

CLIENT ALERT

How Should Your Company Plan for the 2020 Social Elections?

April 24, 2019

The Belgian legislator has officially announced that the next social elections will be held between May 11 and May 24, 2020 (cf. the recent law of March 22, 2019 (still to be published in the Belgian State Gazette) which also introduces some important new rules). This means that one year from now, companies in Belgium will need to be fully prepared for the elections.

The social elections, which are, in principle, organized nationwide every 4 years, aim to elect the members of the (renewed) “Committees for Prevention and Protection at the Workplace” and “Works Councils.” Put succinctly, a Committee’s responsibilities relate to health and safety at the workplace, while a 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.

Undertakings employing “on average” and “usually” 50 employees or more during the reference period (4 semesters) should organize elections for a Committee in 2020. Where an undertaking employs (on average and usually) 100 employees or more, elections for a Works Council should also be organized. The law of March 22, 2019 fixes the reference period as between October 1, 2018 and September 30, 2019, which is a semester earlier compared to previous elections. In addition, any undertaking that established or should have established a Works Council after the previous social elections also needs to establish a Works Council as long as the undertaking is employing on average and usually 50 employees or more. In this case, the Works Council members should not be elected: their mandates will be held by the Committee members.

“Undertaking” is defined in this context as a “technical business unit” (TBU). The assessment of what constitutes a TBU is based on economic and social criteria (in case of doubt, the social criteria will be decisive). The TBU does not necessarily refer to a legal entity (NV/SA, BV(BA)/SP(RL), etc.).

Now is the right time to consider the following strategic questions in order to understand whether or not you need to organize social elections in 2020 (and whether you can still weigh on this) and, if so, what you should do to be well prepared for the actual start of the elections:

How to define the TBU(s) in your company?

Can you rely on the general rule? This states that if 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, template employment contracts, salary policy, employment conditions, etc.), the unit/entity will be considered a TBU in the context of the social elections regulations.

Or, do you need to take specific rules into account? For instance, there is a refutable legal presumption that several legal entities together constitute a TBU if the legal entities are part of the same economic group and if there are elements that show a social cohesion between the legal entities.

This is, of course, a very important strategic question since the determination of the TBUs will decide whether or not social elections need to be organized (in a specific company division).

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. Please note that 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.

We highly recommend that you make the calculation of the average number of employees now (see also the following question).

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.

Regarding interim workers, please also note, (and this is a brand new rule introduced by the law of March 22, 2019) that if they have been working for the TBU (user) for at least three months (there are specific rules on how to calculate this), they will have the right to vote in the user's elections.

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 hierarchal 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.

How do the upcoming elections impact your termination policy/schedule?

It is now a good time to evaluate your company's termination policy and schedule. Are there employment terminations scheduled in the coming months? Do these terminations affect protected employees, or employees that may become, or wish to become, protected at the occasion of the next social elections? Is there a risk that employees may become candidates in 2020 for the wrong reasons (abusive candidatures) and, if so, how should this be dealt with?

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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