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Belgium

EMPLOYMENT AND LABOUR LAW

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in Belgium.

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BELGIUM
EMPLOYMENT AND LABOUR LAW

1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Employers in Belgium are not legally obliged to spontaneously provide the reason for termination of an employment relationship. Employees however have the possibility to ask for the reason for the termination of their employment, within a 2 months' period after the end of employment and by registered mail. If the employment relationship was terminated with a notice to be worked, the employee's request must be sent no later than 6 months after the notification thereof without exceeding 2 months after the effective termination date. The employer must respond within a 2 months' period after receipt of the request, failing which the employee would be entitled to a lump-sum civil fine amounting to 2 weeks' gross remuneration (including benefits).

The reasons for the termination should therefore be carefully considered. In the event an employee brings a claim before the courts based on so-called 'patently unfair dismissal', the employer must be able to substantiate that the reasons for the termination are related to the 'suitability of the employee' (e.g. performance or conduct) or 'the functioning needs of the company' (e.g. reorganisation or redundancy). Failing that, an indemnity for patently unfair dismissal between 3 and 17 weeks' gross remuneration (including benefits), on top of the statutory termination indemnities, may be due by the employer if it is held that a 'normal and reasonable employer' would never have taken the same decision.

Also, employers should be aware that the reasons for the termination of employment may not violate discrimination legislation. Non-compliance with discrimination legislation exposes the employer to a payment of a lump-sum discrimination indemnity equal to up to 6 months' remuneration, on top of the statutory termination indemnities, and without prejudice to the employee's right to claim indemnification for the damages actually suffered. Note that an indemnity based on patently unfair dismissal and a discrimination indemnity cannot be cumulated.

Please note that special rules regarding the termination of employment apply to certain protected categories of employees, e.g. employees who take up certain types of leave from work, employee representatives, internal health & safety counsellors, etc. (as discussed under question 13).

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

Employers envisaging the dismissal of several employees within a short period of time need to be aware of certain procedural and financial consequences.

A so-called 'collective dismissal' is triggered as soon as, within an uninterrupted 60 days' period, a minimum number of employees are terminated in (a division of) an undertaking for reasons which do not relate to the person of the employees.

The minimum number of dismissals is:

- 10 in undertakings employing more than 20 but less than 100 employees;
- 10% of the workforce in undertakings with at least 100 but less than 300 employees; and
- 30 employees in companies with at least 300 employees.

Prior to taking any decision in this respect, the employer is required to inform and consult the employee representatives in the works council about its intention to implement these dismissals. Absent any Works Council, the employer will have to inform and consult the Trade Union Delegation or, if there is no trade union

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delegation either, the Committee for Prevention and Protection at Work. Absent any employee representative bodies, the employees will have to be informed and consulted directly.

Moreover, the employer is required to address notifications of its intention and, subsequently, of its decision, to several authorities.

If, upon completion of the information and consultation process, the employer decides to implement the dismissals, the employer must first observe a cooling-off period of 30 days before effectively proceeding with any dismissal. It is furthermore common practice to first negotiate and agree on a social plan in which the terms and conditions of the terminations of employment would be agreed.

In some industry sectors, sector-level collective bargaining agreements provide for specific information and consultation requirements in case of so-called 'multiple dismissals'. The thresholds for triggering a 'multiple dismissal' are determined in the applicable sector-level collective bargaining agreement and now and then provide lower employee thresholds compared to the thresholds for triggering a 'collective dismissal'.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

Additional considerations apply in case of a business sale structured as a transfer of assets. Collective Bargaining Agreement no. 32 bis (CBA no. 32bis), which implements the European Acquired Rights Directive in Belgium, protects the rights of employees if the business in which they are employed changes hands by way of an asset transfer and they are, as a result, faced with a new employer (e.g. in the context of certain types of business sales).

One of the consequences of the applicability of CBA no. 32bis is that the employment of the transferring employees may not be terminated by the transferor or by the transferee for reasons related to the transfer. As an exception, termination of employment may be permitted, however, only for cause or for economic, technical or organisational reasons.

CBA no. 32bis provides no specific sanctions in the event of violation of the dismissal protection. However, should the courts find that the termination of an employee was in violation of the dismissal protection, they may condemn the employer to pay damages in application of general principles of tort law. In such case, the employee must prove that he or she suffered damages because of the violation of the provisions of CBA no. 32bis, i.e. damages distinct from those that are covered by the statutory termination indemnities. The damages awarded by the courts usually range between EUR 2,500 and EUR 5,000. A termination of employment in violation of the dismissal protection is also likely to be held patently unfair in which case the employees would be entitled to an additional indemnity of between 3 and 17 weeks' gross remuneration (including benefits) (as discussed under question 1). Finally, an administrative fine may be imposed on the employer of between EUR 10 and 100 (multiplied by the number of employees involved, capped at 100, and multiplied by surcharges which are currently equal to factor 8).

4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

In Belgium, notice periods in the event of a termination of employment are determined in the Employment Contracts Act of 3 July 1978 and are, since 1 January 2014, harmonised for blue-collar and white-collar employees. Contractual notice entitlements are only permitted if they are more advantageous to the employee than the statutory notice and are rather uncommon in Belgium.

The statutory notice periods are determined based on the employee's seniority. Seniority refers to the uninterrupted length of time that an employee has been in service of the employer (or of another company within the same group). The statutory notice increases as long as the employee's number of years of service increases.

The minimum notice period in case of termination by the employer to terminate employment is 1 week for employees with a seniority of less than 3 months and goes up to 62 weeks for an employee with 20 years' seniority and further increases with another week for each additional year of seniority.

In case of resignation by the employee, notice periods range between 1 week for employees with less than 3 months' seniority and are capped at 13 weeks for employees with 8 years' seniority or more.

In case of termination by the employer, transitional rules apply for employees whose employment started prior to 1 January 2014 but is terminated after that date considering the harmonisation between blue collar and

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white collar employees since 1 January 2014.

For these employees, the old rules (which were based on the category of employees and on their level of remuneration) apply to the seniority they accrued until 31 December 2013. By way of exception, white-collar employees with an annual gross remuneration (calculated on that date) of at least EUR 32,254 per annum are entitled to 1 month notice per year of seniority until 31 December 2013.

The new rules apply for the seniority accrued as from 1 January 2014.

The total notice periods for these employees will then be equal to the sum of their entitlements accrued until 31 December 2013, on the one hand, and their entitlements accrued as from 1 January 2014, on the other hand.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Yes. Open-ended employment agreements are, in principle terminated with observance of a notice period during which the employee continues to work and to be paid. If the employer does not want the employee to work the notice period, the employment agreement can be terminated with immediate effect and a payment-in-lieu of notice (PILON). Such PILON is a one-off payment that will correspond to the gross remuneration (including benefits) that the employee would have been entitled to should he/she have worked out the notice period.

6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Garden leave cannot be imposed unilaterally by the employer pursuant to Belgian law. Consent of the employee is required for garden leave. Imposing garden leave without the employee's consent could be considered as a so-called 'constructive dismissal' by the labour courts. In the event of a constructive dismissal, the employment agreement will be considered as terminated with immediate effect by the employer. As a result, the employer may be condemned by the labour courts to pay a PILON to the employee.

The employer and the employee can nevertheless mutually agree on garden leave. Such agreement can only be validly entered into from the moment the notice has been served to the employee, being from the third working day following the sending date of the registered termination letter.

If an employee is released from service during a notice period, the employer is obliged to inform the employee of his/her obligation to register with the regional employment services.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

The prescribed procedure to achieve an effective termination of the employment relationship depends on the specific type of termination.

In case of termination with observance of a notice period, a strict procedure applies. Notice must, among others, be served in writing either by registered letter or via a bailiff. The termination letter must specify the length of the notice period as well as the date of commencement of the notice period.

In case of termination with immediate effect and a PILON, no prescribed procedure applies (termination does not have to be in writing). It is however recommended for employers to confirm the termination in writing for evidence reasons.

Finally, a strict procedure applies in the event of a termination for cause (being a termination for gross misconduct without observance of a notice period or payment of a PILON). The employment must be terminated within three working days following the moment the employer gained sufficient knowledge of the cause for termination. Although no formal requirements apply, it is recommended for reasons of proof to use a registered termination letter. Furthermore, the employer must in a second step mandatorily motivate the reasons for the termination for cause by registered letter within three working days following the termination date.

Note that specific legislation applies to the use of languages in an employment context. Depending on the location of the place of business of the employer, the termination paperwork must therefore be drafted in Dutch, French or German. It remains possible to additionally provide employees with a convenience translation.

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8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

In case of termination with observance of a notice period, failure to observe the prescribed procedure implies that the termination with observance of a notice period is considered null and void.

As a result, the employment would be considered as terminated by the employer with immediate effect and a PILON would be due by the employer.

As mentioned above, no prescribed procedure applies in case of termination with immediate effect and a PILON, but if the employer does not have any (written) evidence of the termination, discussion may arise on the date of termination of employment.

In case of termination for cause, not following the prescribed procedure may imply that the termination for cause is considered null and void.

As a result, the employer would be obliged to pay a PILON.

9. How, if at all, are collective agreements relevant to the termination of employment?

Collective (bargaining) agreements in Belgium can be concluded at three different levels and may, among other things, regulate various aspects with respect to termination of employment (e.g. prescribed procedures, compensation, information and consultation obligations):

National level. Relevant collective agreements entered into at national level and applicable to the entire private sector include, among others, the rules with regard to patently unfair dismissal (as discussed under question 1) and certain aspects of collective dismissal (as discussed under question 2).

Industry sector level. In specific industry sectors, sector-level collective agreements may be in place. These may, among others, regulate so-called 'multiple dismissals' (as discussed under question 2) or may impose specific formalities to be complied with in case of (individual) dismissals for economic and/or for performance reasons.

Company level. Collective bargaining agreements can also be entered into at company level. As is the case for sector-level collective bargaining agreements, these company-level collective bargaining agreements may, among others, impose specific formalities to be complied with in case of (individual) dismissals for economic and/or for performance reasons or even temporary dismissal prohibitions. This type of collective agreement at company level tends to be rather uncommon in Belgium and is often linked to a restructuring process.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

In principle, no obligations to obtain the permission of or to inform a third party exist to be able to validly terminate an employment relationship under Belgian dismissal laws.

That said, such obligations may by way of exception exist in specific circumstances.

There are several protected categories of employees for which the employer has to obtain permission from a third party (labour court, industry level joint committee, etc.) before being able to validly terminate the employment relationship including but not limited to employee representatives in the Works Council and the Committee for Prevention and Protection at Work, trade union representatives and internal health and safety counsellors.

In addition, in the event of a collective dismissal information obligations towards local authorities also apply (as discussed under question 2).

Finally, sector-level or company-level collective bargaining agreements may impose additional obligations, such as information obligations (e.g. towards a trade union delegation or an industry level joint committee), prior to being able to validly terminate the employment relationship.

Failing to comply with information obligations or a failure to obtain permission may expose the company, depending on the circumstances, to administrative or criminal sanctions and/or the obligation to pay damages to the employee.

11. What protection from discrimination or harassment are workers entitled to in

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respect of the termination of employment?

Discrimination. Employees are protected from discrimination on the termination of employment (as well as during employment and the recruitment process) on the grounds of protected characteristics prescribed by the Anti-Discrimination Act 2007 and the Gender Act 2007.

Protected criteria include (non-exhaustive) age, sex, gender identity or expression, pregnancy, marital status, birth, wealth, religion or belief, political opinion, trade union affiliation, language, health condition, disability, physical or genetic characteristic or social origin.

Employees are protected against both direct and indirect discrimination:

- **Direct discrimination** occurs when a person is treated worse than another person or other people because he/she has (or is deemed to have) a protected characteristic. The circumstances of the discriminated person must be similar (enough) to the circumstances of the person being treated better for a valid comparison to be made.
- **Indirect discrimination** occurs when there is a policy (which can include a practice, a rule or an arrangement) that applies in the same way for everybody but disadvantages persons with a specific protected characteristic. It makes no difference whether anyone intended to cause disadvantage.

Both direct and indirect discrimination are unlawful, unless the distinction that is made can be justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Direct discrimination based on age, sexual orientation, philosophical or religious beliefs or state of health in the employment context can only be justified by a genuine occupational requirement.

The law also provides for the obligation to foresee reasonable accommodation, in other words, “reasonable” measures allowing a person with a disability to do a certain job.

Finally, employees who raise their voices with respect to (alleged) acts of discrimination (e.g. by filing a complaint, acting as a witness, advising, helping or assisting the victim of discriminatory behaviour, etc.) are protected against retaliation, including termination of employment.

Harassment. Employees who have raised their voices around violence or harassment at the workplace that are related to a discrimination ground or around unwanted sexual behaviour at work benefit from the protection against retaliation (including termination of employment) under the discrimination legislation referred to above.

Employees who have filed a formal complaint with the psychosocial aspects prevention counsellor (PAPC) on the grounds of violence or harassment not related to a discrimination ground benefit from a special protection against dismissal based on the Wellbeing at Work Act 1996. The protection entails that the employer may not terminate the employment of employees in retaliation for filing such complaint.

It is important to note that the protection goes beyond mere protection against termination of employment. The employer may not take any adverse action against the protected employee as a retaliatory measure, e.g. refusing a promotion.

However, the employer can still terminate the employment of an employee if the dismissal is unrelated to the complaint.

Protection from retaliation begins from the moment that the employer knows or is reasonably ought to know about the filing of the complaint with the PAPC.

In principle, there is no specific end date of the protected period. However, there is an important distinction in terms of burden of proof:

- if the employer retaliated within a period of 12 months from the moment that the employer knows or is reasonably ought to know about the filing of the complaint with the PAPC, the burden of proof is reversed. This means that the employer will have to prove before the labour courts that no retaliation took place; and
- outside this 12-month period, the burden of proof rests on the employee.

Furthermore, and provided that certain conditions are met, an employee who has filed a complaint with the labour inspectorate (section Wellbeing at Work), the police, the Public Prosecutor’s Office, or the investigative judge may also benefit from a similar protected status.

Finally, an employee who has been a (direct or indirect) witness in the investigation of a formal complaint with the PAPC on the grounds of violence or harassment or who has been a witness in court benefits, under certain circumstances, from a protected status as well.

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12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Discrimination. Non-compliance with discrimination legislation in the context of termination of employment exposes the employer to payment of a lump-sum discrimination indemnity up to 6 months' gross remuneration, on top of the statutory termination indemnities, and without prejudice to the employee's right to claim indemnification for the damages actually suffered.

Note that courts may award multiple lump-sum discrimination indemnities (e.g. 2 times 6 months' remuneration) to a single employee if they find that multiple protected criteria (e.g. age and sex) have been violated, for example in the context of a termination of employment.

Also, the employer may be faced with a cease-and-desist order with financial penalties in order to stop engaging in discriminatory behaviour.

A court may further decide that the decision by which the employer is condemned for discrimination in the context of termination of employment be published internally in the company or externally (e.g. in a newspaper).

Harassment. If the employer terminates the employment of an employee who benefits from a protected status due to a formal complaint on the grounds of violence or harassment not related to a discrimination ground (as discussed under question 11), the employee has the option to request his/her reintegration into the company in accordance with the terms of employment that existed prior to the termination:

- if the employer refuses reintegration, the employee may claim a lump-sum indemnity before the labour courts equal to 6 months' remuneration, on top of the statutory termination indemnities, and without prejudice to the employee's right to claim indemnification for the damages actually suffered. If the employer accepts reintegration, he must only pay the employee the remuneration that was lost due to the dismissal; or
- the employee can immediately claim the same indemnities before the labour courts if the employee chooses not to request reintegration.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

The Fixed-Term Employees Act 2002 applies to employees with contracts of employment for a specific time period or which will end when a specified event happens.

Employees working under such contracts are entitled to be treated in the same way as permanent employees who are employed at the same place and do similar work. Different treatment is only allowed if this can be objectively justified.

Part-time employees are entitled to similar protection under the Part-Time Employees Act 2000. They are entitled to be treated in the same way as comparable full-time employees and are protected from being subject to less favourable contractual terms or any other detriment, on the grounds that the employee works part-time.

Specific protections with regard to termination of employment also apply to some categories of employees.

For example, employees who have requested or taken up specific types of leave (including but not limited to birth leave, parental leave and leave for care purposes) cannot be dismissed for reasons related to that leave.

Employees with a mandate as employee representative in the Committee for Prevention and Protection at Work and/or the Works Council are protected against dismissal. They cannot be dismissed unless for cause or for economic reasons provided that the authorisation of respectively the labour courts and the competent joint committee has been obtained beforehand. Note that non-elected candidates to these employee representative bodies also benefit from a protection against dismissal.

Trade union delegates enjoy a similar protection against dismissal as they cannot be dismissed for reasons related to their mandate and without prior information to the representative trade organisation that presented the trade union delegate. This representative trade union organisation has the possibility to object to the intended dismissal, in which case the competent joint committee (or if no unanimous decision can be reached, the competent labour court) has to decide whether the intended dismissal can take place. In case of dismissal

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for cause, the representative trade union organisation only has to be informed without possibility to object.

Employees who have a role as internal health and safety counsellor also benefit from a special protection against dismissal. They can only be dismissed with prior consent from the committee for prevention and protection at work of, if no consent is obtained, following a specific procedure before the competent labour courts (including an attempt from the labour authorities to find a solution).

Employees requesting a more flexible work arrangement or more predictable and secure working conditions pursuant to the Belgian implementation of the European Work-Life Balance Directive or the Transparent and Predictable Working Conditions Directive also benefit from a special dismissal protection. These employees cannot be dismissed for reasons related to the fact that they exercised their rights pursuant to this legislation.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Belgian law indeed provides protection to whistle-blowers.

The Act of 28 November 2022 on the protection of reporters of breaches of Union or national law discovered within a legal entity in the private sector implemented the EU Whistle-blower Directive (2019/1937) into Belgian law for the private sector (the Whistle-blower Act).

An Act of 8 December 2022 did the same for the federal public sector, whilst regional authorities have done the same for the Flemish public sector, the public sectors of the German-speaking Community and the French Community, and for the public sectors of the Walloon Region and the Brussels-Capital Region.

Based on the Whistle-blower Act, whistle-blowers in the private sector who made a report on information that they became aware of in a work-related context (or outside of a work-related context if the report relates to legislation on financial services, products and markets or anti-money laundering and terrorism financing) are protected against retaliation provided that (i) they had reasonable grounds to believe that the information they reported on was correct, (ii) they made a report with respect to one of the domains that fall in scope of the Whistle-blower Act, and (iii) they reported the information through one of the available reporting channels, i.e. an internal reporting channel, an external reporting channel or public disclosure.

The criterion of 'reasonable grounds' will be assessed in light of a person who would be placed in a similar situation and who would have similar knowledge.

It must be noted that protection against retaliation will only be offered to whistle-blowers who made use of public disclosure if they had (i) first reported their concern internally and externally (or directly externally) but no appropriate action was taken, or (ii) reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest, or there is a risk of retaliation or low prospect of the breach being effectively addressed.

Victims of retaliation are entitled to compensation of between 18 and 26 weeks' remuneration, if they are employees, or actual damages if they are not bound by an employment agreement. Moreover, if the report relates to violations of legislation on financial services, products and markets or anti-money laundering and terrorism financing, the compensation will be equal to up to 6 months' remuneration (or actual damages if the victim was not bound by an employment agreement). In the latter case, if the whistle-blower was an employee and the act of retaliation consisted of a dismissal, the whistle-blower can ask to be reintegrated into the organisation.

Victims of retaliation can also file a complaint with the federal coordinator who will initiate an extrajudicial procedure to verify the existence of retaliation. The burden of proof that no retaliation had taken place will rest on the company. In case there is a reasonable suspicion of retaliation, the federal coordinator will first ask the highest executive of the legal entity to demonstrate that no retaliation has taken place. If it appears that there is a reasonable suspicion of retaliation, he will subsequently give recommendations within 20 days following receipt of the answer (in the form of a duly justified report) from the highest executive of the company, make recommendations to reverse the retaliation or remedy the harm that was caused. The highest executive then has 20 days to accept or reject these recommendations.

As already mentioned, similar protection is provided to whistle-blowers in the public sector. The Act of 8 December 2022 provides that all statutory officials and all other persons working within or with federal public institutions will be protected as a whistle-blower, when they report or disclose information they received in a work-related context on possible integrity violations of the public institution. They also need to have reasonable grounds too to believe that the information is correct

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and falls within the scope of the whistle-blowing act. Such integrity violation is any threat to or violation of the public interest and is either a (i) violation of legislation, (ii) a risk to life, health or safety of persons or environment or (iii) a serious deficiency in professional duties or in good governance.

Protection is offered to whistle-blowers, but also to facilitators, third parties and legal entities linked to the whistle-blowers.

15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

Termination and re-engagement is not a customary practice used by employers in Belgium during financial difficulties. In theory, it is possible, but it is not without risk.

It is disputed in legal doctrine if employees can validly agree to less favourable terms while they are employed. This has to do with the fact that employees, who are by nature in a subordinate relationship vis-à-vis the employer, cannot freely consent to less favourable terms, according to these legal authors.

By terminating an employee's contract of employment first, the employee would be free to consent to less favourable employment terms (as the employee is no longer in a subordinate relationship post-termination). However, a risk exists that the re-engagement would be considered as one and the same employment, which could put the validity of the employee's consent at risk.

In certain circumstances, a practice exists in Belgium where employees agree to less favourable terms due to the employer's financial difficulties and in return are offered job security by the employer for a specified amount of time (e.g. 1 or 2 years). Such arrangement is generally negotiated between the employer and the trade unions and included in a collective bargaining agreement.

16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

To date, no official text of the upcoming EU Regulation on artificial intelligence is available. This EU Regulation will undoubtedly have an impact on the use of artificial intelligence in employers' recruitment and termination decisions.

Until the entry into force of said EU Regulation, employers must in any case take data protection legislation into consideration when using artificial intelligence in an employment context, including in the context of recruitment and/or termination decisions.

In particular, based on article 22 of the General Data Protection Regulation 2016/679 (GDPR), data subjects shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly affects him or her.

As a result, safe where exceptions would apply, employers who use AI systems to facilitate decision-making processes shall provide for (the possibility of) effective human intervention where these are used for recruitment or termination decisions.

Furthermore, employers envisaging to start using AI systems for recruitment and termination purposes, will have to inform and consult their Works Council about their intention to use such systems. Absent any Works Council, the Trade Union Delegation shall be informed and consulted or, if no trade union delegation is established either, the Committee for Prevention and Protection at Work.

Failure to duly inform and consult the works council results in a prohibition for the employer to dismiss any employee for reasons linked to the introduction of the new AI-based technology.

Moreover, employers using artificial intelligence in recruitment and/or termination decisions must be aware that such use may potentially expose the company to risks related to discrimination legislation.

If an employee can prove certain elements that give rise to a presumption of the existence of discrimination, the employer must prove that his recruitment or termination decision was not discriminatory. In order for the employer to be able to defend himself against potential discrimination claims, the AI-generated decisions should be sufficiently transparent with respect to the criteria that were used in the decision process related to recruitment or termination.

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In case of termination of employment, an automated decision may also be considered patently unfair in which case the employee would be entitled to an additional indemnity equal to between 3 and 17 weeks' gross remuneration (including benefits) (as discussed under question 1).

Finally, we are not aware of any Belgian court or tribunal claims that have been brought regarding an employer's use of AI or automated decision-making in the termination process.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

As discussed under question 5, open-ended employment agreements are, as a rule terminated with observance of a notice period. In such case, the employer continues to pay the employee's remuneration throughout the notice period, but no additional severance payment would be due. If the employer does not want the employee to work the notice period, the employment agreement can be terminated with immediate effect and a PILON.

Such PILON is a one-off payment that will correspond to the gross remuneration that the employee would have been entitled to should he/she have worked the notice period. The calculation basis of the PILON includes not only base pay but also variable pay and incentives as well as fringe benefits (company car, supplemental pension, medical insurances, etc.).

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Employers and employees can conclude an agreement on the termination of employment that includes a waiver of rights (in return for a payment).

Such agreement can only be validly entered into once the decision to terminate the employment relationship has been notified to the employee and as far as the rights that exist at that time are concerned. As soon as the employment has effectively come to an end, the employee can also validly waive any other rights.

The employer and the employee commonly agree on confidentiality or non-disclosure provisions in such termination agreements. These provisions are valid as long as they do not disproportionately restrict the employee's rights.

Other typical items covered in such termination agreements relate to the calculation basis of the PILON, post-termination non-compete clauses, etc.

Belgian law requires that such termination agreements are adopted in writing. This requirement however mainly applies for evidence purposes, as Belgian courts generally accept that evidence of the existence of such agreement can be produced by means of witnesses or presumptions.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Under Belgian law, engaging in acts of unfair competition is at all times prohibited, for an indefinite period of time following termination of employment.

With respect to acts of fair competition, post-termination non-compete clauses restricting employees from engaging in acts of fair competition once they have left the employer are a frequently used type of restrictive covenant in Belgium.

Under Belgian law, such post-termination non-compete clauses can only be validly entered into if the employee's total annual gross remuneration (including benefits) is equal to at least EUR 83,939 or EUR 41,969 if an industry sector-level collective bargaining agreement applies (which is currently only the case in the hospitality sector) or for sales representatives. Note that the amounts of these thresholds apply in 2024 and are indexed each year.

The validity and enforceability of post-termination non-compete clauses are furthermore subject to strict requirements, non-compliance with which results in the clauses being null and void:

- they can only apply to activities that are both (i) similar to the ones the employee carried out for the employer, and (ii) competing with the employer's activities;
- their duration cannot exceed 12 months (or 24 months in case of so-called 'international' non-compete clauses);

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- they must be geographically limited to the places where the employee can actually compete with the (former) employer, without exceeding the Belgian territory (other jurisdictions may be added in case of an 'international' non-compete clause); and
- (except for sales representatives) they must provide for the payment of a non-compete indemnity equal to at least 50% of the gross remuneration (including benefits) corresponding to the duration of the non-compete clause.

Employers may waive the application of post-termination non-compete clauses of their employees (other than sales representatives), provided that they do so within 15 days following effective termination of employment. In such case, no non-compete indemnity will be due by the employer, but the employees will be free to (fairly) compete with their former employer once their employment comes to an end.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Employees are bound by a statutory confidentiality obligation laid down in the Employment Contracts Act 1978 that continues to apply after the termination of employment.

This obligation implies, among other things, that the employee may not unlawfully obtain, use or disclose any trade secrets of which the employee became aware during his or her employment, e.g. customer lists, product information, commercial data, etc.

No contractual confidentiality arrangements are therefore required to bind an employee to confidentiality. Nonetheless, even though the confidentiality obligation applies based on statute, most employment agreements in Belgium expressly refer to the obligation of the employee to keep information of the employer confidential after the termination of employment. These clauses generally also allow employers to emphasise which information in particular they consider to be key and to be covered by the confidentiality obligation.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

There is no legal obligation for employers to provide references to new employers if these are requested. However, the obligation to provide references to new employers is sometimes contractually agreed in a termination agreement between employers and the departing employee as part of negotiations around the termination.

Should the employer provide references to new employers, the employer should take into account the relevant provisions of the GDPR, depending on the type of data transmitted.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

A difficulty employers in Belgium are faced with regularly is the burden of proof in the event an employee brings a claim for an indemnity based on the grounds of patently unfair dismissal before the labour courts. As discussed under question 1, to counter a patently unfair dismissal claim, the employer must be able to substantiate that the reasons for the termination are related to the 'suitability of the employee' (e.g. performance or conduct) or 'the functioning needs of the company' (e.g. reorganisation or redundancy).

A reorganisation or redundancy is in many cases well-documented in company records (board meeting minutes, organisational charts, internal communications) and is therefore generally less challenging for employers to prove before a labour court. However, reasons for termination related to performance or conduct are often less well documented as employers tend to address poor performance or behavioural issues informally (e.g. by giving oral instead of written warnings or by organising an informal chat with the manager).

Employers are recommended to document issues related to performance or conduct in order to increase chances of success before the labour courts. This could be done by introducing a formal performance review process and by issuing written warnings in the event of (repeated) problems related to conduct which may eventually result in termination.

Another issue employers in Belgium are confronted with is that employees are often absent due to sickness once a process that may end in the termination of employment has been initiated or in anticipation of it

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being initiated. Sickness absence can be difficult to manage as the employer should be vigilant of the risk of claims based on the grounds of discrimination based on health status (as discussed under question 1). Here as well the employer is recommended to carefully document that the reasons for the termination are unrelated to health status.

23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

No. There is currently no specific legislative initiative pending that would impact termination of employment.

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