The reform of dismissal rules in Belgium

2014
The reform of dismissal rules in Belgium

On 1 January this year, new dismissal rules came into force.

Following a judgment of the Constitutional Court, the distinction between blue-collar and white-collar employees in terms of notice periods and the first day of sick leave for blue-collar employees (carenzdag/jour de carence) had to be eliminated. The result of this harmonisation exercise is the Law of 26 December 2013 concerning the introduction of a unified status for blue-collar and white-collar employees with regard to notice periods and the first day of sick leave and accompanying measures (the “LUS”). The LUS introduces new dismissal rules both for blue-collar and white-collar employees.

Subsequently, the social partners have concluded a CLA within the National Council of Labour regarding the duty to give reasons for dismissal (“CLA n° 109”). The new rules will undoubtedly have a significant impact on your HR policy.

This publication provides an explanation of the most important new elements introduced by the LUS and CLA n° 109 concerning the termination of employment agreements. We provide you with an overview of the new notice periods, and also of the wider reform and modernisation of the dismissal regulations.

This publication does not address the special rules applicable to agreements for students, servants, home workers, programmes of re-employment and the execution of temporary labour and temporary agency work. The limited context of this publication similarly does not allow us to touch upon extraordinary situations such as, for example, the position of an employee whose blue-collar status has changed to white-collar status after 1 January 2014.

This publication is based on the regulations in force as at 1 March 2014.
# Table of content

1. Terminology 4

2. Overview 5

3. Notice periods 7
   3.1 Basic terms 7
   3.2 Exceptional Sectors 9
   3.3 Special terms 12
      3.3.1 Retirement 12
      3.3.2 SUC 12
      3.3.3 Temporary unemployment 12
   3.4 Possibility to deviate 13
   3.5 Entry into force 13

4. Employment agreement commenced before 1 January 2014 15
   4.1 Basic rule: 2-step-calculation 16
      4.1.1 Termination of employment by the employer 16
      4.1.2 Resignation by the employee 21
   4.2 Exceptional Sectors 26
   4.3 Special terms 26
   4.4 Special situations 27
      4.4.1 On-going trial period 27
      4.4.2 Deviating clause for blue-collar employees with less than 6 months’ service 27
      4.4.3 Collective dismissal 27

5. Start of notice period 31

6. Length of service 33

7. Compensation in lieu of notice (calculation basis) 35

8. Fixed-term employment agreement or agreement for clearly-defined project 37
   8.1 Agreement entered into before 1 January 2014 37
   8.2 Agreement entered into on or after 1 January 2014 37

9. Dismissal in the event of incapacity to work 41
   9.1 Incapacity to work after notice of termination has been given 41
   9.2 Incapacity to work and fixed-term agreements or agreements for a clearly-defined project 42

10. Trial period clause 45

11. Outplacement 47

12. Measures designed to increase employability 51

13. Leave to search for new job 53

14. The duty to give reasons for dismissal and arbitrary dismissal 55

15. Re-activation compensation 61

16. Compensatory measures 63
   16.1 Dismissal compensation payment and dismissal allowance 63
   16.2 Additional allowances at industry level 67
   16.3 Special compensatory contribution on compensation in lieu of notice 68
   16.4 The “provision for social liabilities” tax exemption 69

17. Contact persons 71
1. Terminology

CIT: The code on Income Tax.
CLA: A collective labour agreement.
CLA n° 75: Collective labour agreement n° 75 of 20 December 1999 regarding the notice periods of blue-collar employees.
CLA n° 82: Collective labour agreement n° 82 of 16 July 2002 regarding outplacement for employees aged 45 and older that are being dismissed.
CLA n° 109: Collective labour agreement n° 109 of 12 February 2014 regarding the duty to give reasons for dismissal.
Closure Fund: The fund for the remuneration of dismissed employees in the event of a closure of an undertaking.
Decretal Law: The decretal law of 28 December 1944 regarding the social security of blue-collar employees.
EE: The employee.
ER: The employer.
Exceptional Sector: A sector in which on 31 December 2013 notice periods were determined through a royal decree (on the basis of article 61 or 65/3, § 2 of the Law on Employment Agreements) that were shorter than the notice periods that are specified in article 70, § 2 of the LUS.
LUS: The law of 26 December 2013 regarding the introduction of a unified status for blue-collar and white-collar employees with regard to notice periods and the first day of sick leave and accompanying measures.
RD on Dismissal Compensation Payment: The Royal Decree of 9 January 2014 regarding the dismissal compensation payment.
Reference Period: The first half of the agreed duration of the employment agreement for a fixed term or for a clearly-defined project, subject to a maximum of 6 months.
Renault Law: The law of 13 February 1998 regarding provisions for the improvement of employment.
SUC: The system of unemployment with company payment (Stelsel van werkloosheid met bedrijfstoeslag/Régime de chômage avec complément d’entreprise).

© Allen & Overy LLP 2014
2. Overview

The most important changes surrounding the termination of employment agreements are:

- The rules regarding the termination of employment agreements of indefinite duration whose performance commenced on or after 1 January 2014 (these are covered in section 3);
- The rules regarding the termination of employment agreements of indefinite duration whose performance commenced before 1 January 2014 (these are covered in section 4); and
- The rules regarding the termination of employment agreements of fixed duration or for a clearly defined project (these are covered in section 8).

In addition to these rules regarding notice periods, we also provide an overview of other relevant changes in connection with the termination of employment agreements, including regarding the start of the notice period, the concept of length of service, trial period clause, outplacement, leave to search for a new job, the duty to give reasons for dismissal and arbitrary dismissal, compensation measures, etc. These are covered in sections 5 to 7, and from section 9 onwards.
3. Notice periods

The LUS has introduced fixed notice periods, both for termination of employment by the employer as well as for resignations by the employee. Henceforth, an employee’s length of service is the only criterion to be taken into account in determining the duration of the notice period.

---

### Basic terms

The notice periods included in the Law on Employment Agreements will be defined in section 3.1. Hereafter, we will refer to these terms as the “basic terms”.

---

### Exceptional Sectors

In addition to these basic terms, there are also exceptional terms for certain sectors (the Exceptional Sectors). These will be explained in section 3.2.

---

### Special terms

Finally, there are special terms that apply in the event of termination of employment due to certain specific reasons or in the case of certain circumstances. These will be discussed further in section 3.3.

---

3.1 Basic terms

**NOTICE GIVEN BY THE EMPLOYER** –

The notice periods are fixed terms which apply to both blue-collar and white-collar employees, the duration of which is determined solely on the basis of the employee’s length of service. The terms are gradually established, in different phases, but with a decreasing augmentation as the employee’s length of service increases. Henceforth, the fixed terms will be expressed in weeks.

*See table on page 8.*

➤ Art. 37/2, § 1 Law on Employment Agreements

**NOTICE GIVEN BY THE EMPLOYEE** –

In the event that notice is given by the employee, the applicable notice period equals half of the notice period that must be taken into account if notice were given by the employer (rounded off to the lower whole number), subject to a maximum of 13 weeks.

*See table on page 8.*

➤ Art. 37/2, § 2 Law on Employment Agreements

**COUNTER NOTICE** – An employee who has been served notice by their employer but then finds another job can terminate the agreement with a reduced notice period. The terms of the counter notice are the same as the terms that apply in the event of notice being given by the employee, however subject to a maximum of 4 weeks.

*See table on page 8.*

➤ Art. 37/2, § 3 Law on Employment Agreements
If the basic terms must be applied, the terms are as stated below, unless a more beneficial regime (for the EE) exists at a company or individual level.

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Notice period in the event of termination by ER</th>
<th>Notice period in the event of resignation by EE</th>
<th>Notice period if counter notice is given by EE</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 0 to less than 3 months</td>
<td>2 weeks</td>
<td>1 week</td>
<td>1 week</td>
</tr>
<tr>
<td>From 3 to less than 6 months</td>
<td>4 weeks</td>
<td>2 weeks</td>
<td>2 weeks</td>
</tr>
<tr>
<td>From 6 to less than 9 months</td>
<td>6 weeks</td>
<td>3 weeks</td>
<td>3 weeks</td>
</tr>
<tr>
<td>From 9 to less than 12 months</td>
<td>7 weeks</td>
<td>3 weeks</td>
<td>3 weeks</td>
</tr>
<tr>
<td>From 12 to less than 15 months</td>
<td>8 weeks</td>
<td>4 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 15 to less than 18 months</td>
<td>9 weeks</td>
<td>4 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 18 to less than 21 months</td>
<td>10 weeks</td>
<td>5 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 21 to less than 24 months</td>
<td>11 weeks</td>
<td>5 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 2 years to less than 3 years</td>
<td>12 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 3 years to less than 4 years</td>
<td>13 weeks</td>
<td>6 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 4 years to less than 5 years</td>
<td>15 weeks</td>
<td>7 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 5 years to less than 6 years</td>
<td>18 weeks</td>
<td>9 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 6 years to less than 7 years</td>
<td>21 weeks</td>
<td>10 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 7 years to less than 8 years</td>
<td>24 weeks</td>
<td>12 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 8 years to less than 9 years</td>
<td>27 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 9 years to less than 10 years</td>
<td>30 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 10 years to less than 11 years</td>
<td>33 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 11 years to less than 12 years</td>
<td>36 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 12 years to less than 13 years</td>
<td>39 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 13 years to less than 14 years</td>
<td>42 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 14 years to less than 15 years</td>
<td>45 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 15 years to less than 16 years</td>
<td>48 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 16 years to less than 17 years</td>
<td>51 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 17 years to less than 18 years</td>
<td>54 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 18 years to less than 19 years</td>
<td>57 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 19 years to less than 20 years</td>
<td>60 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 20 years to less than 21 years</td>
<td>62 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 21 years to less than 22 years</td>
<td>63 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 22 years to less than 23 years</td>
<td>64 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 23 years to less than 24 years</td>
<td>65 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 24 years to less than 25 years</td>
<td>66 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 25 years to less than 26 years</td>
<td>67 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 26 years to less than 27 years</td>
<td>68 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 27 years to less than 28 years</td>
<td>69 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 28 years to less than 29 years</td>
<td>70 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 29 years to less than 30 years</td>
<td>71 weeks</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>Etc (+ 1 year)</td>
<td>Etc (+ 1 week)</td>
<td>13 weeks</td>
<td>4 weeks</td>
</tr>
</tbody>
</table>

© Allen & Overy LLP 2014
3.2 Exceptional sectors

SHORTER NOTICE PERIODS FOR BLUE-COLLAR EMPLOYEES IN CERTAIN SECTORS –
In certain sectors, blue-collar employees do not fall under the basic terms previously referred to. For those blue-collar employees, different (shorter) notice periods apply.

For some blue-collar employees, this exception only applies temporarily (temporary exception); for others the exception applies permanently (structural exception).

SECTORS INVOLVED – The sectors in which these exceptional terms apply are those sectors in which, as at 31 December 2013, use had been made of the option to fix shorter notice periods for blue-collar employees via a royal decree (on the basis of article 61 or 65/3, § 2 of the Law on Employment Agreements) which are shorter than the notice periods that are determined in article 70, § 2 of the LUS (which largely correspond with the notice periods determined in CLA n° 75 – see table on page 11).

In practical terms, this means that in those sectors in which on 31 December 2013 the applicable notice periods were shorter than the periods determined in the table on page 11, the notice periods set out in the table will apply as from 1 January 2014.

Those sectors in which a royal decree only fixed shorter notice periods for blue-collar employees with a maximum of 1 year's service, or for employees that were dismissed in the context of a restructuring, retirement or SUC, do not fall under the exceptional regime.

According to the FPS ELSD, this affects the following sectors:

JC n° 109
(Clothing and tailoring industry)

JC n° 124
(Construction industry)

JC n° 126
(Upholstery and woodworking)

JC n° 128.01
(Tannery and trade in raw skins)

JC n° 128.02
(Footwear, bootmakers and custom workers)

JC n° 140.04
(Ground handling at airports)

JC n° 142.02
(Recovery of rags)

JC n° 147
(Weapons forged by hand)

JC n° 301.01
(Port of Antwerp)

JC n° 311
(Large retail stores)

JC n° 324
(Diamond industry and trade)

JC n° 330
(Health establishments and services – Dental prostheses)

* The NEO also includes the following sectors: JC n° 111 Metal-, machine and electrical construction – East- and West-Flanders and JC n° 111 Metal-, machine and electrical construction – for the employees who are usually employed in workplaces outside the company’s registered office and who, with appropriate building materials, assemble bridges and metal trusses, and perform works of heavy kettle building works with the same features.
ASSESSMENT AT THE SECTOR OR INDIVIDUAL LEVEL? — According to the FPS ELSD, the comparison of notice periods (i.e. between the notice periods that were applicable on 31 December 2013 and those fixed in article 70, § 2 LUS) in order to determine who falls under the (shorter) exceptional terms must be made for each employee individually.

This would imply that not necessarily all blue-collar employees of the joint committees previously referred to would be subject to the shorter notice periods. In some sectors there are, for example, notice periods that are shorter than the terms of article 70, § 2 LUS, but only for employees with certain periods of service.

However, this interpretation is not in line with the preparatory works, which give the impression that the applicability of the exceptional regime ought to be determined at the sector level. It remains to be seen how the courts will assess this.

TEMPORARY EXCEPTION UNTIL 31 DECEMBER 2017 — In the sectors concerned, the shorter terms will apply to any notice given (whether by the employer or the employee) between 1 January 2014 and 31 December 2017. Hence, as from 1 January 2018, the basic terms will apply (unless the notice concerns an employee that falls under the structural exception).

However, the sectors can decide to evolve faster towards adopting the basic terms via a CLA.

STRUCTURAL EXCEPTION FOR CERTAIN BLUE-COLLAR EMPLOYEES — For certain blue-collar employees employed in the sectors concerned, the exceptional shorter terms will also remain applicable after 31 December 2017.

More specifically, those affected are employees without a fixed place of employment that usually perform one or more of the following activities in temporary and mobile workplaces*: excavation works, earthworks, foundation and reinforcement works, water-engineering works, road works, agricultural works, placement of utility pipes, construction, assembly and disassembly of in particular prefabricated elements, beams and columns, furnishing or equipment works, dismantling works, demolition works, preservation works, maintenance works, painting and purification works, cleaning or reorganisation works, or finishing operations associated with one or more of the works listed.

The FPS ELSD indicates that this concerns certain employees of joint committee n° 124 (Construction industry) and of joint committee n° 126 (Upholstery and woodworking).

➤ Art. 70, § 4 LUS

* The Dutch version of the LUS refers to temporary and mobile workplaces (“tijdelijke en mobiele werkplaatsen”), whilst the French version refers to temporary or mobile workplaces (“des lieux de travail temporaires ou mobiles”).
SHORTER NOTICE PERIODS – The (shorter) notice periods that have to be applied if the temporary exception or structural exception applies are as follows:

If the special terms for the Exceptional Sectors must be applied, these are the terms mentioned here, unless a more beneficial regime (for the EE) exists at the sector, company or individual level.

<table>
<thead>
<tr>
<th>Length of service</th>
<th>Notice period in event of termination by ER</th>
<th>Notice period in event of resignation by EE</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 0 to less than 3 months</td>
<td>2 weeks</td>
<td>1 week</td>
</tr>
<tr>
<td>From 3 to less than 6 months</td>
<td>4 weeks</td>
<td>2 weeks</td>
</tr>
<tr>
<td>From 6 months to less than 5 years</td>
<td>5 weeks</td>
<td>2 weeks</td>
</tr>
<tr>
<td>From 5 years to less than 10 years</td>
<td>6 weeks</td>
<td>3 weeks</td>
</tr>
<tr>
<td>From 10 years to less than 15 years</td>
<td>8 weeks</td>
<td>4 weeks</td>
</tr>
<tr>
<td>From 15 years to less than 20 years</td>
<td>12 weeks</td>
<td>6 weeks</td>
</tr>
<tr>
<td>Minimum 20 years</td>
<td>16 weeks</td>
<td>8 weeks</td>
</tr>
</tbody>
</table>

JUSTIFICATION FOR TEMPORARY EXCEPTION –
The temporary exception is justified for the sectors concerned by the fact that an immediate switch to the new notice periods could potentially seriously disrupt employment in those sectors.

JUSTIFICATION FOR STRUCTURAL EXCEPTION –
According to the preparatory works, the structural exception for certain blue-collar employees is compensated for by the shortage of employees in the sectors concerned and justified by the goal of maintaining the social protection of those employees. At the moment, those employees generally have an employment agreement of indefinite duration, despite the temporary nature of their activities and an extension of the notice periods would cause the use of indefinite duration contracts to be replaced, on a large scale, by forms of temporary employment.
3.3 Special terms

Finally, there are special rules that apply in the event of termination of employment with a view to retirement, an SUC or during a period of temporary unemployment.

3.3.1 Retirement

MAXIMUM 26 WEEKS’ NOTICE – If notice is given to an employee in order to terminate the employment agreement as from the first day following the month in which the employee attains the statutory pension age (currently 65 years old), the basic terms apply (see section 3.1), subject to a maximum notice period of 26 weeks.

➤ Art. 37/6 Law on Employment Agreements

3.3.2 SUC

MINIMUM 26 WEEKS’ NOTICE – If notice is given to an employee in order to allow the employee to benefit from the system of unemployment with company payment (SUC), the basic terms can be reduced, but subject to a minimum notice period of 26 weeks. This is, however, only possible if the employer is recognised as a company in restructuring or financial difficulty. The further rules and conditions of this possibility must be determined by royal decree.

➤ Art. 37/11 Law on Employment Agreements

3.3.3 Temporary unemployment

EMPLOYEE CAN TERMINATE AGREEMENT WITHOUT NOTICE – During any period of full suspension of the employment agreement or partial employment in the event of economic unemployment or bad weather, the employee is entitled to terminate the employment agreement without notice. If the suspension is due to bad weather, this is only possible if the suspension lasts for more than 1 month.

EMPLOYER AND EMPLOYER CAN GIVE NOTICE – In addition, the law clarifies that the employer and the employee are both entitled to give notice to terminate the employment agreement during a suspension caused by economic unemployment or bad weather. If notice is served by the employee before or during the suspension, the notice period continues to run during the period of suspension. If notice is served by the employer in this manner, the notice period stops running during the period of suspension.

➤ Art. 37/7 Law on Employment Agreements

“It is not possible to determine more beneficial notice periods for employees at the sector level. This is however possible at the company or individual level”.
3.4 Possibility to deviate

**NO DEVIATION AT THE SECTOR LEVEL** –
It is not possible to deviate from the statutory notice periods (whether for termination of employment by the employer or by the employee) by entering into a sector CLA. Hence, the sectors cannot provide more beneficial notice periods.

▷ Art. 37/3 Law on Employment Agreements

**DEVATION IS POSSIBLE AT THE COMPANY AND INDIVIDUAL LEVEL** – More beneficial notice periods for the employee can, however, be provided at the company or individual level.

3.5 Entry into force

1 JANUARI 2014 – The notice periods discussed in this section 3 apply to any termination of employment that is notified as from 1 January 2014. By contrast, any termination of employment that was notified before 1 January 2014 retains its effects under the former rules.

▷ Art. 110 and 111 LUS

**TRANSITIONAL REGIME** – However, there is a transitional regime for any termination of employment that is notified on or after 1 January 2014 but that concerns an employment agreement whose performance commenced before 1 January 2014. The notice periods that apply in this case are discussed further in section 4.
4. Employment agreement commenced before 1 January 2014

For dismissals carried out as from 1 January 2014 that relate to employees with an employment agreement (of indefinite duration), the performance of which commenced before 1 January 2014, the rules that are explained in this section 4 must be applied.

**Basic rule**
In the event of the dismissal of an employee whose employment agreement commenced before 1 January 2014, the notice period must be determined in accordance with a 2-step-calculation, as further explained in section 4.1.

**Exceptional sectors**
Notwithstanding this, there are exceptional rules for (certain) blue-collar employees employed in the so-called Exceptional Sectors, as discussed in section 4.2.

**Special terms**
Furthermore, there are special terms that apply in the event of termination of employment due to certain specified reasons or in the event of certain circumstances. These are further explained in section 4.3.

**Specific transitional rules**
Finally, there are specific transitional rules for on-going trial period clauses, for blue-collar employees with less than 6 months’ service and for collective dismissals for which a social plan was agreed upon before 2014. These are explained in section 4.4.
4.1 Basic rule: 2-step-calculation

4.1.1 Termination of employment by the employer

FIXED POINT SYSTEM – To accommodate the legitimate expectations of those parties whose employment agreement commenced before 2014, the legislator has provided a fixed point system which takes into account the rights that were “accrued” under the old rules.

CALCULATION IN 2 STEPS – Accordingly, the calculation of the notice period is done in 2 steps:

– the first step concerns service already accrued as at 31 December 2013;

– the second step concerns service accrued as from 1 January 2014.

In principle, the final notice period is the result of the sum of the notice periods resulting from step 1 and 2.

➤ Art. 67 LUS

"For employees who started before 1 January 2014, the notice period is calculated in 2 steps: a first step is based on their accrued service as at 31 December 2013 and a second step based on their service as from 1 January 2014".

STEP 1: ACCRUED SERVICE AS AT 31 DECEMBER 2013

PRINCIPLE: SNAPSHOT AS AT 31 DECEMBER 2013

– In the first step, the notice period is calculated on the basis of service accrued as at 31 December 2013. In principle, this notice period has to be calculated in accordance with the statutory, regulatory and contractual rules that were in force on 31 December 2013. So it is as if a snapshot is taken on 31 December 2013 of the employee’s acquired rights.

Consequently, it is important to take a snapshot for each employee of their (i) status (blue-collar/white-collar employee), (ii) length of service and (iii) remuneration package as at 31 December 2013. Subsequently, in the event of a possible termination, all these elements will be determinative for the calculation of the first part of the notice period. Whenever a white-collar employee with a remuneration package around the threshold between lower/higher earning white-collar employees (ie € 32,254) is involved, it is important for the employer to thoroughly document the remuneration package as it existed on 31 December 2013, in order to avoid future discussions as to which category the affected employee fell under on 31 December 2013.
SNAPSHOT BASED ON THE RULES APPLICABLE ON 31 DECEMBER 2013 – The first part of the notice period is, as mentioned, determined in accordance with the statutory, regulatory and contractual rules that were applicable on 31 December 2013.

In practice this means the following:

– For blue-collar employees whose employment agreement commenced before 1 January 2012, these are the statutory notice periods set out in article 59 of the Law on Employment Agreements or an exception from these notice periods that existed on 31 December 2013 (on the basis of article 61 of the Law on Employment Agreements), or a regime that is more beneficial (for the employee) which existed on 31 December 2013 at the sector, company or individual level.

– For blue-collar employees whose employment agreement commenced on or after 1 January 2012, these are the statutory “IPA” notice periods set out in article 65/2 of the Law on Employment Agreements or an exception to these notice periods that existed on 31 December 2013 (on the basis of article 65/3 of the Law on Employment Agreements), unless a more beneficial regime (in respect of the employee) existed on 31 December 2013 at the sector, company or individual level.

– For lower earning white-collar employees (ie white-collar employees whose annual salary was equal to or lower than € 32,254 on 31 December 2013), these are the statutory minimum periods, in other words 3 months per commenced 5-year period of service, unless a more beneficial regime (for the employee) existed on 31 December 2013 at the sector, company or individual level.

EXCEPTION FOR HIGHER EARNING WHITE-COLLAR EMPLOYEES – For higher earning white-collar employees, there is an exceptional rule. Higher earning white-collar employees are white-collar employees whose annual salary was higher than € 32,254 on 31 December 2013. For them, the first part of the notice period is fixed. This is because the rules that were in force on 31 December 2013 referred to a notice period that was to be fixed by the parties by agreement or by the judge.

LUMP SUM: 1 MONTH PER YEAR’S SERVICE – More specifically, the first part of the notice period for higher earning white-collar employees, in case of termination of employment by the employer, is 1 month per commenced year of service, subject to a minimum of 3 months.

Because of this rule, the Claeys formula and other calculation formulas are now no longer relevant.

If on 31 December 2013 a regulation existed at the sector, company or individual level that is more beneficial (for the employee) than the aforementioned rule of 1 month per commenced year of service subject to a minimum of 3 months, that more beneficial regulation must be taken into account.

➤ Art. 68 LUS

“In the first step, a snapshot is taken based on the rules that applied on 31 December 2013, albeit with some exceptions.”
AMBIXITY IN THE EVENT OF A SPECIFIC REASON FOR DISMISSAL OR ONGOING TRIAL PERIOD ON 31 DECEMBER 2013 – One of the main areas of ambiguity in the LUS is the question of which notice period must be applied during the first step if there is a specific reason for the dismissal. Do the general notice periods always have to be applied during the first step or do the specific notice periods have to be taken into account in the event of termination because of a specific reason?

For example, it is not clear how the snapshot should be taken in the following situations:

– Dismissal with a view to SUC: In determining the first step in the event of a dismissal with a view to SUC, does one have to take into account any reduced notice periods that may have been provided at the sector level on 31 December 2013?

– Dismissal in the context of a restructuring: For the determination of the first step in the event of a dismissal in the context of a restructuring, do the general notice periods need to be taken into account or any exceptional terms that may have been provided at sector or company level on 31 December 2013?

A similar question arises if a trial period was running on 31 December 2013. If the white-collar employee is dismissed after the end of the term of the trial period and their dismissal rights consequently need to be determined on the basis of the 2-step-calculation, how does the first step need to be completed? Does one need to take into account the general notice period that applied to the affected employee on 31 December 2013, or rather the reduced notice period that applied to a dismissal during the trial period?

In any event, it would be useful if the legislator addressed this.

WHAT ABOUT TERMINATION CLAUSES? – Based on a literal reading of the LUS, the rule of 1 month per commenced year of service subject to a minimum of 3 months also applies to those higher earning white-collar employees whose employment agreement contains a valid termination clause (in which the notice period was agreed upon on the basis of article 82, § 5 of the Law on Employment Agreements). On this issue, the Council of State noted the objection that this detracts from the acquired rights of those employees.

Nevertheless, it appears from the preparatory works (as amended after the advice of the Council of State) that it is still the legislator’s intention to enforce validly concluded termination clauses.

In this sense, the preparatory works state that one must take into account the legitimate expectations of the parties whose employment agreement was entered into and performed before 1 January 2014. A legitimate expectation entails, according to the preparatory works, that clauses agreed upon will be respected. Hence, the conclusion in the preparatory works is that all valid clauses existing on 31 December 2013 will remain unchanged and that the rights for past service will be determined on the basis of these clauses.

Elsewhere in the preparatory works it can be read that, following the Council of State’s advice, it was decided that those agreements that are in force on 31 December 2013 will remain in force, irrespective of whether the notice period determined in the agreement is more or less beneficial than the one under the new statutory regulation.

However, the text of the LUS was not amended in this respect. Therefore, it remains to be seen which position the labour courts will follow.
STEP 2: SERVICE ACCRUED AS FROM 1 JANUARY 2014

COUNTER RESET TO ZERO – In the second step, the second part of the notice period is calculated in accordance with the service that is accrued as from 1 January 2014. For the calculation of the second part of the notice period, the service counter is reset to zero and starts running again on 1 January 2014.

APPLY BASIC TERMS – The second part of the notice period has to be calculated in accordance with the statutory or regulatory rules that are in force at the moment notice of termination is given.

Consequently, the new notice periods referred to in section 3.1 (ie the basic terms) have to be applied to the service accrued as from 1 January 2014.

It must be assumed that if there is a more beneficial regulation (for the employee) at the company or individual level, those more beneficial terms count rather than the basic terms.

➤ Art. 69 LUS

Below, we give a couple of examples in which the 2-step-calculation has been applied to a specific case.

EXAMPLE 1

Performance of the employment agreement of a white-collar employee whose remuneration was not higher than € 32,254 on 31 December 2013 commenced on 1 July 2010. The employer gives notice of termination in September 2016.

- On 31 December 2013 the white-collar employee was in his 4th year of service with this employer. If he were to have been dismissed at that moment, he would have been entitled to 3 months’ notice, in accordance with article 82, § 2 of the Law on Employment Agreements. The first part of his notice period is accordingly 3 months.
- As from 1 January 2014, a new period of service started running. Consequently, at the time of his dismissal in September 2016, the white-collar employee will be in his 3rd year of service, counting as from the introduction of the new dismissal rules. Based on the new rules regarding notice periods, the second part of his notice period equals 12 weeks.
- When dismissing this employee in September 2016, the employer consequently must observe a (total) notice period of 3 months plus 12 weeks.
EXAMPLE 2

A blue-collar employee whose employer falls under joint committee n° 116 for the chemistry industry has been employed since 1 January 2010 and will be dismissed by his employer in November 2017.

– On 31 December 2013 the blue-collar employee was in his 4th year of service with this employer. The first part of his notice period equals 42 days in accordance with the royal decree of 26 January 2010 that, on the basis of article 61 of the Law on Employment Agreements, regulates the notice periods of blue-collar employees in the chemistry industry.

– As from 1 January 2014, a new period of service started running. At the moment of his dismissal in November 2017, the employee is in his 4th year of service, counting as from the introduction of the new dismissal rules. On the basis of the new rules regarding notice periods, the second part of his notice period equals 13 weeks.

– When dismissing this employee in November 2017, the employer must observe a (total) notice period of 42 days plus 13 weeks, or 19 weeks in total.

“In the second step the service counter is reset to zero on 1 January 2014 and the new terms are henceforth applied.”

AGREEMENT STARTED < 1/1/2014 – TERMINATION OF EMPLOYMENT BY ER – BASIC RULES

<table>
<thead>
<tr>
<th>Employment agreement started &lt; 1/1/2012</th>
<th>Employment agreement started ≥ 1/1/2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blue-collar EE</td>
<td>White-collar EE</td>
</tr>
<tr>
<td>Lower earning white-collar EE (&lt; €32,254 on 31/12/2013)</td>
<td>Higher earning white-collar EE (&gt; €32,254 on 31/12/2013)</td>
</tr>
</tbody>
</table>

Concerning service < 1/1/2014

Terms as at 31/12/2013 (*)
- OR a more beneficial regime (for EE)
- Individual
- Company
- Sector

Concerning service ≥ 1/1/2014

Basic terms under unified status (see table on page 8)
- OR a more beneficial regime (for EE)
- Individual
- Company
- Sector

(*) art. 59 Law on Employment Agreements or existing deviation on 31/12/2013
(**) art. 65/2 Law on Employment Agreements or existing deviation on 31/12/2013
(***) Issue contractual clause on the basis of art. 82 § 5 Law on Employment Agreements

© Allen & Overy LLP 2014
4.1.2 Resignation by the employee

To determine the notice period that has to be observed by the employee, the 2-step-calculation must also be applied.

**STEP 1: ACCRUED SERVICE AS AT 31 DECEMBER 2013**

**PRINCIPLE: SNAPSHOT AS AT 31 DECEMBER 2013**
- In the first step, the notice period is calculated on the basis of the service accrued as at 31 December 2013.

**SNAPSHOT BASED ON THE RULES APPLICABLE ON 31 DECEMBER 2013**
- The first part of the notice period is, in principle, determined in accordance with the statutory, regulatory and contractual rules that were applicable on 31 December 2013.

In practice this means the following:

- For blue-collar employees whose employment agreement commenced before 1 January 2012 these are the statutory notice periods of article 59 of the Law on Employment Agreements or an exception from these notice periods that existed on 31 December 2013 (on the basis of article 61 of the Law on Employment Agreements), or a regime that is more beneficial (for the employee) which existed on 31 December 2013 at the sector, company or individual level.

- For blue-collar employees whose employment agreement commenced on or after 1 January 2012 these are the statutory “IPA” notice periods set out in article 65/2 of the Law on Employment Agreements or an exception to these notice periods that existed on 31 December 2013 (on the basis of article 65/3 of the Law on Employment Agreements), unless a more beneficial regime (for the employee) existed on 31 December 2013 at the sector, company or individual level.

- For lower earning white-collar employees (ie white-collar employees whose annual salary was equal to or lower than € 32,254 on 31 December 2013), these are the statutory periods set out in article 82, § 2 of the Law on Employment Agreements – in other words 1.5 months per commenced 5-year period of service, subject to a maximum of 3 months – unless a more beneficial regime (for the employee) existed on 31 December 2013 at the sector, company or individual level.

**EXCEPTION FOR HIGHER EARNING WHITE-COLLAR EMPLOYEES**
- For higher earning white-collar employees, there is an exceptional rule (just as there is in the case of a dismissal by the employer). Higher earning white-collar employees are white-collar employees whose annual salary was higher than € 32,254 on 31 December 2013. For those employees, the first part of the notice period is fixed.

More specifically, the first part of the notice period, in the event of termination of the agreement by the employee, is:

- 1.5 months per commenced 5-year period of service, subject to a maximum of 4.5 months for a white-collar employee whose annual salary is not higher than € 64,508; and

- 1.5 months per commenced 5-year period of service, subject to a maximum of 6 months for a white-collar employee whose annual salary is higher than € 64,508.

Although this is less relevant in practice, for completeness we note that if a regulation existed on 31 December 2013 at the sector, company or individual level that was more beneficial for the employee than these rules of 1.5 months’ notice per 5-year period of service, subject to a maximum of 4.5 or 6 months respectively, those more beneficial regulations must be taken into account.

➤ Art. 68 LUS
STEP 2: SERVICE ACCRUED AS FROM 1 JANUARY 2014

COUNTER RESET TO ZERO – In the second step – just as in the event of termination of employment by the employer – the second part of the notice period is calculated taking into account service that is accrued as from 1 January 2014.

APPLY BASIC TERMS – The second part of the notice period has to be calculated in accordance with the statutory or regulatory rules that are in force at the moment notice of termination is given.

Consequently, the new notice periods referred to in section 3.1 (ie the basic terms) must be applied to the service accrued as from 1 January 2014.

For completeness, we also note here that, if there is a more beneficial regulation (for the employee) at the company or individual level, those more beneficial terms must be taken into account rather than the basic terms.

EXCEPTION: APPLY MAXIMA – In the event of termination of employment by the employee, there are 2 limitations to the 2-step-calculation:

– Firstly, the second step of the calculation does not have to be applied whenever the maxima from the first step (namely 3, 4.5 or 6 months respectively) have already been attained on 31 December 2013.

In that case, the maxima from the first step are applicable and the notice period is not extended on the basis of the service accrued as from 1 January 2014.

– In addition, there is an absolute maximum which applies if the maxima from the first step (namely 3, 4.5 or 6 months respectively) have not been attained on 31 December 2013 and the second step of the calculation must consequently be applied.

In that case, the total notice period (ie the sum of the first step and the second step) cannot exceed 13 weeks.

This cap of 13 weeks does not apply if the maxima of the first step have already been attained. If the notice period that is to be respected by the employee based on the first step amounts up to 4.5 or 6 months, that notice period will not be decreased to 13 weeks.

– The FPS ELSD adds a third situation in their commentary* on the LUS, namely if the employee has not attained the maxima from the first step but the notice period to which he or she is entitled equals or is higher than 13 weeks. According to the FPS ELSD, in that case the second step does not have to be applied and only the notice period that follows from the first step has to be applied.

The wording of the LUS however does not make this distinction and states that if the maxima from the first step have not been attained, the second step must be applied, without the sum of the two steps being able to exceed 13 weeks.

* www.werk.belgie.be / www.emploi.belgique.be
EXCEPTION ONLY FOR WHITE-COLLAR EMPLOYEES? – Although the wording of the LUS refers to all situations of termination of employment by the employee (i.e. whether by a white-collar or blue-collar employee), the maxima to which the LUS refers only apply to white-collar employees. It is consequently unclear whether the exceptions previously referred to only apply to white-collar employees, or whether they should also be applied to blue-collar employees and, if so, in what manner. According to the FPS ELSD, the exceptions only apply to white-collar employees.

In view of the various ambiguities, it would be useful if the legislator would further clarify the application of the exceptions.

➤ Art. 69 LUS
EXAMPLE 1
Performance of the employment agreement of a white-collar employee whose salary was not higher than € 32,254 on 31 December 2013 commenced on 1 July 2004. The white-collar employee resigns during the course of September 2016.

– On 31 December 2013 the white-collar employee had accrued 9 years of service. If he were to have terminated his employment agreement on that date, he would have been entitled to 3 months’ notice, which corresponds to the maximum notice period for this category of white-collar employee in accordance with article 82, § 2, third paragraph of the Law on Employment Agreements. The first part of his notice period consequently equals 3 months.

– Since the maximum notice period of 3 months for the employee has already been accrued by 31 December 2013, he does not have to add the notice period for the service accrued between 1 January 2014 and the moment of his resignation in September 2016.

– On his resignation in September 2016, the white-collar employee will have to serve a (single) notice period of 3 months.

EXAMPLE 2
Performance of the employment agreement of a white-collar employee whose salary was higher than € 32,254, but lower than € 64,508 on 31 December 2013 commenced on 1 July 2012. The employee resigns in September 2016.

– This employee is a higher earning white-collar employee for whom the first part of the notice period is fixed. Consequently, the first part of his notice period, calculated in function of the employee’s length of service on 31 December 2013, equals 1.5 months.

– As from 1 January 2014 a new period of service started running. As at the moment of his resignation in September 2016, the employee will be in his third year of service, counting from the introduction of the new dismissal rules. Based on the new rules regarding notice periods, the second part of his notice period equals 6 weeks.

– On his resignation in September 2016, the white-collar employee will have to observe a (total) notice period of 1.5 months plus 6 weeks.
**AGREEMENT STARTED < 1/1/2014 – RESIGNATION – BASIC RULES**

<table>
<thead>
<tr>
<th>Employment agreement started &lt; 1/1/2012</th>
<th>Concerning service &lt; 1/1/2014</th>
<th>+</th>
<th>Terms as at 31/12/2013 (**<em>) (</em>)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blvd-collar EE</td>
<td></td>
<td></td>
<td>Basic terms under unified status (see flowchart on page 8 (**))</td>
</tr>
<tr>
<td>White-collar EE</td>
<td></td>
<td></td>
<td>IPA terms as at 31/12/2013 (**) (*)</td>
</tr>
<tr>
<td>Lower earning white-collar EE (&lt; 82,254 on 31/12/2013)</td>
<td>1.5 months/commenced 5-year period of service, subject to a maximum of 3 months (*)</td>
<td></td>
<td>Only if the limit of the first step (3 months) has not been reached: Basic terms under unified status (see flowchart on page 8 (**))</td>
</tr>
<tr>
<td>Higher earning white-collar EE (&gt; 82,254 and ≤ 854,508 on 31/12/2013)</td>
<td>1.5 months/commenced 5-year period of service, subject to a maximum of 4.5 months (*)</td>
<td></td>
<td>Only if the limit of the first step (4.5 months) has not been reached: Basic terms under unified status (see flowchart on page 8 (**))</td>
</tr>
<tr>
<td>Superior earning EE (&gt; 854,508 on 31/12/2013)</td>
<td>1.5 months/commenced 5-year period of service, subject to a maximum of 6 months (*)</td>
<td></td>
<td>Only if the limit of the first step (6 months) has not been reached: Basic terms under unified status (see flowchart on page 8 (**))</td>
</tr>
</tbody>
</table>

**Concerning service ≥ 1/1/2014**

- Basic terms under unified status (see flowchart on page 8 (**))
- Basic terms under unified status (see flowchart on page 8 (**))
- Basic terms under unified status (see flowchart on page 8 (**))
- Basic terms under unified status (see flowchart on page 8 (**))

**Concerning service ≥ 1/1/2014**

- Terms as at 31/12/2013 (***) (*)
- IPA terms as at 31/12/2013 (**) (*)
- 1.5 months/commenced 5-year period of service, subject to a maximum of 3 months (*)
- 1.5 months/commenced 5-year period of service, subject to a maximum of 4.5 months (*)
- 1.5 months/commenced 5-year period of service, subject to a maximum of 6 months (*)

**Specific reason**

Possible application of termination without compensation in the event of temporary unemployment

(*) or a more beneficial regime (for EE) at the individual, company or sector level
(****) or a more beneficial regime (for EE) at the individual or company level
(****) art. 65 Law on Employment Agreements or deviation existing on 31/12/2013
(****) art. 65 Law on Employment Agreements or deviation existing on 31/12/2013

www.allenovery.com
4.2 Exceptional sectors

APPLICATION OF EXCEPTIONAL REGIMES –
As an exception to the general rule of the 2-step-calculation, there is an exceptional regime for blue-collar employees who work in the so-called Exceptional Sectors. The exceptional regimes described in section 3.2 apply to those blue-collar employees.

As previously stated, the FPS ELSD is of the opinion that the application of this exceptional regime needs to be judged individually. Consequently, the regime is not necessarily applicable to all blue-collar employees working in the Exceptional Sectors (see section 3.2).

STRUCTURAL EXCEPTION – The 2-step-calculation does not apply to blue-collar employees falling under the structural exception. In those cases, the exceptional (shorter) periods referred to in section 3.2 apply, even if their employment agreement started before 1 January 2014.

TEMPORARY EXCEPTION – The exceptional (shorter) periods referred to in section 3.2 apply to those blue-collar employees falling under the temporary exception, even if their employment agreement started before 1 January 2014, if their notice is given between 1 January 2014 and 31 December 2017. If notice is given after 31 December 2017, their notice period needs to be determined according to the previously mentioned 2-step calculation.

➤ Art. 70 LUS

4.3 Special terms

APPLICATION OF SPECIAL TERMS AFTER APPLICATION OF 2-STEP CALCULATION –
The special terms in the event of termination of employment with a view to retirement, SUC or during a period of temporary unemployment (as referred to in section 3.3), can also be applied to employees whose employment agreement started before 1 January 2014.

For example, this means that the maximum period of 26 weeks in the event of termination with a view to retirement or the reduction to a minimum period of 26 weeks in the event of termination with a view to SUC, can apply to the result of the 2-step calculation.

➤ Art. 37/6, 37/11 and 37/7 Law on Employment Agreements
4.4 Special situations

Finally, in addition to the general transitional rules for employment agreements started before 1 January 2014, there are also some specific transitional rules for on-going trial period clauses, for blue-collar employees with less than 6 months’ service and for collective dismissals with a social plan agreed upon before 2014.

4.4.1 On-going trial period

OLD RULES STILL APPLY – As explained in section 10, the notion of a trial period has been abolished (except for in agreements for students and for temporary labour and temporary agency work).

However, any trial period in an employment agreement whose performance started before 1 January 2014 retains its effects until the end of that trial period.

If a dismissal occurs on the basis of such a trial period clause during the trial period, the dismissal is governed by the rules on dismissal during a trial period that were in force on 31 December 2013.

➤ Art. 71 LUS

RELEVANCE FOR 2-STEP CALCULATION? – As regards the relevance of a trial period in force on 31 December 2013 in relation to the 2-step calculation (in the event of dismissal after the trial period), we refer to section 4.1.1 on page 18.

4.4.2 Deviating clause for blue-collar employees with less than 6 months’ service

CLAUSE RETAINS CONSEQUENCES – Before 1 January 2014, parties could contractually agree on a shorter notice period (of at least 7 days) for blue-collar employees with less than 6 months’ service. These shorter notice periods can no longer be agreed upon after 1 January 2014, but if such clauses are included in an employment agreement whose performance started before 1 January 2014, their consequences are retained (obviously only until the blue-collar employee has accrued 6 months’ service).

➤ Art. 72 LUS

4.4.3 Collective dismissal

OLD RULES REMAIN IN FORCE – The old rules remain in force for certain collective dismissals which were negotiated before 1 January 2014, but where individual dismissals are only carried out at a later date.

The following 2 conditions need to be met:

– the employee is subject to a collective dismissal announced (in the sense of article 66, § 2, first paragraph of the Renault Law) on or before 31 December 2013; and

– the employee is subject to a CLA (social plan) which was deposited at the clerk’s office of the General Management of Collective Labour Relations of the FPS ELSD on or before 31 December 2013.

If these conditions are met, the notice period must be fixed on the basis of the legal, regulatory and contractual rules in force as at 31 December 2013.

➤ Art.73 LUS
**AGREEMENT STARTED < 1/1/2014 – TERMINATION OF EMPLOYMENT BY ER – OVERVIEW**

- **Trial period clause in employment agreement and trial period still running?**
  - Yes: Rules on dismissal during trial period as at 31/12/2013
  - No:
    - **Blue-collar EE < 6 months' service and deviating notice period in employment agreement?**
      - Yes: Deviating term remains applicable
      - No:
        - Collective dismissal for which social plan (CLA) has been registered ≤ 31/12/2013?
          - Yes: Rules on dismissal as at 31/12/2013
          - No:
            - **ER is part of Exceptional Sector + EE is blue-collar EE?**
              - Yes: Exceptional terms (see flowchart on page 11)
              - No: Basic rules (see flowchart on page 20)

(*) or a more beneficial regime (for EE) at the individual, company or sector level
AGREEMENT STARTED < 1/1/2014 – RESIGNATION – OVERVIEW

Trial period clause in employment agreement and trial period still running?

- Yes: Rules on termination of employment during trial period as at 31/12/2013
- No

Blue-collar EE < 6 months’ service and deviating notice period in employment agreement?

- Yes: Deviating term remains applicable
- No

ER is part of Exceptional Sector + EE is blue-collar EE?

- Yes: Exceptional terms (see flowchart on page 11) (*)
- No

Basic rules (see flowchart on page 25)

Notice period ≤ 31/12/2017?

- Yes
- No

(*) or a more beneficial regime (for EE) at the individual, company or sector level
5. Start of notice period

STARTS ON A MONDAY – The notice period starts on the Monday following the week during which the notice was notified.

➤ Art. 37/1 Law on Employment Agreements

FORMAL REQUIREMENTS REMAIN UNCHANGED
– There are no other changes to the formal requirements or to the mandatory statements in the notice letter. A notice letter sent by registered mail still comes into force on the third working day after the day it was sent. Saturdays are considered to be working days. This means that for the dismissal to come into force on a Monday, the registered letter needs to be sent on or before the Wednesday of the preceding week (insofar as there is no legal holiday during the relevant period).

➤ Art 37 Law on Employment Agreements

“The notice period starts on the Monday following the week in which notice was given.”
6. Length of service

SOLE CRITERION – As explained before, length of service is now the only criterion used to determine the length of the notice period.

SAME COMPANY – Length of service means the period during which the employee was employed by the same company without any interruption. “The same company” refers to “the technical business unit constituting the company” (according to the parliamentary works).

TIME AS TEMPORARY AGENCY WORKER ALSO COUNTS – If notice is given by the employer, any previous employment period as a temporary agency worker with the same employer needs to be taken into account in calculating the length of service, subject to a 1 year maximum. This service as an agency worker can only be taken into account if the following conditions are met:

– the employment recruitment must follow immediately (or with an interruption of no more than 7 days) after the temporary agency period; and

– the employee’s position at the employer needs to be identical to that performed as a temporary agency worker.

Any period of inactivity of 7 days or less counts as a period of employment as a temporary agency worker.

➤ Art. 37/4 Law on Employment Agreements
7. Compensation in lieu of notice (calculation basis)

**BASIC PRINCIPLE** – If an employment agreement is terminated without serious cause and without taking into account the applicable notice period, compensation in lieu of notice is due. This compensation is calculated on the basis of the employee’s salary and benefits acquired in accordance with the employment agreement.

**MONTHLY SALARY X 3/13** – The compensation in lieu of notice is calculated on the basis of the employee’s weekly salary. To determine the weekly salary, the employee’s fixed monthly salary is multiplied by 3 and divided by 13. The formula used to calculate the weekly salary is thus: ‘monthly salary x 3/13’.

**VARIABLE REMUNERATION: AVERAGE OF 12 PRECEDING MONTHS** – If the salary and/or benefits of the employee are wholly or partly variable, one takes the average of the 12 preceding months for the variable part (or, as the case may be, only that part of the 12 months during which the employee was employed). The parliamentary works refer more specifically to the average of the variable salaries and/or benefits which can be rightfully claimed for payment during the 12 months preceding the dismissal.

➤ Art. 39, § 1 Law on Employment Agreements
8. Fixed-term employment agreement or agreement for clearly-defined project

The possibilities for terminating a fixed-term employment agreement or an agreement for a clearly-defined project have also been substantially modified.

8.1 Agreement entered into before 1 January 2014

NO POSSIBILITY TO GIVE NOTICE – Fixed-term employment agreements and agreements for a clearly-defined project entered into before 1 January 2014 cannot be terminated early. So in principle both parties must stick to the agreed duration.

COMPENSATION IF EARLY TERMINATION IS NEVERTHELESS INVOKED – If one of the parties nevertheless proceeds towards an early termination of the agreement, that party must pay compensation in lieu of notice. The compensation due equals the employee’s remuneration for the period until the agreed end date of the agreement, subject to a maximum of double the remuneration for the duration of the notice period which would have applied if the agreement had been of indefinite duration.

➤ Art. 40, § 1 Law on Employment Agreements; Art. 113 LUS

8.2 Agreement entered into on or after 1 January 2014

COMPENSATION IN EVENT OF EARLY TERMINATION – For fixed-term employment agreements and agreements for a clearly-defined project entered into on or after 1 January 2014, the starting point is the same as that applicable to agreements entered into before 1 January 2014. This means that, in principle, the agreements cannot be terminated prematurely, and if that were nevertheless to happen, the compensation referred to in section 8.1 would be due.

➤ Art. 40, § 1 Law on Employment Agreements

POSSIBILITY TO TERMINATE DURING REFERENCE PERIOD – By way of derogation from this principle, it is possible to terminate an agreement during a defined fixed period upon respecting a notice period. This possibility to give notice exists during the first half of the agreed duration of the agreement, provided that period does not exceed 6 months. This period is referred to below as the Reference Period.

➤ Art. 40, § 2, first subparagraph Law on Employment Agreements
APPLICATION OF BASIC TERMS – The notice periods to be respected if this possibility to give notice is applied are the basic terms referred to in section 3.1.

➤ Art. 40, § 2, second subparagraph Law on Employment Agreements

NOT FOR SUCCESSIVE AGREEMENTS – If successive fixed-term employment agreements or agreements for clearly-defined projects are entered into, the possibility to give notice can only be applied to the first agreement.

➤ Art. 40, § 3 Law on Employment Agreements

REFERENCE PERIOD IS NOT SUSPENDED – The parliamentary works specify that the Reference Period is a fixed period and therefore cannot be suspended. This means that the Reference Period continues to run during any suspension of the employment agreement. This is unlike the notice period itself, which can be suspended.

The Reference Period starts to run when the employment agreement is first performed or should normally be performed. In practice this means as follows:

**Example 1:**

The employment agreement is entered into on 5 January 2014 for a fixed term of 1 year. The agreed date of execution is 5 January 2014 and the agreement is also actually performed with effect from 5 January 2014. In this case, the Reference Period during which it is possible to give notice will start to run on 5 February 2014 and end 6 months later on 4 August 2014.

**Example 2**

The employment agreement is entered into on 5 January 2014 for a fixed term of 1 year. The agreed date of execution is 5 February 2014. However, the employee is sick from 5 February 2014 until 11 February 2014 so that the agreement is only actually performed as from 12 February 2014. In this case as well, the Reference Period will start to run on 5 February 2014 and end on 4 August 2014.

SAME FORMALITIES AS FOR AGREEMENT OF INDEFINITE DURATION –

As regards notice, the rules are the same as those that apply to an agreement of indefinite duration. So the same formalities apply and the period of notice starts to run the Monday following the week during which notice is given.

➤ Art. 40, § 2, third subparagraph Law on Employment Agreements

END OF NOTICE PERIOD DURING REFERENCE PERIOD – An important specification made in the parliamentary works is that the end of the agreement must lie within the Reference Period. In other words, the last day of the notice period must be no later than the last day of the Reference Period.

If the agreement was terminated during the Reference Period by giving a notice period and the employer lets the employee work after the end of the Reference Period, the employee is entitled to compensation in lieu of notice (despite the fact that a notice period has been given and worked out) and without deduction in respect of (the already worked out part of) the notice period. The compensation in lieu of notice which is payable in such case is the compensation due in the event of early termination, as referred to in section 8.1.

It is thus advisable for an employer facing a notice period which should continue to run after the Reference Period to terminate the agreement with immediate effect before the end of the Reference Period. The employer then need only pay the balance of the still remaining part of the notice period.

“Fixed-term employment agreements and agreements for a clearly-defined project entered into on or after 1 January 2014 can be terminated during the first half of the agreed duration of the agreement (up to a maximum of 6 months).”
**TERMINATION WITH IMMEDIATE EFFECT DURING REFERENCE PERIOD** – If the agreement is terminated during the Reference Period without serious cause and without respecting the (entire) applicable notice period, compensation in lieu of notice equal to the employee’s remuneration for a period corresponding to the duration of the notice period which has not been respected (or that part thereof which has not been respected) is due.

> Art. 40, § 2, last subparagraph Law on Employment Agreements

The basis of calculation for this compensation in lieu of notice is defined in the same way as for the termination of employment agreements of indefinite duration (see section 7).

> Art. 40, § 4 Law on Employment Agreements

**FIXED-TERM EMPLOYMENT AGREEMENT OR AGREEMENT FOR A CLEARLY-DEFINED PROJECT (*)**

- Employment agreement entered into before 1/1/2014
  - In principle, no termination possible before agreed end date
  - If, however, early termination

- Employment agreement entered into on or after 1/1/2014
  - Termination possible during reference period (**)
  - Basic terms under unified status (see flowchart on page 8) (***)
  - Reference period = first half of duration of agreement, subject to maximum of 6 months
  - Termination with immediate effect possible during reference period
  - Compensation = remuneration for period of notice – basic terms (see flowchart on page 8) (***)
  - Payment of compensation = remuneration until agreed end date, subject to maximum equal to double of remuneration for period of notice applicable if agreement of indefinite duration

- If notice of termination or end of notice period or termination with immediate effect falls outside reference period

(*) termination of employment by ER or EE

(**) in the event of successive agreements, the possibility to give notice is only valid for the first agreement

(***) or more favourable regime (for EE) at the individual or company level
9. Dismissal in the event of incapacity to work

The Law on Employment Agreements contains 2 particular provisions in relation to incapacity to work due to illness or following an accident.

9.1 Incapacity to work after notice of termination has been given

DEDUCTION OF PERIOD OF GUARANTEED REMUNERATION – If an employee is absent due to incapacity to work after the employee has been given notice, the employer may immediately terminate the agreement upon payment of compensation in lieu of notice. The Law on Employment Agreements now determines that in such case, any period during which the employer has paid the guaranteed remuneration can be deducted from the remaining duration of the notice period. Therefore, in this case, the employer must pay compensation corresponding to the remaining duration of the notice period minus the duration of the period covered by the guaranteed remuneration.

Only for ongoing period of absence due to incapacity to work – A– If several periods of absence due to incapacity to work occur during the notice period, it is only the period of guaranteed remuneration that occurs at the beginning of the period of incapacity during which the employer actually proceeds to termination with immediate effect that can be deducted.

In concrete terms this means as follows:

Example:
The employee is given 30 weeks’ notice starting on 3 February 2014. He gets sick on 10 February for 1 week. A new period of absence due to incapacity to work starts on 24 March for 5 weeks. During this long period of absence due to incapacity to work, the employer decides to terminate the employment agreement with immediate effect. He will pay compensation in lieu of notice corresponding to the remaining period of notice after deduction of the period of guaranteed remuneration paid during that period of absence which started on 24 March. No deduction can be made for the period preceding that absence due to incapacity to work.
NO DEDUCTION IN EVENT OF ABSENCE DUE TO INCAPACITY TO WORK BEFORE TERMINATION – To avoid any misunderstanding, this possibility to deduct the period of guaranteed remuneration only exists if the absence due to incapacity as a result of illness or following an accident occurs after notice has been given. So, this deduction is not possible if the absence due to incapacity occurs before any notice has been given.

VALID REASONS? – The parliamentary works state that as a condition for the application of this system of deduction, the employer must terminate the employment agreement for valid reasons. The meaning of “valid reasons” is not further clarified. The law itself does not refer to a valid reason as a condition.

➤ Art. 37/8 Law on Employment Agreements

9.2 Incapacity to work and fixed-term agreements or agreements for a clearly-defined project

PRINCIPLE: NO COMPENSATION OR LOWER COMPENSATION – If the employee performs the work pursuant to a fixed-term employment agreement or an agreement for a clearly-defined project and is absent due to incapacity caused by illness of following an accident, the employer can, in certain circumstances, terminate the agreement without compensation or with payment of lower compensation.

FIXED-TERM AGREEMENT < 3 MONTHS – If the agreement is entered into for a fixed term of less than 3 months or for a clearly-defined project of which the execution usually requires an employment of less than 3 months, the employer can terminate the agreement without compensation if the absence due to incapacity lasts more than 7 days and provided that the Reference Period (ie the period during which the agreement can be terminated – see section 8.2) has lapsed.

➤ Art. 37/9 Law on Employment Agreements

FIXED-TERM AGREEMENT ≥ 3 MONTHS – If the agreement is entered into for a fixed term of 3 months or more (or for a clearly-defined project of which the execution usually requires an employment of 3 months or more) and the agreed term has not lapsed (or the work covered by the agreement is not realised), the employer can at any time terminate the agreement if the absence due to incapacity lasts more than 6 months.

In this case, compensation equal to the remuneration for the remaining period of the agreed term (or for the period of time that is still needed to execute the work) must be paid, subject to a maximum of 3 months remuneration and subject to deduction of what has been paid to the employee since the beginning of the incapacity to work.

➤ Art. 37/10 Law on Employment Agreements

“If an employee is absent due to incapacity to work after notice has been given, the employer can terminate the employment agreement with immediate effect and deduct the (ongoing) period of guaranteed remuneration from the compensation in lieu of notice.”

© Allen & Overy LLP 2014
INCAPACITY TO WORK (*)

(*) notice given by ER in the event of incapacity to work due to illness or following an accident
(**) or employment agreement for a clearly-defined project of which the execution usually requires less than 3 months
(***) or employment agreement for a clearly-defined project of which the execution usually requires at least 3 months

Incapacity to work after notice has been given

- Fixed-term agreement < 3 months (**)
- Fixed-term agreement ≥ 3 months (***)
- Other situations

Termination with immediate effect possible with payment of compensation
Compensation = remuneration for duration of (remaining) notice period minus duration of (ongoing) period covered by guaranteed remuneration

Termination possible without compensation if > 7 days incapacity and reference period (for termination) has lapsed

Termination possible at any time with payment of compensation if > 6 months incapacity
Compensation = remuneration until the agreed end of the agreement, subject to maximum of 3 months and after deduction of guaranteed remuneration (of ongoing period)

- Normal termination rules
- No deduction of (period of) guaranteed remuneration

Incapacity to work before notice has been given
10. Trial period clause

ABOLISHMENT OF TRIAL PERIOD –
The trial period clause has been abolished. Thus it is no longer possible to agree a trial period.

As regards any trial period clause provided in an employment agreement whose performance started before 1 January 2014, we refer to section 4.4.1.
➤ Art. 28 and 41 LUS

EXCEPTIONS: STUDENTS AND TEMPORARY AGENCY WORKERS – There is however an exception to the deletion of the trial period clause for agreements for students and agreements for temporary labour and temporary agency work. This falls outside the scope of this publication.
➤ Art. 127 Law on Employment Agreements and art. 5 Law on Temporary Agency Work

“The trial period clause has been abolished. Thus it is no longer possible to agree a trial period.”
11. Outplacement

OUTPLACEMENT FOR ALL EMPLOYEES WITH NOTICE PERIOD OF MINIMUM 30 WEEKS – In the context of the modernisation of the rules on termination of employment, the outplacement system is now substantially broader. This modification has been inserted in the Law on Outplacement.

From now on, all employees dismissed for any reason other than for serious cause and who are entitled to a notice period of at least 30 weeks (or compensation in lieu of notice covering a period of at least 30 weeks) are entitled to outplacement support. Thus, there is no condition related to age.

However, this new broadened system under the Law on Outplacement is not applicable to employees falling under the rules on measures to re-activate employees in the event of restructuring. Indeed, these rules already provide (even broader) outplacement support for the affected employees.

➤ Art. 11/1, second subparagraph Law on Outplacement

OUTPLACEMENT CAN BE OFFSET AGAINST LEAVE TO SEARCH FOR NEW JOB OR COMPENSATION IN LIEU OF NOTICE – The outplacement support that must be offered by the employer to those employees entitled to a notice period/compensation in lieu of notice of at least 30 weeks can however be offset by the employer.

– If the employee has been given notice of termination, the time that the employee spends on the outplacement support can be offset against the paid leave that the employee can take to search for a new job (see section 13).

➤ Art. 11/6, § 1 Law on Outplacement

– If the employee is dismissed upon payment of compensation in lieu of notice (or in lieu of the remaining notice), the cost of outplacement can be deducted from the compensation in lieu of notice. The cost of the outplacement support is evaluated as a lump sum equal to 4 weeks’ remuneration. The compensation in lieu of notice due can thus be reduced by 4 weeks’ remuneration.

➤ Art. 11/5, § 1 Law on Outplacement

RIGHT TO CHOOSE UNTIL 2016 – Up to and including 31 December 2015, an employee may choose whether or not to accept the outplacement support. The Law on Outplacement provides that, during that period, the 4 weeks’ remuneration deduction from the compensation in lieu of notice as previously referred to can only occur if the employee accepts a valid outplacement offer and provided that the offer is also actually executed by the employer. If the employee chooses not to accept the offer, the employee is entitled to their full compensation in lieu of notice (but will of course not benefit from outplacement support). After this transitional period, the employee will no longer have that choice. As from 1 January 2016, the cost of outplacement support will thus always be deducted from the compensation in lieu of notice, even if the employee does not accept the outplacement support.

➤ Art. 11/12 Law on Outplacement

“From now on, all dismissed employees who are entitled to a notice period/compensation in lieu of notice of at least 30 weeks are entitled to outplacement support.”
EXISTING 45+ REGULATION CONTINUES TO EXIST – The existing regulation regarding outplacement for employees aged 45 and older – which had already been incorporated in the Law on Outplacement and is further worked out in CLA n° 82 – remains applicable. This regulation is specifically applicable to those older than 45 who do not fall under the new general regulation (because they are not entitled to a notice period/compensation in lieu of notice of at least 30 weeks).

➤ Section 2, Chapter V Law on Outplacement

CONTENTWISE ALMOST UNCHANGED – The qualitative criteria that the outplacement support must meet have almost entirely been taken from CLA n° 82. However, as regards the procedural aspects, there are a few differences in comparison to the regulations in CLA n° 82, for instance regarding the moment when the employer has to make its outplacement offer (a distinction is made according to whether the employment is terminated with actual notice or with compensation in lieu of notice). Moreover, the document in which the employer gives its consent can only relate to the outplacement itself.

➤ Art. 11/7 to 11/10 Law on Outplacement

NO SANCTIONS – It is worth noting that the LUS does not provide any specific sanctions for employees or employers if the outplacement regulations are not applied. This is contrary to the regulation regarding outplacement for employees aged 45 and older, where sanctions can be imposed by the NEO on employees and employers in the event of a breach of the regulations on outplacement.

Based on the general regulation on unemployment benefits, it could be argued that the NEO could impose a temporary suspension of unemployment benefits on employees aged 45 years old or older if they refuse to collaborate with or to accept an offer of outplacement support, whatever the applicable outplacement system. The penalty that the employer has to pay to the NEO is however clearly limited in its scope to the outplacement regulation in CLA n° 82. The NEO has indicated that it will not apply any sanctions, towards neither employees nor employers, under the general outplacement system.

Furthermore, the new regulation provides that employees who are dismissed with a payment of compensation in lieu of notice may recover, in certain circumstances, their entitlement to the 4 weeks’ remuneration deducted from the compensation in lieu of notice (for instance in the event of an invalid offer).

➤ Art. 11/11 Law on Outplacement
OUTPLACEMENT

Measures to re-activate employees in event of restructuring applicable?

- Yes → Rules on measures to re-activate employees in event of restructuring
- No →

EE entitled to a notice period or compensation in lieu of notice of at least 30 weeks?

- Yes → Entitled to outplacement support – Law 5/9/2001 (Sect. 1)
- No →

EE aged 45 or older?

- Yes → Entitled to outplacement support – CLA n° 82
- No → Not entitled to outplacement support, unless otherwise provided for in individual, company or sector arrangement.

Outplacement support offset against:
- leave to search for new job; or
- 4 weeks of compensation in lieu of notice

Until 1/1/2016: EE has right to choose deduction only if outplacement accepted

Entitled to outplacement support offset against leave to search for new job
12. Measures designed to increase employability

DEVELOPMENT OF MEASURES BY SECTORS BY 2019 – In addition to broadening the outplacement regulations, the legislator has entrusted the sectors with the development of measures designed to increase employability of employees in the labour market.

For each branch of industry, a package of measures designed to increase employability has to be worked out in the joint committee or sub-committee by 1 January 2019 at the latest. Each sector can determine the content of these measures itself. These can, for instance, consist of an outplacement programme, the granting of the time needed to follow targeted training courses and a financial contribution towards the cost thereof, the granting of the time needed to draw up a career path and the active cooperation of the employer towards making an inventory of the skills of the employee, etc.

INCORPORATION IN DISMISSAL PACKAGE – The aim is that by January 2019, those employees entitled to a notice period/compensation in lieu of notice of at least 30 weeks will receive a dismissal package of which (i) 2/3 consists of a notice period or compensation in lieu of notice and (ii) 1/3 consists of measures that promote employability. However, the notice period/compensation in lieu of notice part can never be less than 26 weeks.

If, for instance, an employee is entitled to a notice period of 39 weeks, the notice period or compensation in lieu of notice should be equal to 26 weeks and measures to promote employability should complete the package for the remaining 13 weeks.

SPECIAL SOCIAL SECURITY CONTRIBUTION BY WAY OF SANCTION – To encourage the sectors, if such measures designed to increase employability do not exist or are not applied, a set penalty in the form of an additional social security contribution must be borne partly by the employer and partly by the employee.

This contribution is due if, after 1 January 2019, an employee entitled to at least 30 weeks’ notice/compensation in lieu of notice is dismissed without application of the measures designed to increase employability. The special contribution amounts to 1% for the employee and 3% for the employer. It must be calculated on the remuneration paid during that part of the notice period that represents 1/3 of the dismissal package and that must, in any event, exceed 26 weeks or on the corresponding part of the compensation in lieu of notice.

➤ Art. 38, § 3quaterdecies Law on General Principles of Social Security

➤ Art. 39ter Law on Employment Agreements
13. Leave to search for new job

**ABSENCE TO SEARCH FOR NEW JOB** – During the notice period, the employee is entitled to be absent from work, with full pay, in order to search for a new job.

**LENGTH OF LEAVE DEPENDS ON WHETHER OR NOT OUTPLACEMENT SUPPORT** – The length of the leave to search for a new job differs depending on whether or not the employee is entitled to outplacement support.

- If the employee is entitled to outplacement support (based on the Law on Outplacement – see section 11), he or she is entitled to take 1 day per week (or 2 half days per week) of leave to search for a new job during the whole notice period.

- Otherwise, the employee is only entitled to 1 day per week (or 2 half days per week) during the last 26 weeks of the notice period and to one half day per week during the period prior to those last 26 weeks of the notice period.

**PRO RATA FOR PART-TIME EMPLOYEES** – The same rules apply to part-time employees, however adjusted proportionally to the length of their working hours.

➤ Art. 41 Law on Employment Agreements

---

**LEAVE TO SEARCH FOR NEW JOB**

- Entitled to outplacement support (~ Law 5/9/2001 (Sect. 1) or CLA n° 82)?
  - Yes: 1 day/week (or 2 half days/week) during entire notice period
  - No:
    - During last 26 weeks of notice period: 1 day/week (or 2 half days/week)
    - During period prior to last 26 weeks of notice period: 0.5 day/week

- Pro rata for part-time EE
 Until recently, different regulations applied to blue-collar employees and white-collar employees in terms of protection against unfair dismissal.

For blue-collar employees, the arbitrary dismissal regime (de regeling van het willekeurig ontslag/le régime du licenciement abusif) applied.

For white-collar employees, no legal regulation existed, but in practice the concept of abuse of rights (rechtsmisbruik/abus de droit) was used.

In the context of the deletion of the difference between blue-collar employees and white-collar employees in this area and the broader reform of the rules on termination of employment, the legislator asked the social partners to work out a uniform regulation regarding the duty to give reasons for dismissal. This agreement was worked out in a CLA concluded within the National Council of Labour, more precisely CLA n° 109.

**DELETION OF ARBITRARY DISMISSAL AS FROM 1 APRIL 2014** – The current arbitrary dismissal regime for blue-collar employees will be deleted as from 1 April 2014. For employees contractually employed in the public sector, this will happen as from the entry into force of a regulation similar to CLA n° 109.

**RIGHT TO KNOW REASONS FOR DISMISSAL** – A dismissed employee has a right to be informed by their employer of the concrete reasons for their dismissal.

In that regard, the employee must submit a request to the employer by registered letter within 2 months after the end of the employment agreement. If the employment agreement was terminated with a notice period, the employee must submit its request to the employer within 6 months after notice was given, without however exceeding 2 months after the end of the employment agreement.

The employer must communicate to the employee the concrete reasons for the dismissal within 2 months after receipt of the registered letter, unless the employer has already done so in writing of its own volition. This must be sent by registered letter.

As regards the content of the employer’s letter, it is merely stated that the letter must contain those elements which allow the employee to know the concrete reasons that have led to their dismissal.

This rule does not apply in the event of dismissal for serious cause.

**DUTY TO GIVE REASONS FOR DISMISSAL** – The new rules on the duty to give reasons for dismissal consist of two core ideas:

- A dismissed employee has the right to know the concrete reasons that have led to their dismissal.
- An employee that is the victim of a manifestly unfair dismissal is entitled to compensation.
FINE FOR NOT (CORRECTLY) INDICATING REASONS FOR DISMISSAL – An employer that does not communicate the reasons for dismissal or that does not comply with the formalities, must pay a lump sum civil fine to the employee, equal to 2 weeks of the employee’s salary.

➤ Art. 2, § 4 and art. 4-7 CLA n° 109

MANIFESTLY UNFAIR DISMISSAL – If the employee has manifestly been unfairly dismissed, the employer will need to pay compensation to that employee. CLA n° 109 defines a manifestly unfair dismissal as the dismissal of an employee, employed for an indefinite duration, based on reasons that do not relate to the suitability or the conduct of the employee or that do not relate to the functioning needs of the company, the institution or service and which a normal and reasonable employer would not ever decide on.

It concerns a ‘marginal review’, meaning that the employer’s discretion must be respected and the employer’s policy options (ie the choices between different policy alternatives) is not being assessed.

The assessment of the unfairness does not relate to the circumstances of the dismissal, but relates solely to the reasons for dismissal.

LUMP SUM COMPENSATION FOR MANIFESTLY UNFAIR DISMISSAL – The compensation that is due from the employer in the event of a manifestly unfair dismissal amounts to a sum equal to between 3 weeks and 17 weeks’ salary. The extent of the compensation depends on the severity of the unfairness of the dismissal.

The compensation cannot be accumulated with any other compensation that is owed by the employer upon termination of the employment agreement, with the exception of a payment in lieu of notice, non-compete payment, an eviction payment or a complementary payment that is paid on top of any social benefits.

The compensation may be accumulated with the lump sum civil fine equal to 2 weeks’ salary that is due if the employer does not communicate the reasons for dismissal or does not comply with the formalities.

ALTERNATIVE: COMPENSATION FOR PROVEN ACTUAL DAMAGE – In the case of a manifestly unfair dismissal, the employee may also choose to claim compensation for the actual damage suffered in accordance with the general rules, instead of opting for the lump sum liquidated damages equal to between 3 and 17 weeks. In that case, the employee will need to prove the actual damage suffered (as was the case under the old rules if a white-collar employee invoked the legal concept of abuse of rights).

In certain cases, the employee may also rely on the rules on compensation for damage determined by other regulations.
SHARED BURDEN OF PROOF – In the event of a dispute, the burden of proof between the employer and employee is as follows:

– If the employer has communicated the reasons for dismissal correctly, the burden of proof lies upon the party that claims a certain thing or fact.

– If the employer has not communicated the reasons for dismissal correctly, the employer must prove the reasons which demonstrate that the dismissal was not manifestly unfair.

– If the employee has not submitted a request to know the reasons for its dismissal or has not complied with the formalities thereto, the employee must prove those elements that indicate the manifest unfairness of the dismissal.

➤ Art. 10 CLA n° 109

EXCLUSIONS – The rules on the duty to give reasons for dismissal do not apply to employees that are:

– dismissed during the first 6 months of employment (where the period of employment under a prior and consecutive fixed-term employment agreement or a temporary agency work agreement in an identical function and with the same employer is also taken into account);

– dismissed during a temporary agency work agreement or a student employment agreement;

– dismissed with a view to SUC;

– dismissed with a view to terminate an employment agreement of indefinite duration as of the first day of the month following the month in which the employee reaches the statutory age for retirement;

– dismissed as a result of a definitive cessation of the activity;

– dismissed in the context of a collective dismissal or closure of the undertaking;

– the subject of a dismissal for which the employer must comply with a specific dismissal procedure as determined by law or by a CLA (such as for example for employee representatives in the works council or the health and safety committee; health and safety advisors; etc); or

– the subject of a multiple redundancy due to a reorganisation, as defined at sector level.

There is thus no duty to give reasons for these dismissals. Of course the employer will need to be able to provide sufficient proof if the employee were to claim that the stated reasons for dismissal (eg dismissal with a view to SUC) are not the real reasons for dismissal or were otherwise to challenge the dismissal.

The rules on manifestly unfair dismissal also do not apply to the aforementioned dismissals. Furthermore, the previous rules on arbitrary dismissal do not apply to these dismissals. Employees that find themselves in one of the aforementioned circumstances may, however, invoke the general rules if they believe their dismissal to be unfair.

➤ Art. 2, § 2 and § 3 CLA n° 109
EXCEPTION FOR BLUE-COLLAR EMPLOYEES IN EXCEPTIONAL SECTORS – A final exception concerns blue-collar employees that are employed in the so called Exceptional Sectors and that fall within the application of the exceptional (shorter) notice periods (see sections 3.2 and 4.2).

– The new rules on the duty to give reasons for dismissal are not applicable to blue-collar employees that fall within the scope of the structural exception regime. For those blue-collar employees, the previous rules regarding arbitrary dismissal will still apply (in full and without any time limit).

– For blue-collar employees that fall within the scope of the temporary exception regime, the previous rules on arbitrary dismissal will apply until 31 December 2015. However, as from 1 January 2016, those blue-collar employees will fall within the new rules on giving reasons for the dismissal.

Also on this point, it is thus relevant to know whether the application of the exception regimes must be assessed at the sector level or at an individual level (see sections 3.2 and 4.2).
The aforementioned regulation on arbitrary dismissal, which remains thus applicable to some blue-collar employees, remains unchanged. This means, amongst others, the following:

– An arbitrary dismissal is a dismissal of an employee that is employed for an indefinite term, for reasons that do not relate to the suitability or the conduct of the employee or that do not relate to the necessities regarding the functioning of the company, the institution or service.

– In the event of a dispute, the employer will need to prove the invoked reasons for dismissal.

– In the event of an arbitrary dismissal, the employer must pay compensation equal to 6 months’ salary.

➤ Art. 2, § 5 and art. 11 CLA n° 109
➤ Art. 63 Law on Employment Agreements

WITH EFFECT FROM 1 APRIL 2014 – CLA n° 109 enters into force on 1 April 2014 for dismissals implemented or notified from that date onwards.

➤ Art. 12 CLA n° 109
15. Re-activation compensation

Another change that has been implemented by the LUS concerns the ‘re-activation compensation’. This is compensation that an employer that is placed in a restructuring situation and that implements a collective dismissal must pay to those employees that are dismissed in the framework of that restructuring and that comply with certain conditions.

**CORRELATION WITH PAYMENT IN LIEU OF NOTICE** – This re-activation compensation replaces, in whole or in part, the payment in lieu of notice that is granted if the employer terminates the agreement with a payment in lieu of notice.

➤ Art. 36 Law on the Generation Pact

**RECOVERY OF SUPPLEMENTARY COST FROM NEO** – If the cost of the re-activation compensation exceeds the total cost of the payment in lieu, from now on the employer may, for all employees, recover the supplementary cost from the NEO.

➤ Art. 38 Law on the Generation Pact
The reform of dismissal rules in Belgium | 2014
16. Compensatory measures

The new dismissal rules are the result of a delicate compromise between employees and employers. In order to find a balance between, on the one hand, the objective of bringing the notice periods of blue-collar and white-collar employees closer together and, on the other hand, limiting the increase in the dismissal costs for employers, the government has provided a number of compensatory measures. These compensatory measures will be explained in this section 16.

16.1 Dismissal compensation payment and dismissal allowance

INTEGRATION OF CURRENT AGREEMENT BLUE-COLLAR EMPLOYEE IN NEW立法 – As explained in section 4, the notice period for blue-collar employees with service accrued partially before and partially after 2014 will be calculated partially according to the old rules (ie with respect to service accrued before 2014) and partially according to the new legislation (ie with respect to service accrued as from 2014).

However, the legislator wanted to ensure that blue-collar employees do not continue to experience the “disadvantageous” treatment of service accrued before 2014. It wanted to ensure that blue-collar employees with an on-going employment agreement would gradually be integrated under the new legislation in respect of their entire period of service.

To achieve this objective, without further increasing the cost for the employer, compensatory measures have been put in place which are funded by the NEO.

HOW? COMPENSATION BY NEO – The compensatory measures mean that those blue-collar employees whose notice period is partially calculated based on the old regulations will receive, upon meeting certain conditions, compensation from the NEO in the form of a supplement on top of what they will receive from their employer.

This compensation can be provided in two different ways, ie either:
– a dismissal compensation payment; or
– a dismissal allowance.

The dismissal allowance already existed. It was introduced by the IPA Law as the successor to the ‘crisis premium’. The dismissal compensation payment is a new form of compensation.

Both the dismissal compensation payment and the dismissal allowance are forms of compensation which are paid directly to the employee by the NEO. The employee must file an application to obtain them (via a payment institution of a union or via a fund for unemployment compensation). No intervention by the employer is required.

WHO IS ENTITLED TO WHAT? – The systems of dismissal compensation payments and dismissal allowances are in principle only relevant for any blue-collar employees whose employment agreement started before 1 January 2014.

Blue-collar employees whose employment agreement started on or after 1 January 2014 are not entitled to any additional compensation paid for by the NEO. As their notice period (or payment in lieu of notice) is fully determined on the basis of the new regulations, there is no reason to provide for a supplement.

➤ Art. 7, § 1, third subparagraph, zf) Decretal Law
The only exception that applies concerns blue-collar employees who fall within the scope of the exceptional (shorter) notice periods for Exceptional Sectors (see section 3.2); they can apply for a dismissal allowance (regardless of the start date of their employment agreement).

**TIMELINE** – Within the group of blue-collar employees whose employment agreement started before 1 January 2014, only those who have built up at least a certain period of service at the moment of dismissal are entitled to a dismissal compensation payment; the others fall within the scope of the system of the dismissal allowance.

The minimum periods of service are the following:

- (30 years on 31 December 2013);
- 20 years on 1 January 2014;
- 15 years on 1 January 2015;
- 10 years on 1 January 2016; and
- less than 10 years on 1 January 2017.

If for example an employment agreement is terminated in August 2015, the blue-collar employee will be entitled to a dismissal compensation payment if he or she has (at least) 15 years’ service. If the employee has less than 15 years’ service, he or she may be entitled to a dismissal allowance.

By gradually lowering the service requirements, the system of the dismissal compensation payment is gradually expanded (up until 2017, after which it applies in principle to all blue-collar employees), whilst the system of dismissal allowances is gradually dismantled.

An exception to this provision applies to dismissals in the context of a collective dismissal for which a CLA (social plan) was registered on or before 31 December 2013. Employees who are dismissed in the context of such a collective dismissal are only subject to the dismissal allowance system.

---

© Allen & Overy LLP 2014
COMPENSATION AMOUNTS

Whilst the dismissal allowance is a fixed lump sum payment, the amount of the dismissal compensation payment must be calculated on an individual basis, based on a formula.

- The dismissal allowance is a lump sum and depends on the start date of the employment agreement and the employee’s length of service. The amount is also affected by the employee’s working time.

- The dismissal allowance for blue-collar employees whose employment agreement started on or after 1 January 2012 amounts to €1,250.

- The dismissal allowance for blue-collar employees whose employment agreement started before 1 January 2012 amounts to €1,250, €2,500 or €3,750, depending on whether the employee has less than 5 years’ service, between 5 and 10 years’ service or at least 10 years’ service respectively.

➤ Art. 40 and 41 IPA Law

- As regards the dismissal compensation payment, the idea is that the payment compensates for the difference between (i) the notice period (or the corresponding compensation in lieu of notice) which the employer must award and (ii) the notice period (or the corresponding compensation in lieu of notice) which the employer would have awarded if the employee’s length of service had been accrued entirely after 31 December 2013.

However, because of the way in which the calculation formula has been drafted in the RD on Dismissal Compensation Payment, a blue-collar employee does not get full compensation. (For example, the calculation basis of the dismissal compensation payment differs from the calculation basis of the compensation in lieu of notice).

➤ Art. 7, § 1sexies Decretal Law
➤ Art. 1 and 2 RD on Dismissal Compensation Payment

Both the dismissal allowance and the dismissal compensation payment are net amounts that are free of tax and social security contribution withholdings.

“The compensation measure makes sure that blue-collar employees whose notice period is based partly on the old regulations, under certain conditions, receive compensation from the NEO as a supplement on top of what they receive from their employer.”
EXCLUSIONS – The IPA Law determined (and still determines) a number of situations in which an employee is not entitled to a dismissal allowance:

– the employee is dismissed for serious cause;
– the employee is dismissed during a trial period;
– the employee has less than 6 months’ service;
– the employee is dismissed with a view to retirement;
– the employee is dismissed with a view to SUC; or
– the employee is entitled to re-activation compensation.
➤ Art. 42 IPA Law

The LUS does not contain similar exclusions with regard to the dismissal compensation payment. However, the RD on Dismissal Compensation Payment does determine an alternative calculation formula if the employee is entitled to re-activation compensation, in which case the amount of the dismissal compensation payment is lowered.
➤ Art. 3 RD on Dismissal Compensation Payment

NO COMBINATION OF DISMISSAL COMPENSATION PAYMENT AND UNEMPLOYMENT ALLOWANCES –
Whereas the dismissal allowance can be combined with unemployment allowances, the dismissal compensation payment cannot. The RD on Dismissal Compensation Payment therefore sets out a formula to determine the period that corresponds to the amount of the dismissal compensation payment and during which the blue-collar employee is not entitled to unemployment allowances.
➤ Art. 3 RD on Dismissal Compensation Payment
16.2 Additional allowances at industry level

OFFSET OF ADDITIONAL ALLOWANCES AT INDUSTRY LEVEL – One of the measures implemented to offset the increase in the dismissal cost for employers, is the ability to offset the existing additional allowances at industry level against the increase in the dismissal cost for the employers.

COMPLEMENT TO SOCIAL SECURITY – An additional allowance means any amount that is paid to the employee in addition to what is provided for by law and that is intended to guarantee the income security of the employee, after and because of the termination of the employment agreement.

These include, for example, the monthly supplements to unemployment allowances paid by the employer or a welfare fund.

Additional allowances awarded with a view to SUC are not in scope.

ONLY ALLOWANCES DETERMINED AT INDUSTRY LEVEL – The LUS only provides for a deduction of additional allowances that are defined in a CLA at industry level. So any additional provisions that exist at the company level are not covered by this.

NO SUPPLEMENT AT INDUSTRY LEVEL IF RISE IN DISMISSAL COST IS HIGHER – The offset principle means that as from 1 July 2015 any additional allowance at industry level is not due to the extent that this additional allowance is less than the difference between (i) the dismissal cost of the notice period or payment in lieu of notice calculated according to the new rules of the LUS, and (ii) the dismissal cost of the notice period or payment in lieu of notice calculated according to the legal provisions and CLAs at industry level that applied on 31 December 2013. In other words, if the increase in dismissal cost is higher than the additional allowance at industry level, the additional allowance is not due.

EXCESS SUPPLEMENT AT INDUSTRY LEVEL REMAINS POSSIBLE – If the additional allowance at industry level is higher than the difference between the old and the new dismissal cost as previously described, then the additional allowance at industry level is due in respect of the portion of the allowance that exceeds the difference.

CLA AT INDUSTRY LEVEL NEED TO BE ADJUSTED – The sectors have until 30 June 2015 to adjust the CLAs at industry level to reflect this principle.

➤ Art. 94 LUS
16.3 Special compensatory contribution on compensation in lieu of notice

COMPENSATION FOR SMES – Another measure to compensate for the increase in dismissal costs is provided specifically for the benefit of SMEs, particularly employers with 20 or fewer than 20 employees.

ADDITIONAL CONTRIBUTION ON TERMINATION ALLOWANCE – An additional contribution has been introduced, which is payable by the employer on the termination allowance of certain employees and which is equivalent to a social security contribution.

WHICH TERMINATION ALLOWANCES? – The additional contribution is applicable to the allowances due as a result of a unilateral termination of employment by the employer and following a termination of employment by mutual agreement.

The special compensatory contribution is payable only on the portion of the termination allowance that is acquired on the basis of performance delivered from 1 January 2014. If an employee is therefore entitled to compensation in lieu of notice based on the two-step calculation (see section 4.1), the special contribution is payable only on that portion of the compensation in lieu of notice that corresponds to the second step.

WHAT PERCENTAGE OF ADDITIONAL CONTRIBUTION? –

The special compensatory contribution will be:

– 1% of the aforementioned termination allowance if the employee has an annual salary of between € 44,509 and € 54,508;

– 2% of the aforementioned termination allowance if the employee has an annual salary of between € 54,509 and € 64,508, and

– 3% of the aforementioned termination allowance if the employee has an annual salary that exceeds € 64,508.

For employees with an annual salary below € 44,509, no special compensatory contribution is due.

PAYABLE BY ALL EMPLOYERS – The compensatory contribution is payable by all employers (if they dismiss employees who meet the previous conditions). The proceeds from this compensatory contribution are however used only for the benefit of employers with 20 or fewer than 20 employees. They are specifically used to reduce their contributions to the Closure Fund.

➤ Art. 38, § 3quindecies Law on General Principles of Social Security
16.4 The “provision for social liabilities” tax exemption

CREATION OF PROVISION FOR SOCIAL LIABILITIES – This tax exemption means that every employer can deduct a certain amount from its taxable income by way of a provision for social liabilities. In other words, a kind of provision is being established for the costs of termination of employment.

AMOUNT – The amount that can be deducted from the taxable profits and income must be calculated for each employee. It amounts to:

- 3 weeks’ salary per year of service starting from the 6th year of service after 1 January 2014 to the 20th year of service after 1 January 2014;

- 1 week’s salary for each additional year of service starting from the 21st year of service after 1 January 2014.

- By royal decree, it is possible to set the maximum amount of remuneration on which the exemption is calculated which means that the amount of the tax exemption can be further reduced that way. At the time of this publication, such a royal decree has been announced but has not yet been implemented.

REVERSAL OF EXEMPTION WHEN EMPLOYEE LEAVES – When an employee leaves the company, the total amount already exempted for that employee must be included in the profits and income of the financial year in which the employment comes to an end.

APPLICABLE FROM 2020 – This opportunity to obtain a tax exemption can be applied for the first time from fiscal year 2020.

➤ Art. 67quater CIT
17. Contact persons

Christian Bayart  
Partner  
Tel +32 3 287 7452  
christian.bayart@allenovery.com

Pieter De Koster  
Partner  
Tel +32 2 780 2210  
pieter.dekoster@allenovery.com

Inge Vanderreken  
Counsel  
Tel +32 2 780 2230  
inge.vanderreken@allenovery.com

Ilse Bosmans  
Senior Associate  
Tel +32 3 287 7421  
ilse.bosmans@allenovery.com

Vincent Vandenkerckhove  
Senior Associate  
Tel +32 2 780 2219  
v Vincent.vandenkerckhove@allenovery.com

Alexander Van Hoof  
Associate  
Tel +32 2 780 2357  
alexander.vanhoof@allenovery.com

Aline Smits  
Trainee  
Tel +32 2 780 2660  
aline.smits@allenovery.com

Marie Schlögel  
Trainee  
Tel +32 2 780 2223  
marie.schloegel@allenovery.com

Ellen Permentier  
Professional Support Lawyer  
Tel +32 2 780 2465  
ellen.permentier@allenovery.com

DISCLAIMER

This publication does not contain an exhaustive overview of the dismissal rules according to Belgian law. Furthermore, the limited framework of this publication does not allow us to take position on doctrinal issues. We therefore limited ourselves to providing you with the main issues surrounding the amendments and new elements of the LUS.

In this publication we do not discuss the special rules applicable for agreements for students, servants, home workers, programmes of re-employment and the execution of temporary labour and temporary agency work. Also, we do not touch upon amendments which the LUS has implemented in areas other than termination of employment (for example concerning the first day of sickness for blue-collar employees, the regulations on well-being at work, etc.).

Nothing in this publication constitutes legal or other professional advice from Allen & Overy LLP, its subsidiaries and/or other partnerships, corporations, undertakings and entities which are authorised to practise using the name “Allen & Overy”, any of Allen & Overy’s partners, lawyers or members of staff, or any other contributor to this publication.
GLOBAL PRESENCE

Allen & Overy is an international legal practice with approximately 5,150 people, including some 525 partners, working in 43 offices worldwide. Allen & Overy LLP or an affiliated undertaking has an office in each of:

Abu Dhabi  Frankfurt  Paris
Amsterdam  Hamburg  Perth
Antwerp  Hanoi  Prague
Athens (representative office)  Ho Chi Minh City  Riyadh (associated office)
Bangkok  Hong Kong  Rome
Beijing  Istanbul  São Paulo
Belfast  Jakarta (associated office)  Shanghai
Bratislava  London  Singapore
Brussels  Luxembourg  Sydney
Bucharest (associated office)  Madrid  Tokyo
Budapest  Mannheim  Warsaw
Casablanca  Milan  Washington, D.C.
Doha  Moscow  Yangon
Dubai  Munich
Düsseldorf  New York

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP’s affiliated undertakings.

© Allen & Overy LLP 2014  |  CS1404_CDD-39005_ADD-44904

www.allenovery.com