

Belgium

Introduction

Almost all aspects of labour relations in Belgium are covered by statutes and collective bargaining agreements. Flexibility is only available to the extent permitted by the statutory and regulatory framework. The governing provisions are, in order of prevalence: (i) the mandatory legal provisions (including EU Regulations, international treaties and implementing decrees); (ii) national collective bargaining agreements, (iii) business sector collective bargaining agreements; (iv) plant collective bargaining agreements; (v) written employment contracts; (vi) non-mandatory legal provisions; and (vii) oral individual agreements.

The main statutes are:

- The law of July 3, 1978, concerning employment contracts.
- The law of December 5, 1968, concerning collective bargaining agreements and joint employers' and workmen's boards.
- The law of April 12, 1965, concerning the protection of employees' salary.
- The Employment Act of March 16, 1971 (working time regulations).
- The law of April 8, 1965, concerning the establishment of working regulations.
- The Royal Decree of June 28, 1971, concerning annual vacation.
- The law of January 4, 1974, concerning legal holidays.
- The law of July 24, 1987, concerning interim labour and loan arrangements covering employees.
- The law of June 26, 2002, concerning plant closure.
- Collective bargaining agreement n°24 concerning collective lay-offs / Royal Decree of May 24, 1976, concerning collective lay-off / Law of February 13, 1998.
- Collective bargaining agreement n°32bis concerning the transfer of business undertakings.

- Flemish language decree of July 19, 1973 / Walloon language decree of June 30, 1982 / Royal Decree of July 18, 1996, on the use of languages (Brussels Region).
- The law of May 7, 1999, on equal treatment between male and female employees in labour relations.
- The laws of May 10, 2007, regarding measures against discrimination.

Labour law disputes are, with a limited number of exceptions, within the jurisdiction of the Labour Courts. The Labour Courts are composed of three judges, among whom are two lay judges (designated by Royal Decree on the proposal of employers' associations and the unions). Litigation involving employment disputes - especially in the framework of individual terminations - is common and part of doing business. Several laws provide for specific recourse to the Labour Courts if parties fail to reach an agreement as part of the dispute resolution process. Because the Civil Procedure rules provide only for very limited discovery, and witness testimony is only allowed in exceptional circumstances, recourse to the Courts is made only where relatively routine procedures are involved. Over the years, the amount of litigation involving individual terminations has been declining because case law has become well established on most issues.

Terminations

Restrictions On Employers

As a general rule, an individual termination of an employment contract is not subject to any prior administrative approval / notification or consultation process.

Employment contracts of white-collar employees can in principle be terminated at will by the employer subject to a prior notice or payment of an indemnity in lieu of notice. Additional damages for wrongful dismissal will only be awarded in exceptional circumstances provided the employee can prove (i) that the employer abused the termination rights or acted improperly in the termination process; and (ii) that such improper behaviour caused harm that is distinct from the termination as such and is not indemnified by the redundancy payments.

Employment contracts of blue-collar workers can also be terminated at will, subject to a prior notice or payment of an indemnity in lieu of notice. In terms of unfair

dismissal allegations the burden of proof is reversed. The employer must be able to prove that the termination was justified by reference to the (in)aptitude or behaviour of the blue-collar worker or the needs of the enterprise or division. If the burden of proof cannot be met, the blue-collar worker is entitled to an additional unfair dismissal indemnity equal to six months salary.

There are numerous exceptions to the general principles:

- Specific legal protection exists for the following employees: effective and substitute members of the Workers Council, Committee for Prevention and Security at the Work Place; non-elected candidates for the social elections; members of the union delegation; pregnant employees; employees on professional, educational or parental leave of absence; employees who filed a complaint for gender discrimination; prevention advisor / labour physician; employees in charge of the supervision of toxic waste;
- In addition, termination is prohibited during suspension of the employment contract for local political offices; and dismissal is prohibited where it is attributed to the introduction of new technologies;
- Protections exist where the terminations involve collective lay-off / plant closing.

The special protection takes the form of enhanced termination indemnities if the employer cannot prove that the termination is unrelated to the specific situation or condition of the employee (e.g., pregnancy), need for prior consultation (termination because of introduction of new technologies), need for prior annulment of the protection subject to substantial indemnities if not obtained before the termination (Workers Council / Committee for Prevention and Safety at the Work Place protection) or a combination of prior consultation requirements and additional indemnities (collective lay-off / plant closing).

Parties can, in accordance with the Rome Convention of June 19, 1980, have the employment contract validly governed by foreign legislation. Because Belgian labour law rules governing terminations are mandatory in nature, the foreign legislation will be set aside when less favourable for the employee. All employees - including expatriate personnel - benefit from the application of the Belgian labour law rules when terminated while employed in Belgium.

Notice Provisions / Consequences Of A Failure To Provide The Required Notice

Fixed term employment contracts can only be terminated before their term only upon the payment of an indemnity in lieu of notice equal to the salary and fringe benefits over the non-expired portion of the fixed term at the time of termination. The indemnity is limited to twice the amount of the indemnity in lieu of notice that would have been payable if the employee would have been engaged for an indefinite period.

Indefinite term employment contracts can be terminated by both the employer and employee with a prior notice of termination. The notice letter must state the notice period and starting date. In case of termination by the employer the notice letter must be forwarded by registered mail or notified by bailiff's writ. The employee can hand deliver the notice letter to the employer provided receipt will be acknowledged. The notice will, for white-collar employees - unless notified during a trial period, only start running on the first day of the month following the one in which effective notification occurred. The notice will begin for blue-collar workers on the Monday following the week in which notification took place. In case of notification by registered mail, effective notification is only deemed to have occurred on the third working day following the date of dispatch.

The notice requirements are as follows:

Dismissal Of White-Collar Employees

- During the trial period (if applicable): seven days subject to full entitlement to the salary for the first month of employment if termination occurs before completion of such minimum employment period.
- Gross annual compensation not exceeding currently 28,580 €: three months for each commenced period of five years employment.
- Gross annual compensation exceeding currently 28,580 €: to be agreed upon at the time of termination between the employer and employee or, failing an agreement, to be determined by the Labour Court at the request of the most diligent party; in practice the notice period will be determined unilaterally by the employer subject to the right of the employee to claim an indemnity in lieu of notice for the shortfall. Labour Courts will determine the applicable notice period by reference to the service years at the time of termination and

assessment of the chances for the employee to find new comparable employment having regard to the age, function and compensation level; as a general rule of thumb, employees will be given 1.2/1.3 months per year of length of service; corrections are to be made when the employee combines limited seniority with a substantial compensation package.

- Gross annual compensation exceeding currently 57,162 €: parties can validly agree in the individual employment contract on the notice the employer is to observe provided the contract is signed no later than the date of commencement of the employment and the notice equals at least three months for each commenced period of five years employment; failing such specific agreement, the rules that apply for employees whose gross annual compensation exceeds currently 28,580 € are governing.
- Termination at the occasion or after the legal retirement age: the notice period for the employer is reduced to three months if the seniority of the employee amounts to no more than five years and six months if his or her seniority exceeds five years provided the notice is notified no sooner than three (or, if applicable, six) months before the legal retirement age (65 years).

Resignation Of White-Collar Employees

- During the trial period (if applicable): seven days.
- Gross annual compensation not exceeding currently 28,580 €:
 - seniority does not exceed five years: six weeks
 - seniority exceeds five years: three months.
- Gross annual compensation exceeding currently 28,580 €: to be agreed upon at the time of termination or by the Labour Court in case of dispute subject to a maximum period of four months (gross annual compensation between currently 28,580 € and 57,162 €) or six months (gross annual compensation in excess of currently 57,162 €).
- Counter-notice: during a notice notified by the employer, the employee can give a counter-notice of one month (gross annual compensation < 28,580 €), two months (gross annual compensation between 28,580 € and 57,162 €) or maximum four months (gross annual compensation > 57,162 €).

The compensation thresholds are revised (indexed) on an annual basis effective as from January 1, of each year.

Dismissal Of Blue-Collar Workers

<u>Service years</u>	<u>Notice</u>
Less than 6 months:	28 days
Between 6 months and 5 years:	35 days
Between 5 and 10 years:	42 days
Between 10 and 15 years:	56 days
Between 15 and 20 years:	84 days
More than 20 years:	112 days.

For a number of business sectors the applicable notice periods have been enhanced by Royal Decree or business sector collective bargaining agreements.

Resignation Of Blue-Collar Workers

<u>Seniority</u>	<u>Notice</u>
Less than 20 years:	14 days
20 or more years:	28 days.

The employment contract for a blue-collar worker can provide for a trial period of a maximum of 14 days. Within the trial period the contract can be terminated without notice on (or as from) the seventh day by both parties.

Notice periods, when notified by the employee, are suspended during (prolonged with) periods of leave of absence (illness / vacation). If the contract is terminated by the employer (dismissal), the employee has the right, during the notice period, to remain absent from work for job interviews during two half days per week over the last six months of the notice and one half day per week in the preceding period.

Failure to give or observe the required notice entitles the other party to an indemnity in lieu of notice.

Termination For Serious Misconduct

There is no entitlement to any prior notice or indemnity in lieu of notice in case of justified termination for serious cause.

The ultimate determination as to whether or not a shortcoming provides sufficient support for a serious cause termination is with the Labour Court. The notion is applied very restrictively and only accepted in extreme circumstances (theft / false reports / competing activities) when applied to employee termination cases. Serious cause termination is in addition subject to formal requirements that need to be strictly complied with (termination within three working days following discovery of the wrongdoing / notification of all relevant factual details by registered mail within three working days following the termination). For employees who enjoy special protection because of Workers Council / Committee for Prevention and Security at the Work Place membership or their capacity of non-elected candidates at the social elections, serious cause termination is subject to prior acceptance by the Labour Court.

Termination Indemnities

In individual termination cases the employee, or as the case may be the employer, is entitled to an indemnity in lieu of notice if no notice or an inadequate notice has been observed by the other party.

The indemnity in lieu of notice is calculated on the basis of the gross annual compensation at the time of termination including all benefits (end of the year premium, extra vacation pay, variable salary [commissions / bonus] earned over the last 12 months of employment, employer's contributions to extralegal pension / medical schemes, meal vouchers, benefits in kind such as private use of a company car).

Sales representatives can in addition claim an entitlement to a clientele (goodwill) indemnity provided they have a seniority of at least one year at the time of termination and can demonstrate to have contributed new customers. Case law holds that a minimum contribution of even a few customers (irrespective of turnover) is sufficient to yield the entitlement. The clientele indemnity equals three months compensation (i.e., salary and benefits) if the seniority does not exceed five years. It is increased with one month for each commenced period of five years employment after the initial five years. The clientele indemnity is exempt from social security contributions. If the employment contract provides for a non-compete covenant, the burden of proof is reversed (i.e., the employer must prove that the sales representative did not develop any new customers). The entitlement can be contested if the employer can prove that the dismissal caused no prejudice. It is

extremely difficult to meet the burden of proof (e.g., case law does not accept hiring by a competitor and solicitation of the same customers as sufficient evidence, but requires in addition proof that the customers placed orders with the competitor).

Employees who enjoy special protection are entitled to specific termination indemnities, which can in certain cases be cumulated with the normally applicable termination entitlements. For example:

- Pregnant employees: additional indemnity equal to six months compensation, unless the employer can prove that the reason for the termination was unrelated to the pregnancy and physical condition of the employee;
- Members / substitute members of the Workers Council - Committee for Prevention and Protection at the Work Place - non elected candidates: failing prior annulment of the protection for technical and economic reasons or prior recognition of a serious cause by the Labour Court, the entitlement equals two, three or four years in function of the service years (i.e., less than 10, between 10 and 20 or more than 20) plus, subject to a rejected request for re-integration, an additional indemnity equal to the compensation over the non-expired portion of the current mandate.

Additional indemnities are provided for in case of collective lay-off (supplements to the unemployment benefits for employees whose notice or indemnity in lieu of notice does not exceed seven months) and closing of a plant or division (currently 139,30 € per year of service and 139,30 € per year of age above 45) (maximum 19 years). The applicable amounts are revised annually.

Law On Separation Agreements, Waivers And Releases

Parties can validly:

- Terminate the employment relationship by mutual consent; or
- Agree on the terms and conditions of termination once notification of the termination has occurred.

If the termination is accompanied by a prior notice, it is generally accepted that the waiver or release can only be validly obtained after the effective date of the notice letter (i.e., three working days after dispatch if notified by registered mail).

The terms and conditions of termination can provide less than the legal requirements. Once an employee is in a position to exercise his or her rights, he or she can waive them in whole or in part.

The rule that separation agreements can only be validly concluded after termination applies for both the employer and employee. Labour Courts will not honour undertakings of the employer in terms of notice or indemnities in lieu of notice - even if they are more beneficial for the employee - and will apply their standard criteria, unless the undertaking covers employees whose gross annual compensation exceeds currently 57,162 €, has been concluded at the latest at the time of commencement of the employment and meets the legal requirements.

Waivers and releases must be sufficiently specific, i.e., will only be deemed to cover the potential rights and entitlements that are specifically mentioned.

Litigation Considerations

While litigation involving termination disputes is not unusual, the need for dispute resolution by the Labour Courts has declined over the years. This is particularly true when the only issues concern the notice period that should have been observed and/or the gross annual compensation on which the indemnity in lieu of notice is to be calculated. The outcome of such litigations can in most cases be predicted within a reasonable range and most individual termination cases are covered by out of court settlements.

There is no review of the terms and conditions of settlement by the Labour Court, i.e., even when the settlement is concluded in the course of the procedure.

Litigation involving an employment dispute take on the average between 12 and 15 months to be tried before the Labour Court and about an additional year if an appeal is lodged with the Labour Court of Appeals.

Potential litigation is not a consideration that has a prevailing impact on the negotiation process because procedural costs are limited.

- As a result of a recent change in the legislation, attorney's fees are recoverable by the party who is successful, as fixed by a scale that depends upon the value of the claims.

Employment Discrimination

Anti-employment discrimination provisions are found, notably, in:

- The law of March 2, 2002, on non-discrimination vis-à-vis part-time workers;
- The law of June 5, 2002, on non-discrimination vis-à-vis fixed term employees;
- The law of May 10, 2007, aimed at combating certain forms of discrimination.
- The law of May 10, 2007, aimed at combating discrimination between men and women.
- The law of May 10, 2007, aimed at combating racism and xenophobia.

The anti-discrimination provisions stated in the laws of May 10, 2007, cover all employment aspects (i.e., interview, hiring process, terms and conditions of employment, equal pay, promotion opportunities, fringes benefits, termination, etc.).

Under the law of May 10, 2007, aimed at combating certain forms of discrimination, direct and indirect discriminations are prohibited.

There is a direct discrimination when a direct distinction exists, i.e., when, on the basis of age, sex, social origin, language, sexual orientation, marital status, birth, wealth, religious or philosophical beliefs, political beliefs, present or future health situation, handicap, physical or genetic characteristic, a person is treated less favorably than another person in a comparable situation.

There is an indirect discrimination where a provision, criterion or practice that is apparently neutral has, as such, an adverse effect on persons to whom one of the above discrimination reasons apply.

In principle a direct distinction based on age, sexual orientation, religion or philosophical beliefs can only be justified by a determinant and essential professional requirement. By derogation, in employment relationship matters, a direct distinction based on age is not a direct discrimination provided objectively and reasonably justified by a legitimate objective, such as a legitimate employment policy or employment market objectives or any comparable legitimate objective, and provided that the means to achieve such purpose are reasonable and necessary.

An indirect distinction is not an indirect discrimination if objectively justified by a legitimate purpose and provided the means to achieve such purpose are appropriate and necessary.

Specific Derogations To The Above Rules Exist.

It is worth mentioning that if the employee / applicant can show some elements that indicate the existence of a prohibited discrimination, it is up to the employer to prove that there is no discrimination. So, there is a reversal of the burden of proof.

Violation of the statute is sanctioned by criminal penalties, i.e., imprisonment between one month and one year (increased in certain circumstances) and/or criminal fines.

There are also specific civil sanctions, including, for example, nullity of the provisions that are discriminatory. Furthermore, the employee can claim civil damages equal to six months salary (three months in certain situations) or compensation for the effective damages that he/she can prove to have incurred.

The Law of May 10, 2007, aimed at combating discrimination between men and women incorporates provisions that are similar to the above provisions (except for the justification of the direct discrimination, which can only be justified by determinant professional requirements).

The same applies to the Law of May 10, 2007, aimed at combating racism and xenophobia.

Sexual And Moral Harassment

Sexual and moral harassment and violence at work is notably covered by the law of June 11, 2002.

- Violence at work is defined as “any factual situation where an employee ... is persecuted, threatened or mentally or physically aggressed during the performance of the employment.”
- Moral harassment (“mobbing”) is defined as “abuses and repeated behaviors of any origin, internal or external to the enterprise ... which include notably unilateral conducts, words, intimidations, acts, gestures or writings having as their purpose or effect to negatively affect the personality, the dignity or the

physical or mental integrity of an employee ... during the performance of the employment, to jeopardize the employee's employment or to create an intimidating, hostile, degrading, humiliating or offensive environment."

- Sexual harassment at work is defined as "any form of verbal, non-verbal or physical conduct of a sexual nature with as object an effect to the dignity of a person or to create intimidating, hostile, degrading, humiliating or offensive environment at the work place."

The employer must appoint a "Prevention Counselor" ("Conseiller en Prévention") who must fulfill certain educational requirements. He or she may be chosen inside the enterprise (but so only in enterprises with a headcount over 50) or outside the enterprise. The unions (if represented in the enterprise) are involved in his or her appointment. The employer may designate one or several "Trustworthy Persons" ("Personne de Confiance") who assist the Prevention Counselor.

The Prevention Counselor is in charge of receiving the complaints of the victims and of suggesting solutions to the employer. He or she is also in charge of reporting on the acts of violence or harassment that he or she knows about to a specific body called the Committee for Prevention and Protection of Work. That report is available to the official in charge of the supervision of the implementation of the law. It contains only statistical information and cites no names.

The law provides for a very specific procedure to be followed in case of harassment or violence at work.