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Belgian HR-RELATED Coronavirus (COVID-19) Q&A: our answers to your questions

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As the COVID-19 virus continues to spread around the globe and impact companies in their day-to-day business, employers are increasingly asking questions about how best to manage the situation, especially following the most recently implemented containment measures taken by the Belgian government to prevent further spread of the virus. Additional measures, orders and guidelines are likely to be issued on a daily basis, and all employers must stay up to date.

With this regularly updated HR-related COVID-19 Q&A we address many of your questions about COVID-19 in relation to your personnel.

Part 1 - Employment

Q. 1: As an employer, do I have any obligation to protect my employees against COVID-19?

Answer ***(UPDATE ON 21.04.2020)****: As an employer, you have a general legal obligation to provide a safe and healthy workplace and you are responsible for the monitoring and evaluation of health risks. All employers need to take the relevant and necessary measures and actions to protect the well-being of their employees (if applicable, in consultation with the competent employees' representative bodies). This means that the necessary measures must be taken to prevent employees' health and safety being put at risk when carrying out their job. Assistance from the company's competent prevention services is recommended, not only as regards risk analysis, but also for the identification both of possible preventive measures, and of possible COVID-19 viral infection amongst employees. To support employers and help them assess COVID-19 related risks within their company, the Federal Public Service (FPS) for Employment, Labor and Social Dialogue has developed a checklist called "Prevention COVID-19", based on the WHO guidelines, the National Security Council and the general principles provided for in the Codex Well-being at Work.*

Q. 2: What kind of preventive measures can I take?

Answer ***(UPDATE ON 21.04.2020)****: The World Health Organization (WHO) has published some guidelines for companies in order to prevent the spread of COVID-19 in the workplace and to protect their employees, customers and contractors. The WHO recommends, among others, that you (i) make sure your workplace is clean and hygienic, (ii) promote regular and thorough hand-washing by employees, (iii) brief employees that if COVID-19 starts spreading within the company, anyone with even a mild cough or low-grade fever needs to stay at home, and (iv) promote teleworking across your organization. In addition to the WHO guidelines, company-specific preventive measures can of course be taken by each employer in consultation with the prevention advisor / occupational doctor (and, if needed, with the competent employees' representative bodies – see Q. 3), such as, among others, installing hand sanitizers, requiring employees to keep a certain distance apart when interacting, and encouraging the use of telephone and video conference.*

Moreover, on 17 March 2020 (confirmed by Ministerial Decree of 23 March 2020), the federal government imposed far-reaching measures that have an impact on how many companies and businesses organize their work. For example, "non-essential" companies are now obliged to organize telework for all positions where that is possible. If telework cannot be organized, measures must be taken to respect "social distancing" (i.e., a distance of 1.5 meters between people must be maintained at all times). If a company is unable to meet its social distancing obligations, the company must close down. These measures currently apply until 3 May 2020, but this deadline may be extended.

As stated under Q. 1, in addition to respecting the measures imposed by the authorities, it is important for employers to call in the prevention services to carry out a company risk analysis so that the necessary concrete and specific measures can be taken within the company (or within certain company departments) to combat COVID-19 and/or to protect employees against a possible infection with the COVID-19 virus.

Q. 3: Is there any obligation to inform and/or consult with the employees' representative bodies when certain measures are taken and/or regarding the impact of COVID-19 on the company?

Answer: Yes, when an employer decides to take a number of preventive measures to protect its employees against COVID-19, it must inform the Health & Safety Committee (HSC) (or in the absence thereof, the trade union delegation) accordingly. Also, if the company is economically and/or financially impacted by COVID-19, and if certain measures are envisaged (e.g., the employer intends to apply for temporary unemployment for economic reasons or to introduce a broader use of teleworking), the employer is obliged to also inform its Works Council.

Even in the absence of employees' representative bodies, a clear and transparent communication with the employees is key. The current COVID-19 outbreak is an unusual and exceptional situation requiring, in the first place, the employer to act with common sense and communicate properly with the employees. It is important to inform the employees about all measures taken/to be taken by the company, and to explain why such measures have been taken. Also if you want to obtain certain information from your employees, it is important to explain why you need the information, and convince the employees that the information is required for the good of the company. Furthermore, we recommend informing your employees of their own legal obligations to ensure a safe and healthy workplace (see also Part 2).

Q. 4: As an employer, can I postpone the start date for new employees as a result of the COVID-19 crisis?

*Answer **(UPDATE 10.04.2020)**: If you have already entered into an employment contract with the new employees, fixing the effective start date, this employment contract must in principle be executed. However, it is possible to temporarily suspend the employment contract due to force majeure (Article 26 of the Employment Agreements Act). The COVID-19 pandemic can, among other things, be regarded as a situation of force majeure, which gives the employer the possibility to temporarily postpone the start date of new employees. However, it is important to inform the employees concerned in time. Moreover, these new employees are in principle also eligible for temporary unemployment due to force majeure as a result of COVID-19 for the entire period of the suspension.*

Following a decision of the Minister of Labor on 1 April, 2020, the National Unemployment Office (RVA/ONEm) has confirmed in the FAQ section on its website (updated on 3 April 2020) that it will check whether the employer and employee are in good faith in this respect and can, among other things, decide that the employment contract had already been concluded before the COVID-19 crisis. This can be done, for example, on the basis of email correspondence, a dimona declaration made before 13 March 2020, etc.

Q. 5: Can I temporarily suspend my service agreements with self-employed consultants on the basis of the COVID-19 crisis?

***Answer (UPDATE 27.03.2020)**: The COVID-19 crisis can of course also have an impact on relationships with self-employed consultants. If the service agreement includes a force majeure clause, you can of course temporarily suspend the agreement as a result of the COVID-19 crisis in line with the provisions of that clause. Even if there is no specific provision, general contract law rules permit contracts to be temporarily suspended in case of force majeure. Where the COVID-19 pandemic and/or the COVID-19 measures taken by the government result*

in the parties being (temporarily) unable to continue to perform the contract, a force majeure situation will have arisen. In that case, it is recommended that you inform the consultant in a timely manner that the service agreement will be temporarily suspended as of a specified date due to force majeure as a result of COVID-19. In such cases, the consultant will not receive any indemnity.

Q. 6: Can my employees (both those who are temporarily unemployed and those who are not) unilaterally cancel or postpone their planned vacation?

Answer ***(UPDATE ON 10.04.2020)****: Even in these unusual times, in principle, the normal rules for taking vacation continue to apply: vacation is taken on the basis of an agreement between the employer and employee. Therefore, employees cannot unilaterally cancel or postpone their vacation. The employer's agreement is required, and you do not have to explain in case of refusal. This applies both to employees who are not temporarily unemployed and those who are temporarily unemployed.*

Nevertheless, in the current circumstances, it is advisable to contact the employee(s) concerned in order to try to reach a mutually acceptable solution. However, you should bear in mind that if you grant a large number of your employees the possibility to cancel or postpone their vacation, those employees will still have the right to those vacation days after the current COVID-19 situation, and at a time when the company may need them most to restart activities.

NEW – UPDATE ON 21.04.2020 Q. 7: As an employer, can I force employees to take their vacation at certain times?

Answer: As mentioned under Q. 6, individual vacation is, in principle, determined by agreement between the employer and the employee. It follows that the employer cannot unilaterally impose vacation on the employee in the periods in which this is most convenient for the employer.

It is important that there is a clear dialogue between the employer and the employees so that an agreement can be reached. When the employer explains very concretely and clearly why it is preferable for vacation to be taken during a certain period (for example, when there is little work) and not at another time (for example, when there is a lot of work, or in the period after the lockdown has finished, when activities are restarting) an employee will find it easier to agree with the employer's proposals/recommendations.

Q. 8: Can I make adjustments to my company's normal work schedules? Can I require employees to perform overtime, etc.?

Answer ***(UPDATE ON 10.04.2020)****: Since the COVID-19 crisis and the measures imposed by the government may have an impact on the employment of personnel and, more specifically, on compliance with normal schedules, the Federal Public Service (FPS) has qualified the current situation as a situation of force majeure (more specifically, as an "accident that has occurred and is imminent"), making it possible, where necessary and subject to certain conditions, to:*

- *deviate from the work schedules provided for in the work regulations when the organization of the company requires work to be carried out outside the planned schedule. However, the new schedules must be communicated in advance to the employees concerned.*
- *derogate from the daily and weekly working time limits and work overtime, the average weekly duration of which may not exceed 48 hours over a period of four months. Overtime must be remunerated, but there is no obligation to take time off in lieu.*
- *derogate from the mandatory rest periods.*
- *employ workers on Sundays or at night.*

The FPS has clarified that these derogations are only possible if needed to deal with the direct consequences of the COVID-19 crisis or to comply with the ensuing legal requirements and measures (e.g., to comply with social distancing measures). The FPS has stated that:

- *this is a matter of fact which must be assessed individually and on a case-by-case basis: for example, an intensive care unit in a hospital will be allowed more flexibility in this respect than a food company, for example, because of the importance of their guaranteeing the continuity of services.*
- *therefore, the derogations cannot be invoked to address indirect consequences of the measures imposed: an employer cannot, for example, organize permanent overtime in order to cope with the influx of work.*

Part 2 – Well-being, health and safety at work vs. the right to privacy

Q. 9: Can I oblige my employees to report whether they have made a private trip to a high-risk country/region impacted by COVID-19?

Answer: It is, in normal circumstances, not possible to oblige your employees to reveal if they have made a private trip to a specific country/region.

The Data Protection Authority (DPA) has taken the following position on this issue:

"The employer cannot oblige employees to fill in questionnaires relating to travel [...]. It is recommended that employees be encouraged to spontaneously report risky trips [...]'.

This view of the DPA seems to us to be open to discussion because it does not take into account the legal obligation of employees not to endanger the safety of the employer, other employees and/or third parties, which means that they are obliged to cooperate in order to enable the employer to fulfill his health and safety obligations. Consequently, employees may be requested to disclose information about their private travel in so far as it is relevant to the adoption of measures needed to combat the COVID-19 crisis. When collecting this information, it is important to comply with the relevant GDPR rules (i.e., the principles of legal purpose, relevance, proportionality, data minimization and transparency must be observed) but as such, a company requesting its employees to fill in such a form may be justified in the present circumstances.

Q. 10: Can I oblige my employees to report if they are infected with COVID-19 and/or force them to undergo a medical examination?

Answer ***(UPDATE ON 21.04.2020)****: Whether or not someone has a certain illness is, in principle, private information protected by the right to privacy. Therefore, theoretically, the employer has no right to this information.*

However, the question here is how the right to privacy of the employee relates to the employee's duty to cooperate with the policy of the company to protect the well-being of the employees.

An employee has an obligation not to endanger the health of colleagues, and an employer must be able to take the necessary measures following an infection. Therefore, in our opinion, an employer may request that employees who suspect or know that they are infected with COVID-19 virus (in circumstances which do not exclude an infection in the workplace) report this to the employer.

On the other hand it is not, in principle, possible to require that the employee concerned take a medical examination. If you suspect a COVID-19 viral infection, we recommend that you ask the employee to contact a doctor of his/her choice and to follow the instructions given by that doctor. In addition, it is possible to consult the prevention advisor / occupational doctor, who will be able to require the employee to undergo a medical examination.

However, taking into account the general well-being obligations of the employer, it seems possible for the employer to send home an employee who is clearly ill.

When collecting information relating to employees' health, the employer must comply with the GDPR and processing rules on sensitive data.

Also, as an employer, you must not discriminate on the basis of the health status of your employees. If you do take measures that could result in a distinction being made between employees, you need to ensure that the measures have a legitimate aim and are proportionate.

Q. 11: Can I systematically check the temperature of my employees and/or visitors to my company?

*Answer **(UPDATE ON 21.04.2020)**: The DPA has confirmed that a temperature check will not on its own be considered the processing of personal data. Provided there is no further registration or processing of data, the GDPR will not apply. This is in line with the statement of the European Data Protection Board on the processing of personal data in the context of the COVID-19 outbreak.*

The DPA, however, underlines that it is up to the prevention advisor / occupational doctor to monitor employees that the employer suspects have been exposed to and/or show COVID-19 symptoms.

In our opinion, although the role of the occupational doctor is indeed important, the position taken by the DPA is too simplistic, as it does not take into account the legal obligations of the employer to ensure a safe and healthy workplace. The final responsibility for the well-being policy within the company lies with the employer.

We recommend that you always contact the competent prevention services / occupational doctor to discuss with them the possibilities of measuring the body temperature of employees.

If you do measure body temperature, the employees' right to privacy must be guaranteed. This implies that employees must be kept informed, and that there must be a case-by-case assessment of when and whether the taking of body temperature is necessary and proportionate in the light of the seriousness of the situation and the pursued objective.

The FPS for Employment, Labor and Social Dialogue recently took the same position on this issue and confirmed that the infection of an employee with the COVID-19 virus is a situation that can affect the health of other employees and for which the employer can take certain measures within the legal limits. According to the FPS, such a measure could consist of taking employees' body temperature before they enter the company, because having an elevated body temperature can be a symptom of COVID-19. The FPS imposes the following conditions that must be complied with when taking employees' body temperature:

- *The HSC should be informed of the measure and have given its opinion on it;*
- *Employees must be given clear information on the concrete, practical implementation of the measure;*
- *Taking body temperature may not be accompanied by any additional recording or processing of personal data;*
- *This measure can only be applied during the period of stricter measures in the context of the COVID-19 crisis;*
- *The introduction of this measure does not affect the employer's obligation to take the necessary measures to respect the rules on social distancing.*

Finally, according to the FPS, it is possible for the employer - in order to protect other employees - to prevent an employee, who appears to have a body temperature of more than 37.5 degrees, from entering the company workplace.

NEW – UPDATE ON 21.04.2020
Q. 12: Can I ask my employees to wear a bracelet that measures if they are keeping the required social distance of 1.5 meters as requested during this COVID-19 crisis?

Answer: If the bracelet only gives a signal when employees do not keep a 1.5 meter distance, without recording and processing personal data, this is, in principle, possible.

However, as soon as personal data is recorded or a so-called "contact tracing"' application is used, there is a

processing of personal data and the GDPR rules have to be followed (legal purpose, transparency and information to the employees, proportionality, minimum data processing, legal basis, etc.).

NEW – UPDATE ON 21.04.2020 Q. 13: Can I disclose the names of sick employees?

Answer: According to the DPA, the employer cannot disclose the names of sick employees:

"By virtue of the principle of confidentiality (Article 5.1 f) GDPR) and the principle of minimum data processing (Article 5.1 c) GDPR), an employer may not simply disclose the names of the persons concerned within the company. Proportionality is also an important principle to be observed when processing personal data (medical or otherwise)."

The DPA does nuance this slightly: "In order to prevent further spread, for example, the employer may, of course, inform other employees of an infection, without mentioning the identity of the person(s) involved."

However, in our opinion, the position of the DPA is again too restrictive. It may in certain cases be necessary for an employer - within the framework of his general obligations regarding well-being, safety and health at work and in the absence of efficient alternatives - to communicate the names of the infected employees to (a number of) other employees (e.g., to the direct colleagues with whom the sick employees work closely together in a certain department) in order to prevent a possible further spread of the COVID-19 virus within the company.

Part 3 – Teleworking

Q. 14: When my employees are working remotely, am I required to pay an allowance covering electricity, internet and other costs?

*Answer (**UPDATE 27.03.2020**): Although there is no legal obligation to do so, you may wish to consider reimbursing some of the costs incurred by your employees during teleworking through, for example, payment of a monthly lump sum. If you decide to offer such an allowance, note that the tax authorities have indicated that lump sum allowances of up to €126.94 per month, paid in the context of the COVID-19 crisis, will not, in principle, be subject to tax. For a confirmatory ruling to this effect for your own business, you should complete the standard application form which can be downloaded from this website.*

The Social Security Office has also confirmed that allowances of up to €126.94 per month to cover heating, electricity, and office equipment, paid to employees working from home in the context of COVID-19, are not subject to social security contributions. The following costs can also be reimbursed:

- a lump sum of max. €20 per month to cover the use of an employee's own computer;

- a lump sum of max. €20 per month to cover the use of the employee's own internet connection.

However, the Social Security Office has emphasized that because temporary home working in the context of COVID-19 falls outside the scope of Title VI of the Employment Agreements Act of 3 July 1978, it is not a teleworking situation in a strict sense, and payment of a flat rate allowance of 10% of the total gross salary will not be exempt.

Part 4 – Temporary unemployment

Q. 15: What kinds of temporary unemployment are there, and in which specific situations / how can I apply for temporary unemployment due to COVID-19?

*Answer (**UPDATE 21.04.2020**): There are two different types of temporary unemployment upon which employers can rely, namely temporary unemployment for reasons of force majeure and temporary unemployment for economic reasons. Both systems are, in principle, subject to different conditions and procedures.*

However, because of the severe impact of the COVID-19 crisis on businesses and employees and the increase of temporary unemployment benefit applications with the National Unemployment Office (RVA/ONEm), the federal government, together with the RVA/ONEm, has simplified and accelerated the application procedures. All temporary unemployment situations that result from COVID-19 are now considered to be temporary unemployment due to force majeure (i.e., for COVID-19 related cases, there is no longer a distinction made between "due to force majeure" and "for economic reasons") and a simplified application procedure is now in place.

This flexible interpretation of "force majeure" and the new simplified procedure were introduced with retroactive effect from 13 March 2020 until (currently) 31 May 2020. The measures thereon were confirmed by Royal Decree of 30 March 2020 amending the procedures in the context of temporary unemployment due to the COVID-19 virus.

In the chart attached to this Q&A, you will find an overview of the various scenarios in which you can apply for temporary unemployment benefit due to COVID-19.

As far as temporary unemployment for economic reasons is concerned, it should be stressed that this can, in principle, be applied for when a company is faced with a lack of work, and there are different arrangements for blue-collar and white-collar workers. During the period of validity of the measures taken by the federal government (currently until 31 May 2020), applications for temporary unemployment for economic reasons for white-collar workers will no longer be examined, because the companies concerned may temporarily (for now until 31 May 2020) rely on the simplified application procedure for obtaining temporary unemployment due to force majeure as a result of Covid-19. However, the "ordinary" scheme of temporary unemployment for economic reasons for white-collar workers will again become relevant after the expiry of the measures taken by the government.

NEW – UPDATE ON 21.04.2020

Q. 16: Do I have an obligation to notify my employees if I want to introduce temporary unemployment due to force majeure?

Answer: On 14 April 2020, the Group of Ten reached an agreement on the notification obligation employers must comply with when they wish to introduce temporary unemployment in their company.

As a result of this agreement, there may in the short term be an obligation for employers to inform their employees of the introduction of temporary unemployment.

The notification obligation requires the employer to:

- *notify the individual employees prior to the start of temporary unemployment;*
- *notifying the period to which the temporary unemployment relates; and*
- *for the specific period, indicate on which days the employee will work and on which days the employee will be temporarily unemployed.*

If the employer does not comply with this notification obligation, temporary unemployment cannot be implemented.

The employer must also inform the Works Council, or in the absence thereof the HSC, or in the absence thereof the trade union delegation, about the introduction of temporary unemployment within the company.

Via this Q&A, we will keep you informed about the effective introduction of this obligation. However, we advise employers to already prepare for this by making a clear plan and ensuring good and clear communication with the employees.

Q. 17: Can I pay a supplement to employees receiving an allowance for temporary employment for force majeure as a result of COVID-19? If so, what are the rules?

<u>Answer</u> ***<u>(UPDATE 21.04.2020)</u>****: Employees who are temporarily unemployed as a result of COVID-19 currently receive an unemployment allowance of 70% of the employee's capped gross monthly salary (capped at € 2.754,76 per month) and a supplement of € 5,63 per day of unemployment. As an employer, you may decide to pay a supplement on top of the unemployment allowance to compensate for your employees' loss of salary. In certain sectors, however, there is a collective bargaining agreement which obliges you as an employer to pay a supplement (e.g., in Joint Industrial Committees n° 105, 106.02, 109, 113, 116, 118, 120, 121, 209, 311, 334, etc.) (other sectors may follow) in which case, of course, you are obliged to pay at least this sectoral supplement. If there are no sectoral rules, you are, in principle, free to decide whether you pay a supplement and how much the supplement is. The terms and conditions of the supplement (amount, period of allocation, etc.) are best laid down in an individual agreement with the employees concerned. As this supplement is considered to be a "supplement to a social benefit," no social security contributions are due.*

The National Social Security Office (NSSO) has clarified in its Administrative Instructions that the supplement may be granted to employees who receive unemployment benefit, so long as there is a link between the supplement and the unemployment benefit, and the supplement only compensates for loss of income. This means that the sum of the unemployment benefit paid by the National Unemployment Office (RVA/ONEm) and the supplement paid by the employer may not have the effect that the employee receives more (net) than if he/she had worked.

On 2 April 2020, the NSSO clarified in its Administrative Instructions what should be understood by "net":

(1) For the calculation of the supplement, "net" means the "gross taxable income", which is the gross amount after deduction of the 13.07% employee contributions, but before deduction of the withholding tax on professional income. This means that it must be verified that the taxable income of the employee concerned during the period of temporary unemployment (which consists of the unemployment benefit, the supplements paid by the RVA/ONem and/or the Social Security Fund and the supplements paid by the employer) on a monthly basis does not exceed the last taxable gross monthly salary of the employee (i.e., the gross monthly salary minus 13.07% social security contributions).

(2) Only the salary on which social security contributions are due may be taken into account. For example, luncheon vouchers cannot be taken into account when calculating the supplement. For employees receiving a variable salary, the average salary of the previous months may be taken into account.

(3) All employees in the same category should be treated equally:

- *either by compensating up to a certain percentage of the net salary;*
- *or by paying everyone a lump sum, but taking into consideration that the employees with the lowest salaries must also not receive more than they would have received if they had worked.*

(4) The NSSO also specifies that in the current COVID-19 situation decisions have to be taken quickly, which means that too high supplements may have been granted for the month of March. The NSSO allows employers to adjust this by reducing the supplements in the following months.

(5) Planned indexations and/or scaled salary increases can be taken into account when calculating the supplement.

From a tax point of view, the supplement qualifies as replacement income, which means that 26.75% of withholding tax has to be deducted from the supplement.

We can assist your company in making a simulation, so that you get a clear picture of the maximum supplement you are entitled to pay your employees and can accurately assess the financial impact of this on your company.

NEW – UPDATE ON 21.04.2020 Q. 18: Can benefits such as luncheon vouchers, company car, mobile phone, laptop, etc. still be granted during a period of temporary unemployment?

Answer: The benefits granted by an employer to employees, such as the company car, mobile phone, laptop, etc. can continue to be granted during the period of temporary unemployment.

The RVA/ONEm has confirmed in its FAQ that this has no impact on the temporary unemployment benefit.

With regard to luncheon vouchers, it is important to point out that granting luncheon vouchers is exempt from social security contributions only if they are granted for days on which the employees have actually worked.

If luncheon vouchers are granted to employees for days of temporary unemployment, they will be be subject to social security contributions.

Luncheon vouchers exempt from social security contributions can therefore still be granted to employees who are teleworking, as they are still effectively performing work. This was also confirmed by the NSSO in the Administrative Instructions of 8 April 2020.

Q. 19: Do my employees build up vacation rights for the year 2021 during the period of temporary unemployment by COVID-19?

*Answer **(UPDATE ON 10.04.2020)**: The days of temporary unemployment due to force majeure as a result of COVID-19 are considered to be working days for the calculation of annual leave; therefore these days count towards the annual leave in 2021, both for the duration of the leave and for the vacation pay. However, the legislation still needs to be amended.*

Q. 20: What impact does temporary unemployment / suspension of the employment agreement due to force majeure have on the end-of-year bonus (thirteenth month) of my employees?

Answer (UPDATE ON 10.04.2020): The conditions for granting an end-of-year bonus are determined at sector or company level. It is possible that periods of temporary unemployment/suspension of the employment agreement due to force majeure are not included as assimilated days in the applicable collective bargaining agreement (i.e., inactivity days that are assimilated to working days, which is why they must be taken into account for the calculation of the end-of-year bonus) (e.g., currently, within Joint Committee n° 200, the periods of temporary unemployment/suspension of the employment contract due to force majeure are not included as assimilated days). This would make it possible to deduct such periods of temporary unemployment from the calculation of the end-of-year bonus. However, it is not yet possible to confirm this. By analogy with the vacation scheme (see question Q. 16), the legislator/social partners could decide to grant assimilation. We will monitor this further and update this Q&A if necessary.

Q. 21: What are my obligations as an employer in the case of illness of one of my employees prior to and/or during a period of temporary unemployment?

*Answer **(UPDATE ON 10.04.2020)**: If the worker was already ill before the period of temporary unemployment, the employer has to pay the guaranteed salary for the first month of illness up to the day preceding the temporary unemployment. During the period of temporary unemployment, it is the health insurance fund of the worker concerned that will pay any sickness benefit due.*

However, if the worker falls ill during a period of temporary unemployment, he/she is not entitled to unemployment benefit. Moreover, a distinction must be

made between the situation where there is full temporary unemployment (i.e., benefits are fully suspended) and partial temporary unemployment (i.e., working days are followed by days of unemployment). When performance is fully suspended, the sickness benefit is fully paid by the health insurance fund. However, if performance is partially suspended, the sickness benefit for the days which coincide with the days of temporary unemployment is paid by the health insurance fund. The employer only has to pay the guaranteed salary for the sick days that coincide with days on which the employee was normally employed (up to a maximum of one month).

Q. 22: For which public holidays do I have to pay my employees if there are public holidays during the period of temporary unemployment?

Answer ***(UPDATE ON 10.04.2020)****: Here again it depends whether there is full temporary unemployment or partial temporary unemployment.*

In the case of full temporary unemployment, you only have to pay for public holidays which fall within a period of 14 days following the start of the suspension.

In the case of partial temporary unemployment, where unemployment days are followed by working days, the "14-day rule" must be applied at the start of each new period of temporary unemployment following a working day. Each public holiday falling within this new period of 14 days must be paid for by the employer.

Part 5 – Modification of employment conditions and termination of the employment contract

NEW – UPDATE ON 21.04.2020 Q. 23: Can I unilaterally adjust the wage and working conditions and the work/ position of the employees because of COVID-19?

Answer: It is not possible to change the position of the employees unilaterally, not even in times of COVID-19. The position held by an employee is considered to be an essential element of the employment contract. Making an important change to an essential element amounts to an irregular implicit termination of the employment contract, as a result of which the employee could, in principle, claim an indemnity in lieu of notice.

However, if the employment contract provides that the position does not constitute an essential working condition, it can be adapted to the company's needs, providing the employer with more flexibility.

Nonetheless, in order to exclude any risk of irregular termination, it is advisable to agree on important changes to an employee's position in an addendum to the employment contract of the employee(s) concerned.

The same principles apply to salary. The salary cannot be changed unilaterally by the employer, not even in times of COVID-19.

Q. 24: Can I terminate an employee's employment contract during a period of temporary unemployment? If so, will the notice period be suspended during the period of temporary unemployment due to force majeure? Does the same rule apply in the case of temporary unemployment for economic reasons?

Answer ***(UPDATE ON 21.04.2020):*** *During a period of suspension, both the employer and the employee retain the right to terminate the employment contract.*

In the event of a suspension due to force majeure, the notice period will not be suspended and will simply continue during the period that the employment contract is suspended due to force majeure. This is the case both when the employer terminates the employment contract and when the employee does so.

The trade unions have indicated that there is a risk of abuse by a number of employers as a result. The FPS for Employment, Labor and Social Dialogue has also brought these rules/regulations to the attention of the competent Minister of Labor, who is now said to have

made it known that the regulations will be amended in the light of the current circumstances.

However, the situation is different in the case of temporary unemployment for economic reasons. Article 37/7 Employment Agreements Act stipulates that the notice period does not continue during the period of temporary unemployment for economic reasons when the employer has terminated the employment contract. Therefore, this does not apply when the employee has given notice, in which case the notice period simply continues.

This was confirmed in the FAQ of the National Unemployment Office (RVA/ONEm) (as updated on 30 March 2020).

NEW – UPDATE ON 21.04.2020 Q. 25: How should the indemnity in lieu of notice be calculated during a period of temporary unemployment?

Answer: The termination of an employee's contract when that employee is temporarily unemployed is subject to the ordinary rules on termination of employment and the indemnity in lieu of notice must be calculated on the basis of the employee's normal statute. This implies that the laid-off employee in temporary unemployment will receive an indemnity in lieu of notice based on his/her normal salary to which he/she was entitled prior to the suspension of the employment contract/temporary unemployment (+ possible indexation).

Part 6 – What about after the lockdown?

Q. 26: Can I oblige my employees on their return to work , to first undergo a medical examination with the occupational doctor?

Answer (UPDATE ON 21.04.2020): In principle, as an employer you cannot oblige employees to undergo a medical examination before they resume work. A medical examination is only possible if the employee performs a function for which health supervision is required and he/she has been absent continuously for four weeks due to illness, accident or pregnancy.

However, in this specific COVID-19 crisis, account should also be taken of the employer's general obligations with regard to safety, health and well-being at work. As a result, this principle needs to be nuanced to some extent.

For example, the FPS for Employment, Labor and Social Dialogue recently took a position and clarified the following:

The employer is ultimately responsible for the well-being policy in the company. When activities in a company are restarted, or when employees return from illness or quarantine, the employer must take the necessary measures to prevent as far as possible the risk of employees becoming infected with the COVID-19 virus.

To this end, the employer must contact the prevention advisor / occupational doctor prior to the restart of activities or the return of the employees in order to together develop the necessary guidelines and preventive measures. The measures taken must then be clearly communicated to the employees, who are obliged to comply with the measures and guidelines taken.

Of course, the occupational doctor can also be informed if the employer believes that an employee's state of health increases the risks at the workplace or if the employee complains of discomfort or shows any signs of an illness. It is then for the occupational doctor to determine whether a medical examination is necessary for the employee concerned.

Q. 27: What will happen to the 2020 social elections procedure?

Answer (UPDATE ON 21.04.2020): The social partners have agreed to suspend the procedure from the moment that all employees' representative organizations file their candidates' lists (day X+35). All steps to be taken as of day X+36 are therefore postponed. The practical details and legal

consequences of this postponement are still to be determined by legislation.

Nonetheless, on 24 March 2020, the National Labor Council published advice n°2.160 concerning the temporary suspension of the social elections procedure. This advice emphasizes that the suspension takes effect as of day X+36 and that it is of utmost importance that all parties' rights and duties are frozen as at day X+36. The National Labor Council has also proposed that the elections period should now run between 16 and 26 November 2020. In addition, the National Labor Council attached to the opinion a non-exhaustive list of points that need to be settled concerning the technical/legal issues arising from the temporary suspension of the electoral procedure (e.g., a number of points relating to protected employees, but also concerning the eligibility conditions of candidates put forward for the 2020 social elections, etc.).

On 04 April, 2020, the Group of Ten discussed the legal uncertainty resulting from the absence of a legal framework for the postponement of the social elections and instructed the President of the Group of Ten to write to the competent Minister for Labor requesting the FPS for Employment, Labor and Social Dialogue to instruct all those involved in the electoral procedure, including the labor courts, to already apply the advice of the National Labor Council n°2.160 mentioned above, pending the entry into force of the law regulating the suspension of the procedure.

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Temporary Unemployment Scheme for Covid-19

Applicable from March 13, 2020 to May 31, 2020 (with a possible extension to June 30, 2020)

What is your specific situation?	Which businesses are concerned?	Can I apply for temporary unemployment? If so, which temporary unemployment scheme applies to my business?	How do I apply for temporary unemployment due to Covid-19?	What are the benefits for my employees?	Other remarks
Scenario 1: **What if my employee is abroad and is not allowed to travel and/or is quarantined for reasons outside the control of the employer/employee?**	All businesses that have employees abroad or quarantined.	If the employee is still able to perform the employment contract, the employer is required to continue to pay the employee's salary. If your employee is (temporarily) unable to perform the employment contract, it is 'force majeure' and you may apply under **the new rules for temporary unemployment due to Covid-19**.	**The application procedure has been simplified:** ✓ **No more intermediary steps** (e.g., the employer is no longer required to file an electronic application and/or written application with supporting documents). ✓ The employer is **no longer required to distribute control cards** to its employees. ✓ The **sole action** to be taken **by the employer** is the submission of an electronic notification (i.e., the so-called ASR scenario 5/DSR scenario 5) of force majeure with specification "coronavirus" to the National Unemployment Office (RVA/ONEm), which includes the necessary data for the calculation and the payment of the unemployment benefits.	✓ The amount of the temporary unemployment benefit **is limited to 70% of the employee's capped monthly gross salary** (capped at €2,754.76 per month). ✓ In addition to the normal unemployment benefits, the employees will be entitled to an **additional amount of €5.63 per day** (exempted from social security contributions) (= €146,38 per month), paid by the National Unemployment Office (RVA/ONEm). ✓ The employer can also pay a **supplement to the unemployment benefits** to compensate the loss of salary by the employees. This supplement is not subject to social security contributions, but a withholding tax of 26,75% is deducted.	✓ Temporary unemployment due to Covid-19 can be awarded **retroactively from March 13, 2020**. ✓ Working days can be followed by days of unemployment. Employees will receive their normal salary for the working days. ✓ Days of temporary unemployment will be counted as **working days** for the calculation of annual leave. ✓ **Obligation of the employees**: the employees must request a document C.3.2 from their payment institution (via the website) and the completed C.3.2 document must be returned to the payment institution.
Scenario 2: **I have to (temporarily or partially) close down my business following a decision of the Belgian government.**	Bars, restaurants, clubs, cinemas, cultural and sport event organizers, party organizers, non-essential shops and stores, driving schools, hotels, caterers, companies where both telework and social distancing are not possible, hairdressers, etc.	**New rules for temporary unemployment due to Covid-19.**			
Scenario 3: **I have no work for some or all of my personnel.**	Suppliers impacted by an imposed closure of another company (see scenario 2), all companies impacted by the consequences of Covid-19 in other regions (e.g., your main supplier is an Italian company).				
Scenario 4: **I have decided to close my business / I have a substantial drop in production, turnover or orders because of Covid-19, which has resulted in a decrease in workload.**	All businesses confronted with a drop in production, turnover or orders resulting in a decrease in workload (no longer required to apply for temporary unemployment for economic reasons).				

Our Brussels Labor & Employment team will continue to closely monitor developments and changes in this field and keep you posted. Our team is also available to advise and assist companies with any other HR-related issues and questions connected to the COVID-19 outbreak.

For information, please contact the professionals listed below, or your regular Crowell & Moring contact.

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