

1. INTRODUCTION

Employment law focuses on the relationship between the organisation, the employer, and the people, its employees. In Belgium, legal rules governing working relationships largely come from specialist legislation and rely on various sources such as statutory law, collective bargaining agreements, customs and employment contracts. As for employment status, either the worker is engaged on the basis of an employment contract (ruled by the Employment Contracts Act dated 3rd of July 1978) or he provides his services as an independent contractor. As for social security, the Belgian system was not built in one day and now relies on several different and specific acts.

2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION

2.1 THE UNLIMITED DURATION (OPEN-ENDED) EMPLOYMENT CONTRACT

The unlimited duration employment contract (hereafter “UDEEC”) is defined as being a contract that has no term. It is because of the open-ended nature of the contract that each party is able, in principle, to decide to put an end to it at any time, by observing a notice period.

This kind of contract is the most frequently used and represents the standard for the Belgian legislator. For that reason, if there is a derogation to this unlimited duration, it must be stated in a written contract (i.e. fixed-term contract, contract made for some clearly defined work). If not, it is presumed to be an open-ended contract.

In other words, practically everybody who is hired either verbally or in writing is engaged under the auspices of an UDEEC unless expressly stated otherwise in writing.

Either party can terminate the contract at any time by observing, of course, the legal provisions. This means that in the absence of serious grounds or common will, this termination right can be exercised only with the observance of a notice period. Depending on the amount of the employee’s annual gross remuneration, the notice period will be fixed or variable (ultimately to be determined by the courts) according to his or her age, length of service, remuneration and position within the organisation. In the event of serious grounds, the contract can be stopped forthwith by the party who invokes such reasons.

If one of the parties does not want to stay at the service of the other party during this notice period, the contract could also be terminated immediately, by providing compensation for the consequences of his/her decision through the payment of an indemnity corresponding to his/her gross salary during the notice period which was not respected.

However, the non-observance by one of the parties of the rules defined by law for the exercise of the right of unilateral termination of the employment contract does not result in making the decision to terminate inoperative. The employer or worker who unilaterally and irregularly terminates the contract will never be constrained to resume his/her obligations. The termination remains effective and its irregularity will simply be sanctioned by the payment of an indemnity in compensation.

The labour courts hear and judge disputes arising from the execution of an employment contract and a training contract, disputes with regard to social security and in particular in respect of industrial accidents and occupational diseases, unemployment, compulsory sickness and disability insurance, retirement, annual holidays, etc.

In all cases in which he recognizes some urgency, the President of the Labour Court can make provisional rulings on matters that are within its competence.

The Labour Court of Appeal hears and determines the appeals of decisions handed down in first jurisdiction by the Labour Court and made by its President.

2.2 THE LIMITED DURATION (FIXED-TERM) EMPLOYMENT CONTRACT

The limited duration employment contract (hereafter “LDEC”) is the one by which the parties agree that it will end on a fixed date that they elect at the time of the hiring. This contract can also be entered into for some clearly defined work, with the completion of the work bringing an end to the contract on the same date. The Act of the 3rd of July 1978 provides that a fixed-term contract or a contract made for some clearly defined work must be drafted in writing for each worker individually at the latest at the time of the entry into the service of the employer. If not in writing, the employment contract will be considered an UDEC.

Several LDEC between the same parties can be entered into successively. However, the law is seeking to suppress the practice of certain employers consisting in successively entering into several LDEC with the same employee, with the sole intention of avoiding obligations inherent to an UDEC, especially those relating to the observance of a notice period to terminate it. Thus a maximum of four LDEC or contracts with some clearly defined work can be entered into, as long as the term of each contract is not less than three months and that the total period of these successive contracts does not exceed two years. It is also possible to enter into fixed-term contracts that may be not less than six months in duration each and the total duration of these contracts not exceeding three years. However, the parties can use this last possibility only with the authorization of the administration (Labour Inspection). Moreover, this contract could never be entered into for life and, as a consequence, parties may not agree on a term that would tie-in the worker for so long a period that it would correspond to the presumed duration of his/her life.

Several consequences arise from choosing this kind of contract:

- the contract automatically ends at the expiry of the agreed term, without the employer or worker having to express any will to terminate the contract;
- except in the event of serious grounds, the party who, unilaterally, puts an end to the LDEC before the expiry of the term would be liable for an indemnity which will amount to the gross salary due for the rest of the fixed period;

- if the parties continue to execute the contract after the expiry of the agreed term, and insofar as this situation reflects the wishes of them both, they are from that moment subject to the rules that apply to UDEC, in particular in relation to in the scope of its termination.

2.3 TEMPORARY EMPLOYMENT CONTRACT

An employer who wants some temporary work carried out has the choice either of hiring a worker for the execution of that work, or of making use of a temping agency. Again, if not made in writing, the employment contract will be entirely subject to the rules enforceable for UDEC.

Temporary employment is a form of temporary work permitted by law that is performed by a worker (the temp) for the account of an employer (the temping agency) for a third party (the user).

In Belgium, temping agencies are subject to prior authorisation without which a temping agency cannot lawfully engage in temping activities. The rules relating to authorisation requirements and procedures fall within the competence of the different Regions (Flemish Region, Walloon Region, Brussels Capital Region).

Temping is regulated by federal law in the Act of 24 July 1987 on temporary work, temporary employment and the posting of workers for the benefit of users.

Temping is possible only for the execution of certain types of temporary work permitted by law. The main cases of temporary work permitted by law are as follows:

- for the replacement of a permanent employee
- to meet the demands of a temporary increase in work
- to ensure the execution of exceptional work

For temporary work, two agreements have to be entered into. The intention to enter into an employment contract for temporary work must be set out in writing no later than on the date when the worker enters the service of the temping agency for the first time. The employment contract for the temporary work itself must be set out in writing no later than within two working days from the date on which the worker enters into the user's service.

An agreement for temporary work is always presumed to be an employment contract.

During the period of temporary work, the temp is entitled to the same wage/salary as that which he would have had, had he been taken on by the user as a permanent employee.

In particular cases, it is prohibited to make use of temping services. This applies when there is a strike or lock-out in the user's undertaking. Temping is also forbidden in a limited number of sectors.

2.4 SPECIAL EMPLOYMENT CONTRACTS

The distinction between work-man (-woman) and employee is traditional in Belgian Law and stems from the origins of our labour legislation. The situation of the work-man (-woman) in

comparison with that of the employee continues to be more precarious. For instance, shorter periods of notice need to be respected in the event of dismissal of a work-man (-woman).

Several types of contracts exist within the category of workers' contracts, and are based on the description of the work entrusted and clearly defined in the Belgian Act on employment contracts dated 3rd of July 1978.

The *sales representative* is the employee dedicated to prospect and visit clients in order to negotiate and conclude business in the name of the employer. A *sales representative* is considered as an employee and therefore benefits from the same protection in this respect. In addition, particular provisions are added that take into account the particularities of this type of activity (i.e. special indemnities in case of breach of the contract when clients are introduced to the employer, see Clauses 87 and following of the Employments Contracts Act).

The *domestic worker* is a specific type of work-man (-woman) and therefore benefits from a special status. The provisions are contained in Clauses 108 and following of the Employment Contracts Act.

Clauses 119 and following govern the home worker employment contract.

The *student employment contract* is, as the case may be, a work-man (-woman), employee, sales representative or domestic employment contract. However, it is subject to special provisions (Clauses 123 and following of the Employment Contracts Act).

3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN BELGIUM

3.1 INTRODUCTION TO THE BELGIAN SOCIAL SECURITY SYSTEM

All employers established in Belgium who employ people there are usually liable for the social security of their workers. The worker's nationality is therefore irrelevant. For the Belgian social security regime to apply, the worker must be employed on Belgian territory and his/her employer must be established there too, or, if not, must have in principle a business address in Belgium to which the worker is attached.

However, Belgium has entered into several international agreements, which provide specific exemptions to the principle of the applicability of the law of the place of employment, and which also seek to preserve the Belgian social security rights of posted workers.

This liability involves payments by the employer and/or personal contributions of the worker, that are calculated on the basis of the gross salary in accordance, usually, with a rate fixed by the law. The revenue from these contributions is intended to finance the social security system and the various allowances provided for its different sectors: sickness and disability insurance, family allowance, annual holidays for work-men (-women), unemployment insurance, occupational diseases, retirement and survival pensions schemes and industrial accidents.

The National Office of Social Security ("NOSS") collects and distributes these various social security allowances.

The worker's remuneration is the basis of the calculation of the contributions. It is regarded as a part of the remuneration of a worker any benefit in cash or that can be monetarily appraised:

- that is allocated to the worker in return for the services rendered in the context of the employment contract;
- to which the worker is entitled because of his/her appointment and which is borne by the employer, either directly or indirectly.

The NOSS contributions are presented as percentages, fixed and determined by the Act of 29th of June 1981, which vary according to the type of worker concerned (employee or work-man (-woman)), to be calculated on the gross amount of the remuneration due to the relevant worker, before any withholding tax deducted at the source. These contributions include:

- a personal quota from the worker that will be deducted from the gross salary (13,07%);
- a quota for the employer that will be paid on top of the gross salary that the employer owes to the worker (it differs depending on the category of worker: 32,44% for an employee and 38,44% for a work-man (-woman)).

Besides these ordinary contributions, there are also some special contributions, not directly destined for one of the sectors of the social security but due in particular circumstances, by both employer and worker.

3.2 THE STATE PENSION SCHEME

The following workers can usually benefit from a retirement or survival pension:

- without distinction of nationality, any person who has worked either in Belgium or abroad, at the service of an employer established in Belgium;
- Belgians, stateless people, UN-recognized refugees and all those who have the nationality of a country that has entered into a treaty or an agreement with Belgium as regards social security and who have worked as a cross-border worker in a neighbouring country and returned to Belgium in principle every day or who has worked as a seasonal worker in another country, while their family continued to stay in Belgium and they themselves have returned there at least once a year;
- without distinction of nationality, widowers and widows of the above mentioned workers.

The retirement pension becomes effective from the first day of the month following the one during which the member of staff applies for it and at the earliest on the first day of the month following the one during which he or she reaches the age of 65. The age of 65 constitutes the normal retirement age. A member of staff can nevertheless under certain conditions anticipate his or her departure into retirement, or even delay it. The retirement age of women was gradually raised to align it with that of men and the harmonisation was completed on 01 January 2009.

The amount of the retirement or survival pension depends, on one hand, on the duration of the professional career accomplished as a worker and, on the other hand, on the remuneration that he or she has actually received.

In order to obtain a complete pension, the male worker must submit proof of 45 years of professional career. The period of professional career giving the right to a complete pension for women was gradually aligned with that of men and was harmonised in 2009.

The retirement pension is calculated either at the household rate, or at the single person rate: for each year of career, the annual pension is equal to a fraction of the remuneration multiplied by 75 % (= pension at the household rate) or by 60 % (= pension at the single person rate).

3.3 THE UNEMPLOYMENT BENEFITS SYSTEM

The unemployment insurance regime financed by the State and by revenue from the social security contributions has, at the head of its administrative structure, the National Employment Office (NEO). The training and placement of the unemployed are matters for other semi-public organisations. Unemployment benefit is paid in Belgium by three recognized trade-union organisations and by a public organisation.

Admission to unemployment benefits can be justified on the basis of:

- work accomplished: to be entitled to unemployment benefits, it is necessary to be able to show proof of a certain number of working days (or comparable) for the period prior to the benefit application (reference period). The number of working days and the duration of the reference period will vary according to the applicant's age (Clause 30 of the Royal Decree of 25th of November 1991);
- the accomplishment of studies or an apprenticeship (Clauses 35 and following of the Royal Decree of 25th of November 1991).

The benefit is granted for every day of the week, with the exception of Sundays, and in principle for an unspecified period. The amount of the unemployment benefit is calculated according to a rate applied to the worker's average gross remuneration, which might have a maximum cap.

Unemployment benefit is granted subject to a number of conditions:

- the worker must have lost his/her work for reasons beyond his/her control and is not entitled to benefit for the period during which he/she still has a right to remuneration. During the unemployed period, the unemployed person may not do any work;
- in order to benefit from the fully unemployed allowance, one must in principle have lost a full-time job;
- the unemployed person cannot be in a state of disability according to the criteria of the sickness and disability insurance and cannot therefore benefit from disability allowances. He/she must also be legally capable of working (i.e. he or she must have completed his or her compulsory schooling);
- the unemployed person must be a jobseeker and be registered as such before the competent regional service;
- the unemployed person must be available for the job market;
- the unemployed person must have his/her residence in Belgium.

3.4 SUPPLEMENTARY SOCIAL PROTECTION

In Belgium, every employed person is liable for social security. In order to benefit from health care reimbursement and the payment of disability allowances, one has to be a member of a **mutual society**. The mutual societies also offer services other than this compulsory insurance, namely:

- hospitalisation insurance;
- guaranteed pay in case of disability.

The principal activity of the **prudential institutions** consists of the constitution of a pension (which is not required by law) for the staff and management of one or more private or public companies.

3.5 PROTECTIVE MEASURES FOR PREGNANT WOMEN

In Belgium, according to the Labour Act of the 16th of March 1971, pregnant workers are entitled to 15 weeks' maternity leave. It consists of two periods:

- pre-natal leave of a maximum of 6 weeks
- post-natal leave of a maximum of 9 weeks

Pre-natal leave

At the pregnant worker's request, this leave starts at the earliest six weeks before the expected date of delivery. This date should be substantiated in the medical certificate which the woman concerned should submit to her employer no later than seven weeks before that date.

This pre-natal leave comprises the following:

- an optional period of rest during the first five weeks. This may be taken up, at the worker's choice, either in full before the one-week obligatory pre-natal rest (see below) or after the nine-week obligatory post-natal rest, or partly before the obligatory pre-natal rest and partly after the obligatory post-natal rest;
- one-week's obligatory rest before delivery. It is prohibited for an employer to employ a pregnant woman from the seventh calendar day preceding the expected date of delivery.

If the child is born later than the expected date of delivery, pre-natal leave is extended to the actual date of delivery.

Post-natal leave

Post-natal leave comprises the following:

- nine weeks' compulsory leave immediately after delivery. In no case may an employer employ the woman concerned during this period, even if she asks for it or agrees to it;
- and, where appropriate, following this compulsory post-natal leave, the whole or part of the period of five weeks optional pre-natal leave. This leave can be transferred only on

condition that the woman resumed her work from the sixth week preceding the actual date of delivery.

In addition to maternity leave, a pregnant worker or a worker breastfeeding her child may temporarily be banned from carrying out certain jobs that are recognised as intrinsically hazardous.

It is also prohibited for employers to allow pregnant women to do overtime.

4. FOREIGNERS WORKING IN BELGIUM – TRANSFERS OF UNDERTAKINGS

4.1 FOREIGNERS WORKING IN BELGIUM

An employer who would like to employ a foreign worker in Belgium must, in principle, have obtained an employment permit beforehand. The employed person must, for his or her part, have obtained a work permit beforehand.

The nationals of a signatory State of the agreement implementing the EEA since 01 January 1994 benefit in principle from the freedom of movement and will not have to obtain either a work or an employment permit.

However, except for the employees who benefit from a relevant exemption (see article 9 of the Royal Decree of 9th of June 1999, i.e. the nationals of the following member states of the EEA: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands, The United Kingdom), the granting of an employment permit and of a work permit is restricted to the countries that are bound to Belgium through international treaties or conventions on the occupation of employees. The countries referred to in the above-mentioned Royal Decree (see article 10) are: Algeria, Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Morocco, Serbia, Tunisia, Turkey, and the 2 new member states of the European Union (Bulgaria and Romania).

In order to be able to access the Belgian territory, the nationals of a non-member state of the EEA must meet certain conditions which, when they are met, enable them to remain in Belgium for three months. The Internal Affairs Department (“Office of Foreigners”) may authorize a foreigner to remain for more than three months. The foreigner will, in this case, receive a provisional entry permit which is, in principle, for the period covered by the work permit.

In order to be able to settle in the country, the foreigner must receive permission from the Minister of Internal Affairs and have been previously admitted or authorized to remain in the country (visa).

The applicable Acts on the subject are the Act of the 15th of December 1980 on the access to the territory, the stay, the establishment and the removal of foreigners, and that of the 30th of April 1999 relating to the employment of foreign workers. The Royal Decree of the 9th of June 1999 implementing the Act of the 30th of April 1999 relating to the employment of foreign workers should also be mentioned.

Apart from the exceptions stated in the law, the recruitment of foreign workers without employment and work permits is formally prohibited and heavily sanctioned.

Any employer who employs a worker posted in Belgium is required to respect, for the work services that are rendered, the employment, remuneration and working conditions that are envisaged by the Belgian statutory, regulatory or conventional provisions, which are criminally sanctioned.

Since the 1st of April 2007, a mandatory declaration (“LIMOSA”) needs to be made by the employer and be sent in advance (before the beginning of the secondment in Belgium) to the Department of Employment, Work and Social Dialogue, which will then communicate a registration number. A Belgian Internet website is dedicated to that registration procedure.

4.2 TRANSFERS OF UNDERTAKINGS

The Collective Work Agreement (CWA) Nr. 32a of the 7th of June 1985 seeks to maintain workers’ rights “*in all cases of change of employer because of the conventional transfer of a company or a part of company*” (i.e. transfer, merger, division, legal settlement, etc.). What is regarded as transfer is the transfer of an economic entity maintaining its identity, understood to be an organized economic entity, for the pursuit of an economic activity, whether it be essential or ancillary.

CWA Nr. 32a also regulates certain rights for re-enlisted workers in the event of a takeover of all or part of a company’s assets in the event of insolvency, provided that the takeover occurs within six months of the date of the insolvency.

The rights and obligations that would result for the former employer from an employment contract existing at the date of the transfer are, because of this transfer, transferred to the new employer.

A member of staff cannot oppose the decision to transfer the company but, on the other hand, he or she can refuse to join the service of an employer that he or she has not chosen.

According to the ECJ, but contrary to the interpretation adopted by the majority of Belgian case law, the transferee has an obligation to take over all of the people employed in the transferred company. The change of employer therefore does not in itself constitute a reason for dismissal either for the transferor or for the transferee.

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