Reliance | Littler

MEMO

Subject:

New obligations following the implementation of EU DIRECTIVE 2019/1152 to improve working conditions by promoting more transparent and predictable employment and EU DIRECTIVE 2019/1158 on work-life balance for parents and carers

From: Reliance | Littler

Date: 22 November 2022

INTRODUCTION

Belgium recently adopted important reforms to its employment law framework as part of its implementation of both the EU Directive on transparent working conditions (2019/1152) and the EU Directive on the work-life balance for parents and carers (2019/1158). This memo discusses various legal and practical implications for employers under the new legislative measures, as well as recommendations for compliance. This Memo is for informational purposes only, and not intended to substitute for legal advice.

We are available for any questions or follow up to assist you in the implementation of these new measures within your company.

EU Directive 2019/1152 on transparent and predictable working conditions

EU Directive 2019/1152, adopted on 20 June 2019, seeks to improve working conditions by promoting more transparent and predictable employment to consider the evolution of the labour market, including atypical forms of employment. These changes are transposed in Belgium by the Act of 7 October 2022, which consists of three major sections:

- an update of the rules on the information to be provided to employees on their working conditions;
- the establishment of several minimum rights; and
- the adoption of new criminal sanctions.

Description of the measures	**Employees must receive information about key aspects of the employment relationship on the first day of employment or shortly thereafter**
	
	To comply with this duty, employers must share three types of information with their workers:
	
	❶ "Individual" information
	
	What information?
	
	• Employers with less than 10 employees:
	• the complete identity of the parties;
	• the place of work: When the work is not (or not mainly) performed in a fixed place, an indication that the worker is employed in various places or is free to choose their place of work, information on any arrangements for moving between the various places of work or a reference to the work rules for this purpose, and the registered office or, if applicable, the domicile of the employer;
	• the function that the worker primarily performs for the employer, as well as the worker's title, grade, quality or category (if any, whether sector-based or internal) and the characteristics or a brief description of the work;
	• the remuneration, including the initial basic salary, all other items, if any, indicated separately, the extra-legal social security benefits offered by the employer and to which the worker is entitled, as well as the method and frequency of payment of the remuneration to which the worker is entitled, or the reference to the legal, regulatory or CBA provisions governing these points. If a structural bonus plan is in force within the company, for example an annual plan based on objectives, the employee must be informed of the existence of such a plan. The employment contract (or another document, see below) should therefore at least refer to the bonus plan applicable on the day the employee starts working and this plan should also be communicated to the employee.
	• information concerning the working time:
	  ○ the duration and, where applicable, the terms of the trial period;
	  ○ if the worker is subject to a fixed working time schedule:
	  - the beginning and end of the regular working day, the time and duration of rest intervals as well as the days of regular work stoppages, or the reference to the relevant provision in work regulations in this regard;

	- the rules concerning overtime and complementary hours, the related remuneration and other rights relating to such hours, or the reference to the applicable legal provisions or CBA's governing these points; - where applicable, the rules on changing shifts or the reference to the relevant provision in work regulations in this regard; - where applicable, the start of the cycle; o if the worker is subject to a variable working time schedule: - the principle according to which the working hours are variable and the number of hours of the working arrangement; - the rules concerning overtime and complementary hours, the related remuneration and other rights relating to such hours; - the days of the week and the daily period within which work may be scheduled or the reference to the relevant provision in work regulations in this regard; - how and when the worker is informed, by means of a notice, of their working hours, or the reference to the relevant provision in work regulations in this regard. *How?* • Either in writing or through electronic means, provided that the information is accessible to the worker and can be saved and printed; • in the individual employment contract or in another document. Note, however, that the individual employment contract concluded between the employer and the worker has precedence over any other document to prove the working conditions (see Act of 3 July 1978 regarding employment contracts). *When?* The worker must receive the pertinent information no later than the first day of employment. Any change in the abovementioned information must be communicated in the form of an amendment in the document concerned, at the latest, on the day the change comes into force, unless the change is the result of a simple amendment to the legal or regulatory provisions or collective labour agreements to which the document concerned refers.

	❷ Collective information *What information?* • the worker's right to be trained by the employer or the reference to the legal or regulatory provisions or CBA governing this right; • the duration of annual holidays, as well as the modalities for granting such holidays or reference to the legal or regulatory provisions on the matter; • the procedure, including formal requirements and notice periods, that the employer and the employee must follow in the event of termination of the employment relationship, as well as the time limits for appealing against the dismissal, or reference to the legal or regulatory provisions governing these points; • the reference to the CBA regarding the working conditions and the reference to the competent joint committee within which they were concluded; • the social security body which collects the social security contributions related to the employment relationship. *How?* • Through the work regulations; • or, in case the legal provisions about work regulations are not applicable (e.g., community workers), by completing the document mentioned under ❶, either in writing or through electronic means, provided that the information is accessible to the worker and can be saved and printed. *When?* Within a period of one month as from the start of the employment relationship. Any change in the abovementioned information must be communicated in the form of an amendment in the document concerned, at the latest, on the day the change comes into force, unless the change is the result of a simple amendment to the legal or regulatory provisions or collective labour agreements to which the document concerned refers. **❸ Specific information for workers working abroad** *How?* By completing the document mentioned under ❶, either in writing or through electronic means, provided that the information is accessible to the worker and can be saved and printed. *When?* Before the employee leaves for the foreign country.

	What information?
	• For employees sent abroad for more than four consecutive weeks:
	  ○ the country or countries in which the work abroad is to be carried out and its expected duration;
	  ○ the currency in which the remuneration is to be paid;
	  ○ where applicable, the benefits in cash or in kind related to the work;
	  ○ information indicating whether the worker's repatriation is regulated, and if so, the way repatriation is regulated.
	• For employees seconded to an EU Member State within the scope of Directive 96/71 concerning the posting of workers:
	  ○ the country or countries in which the work abroad is to be carried out and its expected duration;
	  ○ the currency in which the remuneration is to be paid;
	  ○ where applicable, the benefits in cash or in kind related to the work;
	  ○ information indicating whether the worker's repatriation is regulated, and if so, the manner in which repatriation is regulated;
	  ○ the remuneration to which the worker is entitled under the applicable law of the host Member State or the reference to the legal or regulatory provisions or collective agreements which determine it;
	  ○ where applicable, all allowances linked to the posting and all rules for the reimbursement of travel, accommodation and subsistence expenses;
	  ○ the link to the single official national website set up by the host Member State indicating which terms and conditions of employment and/or which parts of their national and/or regional law are to be applied to workers posted to their territory.
	Any change in the abovementioned information must be communicated in the form of an amendment in the document concerned, at the latest, on the day the change comes into force, unless the change is the result of a simple amendment to the legal or regulatory provisions or collective labour agreements to which the document concerned refers.
	New minimum requirements on working conditions

	The Act provides for new minimum requirements relating to working conditions: • **Multiple jobs**: An employer cannot prohibit a worker from taking up employment with other employers outside the work schedule established with that employer, nor subject a worker to adverse treatment for doing so, except when it is authorized by statutory law. In fact, Member States may lay down conditions for the use of incompatibility restrictions by employers, based on objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests. • **Compulsory training**: The employer is obliged to provide free training to the employee if such training is necessary for the performance of the work for which they were hired. The training time must be considered as working time and take place during working hours, unless it can be demonstrated that it is not possible to organise it during working hours. These courses cannot be the subject of a "training clause" (which would require the worker to reimburse (part of) the training costs in case of termination before the expiry of an agreed period). • **Transition to "another form of employment"**: Under certain conditions, employees may request a form of employment with more predictable and secure working conditions. This measure has been implemented through the national CBA n°161 applicable to the private sector. *Which workers can make a request?* Workers with more than six months of uninterrupted service with the same employer (including with the employer-user in case of temporary work). The six months' period is also acquired in the case of successive fixed-term contracts or replacement contracts with the same employer when the periods of interruption between two contracts are not attributable to the worker (or in case of abusive interruption by the employer). *What can the worker request?* The Directive and the law do not define "more predictable and secure working conditions". Only examples of such conditions are given by the CBA: • a contract of employment for an indefinite period rather than for a definite period; • a full-time employment contract rather than a part-time; • a part-time contract with more hours rather than a part-time contract with fewer hours;

	• an employment contract with fixed hours rather than an employment contract with variable hours; • a weekly or monthly temporary employment contract rather than a daily temporary employment contract. However, both the Directive and the CBA state that the worker is eligible for a form of employment with more predictable and secure working conditions to the extent that such a form of employment is available. The CBA adds that the worker must meet the qualifications and skills required for this purpose and accept the hours and pay conditions offered in this context. *How, when and how often can the worker make their request?* The worker's request should: • be made in writing (provided that there is a confirmation of receipt); • be presented at least three months before the required start of the new form of employment; • should specify, in a precise manner, the requested form of work and conditions and their requested start date (to prevent random requests for the sole purpose of attempting to avoid dismissal); • specify the legal basis for the application; • not be made more than once per twelve-month period. *How and when should the employer respond?* The employer should respond: • in writing (provided that there is a confirmation of receipt); • within one month of the request (or two months for companies of the private sector with less than 20 employees); • indicating the concrete reasons for its decision to refuse, postpone or counter-propose, considering among other things the availability of the requested new form of employment, and the qualifications and skills or organizational matters (like the schedule) required for the new form of employment. Such decision may be justified by the resources and operational capacity of the company by identifying concretely which specific problems arise in connection with the operation of the company.

	• **Maximum duration of probationary period:** The Act introduces several restrictions to the probationary period (such as proportional duration, non-application in case of renewal of tasks). As a reminder, probationary periods no longer exist in common employment agreement but still exist in temporary, interim and student employment contracts. • **Minimal predictability of work:** Employees subject to a variable working schedule may refuse to perform without adverse consequences if the work assignment (i) does not take place within a work schedule that was notified on time (seven calendar days or minimum three calendar days if authorized through a CBA, cf. Labour Deal) and/or (ii) does not take place within the predetermined days and hours during which work can be performed. Moreover, in the event of a late cancellation of a work assignment by the employer, the employer must pay for such work as if it had been performed.
	Enforcement of employees' rights **❶ Protection against "negative treatment" and dismissal** Without prejudice to the specific sanctions provided for in CBA n°161 regarding the start date, the duration of the protection period and the amount of the protection indemnity (which can be lower), the employer may not take any negative treatment against a worker who has filed a complaint or initiated proceedings to enforce the rights set forth by the Act or the persons who assisted and supported the worker in filing the complaint, except on grounds unrelated to the complaint. If the employer engages in such negative treatment within 12 months after the complaint is lodged, the employer bears the burden of proving that the treatment was for reasons unrelated to that complaint. Failure to do so will subject the employer to pay the worker a compensation equal either to a lump sum corresponding to six months' gross pay or to the loss suffered. When judicial proceedings have been initiated by the worker, the abovementioned period of 12 months is extended until the end of a period of three months following the day on which the judgment became final. Likewise, except for reasons unrelated to the exercise of the rights deriving from this Act, an employer may not dismiss a worker who is exercising these rights, nor may he prepare the dismissal. At the worker's request, the employer shall inform the employee in writing of the reasons for the dismissal and the employer bears the burden of proving that the dismissal is unrelated to the exercise of the rights under this Act. Failure to do so will subject the employer to pay the worker a compensation equal to a lump sum corresponding to six months' gross pay, in addition to the compensation due to the worker in the event of termination of the employment contract. **❷ Criminal sanctions**

	Failure to provide the worker with the **information about the key aspects of the employment relationship** required by the Act or to comply with the protective measures against negative treatment or dismissal is now punishable by a level 3 sanction, i.e., a criminal fine of 800 to 8.000 EUR or an administrative fine of 400 to 4.000 EUR. For each violation, the fine should be multiplied by the number of employees involved. Failure to comply with the **new minimum requirements relating to working conditions** is punishable by a level 2 sanction (i.e., a criminal fine of 400 to 4.000 EUR or an administrative fine of 200 to 2.000 EUR multiplied by the number of employees involved for each violation). Noncompliance can be established if the employer: • treated negatively a part-time worker employed under variable schedules who refused to perform a work assignment when the worker had the right to refuse; • organises compulsory training outside working hours (without establishing that the training cannot be organized during working hours); • does not count mandatory training hours as working time; • unlawfully prohibits the worker from working for one or more other employers; • fails to reply within the time limit and with reasons to a worker who fulfils the conditions and requests a more secure and predictable form of employment; • fails to provide the worker with information concerning the key aspects of the employment relationship in a complete and accurate way, and within the legal deadlines; • fails to inform the worker of any modification of the aspects of the employment relationship. It is now punishable by a level 3 sanction (i.e., a criminal fine of 800 to 8.000 EUR or an administrative fine of 400 to 4.000 EUR, multiplied by the number of employees involved for each violation) if the employer: • fails to provide the worker with free training, as required under the Act; • fails to provide the worker with information concerning the key aspects of the employment relationship.
Practical actions	Check and, if necessary, adapt your standard employment contracts and work regulations, for which we can assist you.

	When you consider a dismissal, keep the protection against dismissal in mind (e.g., by adding "request of information about the key aspects of the employment relationship", "request of more predictable and safer working conditions", etc., to a "dismissal checklist").
Entry into force	10 November 2022, except for the provisions of CBA No. 161, which entered into force on 1 October 2022. Regarding the employer's duty to provide information about the key aspects of the employment relationship, in principle, the information duty only applies to employment relationships started as from the date of entry into force of the Act. However, there is an important caveat: If an employee hired pre-November 2022 specifically requests this information, the employer must provide the requested information within the deadlines set forth by the Act.

EU DIRECTIVE 2019/1158 ON WORK-LIFE BALANCE FOR PARENTS AND CARERS

Through the implementation of EU Directive 2019/1158 on work-life balance for parents and carers, Belgian law introduced flexible working arrangements, which are regulated through Act of 7 October 2022 and CBA No. 162 (covering employers and employees in the private sector).

Flexible work arrangements

Description of the measure	**What is a flexible working arrangement?** Workers have the right to request an adjustment to their existing work arrangements. This can take the form of remote work, working from home, an adjustment of the work schedule, a reduction of working hours, among other options. **Which workers can request it?** Workers who were employed by the employer for at least six months during the 12 months preceding the application for flexible working arrangements. Periods of interim employment must be considered. **For which reasons can the worker make a request?** *Caring for a child* Workers have the right to request a flexible working arrangement to take care of their own child or their partner's child whom they are living with or are married to, up to the age of 12 years (increased to 21 years when the child is at least 66% affected by a physical or mental incapacity or suffers from a serious medical-social condition). The age requirement must be met no

	later than during the period of the flexible working arrangement. If the employer prefers to postpone the arrangement, but the application was done correctly and within the applicable deadline, the period of flexible working arrangement may exceed the age limit. *Personal care or support of a family member or relative who needs significant care or support for a serious medical reason* Workers who want to provide personal care or support to a family member in need of significant care or support for a serious medical reason also have the right to request a flexible working arrangement. The serious medical reason must be demonstrated by a medical certificate from a physician. **How and when can the worker make their request?** Workers' request must be made in writing to the employer three months in advance. This deadline may be shortened in mutual agreement. The request shall mention: • the type of flexible working arrangement being requested; • an explicit reference to CBA No. 162; • start and end dates of the flexible working arrangement; and • the purpose for which the flexible working arrangement is requested. On the first day of the flexible working arrangement (at the latest), the employee must present the document(s) substantiating the basis for the request. The flexible working arrangement can be requested for a maximum period of 12 months. **How and when should the employer respond?** The employer must respond in writing within one month of the request. Unless it accepts the request, it must justify its answer in writing. In its assessment, the employer must consider the needs of the company and, as far as possible, the needs of the employee. Workers may repeat their request if the employer does not respond within one month. If the employer agrees, the employer and employee shall work out together the details of the work arrangement.

	The employer may postpone the flexible working arrangement based on concrete and justified reasons related to the operation of the company. It must communicate these concrete reasons to the employee within one month of the request. This postponement may not result in making the flexible working arrangement impossible. The employer may also make a reasonable counteroffer, which the employee may accept or refuse. If the request is refused, the employer shall communicate the concrete reasons for the refusal to the employee within one month of the request. The reasons may be the duration of the flexible working arrangement or the resources and operational capacity of the company. They are concretely justified if the employer indicates the specific problems related to the operation of the company in the concrete situation of the application. This concrete justification may always be repeated by the employer if the same employee repeatedly makes identical requests at short intervals, as long as the employee's situation remains unchanged. **Early return** At the end of the period of flexible working arrangements, the worker has the right to return to the original working arrangements. The employee may request early suspension or termination of an ongoing flexible working arrangement to return to the original work arrangements, by a written request sent to the employer 10 days in advance. The employer's written, reasonable response must follow within a maximum of five days of the request. (CBA No. 162 allowed 14 days but the law requires five days.) **New application or extension** Workers have the right to request a new flexible working arrangement or to request an extension of their current flexible working arrangement for a maximum of 12 months. If the extension is part of the same purpose and work pattern adjustment, the application procedure does not need to be followed and the extension can be done by mutual agreement. **Deviating regulations** Through a collective bargaining agreement at the sector or company level, it is possible to deviate from: • the maximum period of 12 months for flexible working arrangements; • the three-month deadline for submitting the application; or • the simplified renewal procedure for a new application.

	At the company level, these adjustments may also be made by agreement between the employer and the union delegation or, in the absence of union delegation, by mutual agreement between the employees concerned and the employer. Deviations can also be made by mutual agreement between the employee concerned and the employer. **Protection against negative treatment and dismissal** An employee exercising the right to request a flexible working arrangement is protected against any "negative treatment" by the employer (such as non-renewal of a fixed-term contract) and dismissal. The protection runs from the written request until two months after the end of the flexible working arrangement or until two months after the refusal of the request. If no flexible working arrangement is started, the protection ends two months after the requested start date. If the employee establishes that the employer negatively treated or dismissed the employee because of a request for a flexible working arrangement, the employer must prove that the adverse employment action was based on grounds unrelated to the exercise of the rights granted by CBA No. 162. An employer who fails to establish this defence may be sanctioned to compensate the employee with an indemnity ranging from two to three months' gross salary in case of negative treatment. In case of dismissal, a lump-sum indemnity of six months' gross salary will be due. The protection indemnity cannot be cumulated with other types of compensation following the termination of the employment contract, except with the indemnity in lieu of notice, the indemnity for loss of clientele (for sales representatives), a non-competition compensation and an additional compensation on top of social security benefits. The protection indemnity may be cumulated with a non-discrimination compensation, except on the grounds of family responsibilities. **No impact on the right to time credit (CBA No. 103/6).** The periods of reduction in work performance following a flexible working arrangement are neutralised for the provisions of the limits to take time credit. This means that the use of flexible working arrangements does not impede the employee's ability to take time credit.
Practical actions	Ensure no negative action is taken towards employees filing written requests for flexible work arrangements and add the written request to the dismissal checklist to minimise potential claims for damages.

Entry into force	1 October 2022

Special leave and extended protection against dismissal for parents and carers

Description of the measures	The implementation of Directive 2019/1158 on work-life balance for parents and carers also entails several changes in terms of special leave and dismissal protection, implemented under Belgian law by the Act of 7 October 2022. **Carers' leave** A new leave called *carers' leave* is intended to provide for personal care and support to a family member or household members who need significant care or support for a serious medical reason. A household member is any person living with the employee and the family members are the employee's spouse or legal partner, parents and children. Employees are entitled to up to five days of carers' leave per calendar year, consecutive or not. The days of carers' leave taken by the employee are charged to the already existing *leave for compelling reasons* (employees are entitled to up to 10 days per calendar year of this leave) and are therefore by definition unpaid. The Act of 7 October 2022 leave the possibility of providing an allowance for each day of carers' leave taken by the employee through an Act. (This possibility has not yet been implemented.) The employee who wishes to exercise the right to carers' leave must inform their employer in advance and justify their absence by providing the employer as soon as possible with a certificate attesting to the family member's need for care or support. This certificate must be issued by the doctor treating the family member or relative in question and cannot indicate the medical reason itself. Employees who exercise this right benefit from a special dismissal protection. The employer may not terminate the employment contract during the protection period except for reasons unrelated to the carers' leave. The protection period begins when the employer is notified of the taking of carers' leave and ends one month following the end of the leave. The employee may request the employer furnish a written explanation for the dismissal. It is up to the employer to prove that the dismissal is not related to the taking of the carers' leave. If the employer fails to do so, the employee will be entitled to a lump-sum indemnity of six months' gross salary. **Maternity leave for co-mother in case of hospitalisation or death of mother**

	In case of the death or hospitalization of the mother, maternity leave can be converted into leave for the employee who is the father, the co-parent or – as from now – the co-mother. **Birth leave (formerly known as "Paternity leave") and Adoption leave** **Particularities regarding entry into force**: As from 1 January 2023, employees will be entitled to 20 days of leave for births occurring after 1 January 2023 (employees are currently entitled to 15 days of paternity leave). The term *paternity leave* is replaced by the term *birth leave*. The protection indemnity in the context of birth leave and adoption leave is increased from three to six months' gross salary. The period during which the employee enjoys dismissal protection because of the birth leave is extended as follows: Dismissal protection begins from the notification to the employer, and no later than the first day of the birth leave, and the protection period ends five months after the day of the birth. **Parental leave** To be entitled to parental leave, the employee who wants to apply must have a certain seniority within the company. Previous periods of employment that the employee has carried out with the employer as an interim worker will now be considered when calculating the seniority condition. There are also certain changes concerning the application procedure: • the absence of a decision by the employer will be considered as approval by the employer; and • the employer's decision will have to be a motivated decision. Postponement of taking parental leave is now only possible if taking parental leave would seriously disrupt the proper functioning of the company. In certain cases, the employer will only be able to invoke postponement by offering alternatives that are fully or partially within the period requested by the employee. After taking (unpaid) parental leave pursuant to CBA No. 64, the employee may take two more months of (paid) parental leave for the same child under the form of full suspension of performance of the employment contract. **Preparation for dismissal during the protection period is now equal to a dismissal**

	Employees will now enjoy protection against dismissal following the protection period when the employer has already prepared the dismissal during the protection period. Any act of the employer following the protection period which aims to unilaterally terminate the employment relationship and for which some preparation was made during the protection period, is equal to a dismissal during the protection period. Making the decision to terminate the contract during the protection period is also considered as preparation for dismissal. This assimilation applies in the context of dismissal protection in case of (*conversion of) maternity leave*, *maternity leave*, *birth leave*, *carers' leave* and *career break* (including *parental leave*). **Extension of protection to fixed-term/interim contracts** If an employee who is employed with a fixed-term contract informs their employer that they will take up birth or adoption leave and the employer fails to renew their employment contract, the non-renewal is assumed to be related to the *birth or adoption leave*. The same protection is foreseen for interim in the event of non-renewal of their interim contract. In that case, the user company is considered the employer. The employee may request the employer furnish a written explanation for the non-renewal of the employment contract. It is up to the employer to prove that the non-renewal of the contract in question is not related to the birth or adoption leave. If the employer fails to do so, the employee will be entitled to a lump-sum indemnity of three months' gross salary. This special dismissal protection for fixed-term employment contracts and interim contracts also applies in case of *pregnancy* and *conversion of maternity leave*. **Notice during periods of suspension** When the employment contract is suspended in case of *birth leave*, *leave for compelling reasons*, *carers' leave* and *adoption leave*, the employee may terminate the employment contract with a notice period, which can continue to run even during the suspension. **Calculation of severance pay during period of reduction in work performance** When an employment contract is terminated during a period of reduction of work performance, the severance pay must now be calculated based on the salary to which the employee would have been entitled under their employment contract if they had not reduced their work performance.

	Criminal sanctions Failure to comply with these obligations is now sanctioned with a level 2 sanction, i.e., a criminal fine of 400 to 4.000 EUR or an administrative fine of 200 to 2.000 EUR multiplied by the number of employees involved for each violation: • Failure to grant paternity leave or comply with the duration or conditions of birth leave; • Failure to grant converted maternity leave; • Failure to grant carers' leave and failure to observe the duration or conditions of carers' leave.
Practical actions	Ensure compliance with the rules on special leaves and dismissal protection as failure to comply may result in the obligation to pay indemnities to employees and in criminal penalties.
Entry into force	10 November 2022

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