Be Aware Belgium May 2016

BE AWARE BELGIUM SERIES

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What are the main amendments made to the Social Criminal Code?

The act of 29 February 2016 supplementing and amending the Social Criminal Code and various provisions of social criminal law was published in the Belgian Official Gazette on 21 April 2016. It is the first important reform of the Social Criminal Code which came into effect on 1 July 2011.

A number of the main amendments are related to wellbeing at work.

As such, the Social Criminal Code is adapted in terms of psychosocial risks at work, such as stress, violence, psychological and sexual harassment, as a consequence of the amendment of the Act on wellbeing on this point. The sanctions foreseen in the context of preventive measures and employee protection from violence, psychological and sexual harassment are at level 3, namely a criminal fine of 600 to 6000 euro or an administrative fine of 300 to 3000 euro. From now on, failure to comply with the procedures laid down in the Act on wellbeing in case of a formal psychosocial intervention request and failure to appoint a health and safety advisor specializing in psychosocial aspects and a person of trust are also punishable. Non-compliance with the obligations regarding psychosocial risk prevention in general can also give rise to sanctions.

Non-compliance with legislation regarding smoking in the workplace is also punishable. In case of infringements such as failure to provide smoke-free workspace, a level 3 sanction may be imposed. The infringements may even be punished with a level 4 criminal sanction, namely a prison sentence of 6 months to 3 years and/or a criminal fine of 3600 to 36 000 euro, or also an administrative fine of 1800 to 18 000 euros, if these infringements caused health issues or a work accident to the employee.

In the context of temporary employment, the amended Social Criminal Code now also assimilates the user of the temporary workers with the employer of these temporary workers, namely, the temporary work agency, in terms of criminal liability in case of infringements to provisions the application of which it is responsible for, for instance infringements to the legislation regarding working time, public holidays, maternity protection, working rules and wellbeing at work.

Finally, from now on, an employee that is knowingly and intentionally performing work, while not being declared, can be punished. The sanction which may be imposed on the employee is, however, limited to a level 1 sanction: an administrative sanction of 60 to 600 euro.

The amended Social Criminal Code came into effect on 1 May 2016.

Soetkin Lateur

Are bills payable in case forbidden labour leasing?

Article 31, § 1 of the Act of 24 July 1987 on temporary work, temporary agency work and hiring out of workers for the benefit of users (the "Act on labour leasing") prohibits an employer from leasing his employees to a third party which uses these employees and has part of the authority over them that would normally pertain to the employer.

Hence, Belgian legislation departs from a prohibition of labour leasing. The essential condition for this prohibition to apply is that the employees are leased out and that, in this regard, there is a shift of part of the employer's authority from the initial employer (service provider) to the user.

These are the legal exceptions to the prohibition of labour leasing:

- temporary work;
- authorised labour leasing for a limited period;
- labour leasing in the context of an employment project approved by the region;
- labour leasing in the context of a group of employers;
- specific exceptions in the public sector.

Article 33 of the Act on labour leasing also specifies that "any provision contrary to the provisions of this act and its implementing decrees is void in so far as it aims to restrict the employees' rights or to aggravate their obligations".

In a judgment dated 15 February 2016, the Supreme Court ruled that a violation of the Act on labour leasing resulted in the contract concluded between the service provider and the user being absolutely null, since the provision ordering the prohibition is a public policy provision. Hence, the service provider cannot claim the amount of the unpaid bills from the user.

Neither can the service provider's request be based on the unjust enrichment as mentioned in article 1131 of the Civil Code.

The Supreme Court indeed says that the judge can dismiss the impoverished party's claim, if he thinks that the preventive effect of the sanction, in case the parties concluded an agreement that is contrary to public order, would be put in jeopardy if he proceeded with this legal claim, or if he is of the opinion that the social order requires the impoverished party to be sanctioned more severely.

The judgment clearly shows the risk related to a violation of the Act on labour leasing. Nevertheless, it should be noted that in practice, companies are often poorly informed about the scope of the prohibition of labour leasing.

The Supreme Court ruled that the bills issued for a forbidden labour leasing were not payable.

Laurent De Surgeloose

Can an employee working part-time receive a full-time salary if the employer did not meet his obligations in terms of displaying the part-time work schedules and registering the derogations to these schedules?

In a judgment dated 29 February 2016, the Supreme Court had to rule on this matter once again.

Article 171 of the programme act of 22 December 1989 contains a legal presumption according to which parttime

employees are presumed to have performed their work in the context of an employment contract as a fulltime employee if the employer fails to meet his obligations in terms of displaying the part-time work schedules and its registration obligations of the derogations to these schedules.

Employers of part-time employees are obliged to keep a copy of the part-time employee's employment contract at the place where the working rules can be consulted, to inform the employees of variable part-time work schedules by displaying a notice at least five work days beforehand and to register all derogations to these parttime work schedule in a document that is provided for that purpose.

In case an employer does not meet one of these obligations, the legal presumption outlined in article 171 of the programme act of 22 December 1989 will apply.

In a judgment dated 4 October 1999, the Supreme Court had already ruled that this legal presumption had been established for the benefit of the institutions and the authorized civil servants to prevent illegal employment and not for the benefit of the employees. Taking into account this jurisprudence by the Supreme Court, upheld today in the judgment dated 29 February 2016, employees cannot claim salary as full-time employees based on article 171 of the programme act dated 22 December 1989.

Nevertheless, it should be noted that, in its judgment, the Supreme Court rules on the scope of article 171 before its amendment by the act of 29 March 2012. Through this amendment of the act, it was added that the legal presumption was rebuttable. The explanatory statement of this amendment, however, explicitly referred to the Supreme Court's jurisprudence and hence it is explicitly confirmed that this presumption does not apply for the benefit of the employee. As such, we can depart from the principle that the current version of article 171 of the programme act of 22 December 1989 cannot be invoked by employees in order to claim a salary as a full-time employee.

Soetkin Lateur

Save the date!

In collaboration with UWE (Union Wallonne des Entreprises), DLA Piper organises a conference concerning the following topic: "Cyber Security - Data Breach: Nouveaux challenges - Nouvelles responsabilités."

When? On 10 June 2016
Where? in Namen (Moulins de Beez)
For additional information, please contact Frédérique Gillet -

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