MEMENTO OF THE EMPLOYER 2

TOPICS

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Kantoor van afgifte: Leuven MassPost | P705107

CROSS-BORDER EMPLOYMENT WITHIN THE EUROPEAN UNION

PART II – EMPLOYMENT LAW AND SOCIAL SECURITY

The first part of this article was published in the January issue. It described two different scenarios: "transfer" and "posting". This second part takes a look at a third scenario: "simultaneous employment". The main rules for each of the three scenarios have been summarised in a table providing a simplified overview.

At the end of this second part, we will review the various employment-related documents as well as the old and new formalities.

01

SCENARIO 3: SIMULTANEOUS EMPLOYMENT

The worker is employed in several EU Member States. He/she works for one or more employers within a single group. The employers may but need not be located in one of the Member States. In practice, this scenario is most often used for long periods of time.

Often, when they opt for simultaneous employment, the aim of the worker and the employer is to take advantage of the tax advantage conferred by the salary split. The actual advantage depends on the actual circumstances and the tax rates applicable within the various Member States.

Working in several countries at the same time always has major repercussions as regards remuneration and working conditions, and as regards the law on employment contracts and the payment of social security contributions.

When does simultaneous employment occur?
A worker may carry out simultaneously - or alternately - one or more separate activities in two or more Member States of the EU for a single employer or for different employers. Unlike posting (scenario 2), which is temporary by its very nature, simultaneous employment takes place over a longer period of time. However, it is not always easy to distinguish between both scenarios. Regulation No. 883/2004 on the coordination of social security schemes defines a number of criteria that can also be applied to labour law:

- It is a stable and recurring employment pattern spread out across several EU Member States.
- The marginal activities carried out in one or more Member States are not taken into account. The activities representing less than 5% of the normal working time are therefore not taken into account.

When temporary assignments in other Member States increase in number, follow each other with increasing frequency and even begin to become semi-regular, it is no longer a posting.

EXAMPLE

A Belgian employer asks a worker to make improvements to the group's Luxembourg-based company. For a period of a few months, the worker works only in Luxembourg. During this period, the worker is therefore posted in Luxembourg from Belgium (scenario 2). Some time later, the worker is once again sent to Luxembourg and works a few days out of every month on a project in Belgium. He is therefore simultaneously employed in the two countries by his Belgian employer. Therefore, his employment situation has changed from a posting to simultaneous employment.

A. THE CONTRACT

The type of contract will depend on the actual situation. It is recommended to ensure that the contract matches the reality as much as possible. The organisational link between the worker and one or more companies in the same group is crucial.

If several companies have the power to take decisions regarding, for instance:

- (the amount of) the fixed/variable remuneration
- the rules on promotion and dismissal
- the nature of the tasks,

it is recommended that this be reflected in the contract(s). Each of the companies concerned will thus be officially linked to the worker.

The first option involved entering into a part-time employment contract with each of the companies concerned. The second option involves entering into an "overall" employment contract. In such case, the various companies of the group jointly exercise the employer's authority over the worker, and the worker is entitled to an overall wage package.

B. WHICH LABOUR LAW? THE RULES OF ROME I DETERMINING APPLICABLE LAW[1]

SUMMARY OF THE FIRST FOUR RULES DETERMINING APPLICABLE LAW

Four rules enabling the applicable law to be determined were detailed in the first part.

Rule No. 1: freedom of choice of the parties – In principle, the parties determine which labour law governs the working relationship by mutual agreement. This is known as "freedom of choice". The labour law in force within the State of employment therefore does not automatically apply.

Rule No. 2: the country of habitual employment – The worker and the employer are not obligated to determine the applicable law themselves. Failing a choice made by the parties, the employment contract is governed by the law of the country in which the worker habitually carries out his work. This rule is particularly important in cases of simultaneous employment.

Rule No. 3: restrictions to the freedom of choice of the parties – The freedom of choice of the parties is not absolute. When the parties opt for the labour law of a Member State other than the country of habitual employment, the worker may nevertheless invoke the binding provisions of the law of the country of habitual employment (or of the country in which the employer is located).

Rule No. 4: the police laws of the country of temporary employment and Posting Directive 96/71 – In the event of temporary employment within a receiving State, the "police laws" of the receiving State must be complied with. This also applies when the parties opt for the labour law of the sending State.

RULE NO. 2: THE COUNTRY OF HABITUAL EMPLOYMENT

There are no strict criteria for determining when a Member State becomes the place of habitual employment. In principle, it is the country where the worker habitually carries out his work. However, what happens when it is not possible to determine this? In such cases, the labour law of the country **from which** the worker habitually carries out his work applies. It is therefore necessary to determine the country of habitual employment ("where") first and foremost.

To that end, case law is based on the two following criteria:

1) Quantitative criterion: The Member State in which the worker spends most of his working time is the country of habitual employment.[2]
2) Qualitative criterion: The Member State in which the worker carries out most of his obligations to his employer and where the actual centre of his professional activities is located is the country of habitual employment.[3] It does not necessarily have to be a fixed place organised and managed by the employer.

EXAMPLE

The actual centre of professional activities is the worker's office. This is the place from which he goes on business trips, where he meets with clients, and where he writes up reports for his employer.

In practice, the quantitative criterion is easier to apply than the qualitative criterion. The latter criterion is often more vague and less predictable as all circumstances must be taken into account.

The quantitative and qualitative criteria may each refer to a different Member State, of course. In such case, the joint will of the employer and the worker shall be decisive[4].

EXAMPLE

A worker works in Belgium for several years. Belgium is clearly the country of habitual employment. The worker is responsible for the employer's operations in the Netherlands. The worker and the employer agree that the worker will now work permanently in the Netherlands. A few months later, the employer wishes to terminate the employment contract. Which labour law must be applied to complete the dismissal? From a quantitative point of view, employment in Belgium prevails. From a qualitative point of view, it is the Netherlands. The joint will of the employer and the worker was that the worker be permanently employed in the Netherlands. Thus, the Netherlands must be considered the new country of habitual employment.

RULE NO. 5: THE COUNTRY IN WHICH THE EMPLOYER IS LOCATED[5]

What can be done in the absence of a place of habitual employment? Here's an exercise: neither the quantitative criterion nor the qualitative criterion enable a place of habitual employment to be identified. In such case, the law of the country in which are located the headquarters of the employer who hired the worker must be applied.

This rule refers exclusively to the business unit that hired the worker. This criterion is also entirely independent of the circumstances in which the worker is employed. Therefore, it is not the business unit to which the worker is linked for his actual employment.[6] The term "business unit" refers to any stable business unit belonging to the company: the business unit does not necessarily need to be a separate legal entity.

In practice, this situation is relatively rare. Even if a worker is active in several countries and it is difficult to define a work pattern ahead of time, the actual centre of the professional activities will be decisive (Rule No. 4). Rule No. 5 may only apply in cases in which it is not possible to determine the actual centre of activities beforehand, given that the worker conducts a nomadic activity.

RULE NO. 6: CLOSE LINK WITH ANOTHER COUNTRY[7]

This "escape clause" only applies in certain exceptional situations. If the contract is found to have closer links with another country, the law of that country will apply.

C. WHERE ARE THE SOCIAL SECURITY CONTRIBUTIONS LEVIED? REGULATION NO. 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS[8]

Three elements serve to determine which social security legislation is applied:

1) the duration of the employment (not the duration of the stay) in each Member State;
2) the place of residence, which does not necessarily match the tax concept of domicile or of the place registered in the population register;
3) the contractual structure of the employment, in particular whether or not the worker is employed by several employers in different Member States.

These elements are often difficult to predict. Nevertheless, it is crucial to correctly evaluate each element ahead of time. The strength of the rules listed above resides in their ability to predict which social security legislation will be applied, and therefore in which Member State the social security contributions will be levied.

The fact of a worker being hired by a second employer established in another Member State can cause the first employer to be obligated to pay social security contributions in the other Member State. A change of the place of residence, even if it is only the result of the worker's family moving, may also cause a change of the applicable social security legislation. Employers therefore have to be aware of more details than they might necessarily want to. Of course, the duration of employment in the various Member States is the most volatile element. The principle of "measuring is knowing" applies here as well. Especially since previous work arrangements are considered a reliable indicator of the future work arrangements.

WHEN DOES SIMULTANEOUS EMPLOYMENT IN TWO OR MORE MEMBER STATES OCCUR?[9]

The duration of the activity carried out in one or more Member States is decisive in distinguishing between posting (scenario II) and the carrying out of an activity in several Member States.

While posting may only be temporary by its very nature, simultaneous employment is characterised by its permanent nature. In order to distinguish between both work arrangements, an overall evaluation of all relevant facts (in particular the workplace as defined in the employment contract) must be carried out.

In a first step, it is necessary to check whether the conditions for a posting have been met. If, and only if, this is not the case, the rules determining applicable law in the event of employment in several Member States may be applied.[10] The temporary nature of the employment within the receiving State is, of course, one of the essential criteria enabling it to be determined whether or not the work arrangements correspond to a posting.

There are two separate employment scenarios:[11]

1) While the worker is carrying out an activity in a Member State, he simultaneously carries out a different and separate activity on the territory of one or more other Member States. The duration and the nature of such separate activity are of no importance. The worker may carry out both

activities under a single employment contract or under separate employment contracts.

2) The worker alternates between activities that do not overlap in two or more Member States. The frequency or regularity of the alternation is of little importance. Nevertheless, the activity must be regular to a certain degree. In this regard, the expected situation over the next twelve calendar months must be taken into account. Previous work arrangements are considered a reliable indicator of future work arrangements.

EXAMPLE

Under successive employment contracts, a worker is employed each time in a single Member State for several months, given that the various contracts are systematically interrupted by periods of inactivity. During such intermediate periods, the worker returns to his place of residence located in another EU Member State. This is not simultaneous employment. Unless the conditions relating to posting are met, the principle of the State in which the activity is carried out applies. The laws of the Member States within which the worker carries out his activity apply successively.[12]

MARGINAL ACTIVITIES NOT TAKEN INTO ACCOUNT

Marginal and secondary activities that are negligible in terms of time and economic profitability may not be taken into account when determining the applicable legislation.

In order to determine the applicable legislation, the person is deemed to carry out an activity in a single Member State. In addition to the practical aspect, the aim is to avoid artificial constructions.

EXAMPLE

A worker is active in a company located in a first Member State and trains a team in a sports club located in another Member State. The scope of the professional activities carried out as a trainer is marginal, however. They are therefore not carrying out activities in two or more Member States. The person concerned is subject to the social security scheme of the first Member State. It is the national legislation of the competent Member State that determines whether or not the marginal (sports) activities entail compulsory affiliation to the social security scheme and that defines the amount of the social security contributions. In principle, social security contributions must be paid on the basis of all income from all activities.

a. Quantitative criterion

By way of illustration, Belgium considers marginal all activities accounting for

- less than 5% of the worker's normal working time (within the EU) and/or
- less than 5% of their overall wage

The rules governing the applicable law in the event of activities carried out in several countries are only applied when the activity carried out in another Member State accounts for less than 5% of the total working time.

b. Qualitative criterion

In addition to the quantitative criterion, the nature of the activities is also an indication of their marginal nature. This is the case for supplementary activities, which are negligible in terms of time and economic profitability.

CARRYING OUT ACTIVITIES IN TWO OR MORE MEMBER STATES AS A WORKER[13]

A worker carrying out activities in two or more Member States will always be subject to the legislation of the Member State of residence, except if they do not carry out any substantial activities in that Member State and if:

- they work for a single employer; in such case, they will be subject to the legislation of the Member State in which the employer is located; or

EXAMPLE

A worker resides in Belgium with his family. He works for an employer located in the Netherlands and is active in Belgium (10%), in the Netherlands (40%) and in Germany (50%). He does not carry out a substantial portion of his activity in Belgium. His employer being located in the Netherlands, he is subject to the Dutch social security scheme. The fact that the worker spends an additional 10% more of his time in Germany than in the Netherlands is of no importance.

- he works for two employers (or more) located in two different Member States and one those Member States is that in which he resides (but where he does not carry out a substantial professional activity);
- in such case, he is subject to the legislation of the other Member State (where he carries out a substantial professional activity, although this is not always the case).

EXAMPLE

A worker resides in Belgium with his family. He works for a Belgian employer and a Dutch employer. For the Belgian employer, he works in Belgium (10%). For the Dutch employer, he works in Germany (90%). He does not carry out a substantial portion of his activity in Belgium. His employer being located in the Netherlands, he is subject to the Dutch social security scheme, although he does not work in the Netherlands at all.

a. Substantial activity[14]

The criterion of "substantial activity" prevents a worker from not being subject to the social security legislation of the Member Stat in which he carries out the majority of his work.

The activity carried out by the worker in the State of residence may be considered substantial if:

- at least 25% of the working time (within the EU) is spent in the Member State of residence, and/or
- at least 25% of the wages are earned in the Member State of residence.

Therefore, a worker may meet the quantitative criterion and carry out a substantial activity in the Member State of residence although it does not necessarily have to be the majority of their activities.

In practice, the National Social Security Office (mainly) bases its opinion on working time, especially when the worker works for a single employer, and when the wages have to be split equally among the various activities carried out within the Member States concerned.

The presumed situation in the next twelve calendar months must also be taken into account when determining the national legislation to be applied.[15] However, previous work arrangements may also be a reliable indicator of future behaviour.[16] Thus, when it is not possible to base a decision on work arrangements or anticipated work schedules, it is reasonable to observe the situation in the twelve previous months. If a company was recently incorporated, the assessment may be based on an appropriate and shorter period.

b. The "employer"

The National Social Security Office considers that the concept of the legal employer takes precedence. Only the company that entered into an employment contract with the worker may be considered to be the employer. The existence of an organisational link between the worker and the company is required, however.

When the worker is only linked to a company on a purely administrative level - for instance for the purpose of payroll simplification and payment of social security contributions - and that the company has no actual liability as regards the wages, recruitment and dismissal, that "administrative employer" may not be considered to be the actual employer.

The legal concept of the employer prevents a registered office (operating office) or a business unit from being considered a full employer.

THE A1 DECLARATION: APPLICATION PROCEDURE AND PROBATIVE VALUE[17]

A worker carrying out activities in two or more Member States informs the institution appointed by the competent authority of the Member State of residence, even if they do not carry out an activity in said Member State. It is that Member State which temporarily determines the applicable social security legislation. The institution of the place of residence then informs the competent institutions of each Member State in which an activity is carried out. Such bodies have a period of two months in which to challenge the temporary decision. If they do not challenge the decision, it becomes final. The competent body contacts the worker concerned, either by letter or by issuing a provisional or final A1 declaration. If a provisional A1 declaration is initially issued, a final A1 declaration will be issued at a later date.

The A1 declaration is binding on the bodies of the other Member States provided that said document has not been withdrawn or declared invalid by the Member State in which it was issued.

D. APPLICATION

In the context of simultaneous employment, the direct link between the contract, the applicable labour law and the applicable social security scheme is not as strong. The rules of Regulation 883/2004 to determine the applicable social security legislation do not impose any strict contractual conditions in the event of simultaneous employment, in contrast to those imposed for posting.

ONE EMPLOYER, ONE EMPLOYMENT CONTRACT

The contract governs the worker's employment within

the various Member States of the EU. It defines the employment arrangements in the various countries, the worker's function and the wage and working conditions.

The parties may provide for freedom of choice in the contract. The contract should preferably also state the Member State which will be the worker's place of habitual employment. To this end, an estimation of the working time per country can be included in the contract.

Nevertheless, the necessary flexibility should be provided for in the contract: the ratio per country is subject to change. The variations in terms of percentage of employment can also have an impact of the final net wages depending on the tax scheme. It is recommended to expressly stipulate that the percentages of employment may vary and the worker is not entitled to net wages.

SEVERAL EMPLOYERS, SEVERAL PART-TIME EMPLOYMENT CONTRACTS

In the event of employment by several employers, the most obvious solution involves entering into a part-time employment contract with the company concerned in each country in which activities are carried out.

Each country's local rules governing part-time work will have to be complied with. In practice, this is very complex to organise. The weekly working time of part-time workers may not, in principle, be less than one-third of the weekly working time of full-time workers.

In principle, the applicable law will have to be determined for each individual employment contract. The close link between the various employment contracts may, however, justify the application of a single labour law. The fact that all of the employers have authority over the worker and the existence of an organisational and economic link between the employers are relevant factors in this regard.[18]

SEVERAL EMPLOYERS, ONE OVERALL EMPLOYMENT CONTRACT

The second option involves entering into an "overall" employment contract. In such case, the various companies of the group jointly have employer authority over the worker, and the worker is entitled to an overall wage package.

Case law allows a worker to have several employers under a single employment contract when the companies share employers' duties and are linked to each other by a close socio-economic link. The different employers are required to fulfil the employer's duties in solidum.[19] (The worker may thus require each employer to pay the full amount of the pay in lieu of notice).

The overall employment contract is a technique used to avoid the strict formalities inherent to part-time work. This type of contract may be perceived by the labour inspectorate as a system used to circumvent the binding rules on part-time work.

It is mainly a pragmatic approach aimed at creating a single overall wage package, on the basis of employment in various countries. Each employer remains a separate entity, but the various employers agree to exercise the employer's authority together. The overall contract will stipulate that the employers are jointly and severally liable for the payment of the wages and the social security contributions.

SEVERAL EMPLOYERS, IDENTIFICATION, THE DMFA DECLARATION AND THE PAYMENT OF SOCIAL SECURITY CONTRIBUTIONS

The National Social Security Office accepts that only the Belgian employer completes the Dimona and DmfA declarations, and pays the social security contributions for all of the employment and of the wages. The foreign employer does therefore not need to identify themselves with the NSSO. The Belgian employer is responsible for declaring the work provided on the territories of the other EU Member States and acts on behalf of the other employers.

Conditions:[20]

1) The Belgian employer and the foreign employers belong to the same economic group of companies;
2) The worker has a centralising function within the group, such that it is impossible to precisely separate the work actually carried out for each company;
3) The various employers undertake beforehand to pay the social security contributions owed on the wages for which they are liable to the NSSO, should the Belgian employer fail to do so;
4) The Belgian employer pays the social security contributions on all of the wages owed.

02 OVERVIEW

The below table provides a simplified overview of the main rules for each of the three scenarios: "transfer", "posting", and "simultaneous employment". The overview makes it possible to determine the wage and working conditions to which the worker is entitled, the applicable employment contract law, and the country in which the social security contributions must be paid.

The worker may be linked to several employers in one or several EU Member States under different employment contracts, but this table uses as its basis the principle that worker carried out his work under a single active employment contract. Therefore, the following only applies in the event of employment by a single employer.

<table>
<tr><th>Place of employment</th><th colspan="2">The worker works in a single EU Member State</th><th>The worker works in several EU Member States</th></tr>
<tr><td rowspan="2">The contract</td><td>Employment contract entered into with the company located in the receiving State (fixed period or indefinite period)</td><td>Employment contract entered into with the company located in the sending State</td><td></td></tr>
<tr><td>The employment contract entered into with the company in the sending State is suspended or terminated</td><td>The parties enter into a posting contract and attach it to the employment contract [21]</td><td></td></tr>
<tr><td>Typology</td><td>Transfer
(scenario I)</td><td>Posting
(scenario II)</td><td>Simultaneous employment
(scenario III)</td></tr>
<tr><td rowspan="3">Which wage and working conditions?</td><td rowspan="3">The labour law and the CBAs of the receiving State.[22] (Please note: the parties may opt for a different labour law)</td><td>The parties generally agree to apply the labour law and the CBAs of the sending State. (See the posting contract)</td><td rowspan="4">Two criteria:
1. Quantitative criterion: The labour law of the Member State in which the worker spends the majority of his working time
2. Qualitative criterion: The labour law of the Member State in which the worker's actual centre of professional activities is located.</td></tr>
<tr><td>Employment within the receiving State < 1 year:[23] The wage and working conditions of the receiving State (mandatory)[24]</td></tr>
<tr><td>Employment within the receiving State > 1 year:[25] The wage and working conditions of the receiving State (mandatory)</td></tr>
<tr><td rowspan="2">Which employment contract law must be applied?</td><td rowspan="2">The law of the receiving State. (Please note: the parties may opt for a different law)</td><td>Employment within the receiving State < 1 year:[26] The law of the sending State</td></tr>
<tr><td>Employment within the receiving State > 1 year:[27] The law of the receiving State</td></tr>
<tr><td rowspan="2">Where must the social security contributions be paid?</td><td rowspan="2">In the receiving State</td><td rowspan="2">In the sending State, up to two years (basic rule), this period may be extended to a maximum of 5 years (specific procedure)</td><td>The worker spends at least 25% of his working time in the State of residence:[28] The social security contributions must be paid in the Member State of residence</td></tr>
<tr><td>The worker spends less than 25% of his working time in the State of residence:[29] The social security contributions must be paid in the Member State in which the employer is located.</td></tr>
</table>

1 The applicable law is defined by Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). Rome I applies to contracts entered into after 17 December 2009.
2 ECJ 27 February 2002, Weber, C-37/100.
3 ECJ 13 July 1993, Mulox, C-125/92; ECJ 9 January 1997, Rutten, C-383/95.
4 ECJ 27 February 2002, Weber, C-37/100, §§53-54.
5 Art. 8.3 Rome I.
6 ECJ 15 December 2011, Voogsgeerd, C-384/10, § 52.
7 Art. 8.4 Rome I.
8 Art. 13.1 Regulation No. 883/2004.
9 Art. 14.7 Applicable regulation.
10 ECJ 16 February 1995, Calle Grenzshop, C-425/93; ECJ 30 March 2000, Banks, C-178/97.
11 Art. 14.5 Applicable regulation.
12 ECJ 4 October 2012, Format, C-115/11.
13 Rule determining applicable law, as amended from 28 June 2012 by Regulation No. 465/2012.
14 Art. 14.8 Applicable regulation.
15 Art. 14.10 Applicable regulation.
16 ECJ 4 October 2012, Format, C-115/11.
17 Art. 16 Applicable regulation
18 ECJ 10 April 2003, Pugliese, C-437/00.
19 For instance, Ghent Labour Court, 14 November, RW 2012-13, 1226.
20 Regarding accidents in the workplace, see the Royal Decree of 8 January 2006 laying down the special rules for application of the Workplace Accidents Act of 10 April 1971 to foreign employers employing certain workers simultaneously employed by a Belgian employer that is part of the same group.
21 The posting contract defines the wage and working condition applicable during cross-border employment.
22 In the case where the receiving State becomes the country of habitual employment.
23 In the case where the sending State remains the place of habitual employment and where the worker therefore only temporarily works in the receiving State. The limit of one year is only a practical indication. No formal time limit has been defined.
24 Pursuant to Posting Directive 96/71, the receiving State (the country of temporary employment) imposes the application of its own police laws.
25 In the case where the receiving State becomes the country of habitual employment. The limit of one year is only a practical indication. No formal time limit has been defined.
26 In the case where the sending State remains the place of habitual employment and where the worker therefore only temporarily works in the receiving State. The limit of one year is only a practical indication. No formal time limit has been defined.
27 In the case where the receiving State becomes the country of habitual employment. The limit of one year is only a practical indication. No formal time limit has been defined.
28 The actual place of residence of the household is the main criterion; the domicile is only an indication.
29 The actual place of residence of the household is the main criterion; the domicile is only an indication.

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REINTEGRATION OF WORKERS WITH A WORK INCAPACITY

PART I – THE REINTEGRATION PATHWAY FOR WORKERS WITH A WORK INCAPACITY

In late 2016, several provisions implementing the government's new policy on the reintegration of individuals with a work incapacity were published in the Belgian Official Gazette. The policy aims, inter alia , to promote the reintegration of workers with a work incapacity within their employer's company.

In this context, a Royal Decree of 28 October 2016 "amending the Royal Decree of 28 May 2003 on the supervision of workers' health as regards the reintegration of workers with a work incapacity" was enacted. In addition, the Act of 20 December 2016 "laying down various provisions in labour law relating to work incapacity" inserted in the Employment Contracts Act of 3 July 1978 a legal basis concerning the termination of the employment contract due to force majeure, in the event of an incapacity for work permanently preventing the worker from carrying out the agreed work.

This article examines the reintegration pathway for workers with a work incapacity provided for by the Royal Decree of 28 October 2016 (part 1.). In the next Memento of the Employer, we will look at the new rules on the termination of contracts due to force majeure in the event of a worker with a permanent work incapacity (part 2.).

01 DEFINITION

The purpose of the reintegration pathway is to promote, with the help of the **prevention adviser-occupational health doctor**, the reintegration of workers unable to perform the agreed work, by providing them with adapted work or other work:

- either **temporarily**, awaiting such time as he can once again perform the agreed work,
- or **permanently**, if he is permanently unable to perform the agreed work.

02 WORKERS CONCERNED

The reintegration pathway may only be "activated" for workers with a work incapacity resulting from an illness or an accident of "**private life**".

Workers with a work incapacity due to a workplace accident or an occupational illness are therefore not entitled to the reintegration pathway.

03 PROCEDURE

A **four-step** procedure involving mainly the worker, the employer and the prevention adviser-occupational health doctor must be followed within a specified period: initiative, reintegration evaluation, development of the reintegration plan, and the worker's decision.

1. INITIATIVE

The reintegration pathway must begin with the submission of an application to the **prevention adviser-occupational health doctor**.

Various persons may take the initiative to apply for a reintegration pathway. They include:

- the **worker**, during the period of his work incapacity (or, if he consents, his treating physician),
- the **employer**, at the earliest 4 months after the start of the worker's work incapacity or from the time at which the worker hands the employer a certificate from his treating physician stating a permanent incapacity to perform the agreed work,
- the **medical adviser of the health insurance fund**, if he is of the opinion that the worker is entitled to a reintegration pathway.

PLEASE NOTE

There is a specific provision regarding the date on which the **employer** may begin the reintegration pathway (see also "Date of entry into force", below). The employer may submit an application for a reintegration pathway to the prevention adviser-occupational health doctor:

- from 1 January 2017 for work incapacities that began from 1 January 2016 et
- from 1 January 2018 for work incapacities that began before 1 January 2016.

Consequently, for workers whose work incapacity began before 1 January 2016, the employer may not submit an application for a reintegration pathway before 1 January 2018

The Royal Decree of 28 October 2016 does not specify the manner in which the application for a reintegration pathway must be sent to the prevention adviser-occupational health doctor. It is strongly advised to submit the application **in writing** (letter, e-mail, etc.).

As soon as the prevention adviser-occupational health doctor has received an application for reintegration, he shall inform the **employer** (in cases in which the application was submitted by the worker/treating physician or by the medical adviser of the health insurance fund) and the **medical adviser of the health insurance fund** (in cases in which the application was submitted by the worker/treating physician or by the employer).

2. REINTEGRATION EVALUATION

The prevention adviser-occupational health doctor convenes the worker for whom he has received an application for reintegration to **a reintegration evaluation**.

The aim is to assess whether the worker will be able to once again perform the agreed work (where appropriate, with an adapted workstation) and the possibilities for reintegration, on the basis of the working capacity.

CONDITIONS

If the worker consents, the prevention adviser-occupational health doctor **will consult** with the worker's treating physician, with the medical adviser of the health insurance fund and with other prevention advisers and the persons that may contribute to a successful reintegration.

At the same time, the prevention adviser-occupational health doctor will examine the worker's **workstation** or his **work environment** in order to assess the possibilities for adapting the workstation.

He shall draw up a **report** of his findings and of those of the persons involved in the consultation. The report is attached to the worker's health record.

DECISION OF THE PREVENTION ADVISER-OCCUPATIONAL HEALTH DOCTOR

After the reintegration evaluation, the prevention adviser-occupational health doctor will write down their decision on the **reintegration evaluation form**. The decision may be:

a. the **resumption**, in time, of the agreed work (where appropriate, with an adaptation of the workstation) and the worker is able to perform **adapted work** or **other work** for the employer in the meantime (where appropriate, with an adaptation of the workstation).
The prevention adviser-occupational health doctor determines the conditions of adapted work or of the other work, as well as the adaptation of the workstation. At such time as he shall determine, the prevention adviser-occupational health doctor will re-evaluate the reintegration pathway.

b. the **resumption**, in time, of the agreed work (where appropriate, with an adaptation of the workstation) and the worker is **not** able to perform adapted work or other work for the employer in the meantime.
At such time as he shall determine, the prevention adviser-occupational health doctor will re-evaluate the reintegration pathway.

c. a **permanent incapacity** to resume the agreed work and the worker is able to perform **adapted work** or **other work** for the employer (where appropriate, with an adaptation of the workstation).
The prevention adviser-occupational health doctor will determine the conditions for adapted work or other work, as well as the adaptation of the workstation.

d. a **permanent incapacity** to resume the agreed work and the worker is **not** able to perform **adapted work** or **other work** for the employer.

e. that it is **not appropriate** to begin a reintegration pathway due to medical reasons.
The prevention adviser-occupational health doctor will re-evaluate the possibilities for beginning a reintegration pathway every 2 months.

The prevention adviser-occupational health doctor will then forward the reintegration evaluation form to the employer and the worker within a period of **40 working days** following receipt of the application for reintegration.

> In addition, within the same period, he will ensure that the medical adviser of the health insurance fund is informed if he does not propose adapted work or other work and that the reintegration form be attached to the worker's health record.

WORKER'S APPEAL

A worker who disagrees with the reintegration evaluation through which the prevention adviser-occupational health doctor declares him to be **permanently unfit** for the agreed work (decisions c. and d. above) may enter an **appeal**, by registered letter to the occupational medical inspector of the Occupational Welfare Control Division, within a period of **7 working days** after receipt of the reintegration evaluation form. The worker must inform the employer of such.

After consultation with the prevention adviser-occupational health doctor and the treating physician but no later than within a period of **31 working days** after receipt of the appeal by the occupational medical inspector, the latter will inform the employer and the worker of the outcome of the procedure.

Depending on the outcome of the appeal procedure, the prevention adviser-occupational health doctor

may re-evaluate the reintegration evaluation.

During the reintegration pathway, the worker may only use the appeal procedure once.

3. DEVELOPING THE REINTEGRATION PLAN

Unless the employer considers that drawing up a reintegration plan is technically or objectively impossible or may not be required for duly justified reasons, it must draw up such a plan in the **two following cases**:

- after receiving the reintegration evaluation form, in the case of a **temporary incapacity** and the worker is able to perform **adapted work** or **other work** for the employer in the meantime (decision a.);
- after the expiration of the appeal deadline or after receipt of the outcome of the appeal procedure confirming the decision of the prevention adviser-occupational health doctor, in the case of a permanent incapacity and the worker is able to perform adapted work or other work for the employer in the meantime (decision c.).

THE EMPLOYER DRAWS UP A REINTEGRATION PLAN

The employer draws up a reintegration plan in consultation with the worker, the prevention adviser-occupational health doctor and, where appropriate, other person who may contribute to successful reintegration.

The reintegration plan must mention, in as concrete and detailed a manner as possible, one or several of the following measures:

- a description of reasonable adaptations to the workstation,
- a description of the adapted work, in particular of the volume of work and the working hours that the worker may perform and, where appropriate, the progressive measures,
- a description of the "other work", in particular of the content of the work that the worker can perform, the volume of work and the working hours the worker may perform and, where appropriate, the progressive measures,
- the nature of training provided for the purpose of acquiring the skills enabling the worker to perform adapted work or other work,
- the period of validity of the reintegration plan.

Where appropriate, the prevention adviser-occupational health doctor will hand the reintegration plan to the medical adviser of the health insurance fund. The latter will then take a decision as regards maintaining the worker's status as being subject to a work incapacity under the AMI regulation and, where appropriate, on the gradual resumption of work. The decision is recorded in the reintegration plan and, if necessary, the employer will adapt the reintegration plan.

More specifically, as soon as the medical adviser of the health insurance fund receives a copy of the reintegration plan drawn up by the employer, he shall assess the impact of the implementation of said plan on the worker's status as being subject to a work incapacity under the AMI regulation AMI (and, consequently, on the worker's compensation by the health insurance fund).

The implementation of the reintegration plan may have one of the following consequences:

- either ending the recognition of the worker's status as being subject to a work incapacity,
- or not ending the recognition of the worker's status as being subject to a work incapacity, and placing said worker in a situation of authorised resumption of work.

In the latter case, the copy of the reintegration plan that the medical adviser of the health insurance fund received shall serve as an application for authorisation to resume authorised work. The worker no longer needs to submit an application for authorisation to resume authorised work to the medical adviser.

The medical adviser of the health insurance fund will automatically check whether the reintegration plan meets the conditions for authorised work.

He shall then make his conclusions known as soon as possible.

If the medical adviser does not provide a response within three weeks of receiving the copy of the reintegration plan, it will be deemed that:

- the implementation of the reintegration plan does not end the recognition of the worker's status as being subject to a work incapacity

under the AMI regulation and, additionally, that,
- the decision of the medical adviser of the health insurance fund regarding the authorised work is positive.

The employer will hand over the reintegration plan to the worker within a period of:
- maximum **55 working days** after receipt of the reintegration evaluation in the case of a temporary incapacity (decision a.);
- maximum **12 months** after receipt of the reintegration evaluation in the case of a permanent incapacity (decision c.).

THE EMPLOYER DOES NOT DRAW UP A REINTEGRATION PLAN

The employer may **refuse to draw up a reintegration plan** if it believes (after consultation with the worker, the prevention adviser-occupational health doctor and, where appropriate, other persons who may contribute to successful reintegration) that drawing up such a plan is technically or objectively impossible or may not be required for duly justified reasons.

In such case, the employer must draw up a **report** and hand it to the worker and to the prevention adviser-occupational health doctor within a period of:
- maximum **55 working days** after receipt of the reintegration evaluation in the case of a temporary incapacity (decision a.);
- maximum **12 months** after receipt of the reintegration evaluation in the case of a permanent incapacity (decision c.).

The report must also be made available to the employment inspectorate.

4. THE WORKER'S DECISION

If the employer has drawn up a reintegration plan, the worker then has a period of **5 working days** after receipt of the reintegration plan in which to accept or refuse said plan, and return it to the employer:
- if the worker **accepts** the reintegration plan, he signs it for agreement;
- if the worker **does not agree** with the reintegration plan, he shall state the reasons for his refusal.

The employer will hand a copy of the reintegration plan to the worker and to the prevention adviser-occupational health doctor. It will also make said copy available to the employment inspectorate.

In addition, the prevention adviser-occupational health doctor will forward the reintegration plan or the report justifying the fact of not drawing up a reintegration plan to the medical adviser of the health insurance fund and will attach it to the worker's health record.

DETAILS

1) The prevention adviser-occupational health doctor **will regularly monitor** the implementation of the reintegration plan, in consultation with the worker and the employer.
   A worker who considers, during the implementation of the reintegration plan, that all or part of the planned measures contained in the plan are no longer adapted to their health status, may request a **spontaneous consultation** with the prevention adviser-occupational health doctor for the purpose of re-evaluating the reintegration pathway.

2) The worker may be **assisted** by a workers' representative in the Occupational Health and Safety Committee or, failing such, by a union representative of their choosing, for the duration of the reintegration pathway.

3) The employer shall pay the worker's **travel expenses** linked to the reintegration pathway.

SUMMARY TABLE (FOCUSED ON THE OBLIGATIONS OF THE WORKER AND OF THE EMPLOYER)

1. Initiative

The application for a reintegration pathway is submitted to the MA-OHD

Who?	When?	Condition?
Worker/treating physician	During the period of incapacity for work	If treating physician, agreement of the worker
Employer	• at the earliest starting from 4 months after the start of the worker's work incapacity or • from the time at which the worker hands the employer a certificate from his treating physician stating a permanent incapacity to perform the agreed work	/
Medical adviser of the health insurance fund	During the period of incapacity for work	/

As soon as the MA-OHD receives an application for reintegration, he shall inform the employer (in the case of an application submitted by the worker/treating physician or by the medical adviser of the health insurance fund).

2. Reintegration evaluation

The MA-OHD invites the worker to conduct a reintegration evaluation at the end of which he shall record his decision on the reintegration evaluation form.

Decision	Worker's appeal	Consequences
a. Temporary incapacity + the worker can perform adapted work/other work	/	Continuation of the reintegration pathway + subsequent re-evaluation of the reintegration pathway
b. Temporary incapacity + the worker cannot perform adapted work/other work	/	Subsequent re-evaluation of the reintegration pathway
c. Permanent incapacity + the worker can perform adapted work/other work	Appeal possible	Continuation of the reintegration pathway (after expiration of the period for appeal (7 working days) or after receipt of the outcome of the appeal procedure confirming the decision of the MA-OHD)
d. Permanent incapacity + the worker cannot perform adapted work/other work	Appeal possible	Reintegration pathway ended (after having exhausted the possibilities for appeal)
e. Not appropriate to begin a reintegration pathway	/	Re-evaluation of the possibilities for starting a reintegration pathway every two months.

The MA-OHD hands the reintegration evaluation form to the employer and to the worker within a period of 40 working days after receipt of the reintegration application.

3. Reintegration plan (only in case of decision a. and c.)

The employer draws up a reintegration plan

In which case?	When?	Handed to the worker within which period?	Consequence
Decision a.	After receiving the reintegration evaluation form	Max. 55 working days after receipt of the reintegration evaluation	Continuation of the reintegration pathway
Decision c.	After the expiration of the appeal period or after receipt of the outcome of the appeal procedure confirming the decision of the MA-OHD	Max. 12 months after receipt of the reintegration evaluation	

The employer does not draw up a reintegration plan, if it believes that drawing up a reintegration plan is technically or objectively impossible or may not be required for duly justified reasons

In which case?	Formality	When?	Deadline	Consequences
Decision a.	The employer hands a report to this effect to the worker and to the MA-OHD	After receipt of the reintegration evaluation form	Max. 55 working days after receipt of the reintegration evaluation	Resumption of the initial work as soon as the worker no longer has a work incapacity
Decision c.		After expiration of the appeal period or after receipt of the outcome of the appeal procedure confirming the decision of the MA-OHD	Max. 12 months after receipt of the reintegration evaluation	Reintegration pathway ended

4.Worker's decision	**The worker agrees to the reintegration plan**			
	In which case?	**What?**	**When?**	**Consequences**
	Decision a. Decision c.	Reintegration plan handed to the employer with the worker's signature	Within a period of 5 working days after receipt of the reintegration plan	Implementation of the reintegration plan
	De werknemer gaat niet akkoord met het re-integratieplan			
	In which case?	**What?**	**When?**	**Consequences**
	Decision a.	Reintegration plan handed to the employer with reasons for refusal	Within a period of 5 working days after receipt of the reintegration plan	Resumption of the initial work as soon as the worker no longer has a work incapacity
	Decision c.			Reintegration pathway ended

04 ROLE OF THE OCCUPATIONAL HEALTH AND SAFETY COMMITTEE

In order to develop an effective reintegration policy, the employer regularly **consults, at least once per year**, the Occupational Health and Safety Committee regarding the possibilities, at a collective level, of adapted work or other work, and regarding the measures for adapting workstations, in the presence of the prevention adviser-occupational health doctor and, where appropriate, other competent prevention advisers.

The collective aspects of reintegration are **evaluated** once per year and are the subject of consultation within the Occupational Health and Safety Committee on the basis of a qualitative and quantitative report drawn up by the prevention adviser-occupational health doctor. The reintegration policy is adapted, if necessary, on the basis of said evaluation.

05 DATE OF ENTRY INTO FORCE

The date on which a reintegration pathway may begin depends on the person who takes the initiative:

- if it is the **worker**, from 1 January 2017 (independently of the date on which his work incapacity started);
- if it is the **employer**, from 1 January 2017 for work incapacities that began on or after 1 January 2016 and from 1 January 2018 for work incapacities that began before 1 January 2016.

Catherine Legardien, Legal Expert

[1] The reintegration policy has a second component aimed at the reintegration into the labour market of persons who are **not employed** by an **employer**. The system is provided for in the Royal Decree of 8 November 2016 "amending the Royal Decree of 3 July 1996 implementing the Mandatory healthcare and compensation Act consolidated on 14 July 1994 as regards occupational reintegration". This component will not be addressed in this document.

PARTENA PROFESSIONAL

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Partena – Non-profit-making association – accredited Payroll Office for Employers by ministerial decree of 3 March 1949 under no. 300
Registered office: 45, Rue des Chartreux, Brussels, 1000 | VAT BE 0409.536.968

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Monthly, except in July and August.

39th year – Monthly review