# Trends and Developments

**Contributed by:**
Filip Saelens, Kris De Schutter and Etienne Pennetreau
**Loyens & Loeff CVBA**

**Loyens & Loeff CVBA** offers a unique combination of legal and tax expertise in its employment, pensions and benefits practice, enabling the firm to provide its clients with innovative and effective solutions. With two partners, a counsel and nine associates, the growing team covers the full employees' life cycle from hiring to firing and retirement. The lawyers act as business partners to their clients, making their lives easier and adding value both to their projects and operations by offering pragmatic solutions to complex national and/or cross-border legal and tax issues. The firm's specialists are recognised for their out-of-the box approach, their innovative vision on change and transformation, and their empathic leadership in negotiating reorganisation plans, (alternative) remunerations and flexible rewards. The team's service also covers transformation processes, restructuring, collective and high-profile dismissals, top management contracts and compensation, working-from-home policies, whistle-blowing policies, international mobility, pension plan design and pension litigation, etc.

## Authors

**Filip Saelens** is a partner of Loyens & Loeff CVBA and co-heads the employment and benefits practice group in Belgium. With over 30 years' experience, he is a recognised specialist in collective and individual employment law. He focuses on company restructuring, executive compensation and employment-related aspects of corporate transactions. Filip is a member of the firm-wide healthcare and life sciences team, as well as the French and German region teams, through which he supports the business development efforts of Loyens & Loeff by providing expert advice and sector insights.

**Kris De Schutter** is a partner of Loyens & Loeff CVBA and co-heads the employment and benefits practice group in Belgium. He has 20 years' all-round experience in collective and individual employment law and is particularly renowned for his focus on transformation, alternative (flexible) remuneration, restructurings and change process. Kris has a strong reputation in transformation and is involved in major change plans, including collective dismissals, closures, cost-cutting operations, new ways of working and new ways of reward. He is a sought-after commentator and is regularly interviewed by the press to comment on legal trends and developments in Belgium.

**Etienne Pennetreau** is a senior associate of Loyens & Loeff CVBA in the employment and benefits practice group in Belgium. He advises local and international companies on all aspects of individual and collective employment law, social security law, pensions and social criminal law. He is skilled in both advisory and litigation work and regularly represents clients before the employment courts.

## Loyens & Loeff CVBA

Tervurenlaan 2
1040 Brussels
Belgium

Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
Email: info.brussels@loyensloeff.com
Web: www.loyensloeff.com

LOYENS & LOEFF
Law & Tax

**Contributed by:** Filip Saelens, Kris De Schutter and Etienne Pennetreau, **Loyens & Loeff CVBA**

## Introduction

In a new (post-COVID) world, while employees are seeking balance between working from home and in the office and inflation is leading to a substantial indexation of wages, many new employment-related regulations have come into effect in Belgium, touching on a wide variety of matters and protecting employees more than ever.

These new measures range from individual vocational training entitlements, the right to request a four-day work week, the right to claim more comfortable working conditions, new medical force majeure rules, and enhanced flexible working conditions for parents and carers, to the possibility to be absent three days per year without a medical certificate, incremental financial liabilities in the context of garden leave, and employee restructurings.

In this context, recent trends and developments in the market have focused in particular on two positive areas: labour cost reduction for companies; and enhanced protection for employees (with a corresponding administrative burden and legal risks for employers).

## Labour Cost Reduction

Companies have been increasingly looking for ways to streamline (wage) costs. This discussion can be held at individual level but is now also being conducted at company level, through collective bargaining agreements (CBAs) and even redundancy plans. Due to the challenging economic situation and even during a war on specific talent, redundancy schemes and closures are being implemented. In addition, various legal systems have also been developed and made available to employers to reduce their wage costs or, at least, to increase employees' take-home pay without affecting the company's total (wage) costs. Outsourcing actions also appear to be more common, and could lead to long-term cost savings – for example, outsourcing IT or even outsourcing supermarket jobs leads to less strict work-and-salary conditions in the long run and is quite popular. Moreover, in retail, the flexi-job system could offer a flexible solution at a reduced cost for employers seeking sales advisers on Saturdays.

### *Flexible reward plan*

Under a flexible reward plan (often called a "cafeteria plan"), employees have the possibility to exchange part of their "traditional salary" (percentage of gross monthly salary, bonus, end-of-year bonus, etc) for other benefits made available under the plan and determined by the company.

By exchanging part of their salary for a flexible reward (eg, for a bicycle, vacation, a mobile phone, car, tablet, extra hospital insurance cover, etc), the employee can make individual choices on how to spend their salary at favourable tax and social rates.

The company can for example, on the one hand, propose a salary reduction to employees and, on the other hand, provide them with a company bicycle. The employee will, in this case, receive slightly less salary each month but will have a bicycle at their disposal for regular commuting, which is exempt from social security contributions and payroll withholding tax. The employee then has the option of purchasing the bicycle at the end of the lease contract.

Although flexible reward plans are not new, they are being increasingly considered by companies to keep their wage costs under control. Such an approach can indeed make costs increase less

rapidly, since the amounts in the flexible reward plan are not indexed.

### *Work bonus*

In Belgium, employees pay 13.07% of their gross salary in social security contributions. Employees with lower wages are, however, entitled to a reduction of these employee contributions. This is the so-called "work bonus".

The aim of this work bonus is to guarantee these workers a higher net wage without increasing their gross wage. In this way, the gap between the lowest wages and unemployment benefits is widened, combating unemployment traps.

The reduction in employee contributions depends on the wage bracket the employee is in. As from 1 July 2023, the reduction amount for the lowest wage bracket has been increased and an intermediate threshold has been added. The sum of all reductions per person per calendar year is however capped (EUR2,967.72, as from 1 December 2022).

Since the taxable wage increases with a lower deduction of employee contributions, the tax legislation provides for a tax reduction, called the tax work bonus. This tax reduction is equal to 33.14% of the work bonus enjoyed during the taxable period up to a maximum of EUR910 (assessment year 2023).

An increase in the gross wage of the workers concerned will, however, reduce the benefit of the work bonus. More concretely, workers will receive barely, if at all, higher net wages than before the gross wage increase, while employers will see their employer contributions rise. Paid overtime will also cause an increase in monthly salary, which may result in less or no reduction in employee contributions.

For this reason, employers and unions are looking, within the legal framework, for alternatives to a wage increase that does not negatively affect work bonus while continuing to safeguard workers' purchasing power. These include, for example, the granting of non-recurring result-based benefits (CBA No 90) or meal vouchers. Relance overtime can also be advantageous in this regard.

### *Relance overtime*

Overtime is strictly regulated in Belgium. It is prohibited, as a matter of principle, and where allowed, it strictly relates to specific circumstances (eg, extraordinary work increase, inventory work, urgent work on machinery or equipment, etc) and is subject to stringent conditions.

To improve flexibility, "voluntary overtime" was introduced a few years ago. This is the possibility of working a certain number of overtime hours on a voluntary basis, where this is, in principle, only authorised for specific reasons or circumstances. Furthermore, this voluntary overtime does not trigger a compensatory rest obligation; only a salary supplement must be paid.

During the COVID-19 pandemic, the government introduced a similar scheme authorising the provision of an additional 120 hours of overtime per year, benefiting from advantageous tax, social security and employment treatment. This is the so-called "relance overtime".

Since 1 July 2023, it has once again been possible for employees to work 120 hours of relance overtime per year, in addition to the ordinary voluntary overtime quota. This favourable measure is applicable until 30 June 2025.

The draft Act reintroducing relance overtime was adopted on 20 July 2023.

The result of this system is a limited cost for the employer and an attractive net remuneration for employees, since:

- these hours are exempted from social security contributions (for both the employer and employees) and tax;
- no holiday pay needs to be paid on the remuneration linked to these hours;
- these hours have no impact on the work bonus; and
- these hours do not give rise to any recuperation or additional pay.

For example, if an employee earns a gross amount of EUR100, qualified as relance overtime, the employer's cost will amount to EUR100 and the net remuneration for the employee will be EUR100.

In addition, any employer may decide to make use of relance overtime before the ordinary voluntary overtime quota has been used up.

Note that employees who have the status of "trusted person" or "managerial staff" cannot benefit from this favourable regime, as no extra hours can be paid to them.

## Enhanced Employee Protection

### *Discrimination*

On 20 July 2023, a new Act was published amending the three existing anti-discrimination Acts in Belgium and significantly expanding both their material scope and their sanctions.

#### *Protected criteria*

The legal framework against discrimination in Belgium is a closed system. Only the criteria explicitly set out in it (eg, gender, health status, religious beliefs, sexual orientation, etc) are protected. The new Act further broadens some of these criteria. The "social origin" criterion has, for example, been extended to include "social origin or condition" in order to take account, for example, of situations involving the homeless, job-seekers, illiterate people, people living in difficult socio-economic conditions or people with a criminal record. The last protection is rather strange as, based on GDPR interpretation, information on criminal records cannot be processed. This leads to uncertainty for employers as it is difficult to prove what cannot be proved.

#### *Multiple discrimination*

The updated legislation also introduces two new notions. The first is cumulative discrimination, defined as "the situation when a person is discriminated [against] on the basis of several protected criteria which are cumulated, but remain separable". For example, the candidature of a 44-year-old man is refused because the employer assumed that he would not be able to work in a team composed only of women between 20 and 30 years old. The man was thus doubly discriminated against – on the basis of his age and on the basis of his gender. The second is intersectional discrimination, defined as "a difference of treatment on the basis of several protected criteria which interact and become inseparable". For example, a woman who comes from a particular ethnic minority may face a different kind of discrimination from that faced by a man who comes from the same ethnic minority, or a different kind of sexism to that experienced by a white woman.

Before this Act, the Belgian legislator only recognised direct and indirect discrimination based on one criterion. With the new Act, direct and indirect discrimination can be based on a combination of different criteria. With this legislative amendment, the Belgian legislator therefore

explicitly recognises for the first time the concept of "multiple discrimination".

*Discrimination by association*

The concept of "discrimination by association" refers to a situation in which a person is discriminated against because they are closely associated with an individual representing a protected criterion. This could be the case, for example, of a father who is made redundant because one of his children has a disability and because his employer considers that the child's disability is likely to undermine the father's motivation and cause him to be absent from work. This concept was already largely accepted by case law, but is now explicitly legally implemented.

*Assumed criterion*

Another concept introduced in the anti-discrimination legal framework is that of "discrimination on the basis of an assumed criterion". This refers to the situation where a person is discriminated against because they are perceived to have a protected characteristic that is in fact foreign to them. This is the case, for example, when it is assumed that a person has a particular sexual orientation because they are involved in an LGBTQI+ organisation, or when it is suspected that a person with a specific skin colour automatically has a particular religion and is discriminated against because of it. This extension codifies already existing case law of the Court of Justice of the European Union and of the European Court of Human Rights.

*Sanctions*

The new Act also broadens the sanctions that can be imposed by a court upon a finding of discrimination. In the field of employment relationships, a victim of discrimination can claim compensation for the actual prejudice (which requires submitting evidence confirming the precise amount of actual prejudice). Or they can claim a lump sum compensation of six months' pay (which does not require any evidence of the prejudice).

For either cumulative or intersectional discrimination, the Labour Court can now combine the lump sum compensation for each of the protected criterion involved. If it is established that there was discrimination both on the basis of gender and ethnic origin, for example, the Labour Court could grant compensation of 12 months' pay. The new legislation does not include any criteria indicating when the lump-sum compensations should be cumulated and when they should not. So it remains to be seen how the case law will evolve.

***Whistle-blowing***

On 28 November 2022, the Act implementing the European whistle-blowers directive was published in the Belgian gazette. The Act came into force on 15 February 2023 for companies with more than 250 employees and all companies active in financial services, regardless of the number of employees. On 17 December 2023, the Act will come into force for companies employing between 50 and 249 employees.

Three channels to facilitate reporting have been established: an internal channel; an external channel (reporting to a federal ombudsman, including for former employees) and the press. Reporting through the press applies if the above channels are not successful and if there is an immediate threat to the public interest. The text also provides protection for whistle-blowers reporting tax fraud.

In addition to these channels, two bodies are also available to whistle-blowers: the Federal Ombudsman (responsible for checking the

admissibility of the information and forwarding it to a competent authority) and the Federal Institute for the Protection of Human Rights (providing whistle-blowers with professional, legal and psychological support).

The Act also provides for protection against retaliation and the threat of retaliation for all individuals utilising the three reporting channels. Retaliation is broadly defined and includes suspension and dismissal, changing the terms of employment, demotion, withholding promotion, etc. As a safeguard against potentially malicious or frivolous reporting, the whistle-blower should however fulfil specific conditions to be eligible for the protection scheme, among which is, having reasonable grounds to believe that their complaint is true. The protection against retaliation is not limited in time, so that the employee could virtually invoke this protection any time. This may cause some legal uncertainty for companies. Of course, the more time that has elapsed between the reporting and an alleged act of retaliation, the more difficult it will be for the employee to demonstrate that there is indeed a causal link between the two.

An employee who has suffered retaliation is entitled to compensation ranging from 18 to 26 weeks' salary. If the reporting relates to legislation on financial services, products and markets or the prevention of money laundering, the compensation may amount to six months' salary or the real damages, and the employee will even have the right to ask for their reinstatement.

The law also provides for a reversal of the burden of proof, which means that the employer will have to prove that any disadvantage afforded to the whistle-blower was justified and not related to the report.

There are also tough sanctions for non-compliance, including criminal sanctions for employers who could be liable for a prison term of between six months and three years. For legal entities (that cannot go to prison), such sentence would be converted into a fine of between EUR24,000 and EUR576,000 (not paid to the employees, for the avoidance of doubt). Non-compliance can take the form of impeding (or trying to impede) a report, the initiation of vexatious proceedings against a whistle-blower, retaliation or violation of confidentiality.

### *Transparent working conditions*

The EU transparent and predictable working conditions directive was transposed into the Act of 7 October 2022 that came into force in Belgium at the end of 2022. National CBA No 161 was also concluded, covering the matter.

Along with several new criminal sanctions in the Social Criminal Code, this Act guarantees the right to (collective) information for employees on certain essential terms and conditions of employment as well as the creation of specific new rights. The aim is to improve working conditions and employee's protection by promoting more transparent and predictable employment.

#### *Information of an individual nature*

Employers must provide their employees with information on a series of listed main aspects of their employment relationship (eg, workplace; function to perform; start and end date; salary, including the initial amount, other components, fringe benefits, payment method and frequency; etc). Additional requirements apply when the employee is working in another country for more than four consecutive weeks, as well as in case of posting.

*Information of a collective nature*

Additional elements must also be integrated into the company's work regulations. These relate to:

- the procedure and requirements applicable to the termination of the employment contract;
- the collective agreements on working conditions concluded at company or sector level;
- the competent social security institution; and
- the right to training offered by the employer.

*Minimum requirements in working conditions*

These specific new rights include several additional restrictions on trial periods that still exist in temporary, agency and student employment contracts; the impossibility for the employer to prohibit their employee from working for other employers, unless a legal exception applies; the guarantee of a minimum degree of predictability regarding variable working hours for part-time workers; and the right of any worker with at least six months' seniority to request a form of employment offering more predictable and secure working conditions and the obligation for the employer to give a reasoned written reply. This new Act also obliges employers, in specific cases, to offer training to their employees free of charge.

*Dismissal protection*

If an employee files a complaint against an employer for a violation of the rights discussed, the employer may not subject the employee to adverse treatment. The employer may, of course, take action based on reasons not related to the complaint (eg, poor performance, reorganisation, etc). Within 12 months of filing the complaint, the burden of proof rests on the employer. It is up to the employer to prove that the unfavourable measure was adopted for reasons unrelated to the complaint. A lump-sum compensation of six months' gross pay is provided.

The legislator goes very far and, moreover, even links dismissal protection to the new rules. Indeed, an employer may not dismiss an employee "who makes use of these rights" without risk of paying compensation of six months' gross pay, except for reasons not related to this complaint.

***Right to disconnect***

Since 1 April 2023, all companies employing 20 or more employees must draft a policy on the right to disconnect. To this end, the work regulations should be amended, or a collective bargaining agreement should be drawn up.

The policy on the right to disconnect should contain the following pillars:

- an overview of the practical modalities for the application of the right to be unavailable outside working hours (= the general framework);
- guidelines for using digital tools in such a way as to safeguard rest periods, holidays and to ensure no infringement in the private and family life of the employee (= the content of the policy); and
- training and awareness campaigns for employees on the conscious use of digital tools and the risks associated with excessive connection (= how to reach the objective).

Service providers will not of course be entitled to a right to disconnect; the law explicitly refers to employees. Similarly, persons holding a management position, or in a position of trust are not subject to provisions on working time. Therefore, the right to disconnect can hardly be applied to this category.

Although the right-to-disconnect policy is meant to be obligatory for employers with more than 20 employees, the law does not prescribe a priori

any explicit sanctions when an employer does not draft such a policy, or when they are not acting in compliance with the policy.

However, when the policy is part of a sectoral CBA, declared Joint Committee-wide, the employer is obliged to comply with the provisions and, in the absence of this, may face criminal sanctions based on the Social Criminal Code. If a CBA on company level is breached by the employer, this is enforceable through civil proceedings which seek compensation for the damage suffered, initiated by the representative employee organisation. Moreover, it could be argued that the rights of employees are, in principle, incorporated in the employment contract.

Does it change the world? Not really. It seems to be more of a compliance measure with limited (if any) added value in reality.