

COVID-19 and Labour Law: Belgium

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Abstract

Belgium has closed its shops. Furthermore, it made a distinction between essential and non-essential services. Non-essential services have to introduce telework at home or to close in case that is not possible. Essential services have to respect the social distancing of 1,5 meter.

Keywords: Covid-19; Labour Law; Public Safety; Civil Protection

1. Lockdown light measures.

Belgium opted for a lock down light with the Ministerial Decree of 18 March 2020. This Ministerial decree was based on article 4 of the Act of 31 December 1963 and article 182 of the Act of 15 May 2007. These dispositions allow the Minister of Internal Affairs to take measures in order to ensure public safety and civil protection. The Ministerial Decree was slightly adapted by the Ministerial Decree of 23 March 2020.

2. Impact on labour and employment relations.

With regard to labour law, the Ministerial decree took very far going measures.

Article 1 of the Ministerial decree provided that all shops with some exceptions (such as pharmacies, newspaper shops, food shops and gas stations) have to be closed.

Article 2 of the Ministerial Decree provides that telework at home is mandatory all non-essential companies. Obviously, telework at home is only possible for those functions where telework is feasible. In case telework cannot be installed, social distancing of 1,5 meter between each member of staff had to be ensured. Essential services are exempted from these measures. The essential services are listed in an attachment to the Ministerial decree and include among others ministries, hospitals, elderly homes, universities, media, police and military forces, courts and tribunals, legal professions en shops selling food (such as supermarkets). Article 3 disposes that even in the essential services telework at home should be applied and social distancing should be respected. Article 10 provides that companies not respecting the rules on social distancing shall be closed.

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Mandatory telework at home is a step which stands at odds with normal Belgian labour regulation. Article 6 of the Collective bargaining agreement nr. 85 on telework, which is applicable in the whole private sector, provides that a written agreement is necessary for telework. The agreement normally contains the agreement on which dates telework can be executed and how the costs shall be divided between employers and employees. Some academics therefore reacted that telework could not be made mandatory without agreement¹. This analysis cannot be followed given the legal framework which provides that the Minister has the task to take measures with regard to public safety and civil protection. Furthermore, Belgian Labour Law knows a large impact of the concept of good faith. Employment contracts need to be executed in good faith. When the legal framework is adapted (in case this is due to extremely exceptional circumstances), both parties still need to execute the contract in good faith even if the content of the contract has been altered through regulatory measures². Article 1134 of the Belgian Civil Code provides that good faith is crucial for the execution of any contract. It is therefore, given the temporary modified regulatory framework, plausible to defend that the execution of employment contracts needs to be executed in good faith and in accordance with the adapted legal framework without necessary adaptation of the employment contract. The situation would be different in case employers would decide themselves unilaterally to reform the employment contract from an employment at the office to mandatory telework. This would be a violation of article 25 of the Act on Employment Contract of 3 July 1978. Even if both parties have to accept the change to telework, the employers remain responsible for the costs linked to the installation and the maintenance of the necessary technical equipment³.

The organisation of social distancing created a lot of difficulties in the companies. Non-essential companies who could not guarantee social distancing and telework at home had to put their employees in unemployment for force majeure. The employment benefits coupled to the force majeure were risen from 65 to 70% by the Federal Authority in the Royal Decree of 30 March 2020.

Schools are not closed but they do not provide any classes. However, school teachers have to ensure to take care of children who are not able to be kept at home (e.g. if both parents are employed in the health sector or in essential services). This implies that the Ministerial Decree of 18 March 2020 has modified the tasks of teachers from teaching of classes to day care of children. For teachers in public schools, this can be executed through a unilateral modification of their employment conditions as there are public servants with a specific status. For teachers in private school, this modification is a consequence of a different legal framework and thus not a purely unilateral variation by the employer which fits into the “good faith”-concept of article 1134 of the Belgian Civil Code.

Finally, the biggest issue remains taking care of the well-being of employees in these turbulent times. The Act of 4 August 1994 on Well-being at work during the execution of their Work and its decrees (codified in the Code on Well Being at Work) stipulates that all

¹ De Standaard (Belgian Newspaper), 12 March 2020

² Read on this topic Van Eeckhoutte W., *De ondraaglijke onveranderlijkheid van de arbeidsovereenkomst*, in Rigaux M., Van Eeckhoutte W. (eds.), *Sociaal Recht: Niets dan uitdagingen*, Ghent, 1996, 50.

³ This is a logical application of article 9 of the CCT nr. 85 of 9 November 2005.

employers need to exclude or diminish risks. Specifically, in the health sector, this provides many difficulties since the purchase of masks and protecting material seems to be very hard. It is a daily concern to make sure that hospitals possess enough protecting material and enough masks. The major problem however appears in elderly care homes where staff does not possess enough masks and material. This has recently led to big increase of infections and deaths in the elderly care homes. The situation could lead to legal procedures in the future. However, it may not be forgotten that also in other essential services, protection is crucial. One staff member of a supermarket has died of Covid19, potentially because of a lack of protection on the workspace. It needs to be investigated but it indicates that well-being measures lay a big responsibility on the shoulders of employers. They however depend on the supply chain because it concerns forms of protection which normally should not be foreseen (in the same manner) by these companies. The future shall make clear whether this death falls on the responsibility of the employer or not.

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