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THE LABOUR DEAL

The Act of 3 October 2022 on various labour provisions

1 INTRODUCTION

1. The previous federal government had its "jobs deal" in 2019, but the current De Croo government also wants to make its mark on employment law with a deal, specifically the so-called "labour deal". In fact, this deal was already announced in the coalition agreement. [1] A first concretisation of some of the components of the labour deal was included in the federal budget agreement in October 2021 in which, for example, the four-day working week and night work for e-commerce were put forward. [2] However, it took until 14 February 2022 until a political agreement was reached between the federal majority parties where the various elements took shape. This resulted in a preliminary draft law that was submitted to various advisory bodies. [3] Perhaps most noteworthy here is that the social partners within the National Labour Council did not agree and delivered a divided opinion to the government. [4] The social partners were not set up with the fact that they had not been involved in the creation process of the deal beforehand and that they were only allowed to give their opinions afterwards. [5] In any case, without too many changes, the labour deal was submitted to Parliament on 7 July 2022 as the "draft act on various labour provisions" [6] and this bill was passed on 29 September 2022. On 10 November 2022, the Act of 3 October 2022 on various labour provisions was published in the Official State Gazette.

2. Below, we elaborate on the main parts of the labour deal. Most of them concern measures on **working time law**, some have more to do with **dismissal law**, but there are also other topics, with an individual right to training and provisions for platform workers being the most prominent. Just about every measure has its own chapter in the law, with its own scope of application (which, unfortunately, is usually not explicitly included) and different entry into force provisions. Unfortunately, the variety of measures and their complicated legal explanation make the legal text difficult to fathom. Below, therefore, we will briefly address some consequences and interpretation issues. We start with the working time measures, followed by the dismissal measures and end with the platform economy, the individual training right and the other measures. For each section, the entry into force and scope are clarified (as far as possible).

2 7-DAY NOTICE PERIOD FOR VARIABLE WORK SCHEDULES

3. The first measure (**Chapter 2** of the Act) concerns the extension of the announcement period for variable hourly schedules. In the case of a part-time **employment contract with**

[1] Government agreement of 30 September 2020, https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf.
[2] See Federal Policy Statement: New Growth - Reforms & Investment, 12 October 2021, https://www.premier.be/nl/federale-beleidsverklaring-nieuwe-groei-hervormen-investeren.
[3] See Council of State, Opinion No 71,165/1 of 20 April 2022; DPA Opinion No 77/2022 of 22 April 2022; DPA Opinion No 107/2022 of 3 June 2022.
[4] National Labour Council Opinion No 2.289 of 17 May 2022.
[5] It is therefore notable that the social partners do get asked to elaborate on some of the measures. Moreover, the NAC will have to review the measures by 30 June 2024.
[6] Draft Act of 7 July 2022 on various labour provisions, *parl. doc.* Chamber 2021-22, no. 55-2810/1.

variable hourly schedules in accordance with Article 11bis, 3rd paragraph of the Employment Contracts Act, the days and hours to be worked cannot be precisely determined in advance, but the employee is given prior notice of his/her performance to be performed. A common example is part-time wait staff in a café or restaurant.

4. The notification procedure is regulated by Article 6 of the Internal working rules Act of 8 April 1965. Previously, the minimum notice period was **five working days**, this is now extended **to seven working days**. This period could previously be reduced to a minimum of **one working day** by **sectoral collective bargaining agreement**. The reduction option by collective bargaining agreement will be retained, but the minimum will be **increased to three working days**. This extension of prior notice should serve to give more foreseeability to the employee so that he/she can better maintain his/her work-life balance, given that the employee will have more time to plan his/her private and professional activities. This extension also cannot be seen in isolation from the transposition of the EU Directive on predictable and transparent working conditions, which had mandated Member States to provide for minimum predictability of work. [7] Art 26 of the transposing act, moreover, provides the same seven-day period for employees who do not fall under the scope of the Internal Working Rules Act. [8]

5. The rules on the publication of variable work schedules should be **included in the internal working rules**. Article 4 of the Labour Deal Act gives companies **nine months to amend** the internal work rules after the entry into force of Article 2 of the Act. However, there is no specific date for the entry into force of this article. Therefore, this amounts to nine months following 10 days after the publication of the law in the Belgian Official Gazette. The law merely states that internal working rules should be "brought into compliance". It seems that this should be done through the normal procedure for amending internal work rules. Thus, this is not merely a material change for which it would not be necessary to follow the procedure. In any case, the old rules will continue to apply until the new internal work rules come into force. However, if the company exceeds the nine-month deadline, then the new deadline may have to be applied, although this is not explicitly stipulated.

6. The Act also provides some **transitional provisions for sectoral regulations** that would deviate from the normal seven-day deadline. Thus, sectoral collective bargaining agreements, concluded before the amendment comes into force, that provide for a notice period of less than three days, will be temporarily respected. In principle, the joint (sub)committees have until 31 December 2022 to conclude a new collective bargaining agreement that can bring the notification period to at least three days. If no sectoral collective bargaining agreement is concluded, then the deadline will obviously be seven days. However, in three sectors, the previous collective bargaining agreement will remain in force until it is terminated. This is the case for the horticulture sector (Joint Committee 145), the cleaning sector (Joint Committee 121) and white-collar workers under PC 200 who work for driving schools. Finally, the hotel industry sector (Joint Committee 302) and textile care (Joint Committee 110) automatically fall back to a three-day notification deadline after 31 December 2022. So, these sectors do not

[7] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union *OJ* L 186, 11 July 2019.
[8] Art. 26 Act of 7 October 2022 partially transposing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, *BS* 31 October 2022.

need to take action, but they could still enter into a collective bargaining agreement that sets a longer notification period.

7. Chapter 2 will apply to both private sector employees and **public sector** contractual staff. However, it is unclear whether e.g. public companies would be allowed to enter into a collective bargaining agreement through their own consultative bodies that brings the publication deadline to three days (as they are not covered by the Collective bargaining agreement Act). **No new criminal sanctions** are foreseen to enforce this measure.

3 FOUR-DAY WORKING WEEK AND VARYING WEEKLY SCHEDULE

8. **Chapter 3** of the Labour Deal Act introduces **two new weekly regimes**, the four-day working week and the alternating week regime. Chapter 3 contains no special entry into force provisions and will also apply to the **public sector** for those agencies and public enterprises covered by the Labour Act of 16 March 1971. [9]

3.1 FOUR-DAY WORKING WEEK

9. One of the most high-profile parts of the labour deal is the introduction of the **four-day working week** (Chapter 3, Section 1) with a new Article 20bis/1 in the Labour Act of 16 March 1971. This means that a full-time working week, in principle of 38h, can be carried out on **four days instead of five**. Therefore, this means that a three-day weekend can be created or the employee can take a rest day in the middle of the week.

10. In the case of a 38-hour week, this will amount to **four 9.5-hour working days**. However, the **internal working rules** will have to provide for this possibility. In the case of a 40-hour week, it is slightly more difficult. In this case, the employee would **work 10 hours** during these four days, and this was apparently just a bit more sensitive with the legislator. Therefore, the law requires a **collective bargaining agreement** to be concluded for this purpose. This collective bargaining agreement will then automatically adjust the internal work rules. So, in both cases (9.5-hour and 10-hour days), some form of social dialogue will have to take place before a company can allow a four-day week.

11. However, the four-day week was introduced as an **option for the employee** and in view of his/her needs. The four-day week will therefore only be possible on the basis of a **written request** by the employee to the employer. If the employer accepts this request, then the parties have to record this in a written agreement. The request will remain valid for **six months** but can be renewed for six months at a time. The agreement can also be concluded for a shorter term but logically also has a maximum validity period of six months and can equally be renewed each time with a new six-month term. Given the requirement of a written request and agreement, it will not be sufficient to renew the request agreement implicitly or orally. Thus, a written request and agreement will be required each time. These six months give some certainty

[9] The public sector is not mentioned at all, though, and it is unclear to what extent e.g. public companies will be able to use the possibility of introducing a regulation by collective bargaining agreement. According to some sources, the measure only covers the private sector, but such a restriction does not follow from the act itself. The De Sutter administration would also like to introduce the system for federal civil servants. See De Standaard, "Vier dagen werken en dus ook zestien dagen vakantie?", 31 October 2022.

to the parties on the one hand, but on the other hand they also allow the employer and employee not to be forever stuck in a system with four working days. If this proves unsuccessful, they simply cannot renew the request and/or agreement, returning to the normal five-day week.

12. The **agreement** should include the **following elements**:

- the time and duration of rest periods and days of regular break from work applicable during the working arrangement;
- the start and end date of the period during which the working arrangement is applied.

The agreement must be concluded before the start of the working arrangement with four working days.

13. A **copy** of the request and of the agreement must also be **kept** with the internal work rules in the place within the company where the internal work rules can be consulted, for the period they are in force. Thereafter, the employer must keep the copies for five years.

The first mentioned obligation leads, firstly, to the question of whether these copies must then also be added electronically if the internal work rules can be consulted electronically. The legal status of electronic internal work rules is not settled. However, it is often allowed by social inspection and, moreover, the recent explanatory memorandum to the transposition law of Directive EU 2019/1152 (on transparent and predictable terms and conditions of employment) contains a clear confirmation that digital internal work rules should be possible. [10] In any case, the teleological interpretation of the law implies that the social inspectorate as well as the employee should have access to the copy.

A second question arises about the desirability (and compliance with the GDPR) that adding such a copy to the internal work rules would allow all employees to learn which colleagues use a four-day system and what modalities have been agreed upon. The Labour Code may provide a processing ground, but this does not seem to have been given very long and hard thought. All in all, employer has few other options to comply with legal obligations. Finally, a copy must also be delivered to the employee to the employee and to the Health & Safety Committee (in its absence to the union delegation) if it so requests. All these rules on transcripts and their retention are enforced by a new Article 186/1 Social Penal Code with a Level 2 sanction. This is one of the few sanctions provided by the Labour Deal Law.

[10] With regard to the method of publication and retention of (amendments to) the internal work rules, the explanatory memorandum of the transposing act states: "*In addition, the aforementioned article 15 of the Act of 8 April 1965 does not pronounce on the manner in which the final internal work rules and the amendments thereto must be made available in an easily accessible place, nor on the manner in which the copies referred to in this article must be created, distributed and retained. In principle, any medium may be used and the use of electronic publication or communication methods (i.e. electronic or digital alternatives) is possible. The transferred electronic information must be accessible to the employee and be capable of being stored and printed. The employer will have to keep proof of transmission or receipt of the information in order to prove that it has complied with its information obligations under the aforementioned Article 15 of the Law of 8 April 1965.*" Explanatory memorandum, *Parl. doc.* Chamber 2021-22, no 55-2811/1, 14.

14. As stated above, the employer may accept the request, but it may **also refuse** the request. Where an acceptance will lead to a written agreement, a refusal must be formalised with a **written justification** (this can be done, for example, by letter or e-mail) delivered to the employee within one month of the request. However, no sanction is provided for the employer who fails to comply with this. The law also provides no substantive requirements for the refusal, leaving the employer with a wide margin of appreciation. Perhaps in many companies its introduction will be difficult due to organisational reasons. If the internal work rules or a collective bargaining agreement do not provide for the possibility of using a four-day week, it will be difficult for the employer to agree to the request (unless if such agreement is given subject to the introduction of the system).

15. Furthermore, the law also provides for a **ban on any adverse treatment** of the employee in response to his/her request to enter a four-day system. Among other things, this also includes a prohibition on dismissal. However, the law does not provide for a reversal of the burden of proof, so it falls to the employee to prove that any adverse action or dismissal resulted from the request by the employee. There is also no provision for a lump-sum severance payment, although a dismissal due to such a request might possibly result in compensation for manifestly unfair dismissal (CBA No. 109).

16. In addition, the Labour Deal Act also **prohibits** the employee from performing **voluntary overtime** on the "fifth day" when he/she performs a full-time schedule on four days (of course, this is also not possible on the 6th and 7th day of the week). Indeed, the legislator wants to prevent this system from being used to deviate from the normal weekly working hours limits. Moreover, the *ratio legis* of the measure is to create more time for leisure by concentrating working hours on a shorter period. If the freed-up day would then still be filled with working time, then the measure is not being used for its intended purpose.

17. Finally, the Labour Deal Act does not regulate anything about the impact of the four-day week on annual leave or meal vouchers. In principle, this could mean that workers in a four-day week would legally be entitled to only 16 days of holiday instead of 20 and would not be entitled to meal vouchers for days on which they do not work. However, the government has meanwhile informally passed this problem on to the social partners with the message that they should reach agreements on this issue. [11] Such agreements could, for example, neutralise the absence during the fifth day so that employees would retain their rights as if they still worked five days a week. Other questions relate to the application of a system of 1/5th time credit or the possibility of "floating working hours" during a four day work week. Of course, this uncertainty will not play into the popularity of this measure.

3.2 ALTERNATING WEEK REGIME

18. Besides the four-day week, the Labour Deal Act in Chapter 3, Section 2 also introduces an **alternating week regime** through the new Article 20quater in the Labour Act of 16 March 1971. The alternating week regime means that a full-time employee will work more one week and compensate by working less the next. At first glance, this appears to be a variation on the flexible hourly schedules of section 20bis of the Labour Act of 16 March 1971 whereby the

[11] See De Standard, "Vier dagen werken en dus ook zestien dagen vakantie", 31 October 2022.

employer can allow employees to work more during peak periods and less during off-peak periods. However, the approach of the alternating week regime differs from flexible hourly schedules given that, like the four-day week, this is primarily an option that can meet needs of certain employees and thus does not (or at least not primarily) serve the interests of the employer. Thus, the option rather creates flexibility for the employee.

19. In principle, the alternating week regime involves a two-week cycle, with a **peak week and an off-peak week** (own terminology). During the peak week, the employee may work a maximum of **9 hours per day** and **45 hours per week**. An example of workers who could benefit from this would be, for example, divorced parents who would like to be home more during the off-peak week to take care of their children while the ex-partner takes care of the children during the peak week. This example is also cited in the explanatory memorandum. [12]

20. The two-week cycle can be extended to a **four-week cycle** during the third quarter of the year (this covers the summer months and thus the summer holidays[13]) or in case there are unforeseen circumstances on the employee's part. What such circumstances may be is not explained further.

21. As with the four-day week, the employee must **request** the employer **in writing** to make use of such an alternating week regime. Again, the request is valid for six months (renewable) and the employer can refuse in writing within one month. The same rules apply here as for the four-day week. Also, if one wants to use the exceptions to extend the cycle to four weeks then it must be included in the written request and in the written agreement. In the request, the employee will have to justify the use of the exception if it is about unforeseen circumstances. Copies of these documents should be kept in the same way as for the four-day week. Finally, a similar prohibition for adverse action against the employee is provided for as for the four-day week.

22. To take advantage of an alternating week regime, the **internal work rules** must be amended. Art 20bis, §3 labour law and a new art 6/2 internal work rules law list the mandatory provisions that should be included:

- Average weekly working hours within the cycle;
- the days of the week when work performance can be determined;
- The daily time period within which work performance can be determined;
- The minimum and maximum daily working hours (max. 9h per day);
- the minimum and maximum weekly working hours (max. 45 hours).

The rest is further detailed in the **written agreement** between employer and employee, notably:

- Start and end date of the period during which the alternating week regime applies;
- the time when the cycle starts;
- Although this is not explicitly mentioned by the law, it also seems logical to include the hourly schedules of the peak and off-peak week in this agreement.

[12] Explanatory memorandum, *parl. doc.* Chamber, 2022, no. 55/2810, 7.
[13] This exception was introduced at the request of the employers' organisations in the National Labour Council (Opinion No 2,289 of 17 May 2022).

23. Again, there is a **prohibition** for the employee to perform **voluntary overtime** during the off-peak week (or weeks). After all, this would go against the *ratio legis* of law (given that this off-peak week just serves to compensate). Finally, a possibility is also provided for the employee to **get out early** by giving two weeks' notice. Thus, in this way, the employee needs not be stuck in this regime for six months. No such escape route is provided for the four-day week, but nothing prevents the parties from ending it early by mutual agreement.

4 EVENING WORK IN E-COMMERCE

24. The Belgian government has long been accused of putting **e-commerce in the hands of** companies from neighbouring countries by not providing measures for more flexible work. The labour deal now partly addresses this, in what can perhaps be called the most important trophy for employers. E-commerce is defined as "the performance of all logistics and support services associated with the electronic trade of movable goods". [14] This primarily refers to online shops with/and parcel services.

4.1 INTRODUCTION VIA COLLECTIVE BARGAINING AGREEMENT

25. Firstly, **Chapter 7** of the Labour Deal Act allows e-commerce companies**, via collective bargaining agreement,** to introduce - hold on - "night work that does not constitute an arrangement with night services" (Section 1). In human language, this means **performance between 8pm and midnight** (after all, night performance is performance after midnight). This will thus make it easier for the e-commerce sector to introduce evening work or "half-night work", meaning that these companies will not necessarily have to follow the normal way of introducing night work via the amendment of the internal work rules.

26. In fact, this system is not that new. Art. 57 of the Programme Act of 25 December 2017 already provided the same regulation of evening work, but it was only temporary and expired on 31 December 2019. The same Programme Act of 2017 (and this does remain in force) had provided an exception for the prohibition of night work for e-commerce in Art. 36, 22° Labour Act of 16 March 1971. So, it was and is indeed possible to introduce an ordinary system of night work by amending the internal work rules in accordance with the procedure set out in Articles 11 and 12 of the Internal work rules Act. Since employee representatives in the works council can easily block or hinder such introduction via the internal work rules, it is sometimes easier to conclude a company collective bargaining agreement, since this only requires the agreement of one representative trade union. In particular, such a collective bargaining agreement will automatically amend the provisions of the internal work rules, without having to go through the amendment procedure.

4.2 TEMPORARY EXPERIMENTS

27. However, the legislator takes into account that it will be equally difficult to conclude a collective bargaining agreement in certain companies, given the potential resistance from trade unions. Therefore, an option to introduce evening work via a temporary and **one-off experiment** (a pilot project) of **up to 18 months** (non-renewable) is additionally provided

[14] Art. 27, §1 Labour Deal Act.

for (Section 2 of Chapter 7). [15] The aim of this experiment option seems to be to allow the employer to convince trade unions or consultative bodies that are initially adverse towards evening or night work by trying out the system in practice and thus demonstrating that the feared adverse effects do not occur. That way, once the experiment is over, a collective bargaining agreement could still be concluded, or the internal work rules can be amended to introduce the scheme permanently.

28. There are many **conditions** attached to setting up such a pilot project. For instance, employees may only participate in the experiment on a **voluntary basis** (via a written request). This written request must be kept for one year by the employer for inspection by the social inspectorate (FPS Employment, Supervision of Social Laws). Moreover, both employees who participate and those who refuse to participate in the experiment are protected by a legal **prohibition on adverse measures** (including dismissal). While there is no specific sanction for this, there is a **reversal of the burden of proof** in case of dismissal: the employer must prove that there are reasons other than the refusal to participate. Moreover, the employer must communicate these reasons in writing to the employee upon request. However, no further procedural rules have been developed for this (e.g. think of the rules of CBA No 109).

29. The framework of the experiment should logically not be introduced through an amendment to the internal work rules, but the timetables used during the experiment should be **included as an annex to the internal work rules**. Nor is the experiment a licence to escape social dialogue. There is an obligation to **involve** the **works council** in the elaboration of the experiment. In the absence of a works council, the health & safety committee will be involved, in its absence the trade union delegation and in its absence the workers themselves. This involvement seems to indicate a **consultation obligation** whereby the consultative bodies can set out their views, although no veto is envisaged. A mere notification to these consultative bodies (information obligation) seems insufficient to meet the required involvement, although this is not explicitly mentioned.

30. To emphasise the experimental character of this trial project, the employer must also **notify** the experiment **in writing** to the competent local directorate of the General Directorate of Supervision of Social Laws of the FPS Employment and the competent joint (sub)committee. This notification must contain the **following elements**:

- The duration of the project, with maximum eighteen months;
- The employer's reasons for introducing the experiment (why is evening work necessary and why does it not succeed through a collective bargaining agreement or internal work rules); [16]
- The criteria on the basis of which the experiment will be evaluated.

[15] This limitation to once applies to the legal entity but also to the level of the technical business unit as defined in Article 14 of the law of 20 September 1948.

[16] The Explanatory Memorandum clarifies: *"This experiment must seek a synergy between the quality of organisation and the quality of work resulting in a win-win situation for the employer and employees. It must be a project with the direct aim of creating a more flexible organisation of labour in companies for the employer and to improve the work-life balance and career workability for the employee, in order to promote employment and competitiveness of enterprises and well-being of employees."*; Explanatory memorandum, *parl. doc*. Chamber, 2022, no. 55/2810, 47.

31. Therefore, an **evaluation** of the experiment based on the reported criteria must actually be carried out after the end of the experiment and again the above-mentioned consultative bodies within the company must be involved. The written evaluation report must be submitted to the competent local directorate of the General Directorate for Supervision of Social Laws of the FPS Employment and the competent joint (sub)committee within three months of the end of the experiment.

32. Chapter 7 is not characterised by any particular provisions regarding the **entry into force**. However, its application to the **public sector** is not clear. As for the option to introduce a collective bargaining agreement, this seems to be possible only for the public authorities falling within the scope of the collective bargaining agreement law, but this remains a small minority. As for the experiment, an application is very difficult, given the reference to a mandatory notification to a joint (sub)committee. The legislator apparently did not consider this, but it seems by no means inconceivable that a public company would ever wish to make use of such a system.

5 RIGHT TO DISCONNECT

33. A final measure of the labour deal on working time is the introduction of a **right to disconnect** (**Chapter 8**). This is not a "right" in the sense of an enforceable subjective right or a fundamental right, but the main purpose of the measure is to make it practically possible to tighten the boundaries between work and private time. There has long been a ban on employees working outside working hours, but the fact that many workers remain connected or reachable even after hours via their laptops, computers, smartphones or other electronic tools does not make it easy to clearly demarcate work and private time from each other. As a first step, the legislator had already included in the **Social Cohesion Act of 2018** an obligation for the employer to hold regular consultations within the health & safety committee on disconnection. [17] This rather weak elaboration of the right to disconnect (rather an obligation to consult) will now be removed and replaced by a new measure.

34. In particular, employers with **at least 20 employees** in the **private sector** [18] will be required to lay down written arrangements regarding disconnection. This measure is clearly based on the French example. [19] These agreements must include the following **minimum modalities**:

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[17] Art. 16 of the Act of 26 March 2018 on strengthening economic growth and social cohesion.
[18] Or at least it is limited to the companies that fall under the scope of the Collective Bargaining Agreement Act. This is not literally stated as such, but the clear references to the Collective Bargaining Agreement Act indicate this. On the other hand, companies not covered by this measure can still regulate this in their internal work rules. Nothing prevents them from making agreements on this. But the legal obligation does not seem to be directed at them. As far as the federal government is concerned, moreover, a right to deconnection has already been enshrined in the federal personnel statute since 1 February 2022 for federal government staff, whether statutory civil servants, trainees, mandate holders or contractual employees. The principles for this were laid down in the Royal decree of 2 December 2021, which amends the Royal decree of 2 October 1937 and was published in the Belgian Official Gazette of Monday 3 January 2022.
[19] Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, *JORF* n°0184 du 9 août 2016 ; see, inter alia, K. Reyniers, "Een recht op deconnectie, of hoe omgaan met technostress? ", *TSR* 2019, no. 1, 97-

- Practical modalities for the employee's application of his right to disconnect outside the hourly schedules;
- Guidelines on the use of digital tools, with a view to ensuring rest time, leave and the employee's private and family life.
- Providing education and sensitisation actions for employees and managers on the wise use of digital tools and risks in case of over-connection.

35. This shows that the employee does have a certain right to disconnect, but exactly how this will be expressed needs to be further elaborated. The explanatory memorandum does give some **examples** such as "*guidelines not to answer e-mails or mobile calls, switching off servers outside working hours, activating absence messages and referral messages, the use of an automatic signature emphasising the non-emergency of an immediate response*. " [20]

36. The fact that the labour deal law defines these modalities in very broad terms ensures that there is still ample room for **social dialogue** within the company. After all, the agreements must be introduced via a **company collective bargaining agreement**. In the absence of such a collective bargaining agreement, it should be introduced in the **internal work rules**. Unfortunately, it is not clear exactly what is meant by "in the absence of a collective bargaining agreement". It makes sense that this would be the case within companies in which it is not possible to conclude a collective bargaining agreement because, e.g., there are no trade union delegates. But whether introduction via the internal work rules is a full alternative and the employer can therefore choose whether to do it via collective bargaining agreement or internal work rules (even if there is a union delegation) is not explicitly stipulated and the explanatory memorandum remains silent on this aspect. However, this silence seems to imply a free choice for the employer.

37. Companies will also be given a particularly **short deadline**. Before 1 January 2023, the company collective bargaining agreement must be submitted to the FPS Employment (General Directorate of Collective Labour Relations) or a copy of the amended internal work rules must be submitted to the social inspectorate. However, the Labour Deal Act also provides for a possibility for the **National Labour Council** or **joint (sub)committees** to conclude a collective bargaining agreement on the matter before 1 January 2023, which would prevent companies from having to take action themselves. It is unclear whether the social partners intend to do this within the NLC (from one side, this is formally denied, on the other, cautious negotiations on this are envisaged) and whether they would finish this in time. In any case, **no sanction** is stipulated for those employers who would not conclude a collective bargaining agreement in time or provide a regulation in the internal work rules. Given the short deadline and the fact that collective bargaining and social dialogue take time, it is difficult to blame companies for a late implementation.

Update: the deadline for companies is postponed by the SPF Employment to 1 April 2023!

100 ; B. Tombeur, "Recht op deconnectie vanuit een Frans perspectief" *NjW* 2018, no. 392, 858-868.

[20] Explanatory Memorandum, *parl. doc.* Chamber, 2022, no. 55/2810, 49.

6 TRANSITION TRACK

38. Besides the measures on working time, the labour deal also provides for a number of novelties in **dismissal law**. A first measure is the introduction of transition tracks (**Chapter 5**) in Article 37/13 Employment Contracts Act.

39. A "transition track" is the possibility for an employee with an open-ended employment contract who has been dismissed with a notice period to perform **work for another employer during that period**. Such a transition track can be offered by the employer or can be done at the employee's request. It is purely a possibility; the employee may request it but has no right to it and the employer cannot force it on the employee. Both parties therefore have a **right of veto**. There is also a **prohibition on adverse action** (including dismissal) against the employee who refuses (though without any specific penalty for the employer) and the explanatory memorandum makes it clear that there is no impact on the employee's entitlement to unemployment benefits. [21]

40. The conditions and duration of the transition track should be laid down in a **prior written four-party agreement** between the employer, the employee, the employer-user and the intermediary. Indeed, a transition track can only take place through the mediation of a **temporary employment agency** or through a **regional public employment service** (VDAB/Forem/Actiris). The maximum duration of the transition track is equal to the remaining notice period; the minimum duration will be determined by royal decree.

41. During the transition track, the (old) employer will pay the employee the **salary applicable** for the position performed with the employer-user. The salary should, however, at least correspond to the salary the employee would receive if he/she performed the services with the former employer (i.e. his/her normal salary during the notice period). It may therefore be that the employee will receive a higher wage, but he/she will never earn less during the transition period than if he/she simply performed the notice period with the old employer. At first glance, the potential additional pay may not seem like an attractive prospect for the old employer, but the employer-user must **compensate part of the pay to the old employer**. Just how much that compensation amounts to is not prescribed by the Act and will be the subject of the contract and thus negotiations between the old employer and the employer-user. Nor does the Act stipulate that this compensation must be limited to the additional salary that the old employer has to pay, the agreement may just as well stipulate that the employer-user must also take responsibility for part of the salary that the old employer had to pay anyway during the notice period. This makes sense, as the employee will perform work for the employer-user and in this way the system also becomes attractive for the old employer. After all, otherwise, the old employer will pay its dismissed employee the normal wage to work for someone else. The only reason to agree to the transition process in that case is if the old employer wanted to exempt the employee from executing his work anyway (garden leave).

42. The transition track is an **exception to the ban on hiring-out workers**. The old employer remains the employee's employer during the transition process, but the employee-user is responsible for applying the provisions of the legislation on health & safety applicable at the place of work, in accordance with Article 19 of the Act on temporary employment.

[21] Explanatory Memorandum, *parl. doc.* Chamber, 2022, no. 55/2810, 42.

Furthermore, the **division of powers between the two employers** has not been worked out, leaving many questions open for interpretation. The **role of the temporary employment agency or the employment service** also remains very vague or even completely unspecified (will a royal decree follow?). One could also ask whether the intervention of the temporary employment agency or the employment service is actually necessary to bring about a successful transition track.

43. The law provides a possibility for the employer-user and the employee to **unilaterally stop** the transition track **early** with a notice period. The notice period is calculated according to the normal rules (Art. 37/2, §1 and 2 Employment Contracts Act), taking into account the employee's seniority since the beginning of the transition track. If the notice emanates from the employer-user, the employee can terminate the transition track immediately with a counter notice. After the notice period, the employee simply returns to the old employee where he/she must resume his/her old position for the remainder of the notice period. Whether this will be practical at that time is another question. Given that the Act refers to the notice periods in Art. 37/2 Employment Contracts Act, it also seems possible to pay a severance payment in accordance with Art. 39 Employment Contracts Act instead. However, this follows purely from the reading of Art. 39 labour contract law referring to art 37/2. Neither the Labour Deal Act nor the new Art. 37/13 Employment Contracts Act explicitly provide this option.

44. The explanatory memorandum also addresses the consequences of **incapacity for work** (the employer will pay the guaranteed salary) and lack of work due to **force majeure** during the transition period. [22] According to the explanatory memorandum, the employee also retains a right to job search leave (but will not be allowed to abuse it).

45. If the transition track is **completed** until the end of the notice period (i.e. the notice period following the termination of the initial employment contract), the employer-user must, in principle, offer the employee an **employment contract for an indefinite period**. To prevent the employee from losing the protection of a notice period, if the employer-user does not offer an employment contract, it will have to pay **compensation equal** to the current salary corresponding to half the term of the transition period. Indeed, otherwise, the employee has potentially wasted months of his/her time and falls back on unemployment benefits at the end of the track. Employer-users may well prefer to circumvent this fee by still giving a unilateral notice just before the end, especially if this notice is "more advantageous" than the penalty compensation. It remains to be seen whether case law will accept such manoeuvres; the Act remains silent on the matter, and, in principle, this will therefore be theoretically possible.

46. If the employee does become employed by the employer-user, he/she will retain the **seniority** from the start of the transition process as regards the calculation of the notice period at the end of the new employment contract. Moreover, even the seniority with the old employer (i.e. based on the previous employment contract) will be taken into account as regards the right to career break and time credit.

47. With this system, the legislator wanted to create a new system to end employment contracts in a more attractive way. For the employee, this has the advantage that he/she does not have to perform the notice period with the old employer and, moreover, it gives the

[22] Explanatory Memorandum, *parl. doc.* Chamber, 2022, no. 55/2810, 42-43.

employee a quick prospect of a new permanent employment contract and he/she will possibly already receive a higher salary. In this way, the employer-user does not have to wait long for the hiring of a new worker and will also get a hefty discount on the employee's salary. Moreover, there are also escape options should the cooperation prove unsuccessful after all. Finally, this system may be interesting for the old employer if he/she prefers to get rid of the employee sooner without having to pay the full termination fee, as part of the salary will be compensated. It will probably depend on the practicality of this system (and the costs of the service/agency) whether this system will actually be a success.

48. No special implementation provisions regarding the **entry into force** are provided. Moreover, this system will also apply to **public sector** contractors.

7 IMPROVING EMPLOYABILITY AFTER DISMISSAL

49. A second measure on dismissal law concerns a system to improve the employability after dismissal (**Chapter 6**). In fact, the **Unified Statute Act of 26 December 2013** had already provided for a similar system in **Article 39ter of the Employment Contracts Act**, but it was up to the sectors to elaborate the scheme. [23] Given that the sectors have neglected this with impunity for years and the legislator has delayed the entry into force several times, the initial Art. 39ter has now been replaced by a new system in the same article.

50. Essentially, for employees who are entitled to **at least 30 weeks' notice** (+/- 10 years' seniority) in the event of dismissal, the notice period will be converted into a **two-part dismissal package.** The **first part** covers 2/3rd of the notice period with a minimum of 26 weeks, during which the employee will simply perform his notice period with the employer or what can be paid out as severance pay (in proportion to that 2/3rd). The **second part** of the severance package is 1/3rd of the notice period (or the remainder of it). This part can be spent **on employability-enhancing measures** such as training for specific professional skills, coaching or additional outplacement. While following these measures, the employee will receive his normal salary. If the dismissal was given with a **notice period**, the employee can follow these employability-enhancing measures from the beginning of the notice period, so the employee should not wait until the last 1/3rd part of the term. If the dismissal was given with **severance pay,** then the employee should keep himself/herself available to follow employability-enhancing measures. This obligation expires when starting a new activity as an employee or as a self-employed person, but it is not clear whether the obligation expires equally after the hypothetical notice period expires (we assume it does).

51. Employability-enhancing measures will be **funded** in both cases (notice period/severance pay) with the employer's social security contributions on the second part of the severance package. This implies that high wage dismissed workers will receive greater funding for their employability promotion measures. This is in addition to **outplacement** obligations, which will still require four weeks' wages to be deducted. And the employability-enhancing measures should also meet the existing quality requirements for outplacement measures. [24]

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[23] Art. 92 Act of 26 December 2013 on the introduction of a unitary status between blue-collar and white-collar workers regarding notice periods and "carenzdag" and accompanying measures, *BS* 31 December 2013.

[24] See Article 11 Act of 5 September 2001 on improving the employment rate of workers, *BS* 15 September 2001.

52. Chapter 6 enters into force on **1 January 2023** and applies to dismissals occurring from the same date. The system applies equally to contractual staff in the **public sector**. The law does provide that the King may lay down further rules on how to calculate the notice period and severance pay of the first and second part of the dismissal package.

8 BETTER PROTECTION FOR PLATFORM WORKERS

53. Belgium has not escaped the **global and long-standing debate** on the **social status and protection of platform workers**. Belgian case law and the Labour Relations Commission (Administrative Commission for the Regulation of Labour Relations) have so far played the leading role regarding the qualification of the employment relationship between platform workers and the digital platform, but no unambiguous interpretation has emerged from this, so the discussion continues. Following the European Commission's proposed Directive of late 2021[25] and perhaps further hastened in this regard by the ruling of the Brussels French-speaking labour tribunal of 8 December 2021 (which qualified Deliveroo riders as self-employed workers)[26] , the Labour Deal Act contains a **Chapter 4** that introduces **two measures** to improve the protection of platform workers. The first measure introduces a rebuttable legal presumption that platform workers are bound by an employment contract if certain criteria are met. A second measure requires digital work platforms to offer work accident insurance to self-employed platform workers.

8.1 REBUTTABLE PRESUMPTION OF EMPLOYMENT CONTRACT

54. The first section of Chapter 4 makes some changes to the labour relations law, notably by introducing a new Chapter entitled "Presumption regarding the nature of the employment relationship for digital commissioning platforms". The main novelties are in a new **Article 337/3 Labour Relation Act**.

55. This first defines some key terms, in particular "digital platform client", the "platform worker" and the "platform operator". These definitions immediately delineate the scope of application. A **digital platform principal** is "*the provider of a for profit service that, by means of an algorithm or any other equivalent method or technology, is able to exercise a decision-making or controlling power with regard to the manner in which performance is to be realised and with regard to labour or pay conditions, and that provides a paid service that meets all the following requirements: a) it is provided, at least in part, remotely via electronic means, such as a website or a mobile application; b) it is provided at the request of a recipient of the service*". This does not cover platforms whose main purpose is to exploit assets or resell shared goods or services or that provide a service on a non-profit basis. Digital platforms such as Airbnb will therefore not be covered.

[25] Proposal for a Directive of the European Parliament and of the Council on the improvement of working conditions in platform work, COM (2021) 762 final, Brussels 9 December 2021.
[26] Labour Tribunal Brussels (Fr.) (25th k.), 8 December 2022, no. 19/5070/A, *JLMB* 2022, vol. 9, 390; *JTT* 2022, vol. 1427-1428, 209, note P. Maerten; M. Wouters, " De zelfstandige maaltijdkoeriers van Deliveroo: Symptomatisch voor een wijdverspreid probleem?", *Arbeidsrechtjournaal* 2022, https://arbeidsrechtjournaal.be/de-zelfstandige-maaltijdkoeriers-van-deliveroo-symptomatisch-voor-een-wijdverspreid-probleem/.

56. The **"platform worker**" is then "*any person performing platform work through a digital platform principal, regardless of the nature of the contractual relationship or its qualification by the parties involved*." And the **platform operator** refers to "*the natural or legal person who, directly or through an intermediary, operates the digital platform principal*." In particular, it is the operator who will be able to take actions that may indicate the existence of an employment contract and thus qualification as an employee for the platform worker. The above terms and definitions are not quite the same as those used in the European Commission's proposed EU directive although they are inspired by it.[27] One may ask why they have not adopted these European definitions, although they are not yet final. Moreover, it is bizarre that the definition of digital platform principal already itself refers to the platform's decision-making or controlling power over how performance is carried out, whereas this is precisely what the criteria are supposed to examine.

57. Second, the labour deal introduces a special **rebuttable legal presumption of the existence of an employment contract** for the platform economy in Article 337/3, §2 Labour Relations Act. The aim of this is to create more legal certainty for platform workers and platforms and thus to provide more clarity in the discussion on the nature of their employment relationships, without wanting to ensure an overly rigid demarcation. After all, it should remain possible to perform services for a platform as a genuine self-employed person.

58. For the digital platform principal, until proven otherwise, employment relationships are presumed to have been carried out under an employment contract if the analysis of the employment relationship shows that at least **three of the eight included criteria or two of the last five criteria** are met. In particular, the last five criteria correspond to the criteria of the legal presumption proposed by the **European Commission**. [28] With a view to a future transposition of the potential directive, these criteria were largely "copy-pasted" into the labour deal and three more Belgo-Belgian criteria were added. Below, we discuss the eight criteria.

59. The three **Belgo-Belgian criteria** are:

- 1° The platform operator may claim **exclusivity with respect to its field of activity**: this criterion is not further clarified. It is striking that the legislator uses "may" here and in most of the following criteria, making it only a possibility for the platform operator, i.e. one does not have to prove that it actually happens. An important question here is what the legislator means by the "field of activity". Perhaps one should look at the type of services offered by the platform. However, this limitation to the field of activity seems unnecessary. After all, if the platform operator were to claim a general exclusivity that is not limited to its own field of activity, this would even more clearly indicate a relationship of authority between the parties.
- 2° The platform operator may use **geolocation for purposes other than the proper functioning of basic services**. The use of geolocation is a classic criterion that recurs in domestic and foreign case law. Especially when geolocation is used as a means of control, it indicates a subordinate employment relationship. This then points to a hierarchical control which is one of the four general criteria to determine

[27] MoT, *parl. doc.* Chamber, 2022, no. 55/2810, 36; Art. 2 Proposal for a Directive of the European Parliament and of the Council on the improvement of working conditions in platform work, COM (2021) 762 final, Brussels 9 December 2021.
[28] Art. 4 Proposal for a Directive of the European Parliament and of the Council on the improvement of working conditions in platform work, COM (2021) 762 final, Brussels 9 December 2021.

the employment relationship (Art. 333, §1 Labour Relations Act). The criterion here provides a general exception for the case where geolocation is used for the proper functioning of services. This very broad definition leaves much to be desired. Indeed, any platform operator will claim that geolocation is only used for the proper functioning of the app. It is usually very difficult to refute this, especially if there is no clarity on how the platform's algorithms work.

- 3° The platform operator may restrict the **freedom of** the platform worker regarding the **manner of performing the work**. This criterion corresponds to one of the four general criteria to determine the nature of the labour relation qualification, namely the freedom of organisation of work (Art. 333, §1 Labour Relations Act). The explanatory memorandum gives the example of a bicycle courier who is not free to choose his route or determine the method of delivery himself, or if he has to notify the platform of the receipt of the parcel according to a predetermined procedure, indicating the time of receipt. [29]

60. The **five European criteria** are:

- 4° the platform operator may **limit** the level **of the platform worker's income**, in particular, by paying **hourly rates** and/or limiting a platform worker's ability to **refuse orders** based on a proposed basic rate and/or by not allowing him to determine the price of the work. **Collective bargaining agreements** are excluded from this clause. This criterion is not explained further but concerns the independent decision-making power of the platform worker over the price of services. It is noteworthy that the criterion excludes price provisions in collective bargaining agreements. The explanatory memorandum even refers specifically (and only) to collective bargaining agreements of the National Labour Council, while the Act itself refers purely to collective bargaining agreements in general. At present, it is not legally possible to conclude collective bargaining agreements in accordance with the Collective Bargaining Act for self-employed workers. But perhaps the legislator here envisages a future adaptation of the Collective Bargaining Agreement Act. We will not delve into this mystery any further.
- 5° To the exclusion of legal provisions, particularly on health and safety, applicable to users, customers or workers themselves, the platform operator may require a platform worker to comply with **mandatory rules on appearance**, **behaviour** towards the recipient of the service or **performance** of the work. The typical example of this is the imposition of a uniform, but other guidelines on appearance and behaviour of platform workers also come into consideration. Most platforms have such rules laid down in policies and may easily meet this criterion.
- 6° The platform operator can **determine** the **prioritisation of future job offers** and/or the **amount offered** for a job and/or the determination of the **ranking** by using the information collected and by **monitoring** the performance of the platform workers, excluding the result of this performance **by electronic means**. This criterion indicates, among other things, the frequent use of "user ratings" to monitor and evaluate the performance of platform workers and attach certain consequences, including sanctions, to it. This obviously indicates hierarchical control (one of the four general criteria).
- 7° The platform operator may restrict, possibly including by means of sanctions, the freedom of organisation of work, in particular the **freedom to choose its working hours or periods of absence**, to accept or refuse tasks or to use **subcontractors or substitutes**, except when in the latter case the law expressly limits the possibility of using subcontractors. Again, this incorporates one of the four general criteria, namely freedom of organisation of working time. This criterion also points to the

[29] MoT, *parl. doc.* Chamber, 2022, no. 55/2810, 37.

practices whereby platform workers are sanctioned if they refuse certain shifts or if they are not available enough for shifts. As a result, they would be assigned fewer assignments, for example, or would only be given access to the platform at less popular times.

- 8° the platform operator may restrict the platform worker's ability to build a **customer base** outside the platform or to perform **work for a third party**. Most platforms give platform workers limited visibility of users' data; this may also follow from the application of the GDPR. This also targets exclusivity clauses.

61. As noted, several of these criteria are quite similar to, or are specific elaborations of, the **four general criteria** to determine the employment relationship (Art. 333, §1 Labour Relation Act). Nevertheless, this is a rebuttable **presumption that applies until proven otherwise (by all means)** and will therefore also be rebuttable using the general criteria themselves. This is reminiscent of the **Brussels French-speaking labour tribunal's** ruling on the Deliveroo riders in which the court found that Deliveroo met most of the criteria of the transport sector's rebuttable presumption but then used the four criteria to rebut the presumption. [30] Based on that finding, one might cynically ask whether such a rebuttable presumption would then be useful in creating more legal certainty for the parties. It will probably depend on its application by the courts and the Labour Relations Commission.

62. A final note on the rebuttable presumption is that one has to take into account the **use of algorithms**. This amounts to the **primacy of the actual exercise of the agreement** over the legal qualification chosen by the parties. [31] Thus, it will not be possible to neutralise the application of the criteria by providing specific clauses in an agreement when in practice the platform's algorithms indicate a different operation. Of course, this is easier said than done. For example, it is unclear what disclosure platforms should provide about the operation of their algorithms. They are often reluctant to do so, as this is usually a trade secret. Even if they were to provide transparent disclosure, it is not obvious for judges or Labour Relation Commission members to properly assess the functioning of the algorithms and they may have to rely on external expertise. In the proposed EU Directive, the European Commission did consider this further and there is a comprehensive information obligation on the operation of algorithms towards platform workers. [32] However, the Belgian legislator has not gone that far.

63. This section will come into force on **1 January 2023**. Its scope is the same as that of the Labour Relations Act and thus equally concerns the **public sector** (as far as contractual workers are concerned).

8.2 ACCIDENT COVERAGE FOR SELF-EMPLOYED PLATFORM WORKERS

64. The second Section of Chapter 4 of the Labour Deal Act provides for a legal obligation for platform operators to provide insurance for self-employed platform workers to cover **bodily harm resulting from accidents** occurring **during** the performance of remunerated activities through the digital platform or accidents occurring **on the way to and from** these activities.

[30] See footnote 26.
[31] See Article 331 Labour Relations Act.
[32] Art. 6 Proposal for a Directive of the European Parliament and of the Council on the improvement of working conditions in platform work, COM (2021) 762 final, Brussels 9 December 2021.

So, de facto, they should take out a sort of occupational accident insurance for the self-employed platform workers similar to the one for employees. Either the platform worker will be considered an employee and, the platform operator (being an employer) should therefore take out work accident insurance in any case. Either the platform worker is a self-employed person - or the platform operator will claim this in any case - and then he will equally have to take out insurance. So, there is no possibility left to escape.

65. The platform operator who fails to fulfil this obligation will be held **civilly liable** for damages to the platform workers. Moreover, Chapter 14 of the Labour Deal Act in Book XV, Title 3, Chapter 2 of the Economic Law Code provides a level 2 **criminal sanction** for platform operators not conforming with this obligation.

66. Moreover, Article 581 of the Judicial Code will be amended so that **labour tribunals -and courts of appeal** will also have **jurisdiction** to hear disputes concerning this "common law (industrial accident) insurance". Thus, self-employed platform workers will thus have equal access to the same courts as employees.

67. The king can extend the coverage to legal aid and, in addition, he should set the minimum guaranteed conditions of the insurances. The protection should be similar to that for workers' industrial accident insurance. The fact that the government still has some work to do in working out this system has also led to the fact that the **effective date** of this section **will be determined** by royal decree. Thus, it could be some time before this system becomes a reality. Especially given that it is hard to imagine that the three short articles in the Labour Deal Act can regulate in sufficient detail a complex fact like a legal accident insurance.

9 INDIVIDUAL TRAINING RIGHT AND TRAINING PLAN

68. Chapter 12 of the Labour Deal Act, titled "Investment in training", introduces an **individual training right** for employees. This regulation is linked to the obligation for employers to draw up a training plan, which in turn can be found in **Chapter 9** of the law.

9.1 TRAINING RIGHT

69. The individual training right applies to those employers and employees covered by the **scope of the collective bargaining law.** The vast majority of the **public sector** is thus explicitly excluded. Employers with **fewer than 10 employees** (i.e. full-time equivalents) are also excluded. The Act also contains a system for calculating the number of employees, which we will not go deeper into.

70. The principle of an individual training right means that every full-time employee in a company with at least **20 employees** will be entitled to **five training days**. As a transitional measure, this will **still be four training days in 2023** (from 2024 it will be five). For employers with **at least 10 but fewer than 20 employees,** this number of mandatory training days will be reduced to **one training day** per year per full-time equivalent. As already stated, workers with fewer than 10 employees are excluded. We are talking about training days, but obviously not every training will take up a full day. The King, after advice from the National Labour Council, will be able to increase the number of training days, but he will also be able to set the rules regarding **converting training days to hours**.

71. Trainings followed in this framework should be **paid for by the employer**. While attending the training courses, employees receive their **normal remuneration**. In principle, training should take place **during working hours**. If this would not be possible, employees should receive their normal wage (as overtime pay) for the hours spent on training outside working hours.

72. Part-time employees or those not employed for a full year, will be entitled to a number of days **in proportion to their employment** by applying a formula. This formula involves multiplying the number of training days granted in the company for a full-time employee by the ratio of the person's employment regime, which is again multiplied by the number of months the person is employed in the company divided by 12. Thus, a half-time worker employed for six months will in principle be entitled to: 5 x ½ x 6/12 = 1.25 training days.

73. Training days can be spent on **formal and informal training**. These terms are defined in detail, but for your convenience, we will stick to the distinction that formal training takes place in a place separate from the workplace and is given by an external trainer and/or organised by an external organisation while informal training can also take place in the workplace itself (or that has a clear link to the workplace such as a fair or conference) and is mainly organised by the employer itself.

74. The right to training and thus the training days should in principle be determined in a **biennial sectoral collective bargaining agreement**. The law provides for the minimum content of such collective bargaining agreements (including the number of days, the growth path, the practicalities, the type of training eligible). In principle, the sectoral social partners have until **30 September 2023** to conclude an initial collective bargaining agreement for 2023-2034. The social partners can (but must not) **reduce** the **number of compulsory training days** in their collective bargaining agreement, without allowing it to be less than **two days**. They are also not allowed to reduce the number of training days if a previous sectoral collective bargaining agreement or a provision at company level provided more than two training days for a given year. Unfortunately, this provision is open to many interpretations and it is unclear exactly what is not allowed.

75. The legislator has provided a **fallback option** if the joint (sub)committee does not conclude a collective bargaining agreement. In this case, the so-called **individual training credit** (with the training days) will be allocated directly to an **individual training account**. In this case, it will therefore be impossible to deviate from the minimum training days (4 in 2023 and 5 from 2024) in the negative sense. The individual training account will take the form of a **form**, to be kept in the employee's personal file. This form will have to include, among other things, the number of remaining training days and must be updated as soon as possible after each training session. The law provides an option to keep this form in electronic form. Meanwhile, there are also voices calling for the government to create a digital application for this purpose.

76. The **balance of unused training days** can be **carried over to the next calendar year**. However, there is a **reference period of five years** during which a full-time employee must take an average of five training days per year. After these five years, the account is reset to zero. It is unclear what the consequences will be if the employee will not have followed enough training days at the end of the reference period.

77. Possibly, the answer is given in the provisions governing what happens to the training days at the end of **the employment contract**. If the employee is dismissed with **notice**, he/she will be entitled to use the training days during the notice period. This will not be possible in a dismissal with **severance pay**. A royal decree will determine how to value the unused training days so that they are taken into account when calculating the severance pay. Returning to the question in the previous point, it may well be that this compensation will also have to be paid to the employee if he did not take enough training days during the five-year reference period. If, finally, the employee has resigned himself or in the case of a dismissal for urgent reasons, the right to the unused training days is lost and in this case this loss should not be compensated either.

78. This Section **enters into force** on the **day of its publication** in the Belgian Official Gazette.

9.2 TRAINING PLAN

79. To give further practical effect to the individual training right, the labour deal in **Chapter 9** imposes an obligation on employers with **at least 20 employees to draw up** a **training plan**. This means that while employers with at least 10 employees but fewer than 20 employees will thus have to ensure that their employees attend at least one day of training per year on average, they will not have to draw up a plan. Employers with fewer than 10 employees will escape the dance entirely.

80. Like Chapter 12, Chapter 9 is limited to the employers and employees covered by the scope of the Collective Bargaining Act and thus basically applies only to the **private sector**. The entry into force of this Chapter is also notable: it enters into force retroactively on **1 September 2022**.

81. The **training plan** is defined as *"a document prepared either under paper, form or electronic form, in which the training courses are listed as well as the target group of employees for which they are intended".* The company will have to draw up such a plan **once a year**, **before 31 March**. The **works council**, or in its absence the trade union delegation, must be consulted on this. The employer must deposit the draft plan at least 15 days before the scheduled meeting with these bodies. The works council (or union delegation) must issue an opinion on it by 15 March at the latest. This means that, practically speaking, the employer will have to deposit a draft plan for consultation with the works council in the second half of February at the latest to allow for actual social consultation. Moreover, a **sectoral collective bargaining agreement**, filed at the latest on 30 September of the previous year, can determine the minimum content of the plans (for 2023, that deadline is postponed to 30 November 2022).

82. The training plan will have to pay particular attention to **at-risk groups**, e.g. the over-50s, and to **bottleneck occupations**. Moreover, the plan should pay attention to the **gender dimension**. The plan has a **minimum duration of one year**; if it is concluded for a longer duration, the question arises whether the obligation to draw up a training plan by 31 March each year will continue to apply. Possibly this could be resolved that the multi-year plan could be evaluated annually and possibly adjusted.

83. The training plan is **kept within the company** and should be available for employees' perusal on easy demand. Given that the plan may take an electronic form, it could be kept on an accessible intranet or shared cloud environment, for example.

84. The employer will provide the training plan to the **social inspectorate** within a month of its entry into force. This obligation will be further developed by royal decree and will only come into effect on a date to be determined by royal decree.

85. The employer's failure to draw up a training plan will **not** be **enforced by a sanction** (for now).

10 OTHER MEASURES

86. The Labour Deal Act contains some other measures. For instance, Chapters 10 and 11 provide for two **new monitoring systems** for the causes of labour shortages on the one hand and diversity on the other. Employers and employees themselves are not directly involved in these mechanisms.

87. Regarding **labour shortages,** it is the joint (sub)committees that hold a debate every two years on the problem of bottleneck occupations in their sector that leads to the drawing up of a list of bottleneck occupations. These lists should take into account the lists of bottleneck professions drawn up by the regions. Based on the list, the joint (sub)committees will prepare a report identifying the reasons why employers in their sector are not finding suitable candidates and recommend action.

88. Monitoring on diversity, in turn, is primarily entrusted to a new service within FPS Employment called "Diversity". This service should produce sectoral fiches of the structure of employment within each business sector. These fiches will analyse the presence of diversity based on the various criteria protected by the three discrimination laws. This would therefore mean that the Diversity Department would need to obtain information on all protected criteria. Given the large number of protected criteria and the very personal nature of certain criteria, this seems particularly disproportionate and undesirable and will potentially lead to a serious violation of employees' right to privacy. Moreover, it is very unclear how the service will obtain such information. So perhaps this information collection will be limited to some of the main criteria. In any case, the intention is that the joint (sub)committees will produce an analysis report based on the sector sheets. If this report finds no explanation for the differences identified within the sector, they will have to draw up an action plan to eliminate these differences. The government and administration will have to develop this scheme further by royal decree. It will be interesting to see whether this measure will create a legal processing ground for employers to process certain sensitive information (e.g. on health status or ethnic origin). Something that is very difficult today thanks to Article 9 GDPR's ban on processing sensitive personal data. [33]

[33] M. Caproni, ""Van Italiaanse origine mevrouw?" - Gegevensverwerking in het kader van een diversiteitsbeleid: wat mag de werkgever weten?, *Or.* 2021, no. 2, 26-34; P. Pecinovsky, "Werving en selectie" in F. Hendrickx and C. Engels, *Arbeidsrecht,* Part I, Bruges, Die Keure, 2022, 341-342.

89. Finally, Chapter 13 amends the Act of 7 January 1989 on **Funds for Subsistence Security** and Chapter 15 further amends the Labour Relations Act in terms of the operation and procedures of the **Administrative Commission for the Regulation of Labour Relations**. While not uninteresting, this review does not elaborate on this.

11 CONCLUSION

90. The Labour Deal Act is a patchwork of measures with different scopes and different dates of entry into force. These two observations already make it a difficult text to understand. Unfortunately, added to this is the fact that the law still contains numerous provisions open to interpretation, or which are not fully elaborated or unclear. Not much can yet be said about the consequences for employment law practice. In any case, the late enactment of the law will create the necessary problems for its implementation by joint (sub)committees and companies. One can hardly expect employers to simply implement these things quickly. Then again, enforcement of the measures is rather weak. Some protection for employees is provided here and there. But the law contains very few criminal sanctions, nor does it provide many civil sanctions such as lump-sum compensations. Finally, it should be noted that working time law and dismissal law will not be simplified by the planned measures. We hope that this exposition can partly help to understand these upcoming changes.