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CLIENT ALERT

Shares Allocated by Foreign Parent Company No Longer Exempted from Social Security Contributions?

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Until recently, one could argue that no social security contributions were due on *i.a*, bonuses, shares or other benefits directly granted without chargeback by a foreign parent company to employees of the Belgian subsidiary.

A new administrative development has made reliance on this position more precarious.

In its latest "administrative instructions" (instructions of the 3rd quarter of 2018, considered to be retroactively applicable as from July 2018), the Belgian National Social Security Office (NSSO) sought to put an end to this practice by changing its interpretation of the concept of workers' "remuneration".

Knowing the exact extent of a worker's remuneration is important because it constitutes the basis on which social security contributions are calculated. The applicable social security legislation primarily refers to remuneration as defined by the Remuneration Protection Act of 12 April 1965. According to article 2 of the Act, remuneration is:

- any benefit **in cash** or **assessable in cash**,
- to which the worker **is entitled**
- **as a result of** his/her employment,
- that is **borne by** his/her employer.

These four conditions must be cumulatively met in order for a benefit to be qualified as remuneration. Regarding more specifically the condition "**borne by** the employer", the benefit can be either *directly* (*i.e.:* the employer pays the benefits directly to the worker) or *indirectly* (*i.e.:* the benefit is granted to the worker by a third party, like a parent company) borne by the employer to meet the criteria.

In the past, the NSSO has deemed a benefit to be "indirectly borne by the employer" (and thus subject to social security contributions) where **the employer "although not bearing the financial cost of the benefit, was the person to whom the worker should turn in the event he/she did not receive the benefit**."

This interpretation found an echo in case-law. Notably, in a decision of October 12, 2016 the Belgian Court of cassation stated that a benefit should be considered as "borne by the employer" if the worker could claim it from his/her employer, even though the benefit was attributed and financially borne by the parent company, because the right to the benefit was foreseen in the employment contract with the employer.

On the basis of this interpretation, the general understanding was that benefits granted by the parent company, without any intervention whatsoever by the Belgian subsidiary, fell outside the definition.

However, the NSSO’s most recent instructions widen the interpretation of the notion “borne by the employer”. According to the NSSO, it now includes any situation where the receipt of the benefit “**is the consequence of the work performed under the employment contract with the employer, or is linked to the position held by the worker with his/her employer**.”

Is this interpretation open to argument?

Yes. This new approach overly **extends the definition of remuneration** because the employer no longer needs to be “the person to whom the worker should turn.”

The NSSO has effectively eliminated the condition “borne by the employer” (fourth condition) and confused it with the condition that the benefit should be “a result of the employment” (third condition). This approach seems to not be in line with the Remuneration Protection Act that expressly foresees four different cumulative conditions.

It remains to be seen whether the Belgian Labor courts will share the NSSO’s broad interpretation or instead declare it unlawful.

In the meantime, what is certain is that the NSSO’s new instructions constitute a risk that Belgian companies must take into account. There can be little doubt that disputes will arise.

Our Brussels Labor & Employment practice is available to advise and assist you in this regard and with all aspects of labor and employment law, including social security law.

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