MEMENTO OF THE EMPLOYER 6

TOPIC

CASE LAW

PARTENA PROFESSIONAL

Kantoor van afgifte: Leuven MassPost | P705107

NEW JOINT AND SEVERAL WAGE LIABILITY FOR ACTIVITIES IN THE CONSTRUCTION INDUSTRY

The March issue looked at the new control measures of the Law of 11 December 2016 laying down various provisions on the posting of workers. At the time the focus was on cross-border employment, but this article examines another aspect of the Law of 11 December 2016.

The Law of 11 December 2016 also introduces a new form of joint and several liability for wage debts. It is a specific regime that applies to activities in the construction industry. The Law of 11 December 2016 transposes into Belgian labour law Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers.

This specific regime came into effect on 1 January 2017 and only applies to the direct contractual relationship between two parties, for example the client and the contractor or the contractor and its direct subcontractor.

This article first discusses this new form of joint and several liability. We then compare the new regime for the construction industry with the general regime for joint and several liability for wage debts, which came into effect on 16 April 2012. These two forms of joint and several liability are not unique, however. Social law recognises a great many other forms of joint and several liability, such as joint and several liability for social security debts (Article 30bis of the Social Security Law) and joint and several liability for non-EU nationals, but these are not discussed in this article.

01

A NEW SPECIFIC REGIME FOR JOINT AND SEVERAL WAGE LIABILITY

The general regime for joint and several liability for wage debts (Article 35/1 to Article 35/6 of the Wage Protection Law) is not amended and continues to apply. On 1 January 2017 a specific regime came into effect for the construction industry.[1] Both forms of joint and several wage liability therefore co-exist, each with its own procedure and conditions.

This new form of joint and several wage liability is not chain liability, and it only applies to direct co-contracting parties. For this new regime the client is therefore jointly and severally liable for the wage debts of the contractor, but not for the wage debts of the subcontractor. However, the contractor is in turn liable for the wage debts of its subcontractor.

The client or contractor can now only be held liable in relation to the direct co-contracting party on the basis of this new regime[2]. The general regime continues to apply in relation to indirect co-contracting parties further along the chain. This means that the client, contractor or subcontractor is liable for the payment of wages to the workers of the contractor or subcontractor.

DEFINITIONS AND SCOPE

WHAT ARE ACTIVITIES IN THE CONSTRUCTION INDUSTRY?[3]

This concerns works and services falling within the sphere of competence of the joint (sub)committees for:

- the construction industry;
- metal, mechanical and electrical construction, provided construction work is involved in accordance with the VAT regulations;[4]
- cleaning, provided construction work is involved in accordance with the VAT regulations;
- upholstering and carpentry, provided construction work is involved in accordance with the VAT regulations;
- electricians: installation and distribution, provided construction work is involved in accordance with the VAT regulations.

All clients, (intermediate) contractors and subcontractors which use contractors or subcontractors for these activities are covered by this specific regime. The client, (intermediate) contractor or subcontractor does not therefore necessarily have to lie within the sphere of competence of the joint (sub)committees referred to above. Instead, it is sufficient that the activities do so.

EXAMPLE

An accounting firm calls on the services of a contractor. The activities the contractor is to carry out lie within the sphere of competence of the joint committee for the construction industry. The accounting firm can therefore be held jointly and severally liable for payment of the wages.

The activities must be carried out in Belgium. The place of establishment of the client, the contractor or the subcontractor is irrelevant.

WHO IS THE DIRECT CONTRACTING PARTY?[5]

The most direct contracting party is the contracting party that is jointly and severally liable within the framework of this specific regime. This can be the client, the contractor or the intermediate contractor.

WHO IS THE CLIENT?[6]

The client is the person who gives a contractor an assignment to carry out or have carried out activities in the construction industry for a specific price.[7]

Not all clients fall within the scope of this regime. This specific joint and several wage liability does not apply to the client who is a natural person and who has activities in the construction industry carried out exclusively for private purposes.

- The client must be a natural person. Non-profit organisations, for example, therefore also fall within the scope of this regime.
- The construction activities are carried out exclusively for private purposes. Therefore, someone who has work carried out on a private dwelling while that dwelling is also used for professional purposes can be held jointly and severally liable.[8]

A similar exception also applies to general joint and several wage liability and joint and several liability for social security debts.[9]

WHO IS THE CONTRACTOR?[10]

The contractor is the person who undertakes directly vis-à-vis a client to carry out or have carried out for a price activities in the construction industry on behalf of its client.

WHO IS THE INTERMEDIATE CONTRACTOR?[11]

Any subcontractor vis-à-vis subcontractors coming after it in a subcontracting chain.

WHO IS THE SUBCONTRACTOR?[12]

The subcontractor is the person who undertakes vis-à-vis a contractor or an intermediate contractor to carry out or have carried out for a price activities in the construction industry that have been entrusted to it by the contractor or the intermediate contractor. Intended here is any direct subcontractor with the capacity of employer, regardless of whether it is based in Belgium.

EXAMPLE

The subcontractor is:

- either the direct subcontractor of a contractor which is itself the direct contracting party of a client;
- or the direct subcontractor of another subcontractor who can itself be regarded as an intermediate contractor.

TO WHICH WORKERS DOES THIS JOINT AND SEVERAL WAGE LIABILITY APPLY?

This specific regime of joint and several wage liability applies to all workers who carry out activities on Belgian territory. The joint and several liability therefore not only relates to the wages owed to posted workers in service with an employer based abroad, but also to workers in the service of an employer based in Belgium.

APPLY THE GENERAL OR THE NEW SPECIFIC REGIME?[13]

The joint and several liability of the direct contracting party is exclusively determined by the new specific regime. The general regime does not therefore apply in the direct contractual relationship between the client, the contractor or intermediate contractor on the one hand and the employer-contracting party (a contractor or subcontractor) on the other.

- Does this concern activities outside the construction industry? Then the new specific regime does not apply, although the general regime may do so.
- Does this concern an indirect relationship, for example between client and subcontractor? Then the new specific regulation does not apply either.

EFFECT OVER TIME

On 1 January 2017 the specific regime came into effect for the construction industry. The new regime applies from that date, even if the agreement was concluded earlier or the parties have already begun executing the agreement. Precisely because the Law of 11 December 2016 does not distinguish between existing and new agreements, the specific regime for joint and several liability also applies to existing agreements.

ORIGINATION OF JOINT AND SEVERAL WAGE LIABILITY

This specific joint and several wage liability can be invoked from the conclusion of the building contract and does not depend on prior notification. Therein lies a crucial difference from the general regime.

SCOPE OF THE JOINT AND SEVERAL WAGE LIABILITY

DURATION: UNLIMITED

This specific joint and several wage liability not only arises immediately, it is also unlimited in time. Once again, this is a crucial difference from the general regime.

THE WAGE OWED

The specific joint and several wage liability relates to the outstanding wage owed to the worker (but which has therefore not yet been paid), with the exception of severance pay.[14] The joint and several liability in question is limited to the rights acquired by the worker in the context of a contractual relationship that exists between his employer (direct subcontractor) and the contracting party of this employer, which is jointly and severally liable.[15]

Even though the specific regime is included in the Wage Protection Law, the wage definition of the Wage Protection Law would nevertheless not apply.[16] The concept of "wage owed" must be interpreted in accordance with the Belgian transposal of Posting Directive 96/71. That would mean that this concerns wages, benefits and allowances that are owed under collective labour agreements that have been declared generally binding, with the exception of contributions to supplementary occupational pension schemes.[17] Fixed cost reimbursements covered by the wage definition of the Wage Protection Law do not therefore qualify as "wage owed". Nonetheless, the Belgian transposal of the specific regime in this area is still broader than Enforcement Directive 2014/67.[18] Namely, Enforcement Directive 2014/67 imposes a liability for the "outstanding net remuneration corresponding to the minimum rates of pay."[19]

The specific joint and several wage liability relates to that part of the wage of the worker that corresponds to the work carried out by the worker for the party concerned.

A distinction can be made between two situations:

1) the joint and several liability of the client in the direct relationship with its contractor; and[20]
2) the joint and several liability of the (intermediate) contractor in the direct relationship with its subcontractor.[21]

THE CLIENT IN RELATION TO THE CONTRACTOR

The client which calls on the services of a contractor is jointly and severally liable for payment of the wages of the worker(s), owed by the employer-contractor, corresponding to the work carried out by the worker(s) for the client.

Written declaration:
no joint and several wage liability

The client can avoid joint and several liability if it can produce a written declaration.

This declaration must be signed by the client and the contractor. The declaration can be included in a separate document, but can also be a clause of the building contract.[22]

This declaration comprises two parts:

1) Confirmation that the client has provided its contractor with the details of the website of FPS Employment, Labour and Social Dialogue, where information on the wage owed can be found: https://www.minimumlonen.be.
2) Confirmation from the contractor that it pays and will pay the wages owed to its workers.

Knowledge on the part of the client:
joint and several wage liability still applies

If the client knows that the contractor is not or only partially complying with its obligation to pay wages, it cannot avail itself of this declaration. The client will be liable for future wages arrears.

- The knowledge of the client can be proven, for example, by a notification from the social inspectorate. However, proof of such knowledge can be provided by all other legal means, including presumption.[23]
- The client is jointly and severally liable from the end of a period of 14 days from the moment at which it becomes aware that the contractor is no longer meeting its obligations in relation to its workers.

THE (INTERMEDIATE) CONTRACTOR IN RELATION TO THE SUBCONTRACTOR

The contractor or intermediate contractor (in a chain of subcontractors) which calls on the services of a contractor is jointly and severally liable for payment of the wages of the worker(s), owed by the employer-subcontractor, corresponding to the work carried out by the worker(s) for the contractor or intermediate contractor.

Written declaration:
no joint and several wage liability
The contractor and the intermediate contractor can avoid joint and several liability if they can produce a written declaration.

This declaration must be signed by them and by the subcontractor and comprises two parts:

1) Confirmation that the (intermediate) contractor has provided the subcontractor with the details of the website of FPS Employment, Labour and Social Dialogue, where information on the wage owed can be found: https://www.minimumlonen.be.
2) Confirmation from the subcontractor that it pays and will pay the wages owed to its workers.

Knowledge on the part of the (intermediate) contractor: joint and several wage liability still applies
If the (intermediate) contractor knows that the subcontractor is not or only partially complying with its obligation to pay wages, it cannot avail itself of this declaration. The (intermediate) contractor will then be liable for future wages arrears.

- The knowledge of the (intermediate) contractor can be proven by a notification from the social inspectorate.
- The (intermediate) contractor is jointly and severally liable from the end of a period of 14 days from the moment at which it becomes aware that the subcontractor is no longer meeting its obligations in relation to its workers.

DUTY TO DISPLAY NOTICE

The social inspectors can notify clients, contractors and intermediate contractors that their contractors or direct subcontractors are failing to meet their obligation to pay the wages owed to their workers.[24]

The employer-(sub)contractor receives a copy of this notice and must display it at the location where the construction activities are taking place.[25] If the employer-(sub)contractor fails to comply with this duty to display the notice, this duty lies with the jointly and severally liable person or persons.

This ensures that all workers who are active there, as well as their representatives, are informed of the infringement (by the employer) and the identity of the jointly and severally liable person.

02

GENERAL REGIME OF JOINT AND SEVERAL WAGE LIABILITY

While the specific regime of joint and several wage liability applies between direct contracting parties, the general regime of joint and several wage liability has an impact on all participants in the subcontracting chain.

A BROAD AREA OF APPLICATION

The general regime of joint and several wage liability is not restricted to construction activities, but has a much broader area of application in nine sectors:

1) security and/or surveillance services;
2) the construction industry;
3) electricians: installation and distribution;
4) upholstering and carpentry;
5) metal, mechanical and electrical construction;
6) agriculture;
7) cleaning;
8) horticulture;
9) the food industry and trade in foodstuffs (certain activities).

In each case, the scope of application is specified by royal decree. Initially, this general regime also applied to certain transport activities, but that royal decree was annulled by the Council of State.

ORIGINATION OF JOINT AND SEVERAL WAGE LIABILITY

The joint and several liability only applies once the clients, contractors and subcontractors have been notified in writing by the social inspectorate of 'serious shortcomings' in the payment of wages. The discretion of the social inspectorate is broad, but the lowest wage bracket in the sector is in principle the reference when assessing this gravity.

SCOPE OF THE JOINT AND SEVERAL WAGE LIABILITY

DURATION: MAXIMUM ONE YEAR

The joint and several liability only applies to the wage that becomes payable during the period of joint and several liability.

It is the social inspectorate that determines this period in the notice to the client, the contractor or the subcontractor.

- The period begins at the end of 14 working days after notice is given.
- The duration of the joint and several liability is limited to one year.

THE WAGE OWED

The general regime relates to the wage definition specified in the Wage Protection Law: (i) the wage in money, or the benefits with a monetary value, (ii) to which the worker is entitled (iii) as a result of his employment and (iv) at the expense of the employer, even if the benefits are not granted in return for work carried out.[26]

The joint and several liability only applies to future wage debts, not to wage debts that date from before the start of the period of joint and several liability.

The jointly and severally liable party is liable in any case for the social security contributions owed.[27]

DEMAND BY WORKER OR SOCIAL INSPECTORATE

Whoever is jointly and severally liable must pay the wages of the workers in question itself if it is asked to do so by registered letter. This can be done by the social inspectorate or by one of the workers in question.

The jointly and severally liable party can limit the amount of the wage to the services provided for it. The burden of proof for the scope of the services lies with it. If the demand comes from the inspectorate, liability is in any case limited to the services provided.

SCOPE FOR ACTION

Clients, contractors and subcontractors cannot extract themselves by submitting a written declaration. However, they can make contractual arrangements governing the consequences of a notification. Think, for example, of a unilateral termination of the agreement or a short notice period.[28]

03 COMPARATIVE OVERVIEW

	General regime	New joint and several liability
Who	Indirect co-contracting parties (all companies in the subcontracting chain)	Only between the client, contractor or intermediate contractor for its direct contracting party (direct contractual relationship)
Start of liability	14 working days after notification by the social inspectorate	Liability applies automatically (no prior notification required) Unless written declaration
What debts	Only future debts	All wage debts from conclusion of the building contract
Outside scope of application	Client-natural person who has work or services carried out exclusively for private purposes	Client-natural person who has work or services carried out exclusively for private purposes
Duration of liability	Maximum 1 year	No limitation in time

Leen Lafourt, Legal Expert
Yves Stox, Senior Legal Counsel

1 Article 35/6/1 to Article 35/6/5 of the Wage Protection Law.

2 Article 35/6/2 of the Wage Protection Law.

3 Article 35/6/1, 1° of the Wage Protection Law.

4 Article 20, §2 of Royal Decree no. 1 of 29 December 1992 on the regime for the payment of value-added tax. Also intended are:
1° any act that has as its object both the delivery and the insertion into a building of:
a) the components or part of the components of a central heating or air conditioning system, including the burners, tanks and regulating and control devices associated with the boilers or radiators;
b) the components or part of the components of a sanitary installation of a building and, more generally, of all fixed appliances for sanitary or hygienic use connected to a water main or a drain;
c) the components or part of the components of an electrical installation of a building, with the exception of appliances for lighting and lamps;
d) the components or part of the components of an electrical bell system, of fire alarms, of anti-theft alarms and of a home telephone;
e) storage cabinets, sinks, sink units and furniture with built-in sinks, washbasins and furniture with built-in washbasins, extraction hoods, fans and air extractors with which a kitchen or bathroom is equipped;
f) shutters, roller shutters and roller blinds installed on the outside of the building.
2° any act that has as its object both the delivery of flooring and its installation in a building, regardless of whether this flooring or covering is attached to the building or is simply cut to size on site in accordance with the dimensions of the area to be covered;
3° any work consisting of attaching, fitting, repairing, maintaining and cleaning goods referred to in 1° or 2° above.
Also intended is the making available of staff with a view to carrying out construction work or an act referred to in 1°, 2° or 3° above.

5 Article 35/6/1, 2° of the Wage Protection Law.

6 Article 35/6/1, 3° of the Wage Protection Law.

7 Article 35/6/3, §1 in fine of the Wage Protection Law.

8 B. Croimans and F. Van Overmeiren, "Hoofdelijke aansprakelijkheid voor loonschulden: eerste beoordeling van de juridische en praktische gevolgen", Or. 2014/4, 108.

9 Article 30bis, §10 of the Social Security Law.

10 Article 35/6/1, 4° of the Wage Protection Law.

11 Article 35/6/1, 5° of the Wage Protection Law.

12 Article 35/6/1, 6° of the Wage Protection Law.

13 Article 35/6/2 of the Wage Protection Law.

14 Article 35/6/1, 9° of the Wage Protection Law.

15 Explanatory memorandum, Parl. st. Chamber 2016/2017, DOC 54 2091/001, p. 21.

16 Explanatory memorandum, Parl. st. Chamber 2016/2017, DOC 54 2091/001, p. 27.

17 Article 5, §1 of the Law of 5 March 2002 on working, wage and employment conditions in the case of posting of workers in Belgium and compliance therewith.

18 Opinion of the Council of State, Parl. st. Chamber 2016/2017, DOC 54 2091/001, p. 127.

19 Article 12.1 of Enforcement Directive 2014/67.

20 Article 35/6/3, §1 of the Wage Protection Law.

21 Article 35/6/3, §2 of the Wage Protection Law.

22 Explanatory memorandum, Parl. st. Chamber 2016/2017, DOC 54 2091/001, p. 30.

23 Explanatory memorandum, Parl. st. Chamber 2016/2017, DOC 54 2091/001, p. 34.

24 Article 49/3 of the Social Penal Code.

25 Article 35/6/4 of the Wage Protection Law.

26 Article 2, paragraph 1 of the Wage Protection Law.

27 Article 78 of the Programme Law of 29 March 2012.

28 B. Croimans and F. Van Overmeiren, "Hoofdelijke aansprakelijkheid voor loonschulden: eerste beoordeling van de juridische en praktische gevolgen", Or. 2014/4, 113-114.

CASE LAW

FALSE SELF-EMPLOYMENT? THE RISK IS GREATER THAN YOU THINK

A company enters into a cooperation agreement with a self-employed person. However, if the actual implementation does not correspond with the terms of the agreement on paper, the risk of false self-employment arises.

Two aspects are generally highlighted in this respect. The NOSS can claim that the person concerned is actually an employee, with the result that social security contributions are owed. In turn, the false self-employed person can claim compensation for notice, holiday allowance, end-of-year bonus and salary indexation.

But that's not all: the financial consequences can potentially be much greater. The false self-employed person/employee can request that the client/employer rectify the damage resulting from the non-payment of social security contributions. As a result, the employer may be ordered to pay the social security contributions as from the start of the cooperation (Cass. 3 April 2017, S.16.0039.N, www.juridat.be).

WHAT IS FALSE SELF-EMPLOYMENT?

Parties freely choose the nature of the cooperation: an employment contract as an employee or a cooperation agreement as a self-employed person. A requalification is only possible if there are sufficient elements in practice that are incompatible with the qualification chosen in the agreement.

When is there a question of false independence? This must be checked based on three criteria, in addition to the intent of the parties as it appears from the agreement. A brief discussion of each criterion can be found below, although in practice it cannot be denied that there is a certain degree of interaction between the criteria.

Criterion 1:
Freedom of organisation of working time
This criterion concerns the free organisation of time, meaning a self-employed person can decide when the work is carried out. He or she does not therefore have to be present according to a work schedule or timetable imposed by the client.

The boundary between what is permissible and what is not is quite narrow. Specifically, the obligation to work during certain hours for commercial or organisational reasons is not in and of itself an indication of the existence of an employment contract. On the other hand, the self-employed person must maintain a certain amount of freedom regarding the organisation and practical execution of the work.

Criterion 2:
Freedom of organisation of the work
A precise description of the tasks and precise instructions from a hierarchical superior indicate the existence of an employment contract.

However, general guidelines and obligations can be compatible with independent cooperation. In that case, you will have to demonstrate that these are the result of the nature of the activity carried out or that they are necessary to achieve a set result. The quality of the work delivered can also be checked in the absence of precise instructions.

Criterion 3:
Possibility of applying hierarchical control
DThe possibility of being subject to control or monitoring indicates the existence of an employment contract. An employee may thus be considered as a false self-employed person even if this control is not actually carried out.

CAN YOU PROTECT YOURSELF CONTRACTUALLY AGAINST FALSE SELF-EMPLOYMENT?

Putting a clause in the cooperation agreement stipulating that the self-employed person indemnifies the client against a claim from the NOSS to pay social security contributions is not valid. As the employer, it is you who are responsible for paying the social security contributions (Art. 23 of the NOSS law). This applies both to employer contributions and to employee contributions and you cannot recover them from the false self-employed person/employee (Art. 26, paragraph 1 of the NOSS law).

In addition, you, as the employer, have to rectify the loss suffered by the false self-employed person/employee due to a failure to pay the social security contributions (Art. 26, paragraph 2 of the NOSS law). This obligation is the basis for the claim for damage by the false self-employed person/employee against the client/employer.

PRESCRIPTION, NEITHER USE NOR ORNAMENT?

Prescription limits the financial impact of a requalification as the claims of the NOSS against an employer expire, in principle, after three years. Therefore, the NOSS cannot claim social security contributions based on invoicing that goes further back in time than that.

On the other hand, the false self-employed person does have the right to go back further in time. If the false self-employed person claims compensation for the damage based on an infraction, the applicable prescription period is five years as from the date on which the last infraction occurred (Art. 26 of the Code of Criminal Procedure and Article 2262bis of the Civil Code). However, there is a condition here: the successive offences - non-payment of social security contributions - are regarded as one offence as a result of the unity of criminal intent on the part of the perpetrator/employer.

In this way a situation arises that effectively equates to no prescription (or virtually none). The false self-employed person/employee can request compensation for damages for non-payment of social security contributions as from the first day of the cooperation with the client/employer.

WHAT ABOUT THE DAMAGE AND THE AMOUNT OF THE COMPENSATION?

Non-payment of social security contributions in the event of false self-employment first and foremost has a negative effect on the old age pension of the self-employed person/employee. The salary subject to social security contributions must be taken into account for the calculation of the old age pension in the salaried employee system. This salaried employee pension is generally higher than the old age pension for a self-employed person. As such, the false self-employed person/employee can claim compensation for the shortfall in the pension that he or she will receive.

Some case law determines the amount of the compensation as the difference between 1) the capitalised amount of the future old age pension as a salaried employee for the period of false self-employment and 2) the amount of the future old age pension as a self-employed person for that same period (Labour Tribunal 14 October 2009, 24 March 2010, 29 May 2012, Soc.Kron. 2014, 477.

The Court of Cassation accepts that you as a client/employer are liable for payment of the social security contributions. This compensation for damages in kind is namely the normal form of compensation. As a result, you as the client/employer will be obliged to pay all social security contributions, so both employee contributions and employer contributions. This retroactive payment of social security contributions relates not only to pension contributions (7.50% employee contributions and 8.86% employer contributions), but also to all branches of social security (Brussels Labour Tribunal 1 April 2009 and 30 March 2011, Soc.Kron. 2011, 335. This approach is simpler for the false self-employed individual/employee because it does not require actuarial calculations.

Yves Stox,
Senior Legal Counsel

COLOPHON

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

Responsible editor: Alexandre Cleven. Hoofdredacteur: Francis Verbrugge, fverbrugge@partena.be, tel. 02-549 32 23.
Contributors: Yves Stox, Philippe Van den Abbeele.

Monthly, except in July and August.
39th year – Monthly review