended from the date of registration of the collective agreement.

The four-day work week can only be applied in case of a prior written request by the employee (for a renewable period of 6 months). The employer can decide to:

- Agree to the request: The employer and employee conclude a written agreement prior to the start of the four-day work week which contains the start and end of the work day, time and duration of the rest periods, days of regular work interruption and the start and end date of the period during which the four-day work week is applied (maximum duration of 6 months).
- Refuse the request: The employer has to motivate the refusal in writing within one month and provide it to the employee.

The request of the employee and the written agreement must be kept at the same location where the work rules can be consulted. Afterwards, the employer must keep these documents for a period of 5 years. Companies that fail to comply with these obligations or fail to keep these documents at the disposal of the Social Inspection may be subject to a level 2 sanction, i.e., a criminal fine of EUR 400 to 4,000 or an administrative fine of EUR 200 to 2,000 (multiplied by the number of employees involved with a maximum of 100).

The Committee for the Prevention and Protection at Work (CPPW), or in the absence thereof, the trade union delegation, may ask for a copy of the written agreement when this is considered necessary for the execution of their tasks. A systemic transfer of the agreements would not be in line with GDPR requirements.

The request of the employee may not give rise to any adverse treatment on the part of the employer. Furthermore, protection against dismissal is provided for an employee who has submitted a legally valid request. The employer may not unilaterally terminate the employment contract, except for reasons that are not related to the request. However, there are no specific sanctions related to this protection.

An employee who performs his/her normal full-time duties under the four-day work week may not perform voluntary overtime on the other days of the week.

These provisions come into force on 20 November 2022 and will be subject to a review by the NLC after two years.

1.3 Alternating full-time week schedule

From 20 November 2022

Working in an alternating full-time week schedule becomes possible at request of the employee and after amending the work rules and concluding an individual agreement.

The labour deal provides for the possibility of working according to a cycle of 2 consecutive weeks where the performance in the first week is compensated by the performance in the second week, without the daily working time exceeding 9 hours and the weekly working time exceeding 45 hours. The more or fewer hours performed in the first week will be compensated by the performance in the second week. This alternating full-time schedule must be foreseen in the work rules, which must specify at least the following:

- the average weekly working hours to be complied with within the cycle;
- the days of the week on which work performance can be determined;
- the daily period during which work performance can be determined;
- the minimum and maximum daily working hours;
- the minimum and maximum weekly working hours.

A cycle may also be extended over 4 consecutive weeks in the third quarter of the year in order to accommodate child care arrangements during the big school break. The same can happen over the year due to an unforeseen event affecting the employee (upon written and motivated request of the employee, which includes the unforeseen event, and a prior written agreement specifying the agreed cycle and the period during which this applies as an annex to the written agreement as determined below).

This alternating full-time week schedule can only be applied after a prior written request by the employee (for a renewable period of 6 months). The employer can decide to:

- Agree with the request: The employer and employee conclude a written agreement prior to the start of an alternating full-time week schedule which contains the sequence of daily work schedules in a set order and the start and end date of the period during which the alternating full-time schedule will be applied (maximum duration of 6 months). The employee has the right to terminate the alternating week schedule early and to resume his/her original working regime. In this case, the employee must inform his/her employer 2 weeks before the start of a new cycle.

- Refuse the request: The employer has to motivate the refusal in writing within one month and provide it to the employee.

The request of the employee and the written agreement must be kept at the same location where the work rules can be consulted. Afterwards, the employer must keep these documents for a period of 5 years. An agreement due to an unforeseen event need only be kept for 1 year. Companies that fail to comply with these obligations or fail to keep these documents at the disposal of the Social Inspection may be subject to a level 2 sanction, i.e., a criminal fine of EUR 400 to 4,000 or an administrative fine of EUR 200 to 2,000 (multiplied by the number of employees involved with a maximum of 100).

The CPPW, or in the absence thereof, the trade union delegation, may ask for a copy of the written agreement when this is considered necessary for the execution of their tasks. A systemic transfer of the agreements would not be in line with GDPR requirements.

The request of the employee may not give rise to any adverse treatment on the part of the employer. Furthermore, protection against dismissal is provided for an employee who has submitted a legally valid request. The employer may not unilaterally terminate the employment contract, except for reasons that are not related to the request. However, there are no specific sanctions related to this protection.

An employee who performs services under this alternating week regime is only allowed to work voluntary overtime in the weeks in which an excess of normal weekly working hours is provided.

These provisions will come into force on 20 November 2022 and will be subject to a review by the NLC after two years.

1.4 Night work in e-commerce

From 20 November 2022

Night work in e-commerce activities can be introduced via a collective bargaining agreement at company levem and a one-time experiment becomes possible via a unilateral amendment of the

There is a long-standing discussion in Belgium regarding night work related to e-commerce activities.

To understand the current changes that the labour deal would bring, it is important to distinguish between the following:

- night work: work between 20.00 and 06.00;
- working-time arrangements with night performance: work between 00.00 and 05.00;
- night work which is not a working-time arrangement with night performance: 20.00–00.00 and 05.00–06.00.

Night work which is not a working-time arrangement with night performance can currently only be introduced by amending the work rules in accordance with the mandatory procedure.

The labour deal defines e-commerce as the performance of all logistics and support services associated with the electronic commerce of movable assets. Night work which is not a working-time arrangement with night performance can also be introduced for activities of e-commerce from 20 November 2022 by concluding a collective bargaining agreement at company level. The work rules will then be automatically adapted on the basis of this collective bargaining agreement without following the mandatory procedure. This measure will be subject to an evaluation by the NLC within a 2-year period.

Furthermore, companies can participate in a one-time experiment with a maximum duration of 18 months whereby night work which is not a working-time arrangement with night performance can be introduced. Only one such experiment is allowed per company, irrespective of whether the legal entity that makes up the company has more technical units of operation. The work rules will be automatically updated without following the mandatory procedure. The following modalities apply:

- the works council – in the absence thereof the CPPW, in the absence thereof the trade union delegation or in the absence thereof the employees – should be involved regarding the implementation of this experiment;
- the company must notify the competent local directorate of the Directorate-General for Supervision of Social Laws of the Federal Public Service Employment, Labour and Social Dialogue and the competent joint (sub)committee in writing of;
    - the involvement of the social consultative bodies or, in the absence thereof the employees, must be demonstrated;
    - the duration of the experiment; and
    - the reasons why the employer wishes to introduce such an experiment; and
    - the criteria that will be used to evaluate the experiment;
- each employee who wishes to participate in the experiment (on a voluntary basis) should hand over a written document to the employer. The employer must keep this request from the employee during the experiment and for 1 year after its end and keep it at the disposal of the Social Inspection. The request from the employee to join the experiment may not give rise to any adverse treatment on the part of the employer.
- The employer may not unilaterally terminate the employment contract of the employee who does not join the experiment, except for reasons that are not related to such a request or its absence. The employer must provide evidence of such reasons and communicate them in writing to the employee (at his/her request). However, there are no specific sanctions related to this protection.

After the experiment, the works council – in the absence thereof the CPPW or in the absence thereof the trade union delegation – needs to evaluate the experiment in consultation with the employer and provide the president of the Federal Public Service Employment, Labour and Social Dialogue and the competent joint (sub)committee with an evaluation within 3 months after the end of the experiment. These provisions enter into force on 20 November 2022 and are furthermore subject to an evaluation by the NLC after one year.

2 Platform workers

1 January 2023

Rebuttable presumption for platform workers enters into force, the mandatory accident insurance not yet.

In recent years, there has been much discussion around the social status of platform workers (Uber drivers, Deliveroo couriers, etc): should they be considered as employees or can they also be considered as free-lance (independent) workers?

In Belgium, the distinction between an employee and a self-employed person is regulated by the Labour Relations Act. This states that the distinction should be assessed according to the following four general criteria:

1. the will of the parties (this refers to contractual qualifications of the collaboration as an employee or self-employed person);
2. the freedom in the organisation of working time;
3. the freedom in the organisation of work;
4. the existence of hierarchical control.

Furthermore, the Labour Relations Act provides a number of legal presumptions for certain sectors (e.g., freight transport), where the employment relationship should be examined according to socio-economic criteria. If these criteria are fulfilled, then there is a presumption of the existence of an employment relationship. However, this presumption can be rebutted by assessing the 4 general criteria.

At the end of last year, the labour court in Brussels applying the Labour Relations Act ruled that Deliveroo couriers cannot be considered as employees (see our Newsflash). They stated that, although there was a presumption that the couriers could be considered as employees based on the socio-economic criteria in the sector of freight transport, this presumption was rebutted by the 4 general criteria.

With the labour deal, the legislator now wants to introduce a rebuttable presumption of the existence of an employment contract for the platform economy. The following criteria would be taken into account:

1. possibility of exclusivity;
2. possibility of using geolocation for other purposes than the proper functioning of its basic services;
3. possibility of restricting the free choice of ways of working;
4. possibility to limit the income level of a platform worker;
5. possibility to enforce rules of appearance, behaviour and performance of work;
6. possibility to have the prioritisation of future work offers, the amount bid for a job and/or determination of ranking determined by evaluating the past work performance of the platform worker;
7. possibility of restriction of the freedom of the work organisation;
8. possibility of restricting building up a customer base or to work for third parties.

If at least 3 of the 8 legal criteria or 2 of the last 5 criteria are fulfilled, there is a presumption of the existence of an employment contract. This presumption can be rebutted by all means of law, including on the basis of the 4 general criteria of the Labour Relations Act. This legal presumption comes into force on 1 January 2023.

This legal presumption will be the subject of an intermediate evaluation after one year and a final evaluation after 2 years. These evaluations will be carried out by the NLC, the General Management Committee for the Social Status of the Self-Employed and the High Council for the Self-Employed and SMEs, in consultation with the FPS for Employment, Labour and Social Dialogue, the National Office of Social Security, the National Office of Social Insurance for the Self-employed, the FPS for Social Security and the Social Intelligence and Investigation Service.

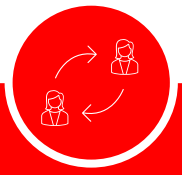
In addition, digital platforms will also be required to take out accident insurance in the interest of their self-employed workers to protect them from bodily harm resulting from accidents during work and on the way to and from work. Digital platforms that do not take out such accident insurance will be held civilly liable for damages suffered. The possible extension of coverage to legal expenses, the minimum guaranteed conditions for these insurance contracts and the date of entry into force are yet to be determined by Royal Decree. Labour courts will be competent to deal with the related conflicts.

Furthermore, the labour deal also adds certain powers to the Administrative Commission to regulate Labour Relations. The Commission will be competent to issue non-binding opinions and binding decisions concerning the nature of a particular employment relationship at the request of one or both of the parties involved and as soon as the intended status of a self-employed or employee is uncertain. Such decision or opinion must be requested before the start of the employment relationship, within 1 year after the start of the employment relationship or within a term of one year after the new element occurred that leads to a new assessment of the employment relationship. However, no opinion or decision can be issued if, at the time the request is submitted, an investigation has already been opened or the nature of the employment relationship in question has been brought before an employment court or it has already ruled on it. These provisions will enter into force on 1 January 2023.

3 Measures regarding dismissal

The third set of measures is related to more activating dismissal regulations for employees.

3.1 Transition paths



From 20 November 2022

Possibility to offer a transition path in case of a dismissal with notice period, at request of the employer or employee and after concluding priorly a four-party-agreement.

A transition path offers employers and employees a framework in which the employee can work for another employer-user during the notice period through the mediation of a regional public employment

service (VDAB, Actiris or Forem) or a temporary employment agency. This transition path would be an (additional) exception to prohibited lease of personnel.

An employer can offer this transition path to the employee, or the employee can ask the employer to offer him/her a transition path.

The conditions and the duration of the transition path must be subject to a prior written agreement between the employer, the employee, the employer-user and the regional public employment service (VDAB, Actiris or Forem) or the temporary employment agency. The maximum duration of the transition path is equal to the notice period to be performed, and the minimum duration is yet to be determined by Royal Decree. During the transition path:

- the employee will receive either the current salary for the position held with the employer or the salary applicable to the employer-user for the position held there (the higher of the 2 amounts). This salary is paid by the employer, and the employer-user needs to pay part of it back to the employer. The labour deal does not clarify which amount of the salary the employer-user should pay back to the employer, so this will have to be mutually agreed between the employer and the employer-user.
- the employer-user will ensure the application of the provisions of the legislation on labour regulation and protection.

Both the employer-user and the employee have the possibility to terminate the transition path at any time by means of a written notice and the performance of a notice period, based on the normal dismissal rules taking into account the seniority as of the start of the transition path. If an employee proceeds with counter-termination, then, in deviation from the normal termination rules, the transition process ends with immediate effect.

After the transition path has ended, the employer-user must hire the employee with an employment contract for an indefinite duration. If the employer-user fails to do so, a termination indemnity equal to the current salary for half of the term of the transition path is due.

This transition path also has an impact on the seniority of the employee after the hiring by the new employer (previously the employer-user):

- the duration of the transition path will be taken into account for the calculation of the notice period if the employee gets fired afterwards;
- the seniority that the employee has acquired on the basis of his/her previous employment contract will be retained for the application of the provisions regarding career breaks and time credit, including the thematic leaves.

The provisions on transition paths will enter into force on 20 November 2022 and will be subject to a review by the NLC by 30 June 2024.

3.2 Employability-enhancing measures

From 1 January 2023

Employability-enhancing measures apply to dismissal with a notice period or severance indemnity in lieu of notice of at least 30 weeks which take place as of 1 January 2023.

The obligations regarding employability-enhancing measures apply to employees with a notice period or severance indemnity in lieu of notice of at least 30 weeks. Although the draft text does not define employability-enhancing measures as such, one can consider outplacement, coaching, training and other forms of guidance. The legal framework on employability-enhancing measures provides that the notice period or severance indemnity will be converted into a severance package. This severance package is composed as follows:

	Notice period	Severance indemnity
Part 1	2/3 of the notice period (with a minimum of 26 weeks)	Severance indemnity equal to: – 2/3 of the notice period; or – the remaining part of this part of the notice period.
Part 2	The remaining part of the notice period (1/3) The value of the employability-enhancing measures is equal to the amount of the employer social security contributions during the remaining part of the notice period. The employee has the right to be absent from work for these measures during his/her notice period (with continued pay).	The remaining part of the severance pay (1/3) The value of the employability-enhancing measures is equal to the amount of the employer's social security contributions corresponding to the remaining part of the severance pay. The employee has to be available for these employability-enhancing measures. The obligation of the employee to keep himself/herself available to follow employability-enhancing measures ceases if the employee enters into a new employment contract or starts working in a self-employed activity.

The employee who does not participate in the employment enhancing activities will not be sanctioned with respect to the entitlement to unemployment benefits (even though this is not explicitly mentioned in the draft text itself).

These employability-enhancing provisions do not apply if a transition path has been initiated (see 3.1).

The provisions on employability-enhancing measures take effect on 1 January 2023 and apply to dismissals occurring from 1 January 2023. They will be subject to a review by the NLC by 30 June 2024.

4 Measures regarding training

The fourth set of measures is linked to training.

4.1 Training plan

No later than 15 March 2023

- Companies with a works council or trade union delegation: advice on the draft training plan.
- Companies without a works council or trade union delegation: presenting the training plan to the employees.

No later than 31 March 2023

Training plan with certain mandatory provisions.

The labour deal establishes an obligation for employers with 20 or more employees to conclude a yearly training plan.

The time-frame is as follows:

- No later than 15 days before the meeting scheduled to examine the training plan: The employer must submit a draft training plan to the works council or, in its absence, to the trade union delegation.
- No later than 15 March of each year, the works council – or, in its absence, the trade union delegation – gives advice on the draft training plan. In the absence of a works council or trade union delegation, the employer presents the training plan to the employees by 15 March at the latest.
- No later than 31 March of each year: The employer must have established a training plan that contains some mandatory provisions.
  Within one month of the plan coming into effect: A copy of the training plan must be delivered electronically to an official yet to be designated by Royal Degree.

The training plan must be kept within the company, and the employees and their representatives should have access to it upon simple request.

The joint (sub)committees may conclude sectoral collective bargaining agreements that establish the minimum conditions a training plan must meet. In this case, they must deposit by 30 September a sectoral CBA that will apply to training plans as of the following year. CBAs that already cover training plans from 2023 onwards must be deposited by 30 November 2022.

This obligation came into force on 1 September 2022 and will be the subject of a review by the NLC by 30 June 2024.

4.2 Individual right to training

From 1 January 2023

Individual right to training for each employee of 4 training days a year (per FTE).

From 1 January 2024

Individual right to training for each employee of 5 training days a year (per FTE).

→ In the absence of a sectoral CBA: an individual training account with some mandatory provisions or in the absence of this, an individual right to training.

The labour deal provides for an individual right to training for employees of companies with 10 or more employees. For this purpose, the number of employees is to be calculated in full-time equivalents based on the average employment of the reference period prior to the two-year period starting for the first time on 1 January 2023.[1]

This individual right to training amounts to (per full-time equivalent):

- In 2023: 4 training days;
- As of 2024: 5 training days.

Training days are prorated for employees who are not employed full-time and/or who were not bound by an employment contract during the full calendar year.

However, employers who employ between 10 and 20 employees need provide only a minimum of one training day per year for each employee. These employers must determine by 30 September each year the number of training days to which employees are entitled.
This individual right to training must be implemented in the company through:

- a sectoral CBA to be filed no later than 30 September of the first year of the two-year period (first commencement date: 1 January 2023);
- an individual training account with some mandatory provisions: When introducing the individual training account, the employer must notify all affected employees. The employer must also inform each new employee of the existence of an individual training account within the company. The employer must also inform the employee each year of the balance of his/her training credit and remind him/her of his/her right to consult the individual training account and to correct any error; or
- failing that, an individual right to training.

[1] The text of the Act states 1 January 2022; however, this is presumably a typo.

At the end of the year, the balance of the unused training days will be carried over to the following year. The employee must have attended on average 5 training days per year at the end of each 5-year period (the first time on 1 January 2029) or at the termination of the employment contract. At the end of this 5-year period, the balance of the available training credit is set to 0.

The employee whose employment contract is terminated (except in case of dismissal for urgent cause) is entitled to the accumulated, unused training days per 5-year period if the dismissal is not attributable to the employee:

- In case of a dismissal with notice, the employee can use the remaining training days before the end of the employment contract. The employer and the employee must mutually decide what happens to the training days and how they can be taken.
- In the case of a dismissal with payment of severance pay, these days are considered a benefit acquired in connection with the employment contract.

The training can be followed during or after the employee's normal working hours. If the employee follows training after working hours, the normal salary will be paid and no overtime pay will be due.

These provisions took effect on 10 November 2022.

5 Right to disconnect

No later than 1 January 2023

The deadline for the deposit of the enterprise collective bargaining agreement or the adapted work rules with the provisions on the right to disconnect.

Finally, the labour deal provides for a more elaborate right to disconnect.

The Belgian legislation previously only provided for a right to merely consult within the CPPW, without the employer being bound by the result of this consultation process. The consultation had to be organised at regular times and whenever requested by the employee representatives in the CPBW.

The labour deal expands this right to disconnect and obliges all employers who employ at least 20 employees to conclude a collective bargaining agreement on the modalities and the application of this right to disconnect. In the absence of such collective bargaining agreement, these modalities must be laid down in the work rules.

The collective bargaining agreements or the work rules must at least contain provisions regarding:

- the practical modalities for the application by the employee of his/her right to be unavailable outside work hours;
- the guidelines for using the digital tools in such a way that the employee's rest periods, vacation, private life and family life are guaranteed;

- training and awareness-raising activities for employees and managers on the prudent use of digital tools and the risk associated with excessive connection.

The deadline for the deposit of the enterprise collective bargaining agreement or the adapted work rules is currently foreseen for 1 January 2023. However, if a national or sectoral collective bargaining agreement is concluded before that date, this obligation to lay down the modalities of the right to disconnect in an enterprise collective agreement or the work rules ceases to exist.

The NLC will review these provisions concerning the right of deconnection before 30 June 2024.

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