

CLIENT ALERT

2020 Social Elections Countdown: Strategically Important Dates To Bear in Mind

November 7, 2019

The next social elections in Belgium will be held between May 11 and May 24, 2020.

Company social elections, which are, in principle, organized nationwide every 4 years, aim to elect members of the (renewed) “Committees for Prevention and Protection at the Workplace” and “Works Councils.” Put succinctly, the Committee’s responsibilities relate to health and safety at the workplace, while the Works Council’s tasks relate to financial, economic and social matters. Both deliberative social bodies have information, consultation or prior approval (veto) powers with regards to their respective responsibilities.

All companies with workers in Belgium are advised to check the following key questions (please see also our [newsletter](#) of April 24, 2019):

- Does our undertaking need to organize social elections in 2020?

Undertakings employing “on average” and “usually” 50 employees or more during the reference period (4 semesters, from October 1, 2018 to September 30, 2019) must organize 2020 elections for their Committee. Where an undertaking employs (again, on average and usually) 100 employees or more, elections for a Works Council must also be organized. In addition, any undertaking that established or should have established a Works Council after the previous social elections (2016) also needs to establish a Works Council as long as the undertaking is employing on average and usually 50 employees or more. However, in this case, the Works Council members do not need to be elected: their mandates will be held by the Committee members.

- How to define an undertaking?

The “undertaking” that should organize social elections is defined as a so-called “technical business unit” (TBU). To define a TBU, the level of economic and social independence should be assessed between different units/legal entities. Only in the event a unit/legal entity is sufficiently independent from an economic point of view (separate management, accounting, administration, VAT number, etc.) and a social point of view (separate Work Regulations, employment contracts, salary policy, employment conditions, etc.) (in case of doubt the social situation will prevail), one can consider this unit/entity as a TBU in the sense of the social elections regulations.

In addition to the determination of the TBU based on this general rule, two specific rules apply.

Firstly, although the elections are principally not organized at the legal entity level, the legal entity remains important. In some particular cases, there is an obligation to organize elections at the legal entity level or to merge TBUs for election purposes in so far as not all TBUs of one legal entity are employing 50/100 employees.

In the event not all TBUs employ 50/100 employees and there is not a single TBU reaching the 50/100 threshold, the employer is obliged to organize elections at the legal entity level in so far as the 50/100 threshold is reached at the legal entity level.

In the event not all TBUs employ 50/100 employees and one of the TBUs does not reach the 50/100 threshold, the TBU not reaching the threshold should be added to another TBU not reaching the threshold, or to a TBU reaching the threshold.

Secondly, the law creates a refutable legal presumption that several legal entities together constitute a TBU if the following conditions are met:

- the legal entities are part of the *same economic group* or the legal entities are managed by the same person or by persons who have mutual economic ties, or the legal entities have the same economic activity or have concerted economic activities; and
- there are elements that show a *social cohesion* between the legal entities.

As the presumption is refutable, the employer can attempt to demonstrate that there is no social cohesion between the several legal entities. He can do so by proving, for instance, that the employees are not working in the same buildings (or nearby buildings), that there is no common personnel administration, no common personnel management, that the Work Regulations or collective bargaining agreements are different or contain no similar provisions, etc.

- How many employees does the TBU(s) have?

There are specific rules and formulae that govern how to calculate the average number of employees per TBU. An employee is broadly defined as any person employed by the TBU under an employment or training agreement. This includes employment contracts for a definite or indefinite period, for full-time and part-time work, as well as employment contracts that are suspended (*e.g.*, employees absent due to sickness or accident, or pregnancy). Also, employees who have been posted elsewhere are included in so far as they are still bound by an employment agreement.

- How many interim workers are working in the TBU(s)?

When calculating the average number of employees per TBU, interim workers, working in the TBU, must also be taken into account. The average number of interim workers is calculated according to a specific formula fixed by law. The reference period here is the second semester of 2019. Companies are obliged to maintain a register to account for the interim workers.

- How to define the list of executive staff?

The employer selects its representatives in the Committee and Works Council from among the executive staff (*"leidinggevend personeel"* / *"personnel de direction"*). During the run-up to the social elections, the employer should draft the executive staff list. The law defines an executive as: (i) a person entrusted with the company/TBU's daily management (daily, actual, independent and continued management) and allowed to represent and bind the employer

(level 1), and (ii) personnel working in the hierarchical structure directly below such a person in so far as they are also dealing with daily management issues.

In the context of the drafting of the executive staff list, it should be taken into account that executives may not be elected as employees' representatives, and may not vote in the social elections. Also, please note that the trade unions may contest the executive staff list as drafted by the employer. In that event, the unions have to demonstrate that the list does not comply with the appropriate legal requirements.

If your undertaking organizes social elections following the above rules, now is also the right time to pick a date for the elections and start preparing your first "to do's". Assuming your undertaking chooses to hold your social elections on **Monday, May 11, 2020**, the following dates will be of the most importance in the coming months:

- **December 13, 2019** (Day X-60): First announcements by the employer

The employer should inform the Works Council/Committee/Trade Union Delegation/the employees about (i) the technical business units (TBUs) in which social elections will be organized, (ii) the number of employees per category, (iii) the positions of the managerial personnel, (iv) the positions of the high level employees ('*kaderpersoneel*'/'*cadres*'), and (v) the scheduled date for the social elections (Day Y) and for the formal announcement of the date for the elections (Day X).

- **Action point:** This is the ultimate date to decide whether or not to organize social elections within your undertaking, based on your definition of the TBU(s)
- **January 7, 2020** (Day X-35): Consultation on the above information
- **January 12, 2020** (Day X-30): Start of employee protection period

Employee representatives in the Works Council and Committee, as well as candidates, are protected against dismissal. As of January 12, 2020, the employees concerned are protected, even though the employer may not necessarily yet be aware of the protection (candidate lists need only be announced to the employer on **March 17, 2020**).

If the agreement of a protected employee would have been terminated, this employee (or his union) should ask for his reintegration (30 days' delay) and the employer can (i) reintegrate the employee, or (ii) pay the protection indemnity.

- **Action point:** Any terminations scheduled in the coming months, should preferably be done before this date to avoid any issues. It is now (before 2020) also important to think about your company's approach towards possible abusive candidatures.
- **February 11, 2020** (Day X): Formal announcement election date

On Day X, the employer should formally announce the election date and hour as well as the name and address of the TBE, the number of mandates per employee category, the (temporary) electors lists, the list of managerial personnel (by name), etc.

- **Action point:** Make sure to comply with the announcement and communication formalities (cf. template forms).
- **March 17, 2020** (Day X+35): Filing candidates' lists

All employees who participate in the social elections are protected, but the protection period differs:

- elected representatives (effective and substitute) will be protected during their mandate (4 years);
- first-time candidates who are not elected will benefit from the same protection as the elected representatives (4 years);
- candidates who are not elected for the second time will only benefit from protection for 2 years from the posting of the social election results.

Protected means that the employee's agreement cannot be terminated except for serious cause (after the Labor Court's approval) or in case of economic or technical reasons recognized by the competent Joint Industrial Committee or Labor Court (in practice, in principle only possible in cases of substantial restructuring and/or with the cooperation of the trade unions).

If an employer were nevertheless to terminate a protected employee's agreement without complying with the procedures and/or without the authorization of the Joint Industrial Committee and/or the Labor Court, the employer would have to pay a so-called "protection indemnity" (up to 8 years' salary - the amount of this protection indemnity depends on whether or not the protected employee representative requested his or her "reintegration" in the company, and the moment of termination).

The protection runs from the 30th day before the posting of the notice determining the social election date (Day X-30). Assuming that the social elections will be held on May 11, the protection starts running on January 12, 2020. On that date, the employer is not yet aware of the candidate list and does not know which employees are protected. As a result, the period from 12 January until March 17, 2020 is called the "hidden protection period". It is highly recommended that no employment agreements be terminated in the hidden protection period so as to avoid the risk of being obliged to pay a protection indemnity to a protected employee (of course, the company can also decide to take the risk and, if any, reintegrate the employee and pay the salary for the period before the reintegration).

- **April 3, 2020:** Appeal against candidates' list (if there was no complaint internally)

During the social election procedure, the employer still has the possibility to contest "abusive candidatures", *i.e.* candidatures purely to avoid termination of the employment agreement, or to benefit from protection against termination, before the Labor Court. In this case, the employer would have to demonstrate an abuse of rights by the employee (this is often hard to prove). If the claim is successful, the candidature will be annulled.

- **Action point:** Follow very closely the candidatures and decide, within the short deadline, to contest possible abusive candidatures.

Our Brussels Labor & Employment practice is available to advise and assist companies regarding the preparation of the upcoming social elections.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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