MEMENTO

OF THE EMPLOYER 7

PARTENA PROFESSIONAL

FEASIBLE AND WORKABLE WORK

Employment Minister Kris Peeters wants "more sustainable jobs thanks to customised rules". A modernisation of Belgian labour law that does not affect its core.

As expected, the Employment Minister presented his proposed "feasible and workable work" draft to the unions before the parliamentary recess: feasible work for workers seeking a balance between work and free time, as they must remain active for a longer time; workable work for companies seeking to be competitive and efficient.

The draft contains no less than 14 proposals, and those relating to working time are expected to have the greatest impact. The aim is to ensure that some of the measures are directly applicable, and that the others are activated on a sectoral basis.

The Peeters plan has already been the subject of lively debate in the press, focusing on "the annualisation of working time". However, the plan covers many more topics. This article examines each of the proposals within a framework and compares them to current legislation for the private sector.

01 MOVEMENT ON THE POLITICAL SCENE

The proposed "feasible and workable work" draft was presented to the unions on 15 July, but the texts have not yet been made public. Further discussions will need to be held within the Michel government. Therefore, a draft law has not yet been submitted to the Parliament. Because of the recess, the Group of 10 only resumed its discussions on 29 August. However, the voice of the unions is crucial for realising the Peeters Plan. Many measures will be introduced through sectoral collective bargaining agreements. We can therefore expect amendments to be made. For the time being, we will be basing our examination on the press release published by Minister Peeters on 16 July. (http://www.krispeeters.be/actua/persberichten/wetsontwerp-werkbaar-wendbaar-werk).

The proposed "feasible and workable work" draft law did not appear out of thin air, of course. It is the result of proposals made by the unions, round tables, parliamentary debate and ministerial working visits in Belgium and abroad. The proposed draft law must also embody the continuation of the political agreement reached within the Michel government. The government parties entered into this agreement at the time of the budgetary review of April 2016. The framework for subsequent negotiation and any possible amendments is therefore clear: the measures must be neutral in respect of the budget and must support, we hope, economic growth and therefore tax revenues.

In the meantime, discussions were started with regard to the text of the draft law. The Open Vld once again criticised the Peeters Plan during the parliamentary recess. A major part of the regulation on working time does not apply to the executives and persons of trust listed in a list dating from 1965.

The ruling party intends to modernise this exhaustive list. As for the workers (ABVV), they fear that the implementation of the Peeters Plan may once again promote unrest among the unions.

The Peeters Plan's aim to strengthen companies' competitiveness is strongly linked to two of the Michel government's other projects: the modernisation of the wage standard by Minister Peeters (Act of 26 July 1996 on the promotion of employment and the preventive safeguarding of competitiveness) and the proposal of Finance Minister Johan Van Overtveldt to reduce corporate income tax. This interaction will not help to reach agreement on the Peeters Plan.

It is therefore possible that the Minister's initial schedule may be somewhat disrupted. Draft laws should be submitted to the Lower House in the autumn. The measures should enter into force from 1 January 2017, in order to serve as a basis for the industry-wide agreement and for the sectoral negotiations of 2017-2018.

02

THE 14 PROPOSALS: A "GENERAL BASE" AND A "MENU" TO BE ACTIVATED AT SECTORAL LEVEL

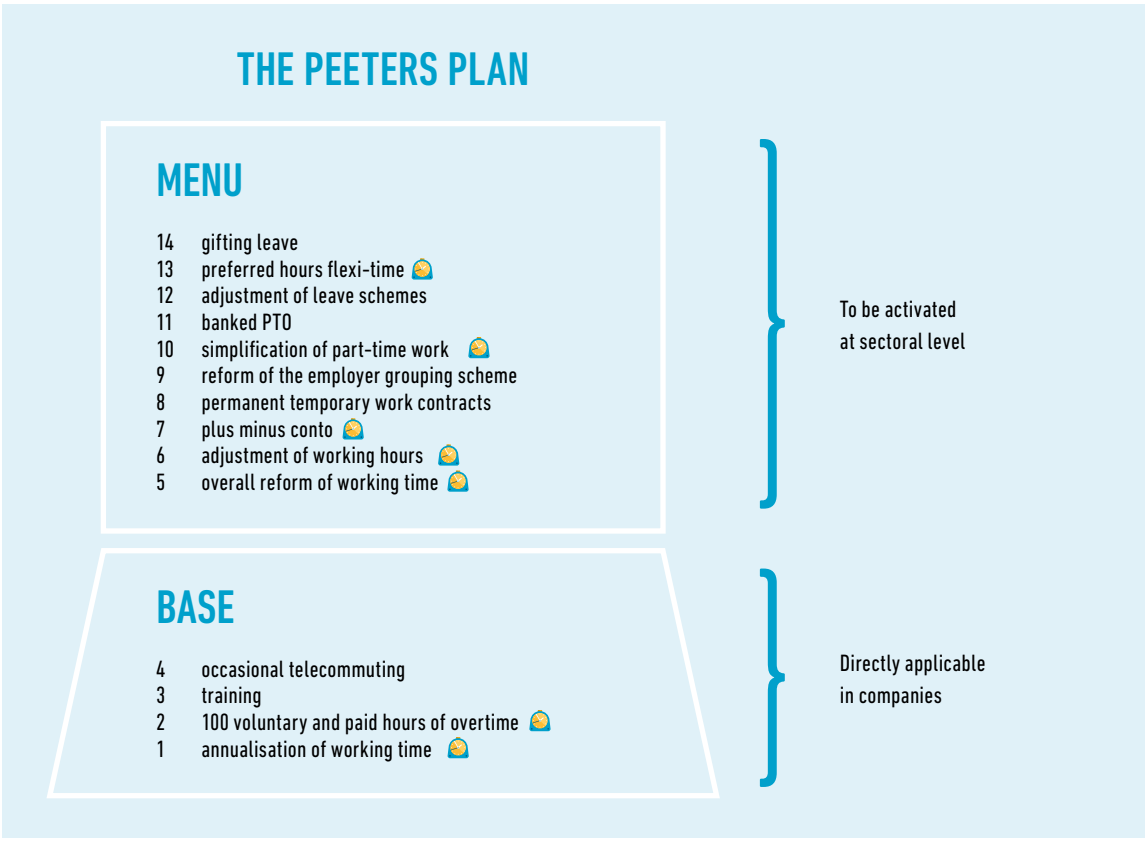
The proposed draft contains 14 proposals. Four proposals form the "base". These measures will apply directly to all industries. The 10 remaining proposals form a "menu". The unions may choose the measures to be activated at sectoral level. Activation implies entering into a sectoral collective bargaining agreement.

The proposed draft only creates new measures, and it does not remove existing regulations, even gradually. Belgian employment law should therefore be complicated a little as a result, particularly given that the menu's measures will be activated in certain industries and not activated in others.

The increased flexibility of working time constitutes the core of the Peeters Plan. No fewer than seven of the fourteen proposals are directly linked to the regulations on working time.

The four proposals comprising the base apply directly to all industries. However, sectoral collective bargaining agreement can also play an important part in the base. At sectoral level, Minister Peeters has given the unions the opportunity to come to an agreement among themselves before 31 December 2016. The unions are therefore free to develop another system, but they must do this quickly. Existing collective agreements will remain in force.

The Peeters Plan only gives individual companies a limited role. The possibilities for deviating from the base within the company are nil. The company may, however, play a more important part in the menu, provided that the unions have not entered into a sectoral collective agreement or enable a company collective agreement to be entered into or the works rules to be adjusted.



CONSIDERED BUT NOT KEPT IN THE PROPOSED DRAFT LAW

The Peeters Plan was even more ambitious in June 2015. Below is a short list of the measures that were considered but not kept in the end:

- a simplification of the many *leave arrangements* (parental leave, leave of birth, etc.)
- the *mobility budget*, with an adapted social security and tax treatment as an alternative to company cars (the CD&V submitted a proposed draft law to the Lower House on 22 September 2014 but it is still under discussion and nothing concrete has been agreed for the time being)
- a modernisation of the list of *executives and persons of trust* which are excluded from a major part of the regulation on working time (put back on the table by the Open Vld)
- the creation of a new social security status, the "*autonomous worker*", a hybrid between that of self-employed and worker
- the transformation of the existing severance pay into a "*transition allowance*", with an attractive social security and tax treatment for the former employer, the new employer and the worker.

The Peeters Plan also has a link to the *plan for the employment of people aged 45 and over* (CBA No. 104 entered into within the National Labour Council on 27 June 2012). Each company employing over 20 workers must draw up an employment plan aimed at maintaining or increasing the number of workers aged 45 and over. The evaluation of CBA No. 104 took place in the meantime, recommendations were made in order to strengthen CBA No. 104's approach, but they are not included in the proposed draft law.

NOT IN THE PROPOSED DRAFT LAW BUT ON TRACK

Finally, the reforms relating to the (gradual) resumption of adapted work for *workers on long-term leave due to illness* fall under the framework of the broader "feasible and workable work" project. The Council of Ministers approved the proposed draft law on 20 July 2016.

03

THE BASE DIRECTLY APPLICABLE WITHIN COMPANIES

MEASURE 1. THE ANNUALISATION OF WORKING TIME

The annualisation of working time enables working hours to be spread out and distributed over a period of one year. In this context, working time is not calculated "traditionally" on a weekly basis, but rather on a yearly basis. During peak periods during the year, the workers may perform more hours, and can then offset this "surplus" during quieter period through shorter workdays.

The measure comprises three components:

- moving the limits on working time to 9 hours per day and 45 hours per week
- subject to observing an average weekly working time of 38 hours over a reference period of one year
- and the granting of time off in lieu after 143 hours of overtime saved over a reference period of one year.

MOVING THE LIMITS ON WORKING TIME FROM 9 HOURS PER DAY TO 45 HOURS PER WEEK

The measure moves the limits on working time from 8 to 9 hours per day and from 38 hours (on average) to 45 hours per week. This means that in peak periods, a worker may work a maximum number of 9 hours per day and 45 hours per week. The employer is not obligated to apply these new limits.

At sectoral level, these ceilings may be increased to 11 hours per day and 50 hours per week. This additional increase falls under measure 5, the overall reform of working time.

AVERAGE WEEKLY WORKING TIME OF 38 HOURS OVER A REFERENCE PERIOD OF ONE YEAR

The reference period for the calculation of the average weekly working time is set at one year for all industries and companies. Full-time workers may work a maximum number of 38 hours per week on average over the entire reference period.

The generalisation of the annualisation to all industries and companies is a truly new development. The reference period is currently set at one quarter, in principle, extendable to one year through a sectoral or company CBA or an amendment to the works rules.

The one-year reference period is an outer limit. The company may continue to apply a reference period of one quarter.

At sectoral level, the reference period may be extended to 6 years at most. This extension falls under measure 7, the plus minus conto.

ENTITLEMENT TO TIME OFF IN LIEU AFTER 143 HOURS OF OVERTIME SAVED OVER A REFERENCE PERIOD OF ONE YEAR: THE INTERNAL LIMIT

The internal limit guarantees the regular granting of time off in lieu, so that the average weekly working time is observed.

Currently, when a worker accumulates 78 hours of overtime above the weekly limit, the employer must grant them time off in lieu. It is only after such has been done that the weekly limit can once again be exceeded. In principle, the reference period is set at one quarter. An extension to one year is already possible through a CBA or an amendment to the works rules, increasing the internal limit to 91 hours.

The measure increases this internal limit to 143 hours over a reference period of one year. Time off in lieu is then due when the worker has worked 143 hours over the limit of 38 hours per week on average.

At sectoral level, the internal limit of 143 hours may be adapted. The same applies for the reference period which may be extended to a maximum period of 6 years. This extension falls under measure 7, the plus minus conto.

ENTITLEMENT TO EXTRA PAY?

It seems that the worker is entitled to extra pay if he exceeds the normal limits of working time (daily and weekly). The measure does not modify the existing regulations relating to extra pay. The worker would therefore also be entitled to extra pay if the limits of 9 hours per day and 45 hours per week are observed.

This approach is not consistent with the other forms of increasing the flexibility of working time. Therefore, the employer applying the plus minus conto is not obligated to pay extra pay when the limits of 10 hours per day and of 48 hours per week are observed. Time off in lieu during the quieter periods serves as compensation for the workers. Workers are entitled to their normal wages (for the normal average weekly working time), both during quiet periods and peak periods.

FOR WHOM?

It seems that this measure applies only to full-time workers. The proposed draft law references an average working time of 38 hours.

UNDER WHICH CIRCUMSTANCES?

The proposed draft law does not set a formal criterion relating to the conditions for application of this new rule. The measure also does not seem to depend on specific prior authorisation.

Currently, the limits of working time can already be exceeded, but only in a given number of specific situations, namely in the event of abnormal pressure of work, subject to authorisation from the union delegation.

EVALUATION

This new measure has many commonalities with flexible schedules ("small flexibility"; Art. 20*bis* of the Labour Act).

Small flexibility currently enables employers the possibility of making the working hours vary based on the company's business and needs. Exceeding working time is limited to 9 hours per day and 45 hours per week, as provided for in the annualisation included in the Peeters Plan.

There is a nuance, however: small flexibility limits the variation in work schedules to 2 hours above or below the normal daily work schedule and to 5 hours above or below the normal weekly working schedule. If normal working time is 38 hours per week, it may only be exceeded up to a total of 43 hours. This limitation would not apply in the case of annualisation. The Peeters Plan offers an advantage of 2 hours per week.

What are the major differences between these two systems that will continue to coexist?

1. In the small flexibility framework, the employer may make schedules vary without having to pay extra pay every time. In the case of annualisation, the employer will be required to pay extra pay.
2. Small flexibility must be implemented through a sectoral or company CBA or by an amendment of the works rules. Annualisation may be implemented without a CBA and without an amendment to the works rules.

The coexistence of two fairly similar systems provides no guarantees as to consistency and transparency.

The whole thing becomes more complex. European Directive 2003/88 concerning the organisation of working time imposes a second internal limit by setting its own reference period: average weekly working time may no longer exceed 48 hours per week over a reference period of 4 months.

MEASURE 2. 100 VOLUNTARY AND PAID HOURS OF OVERTIME

The proposed draft law develops a new concept of "voluntary overtime". Each worker has a budget of 100 voluntary hours of overtime.

Working overtime is subject to three limitations:

1) Each worker may worker up to 100 hours of overtime per calendar year. A sectoral CBA may extend this budget to 360 hours.
2) A worker may work a maximum of 11 hours per business day.
3) A worker may work a maximum of 50 hours per week.

ENTITLEMENT TO TIME OFF IN LIEU?

No, the worker may not recover the voluntary overtime worked.

ENTITLEMENT TO EXTRA PAY?

"Voluntary" overtime must be paid either by extra pay, or added to the banked PTO (see measure 11, banked PTO).

FOR WHOM?

It seems that this measure applies to all workers, both full-time and part-time workers. No details are currently available as regards the possible application of the pro rata principle to the budget for part-time workers.

UNDER WHICH CIRCUMSTANCES?

The worker and the employer must come to an

agreement regarding the time at which these hours will be worked. It is not necessary to invoke a reason. The measure does not seem to depend on specific prior authorisation.

Contrary to "ordinary" overtime as we currently know it, this "voluntary" overtime does not require the prior approval of the union delegation.

EVALUATION

This measure's impact depends on its relationship with measure 1, annualisation. The relationship between the 100 hours of voluntary overtime and the internal limit of 143 hours over a reference period of one year has yet to be defined.

There are two possibilities.

1. The 100 hours of voluntary overtime comprise an independent system which is not linked in any way to the internal limit of 143 hours. This means that the worker is not entitled to time off in lieu when the "ordinary" overtime amounts to less than 143 hours, even if the sum of the "ordinary" and "voluntary" overtime exceeds 143 hours.
2. The 100 hours of voluntary overtime are taken into account for the internal limit. This means that a worker who has worked 100 hours of "voluntary" overtime is entitled to time off in lieu as soon as they have worked 43 hours of "ordinary" overtime.

The first case seems more consistent with the initial intent to create increased flexibility for the employer and the worker. This measure implements a brand new system of overtime which is in no way linked to regulations on working time. In the second case, the measure does not provide any additional flexibility.

MEASURE 3. TRAINING

Continuing training and further training are key to staff employability. Through this measure, Minister Peeters aims to convert companies' training efforts from 1.9% of total payroll to an average of five days of training per Full-Time Equivalent (FTE) per year. The Peeters Plan sets an industry-wide goal of an average of 5 days of training per FTE per year, without increasing labour costs.

This goal is realised as follows:

1) At sectoral level, by entering into a sectoral CBA.
2) At company level, by implementing an individual training account per worker, with a training credit equivalent at least to the existing training effort.
3) In the absence of a sectoral CBA and an individual training account, full-time workers are entitled to two days of training per year, regardless of the industry in which they are employed.

The measure does not mean that each individual worker will be immediately entitled to five days of training per year. The training efforts must be set on a yearly basis, with a goal of five days of training at the end of the growth trajectory.

FOR WHOM?

Not all employers are required to comply with this training requirement.

- SMEs with less than 10 workers are completely exempt from this obligation.
- Specific regulations for SMEs with fewer than 20 workers will be laid down at a later date (developed by way of Royal Decree).

CONDITIONS

Allocated training days may be used for:

- formal training outside of the company,
- formal or informal training within the company or in the workplace.

The employer may organise the training or they may call upon an external service provider, such as their industry's training fund. Training days may also be integrated into normal working time, or be given outside of normal working time as overtime without extra pay.

Companies with 20 or more employees must include the terms for compliance with this right to training in their annual employee report.

EVALUATION

The Michel government had to act. The existing training obligation was already suspended for 2015-2016. The Constitutional Court held that the obligation was unconstitutional. It is not allowed to punish individual employers because industry-level training efforts do not achieve 1.9% of the payroll (Constitutional Court, 23 October 2014, Decision No. 154/2014).

The question arises, however, as to whether the new training effort of five days will in practice correspond to 1.9% and whether labour costs will therefore not increase.

MEASURE 4. OCCASIONAL TELECOMMUTING

Labour law currently provides a legal framework for worker who regularly telecommute (CBA No. 85 entered into within the National Labour Council on 9 November 2005). Telecommuting can be done at the worker's home or any other place chosen by him.

The Peeters Plan also intends to establish a legal framework for occasional telecommuting. Occasional telecommuting is any form of work which is not regular. Clear definitions of the concepts of "regular" and "occasional" are still lacking. When does occasional telecommuting become regular? A regular telecommuter could perform part of their work on the company's premises.

A RIGHT OR IN CONSULTATION?

The Peeters Plan will have to specify whether the worker may claim a right to occasional telecommuting or whether the employer must first give their agreement.

OCCASIONAL TELECOMMUTERS AND WORKING TIME

The Peeters Plan does not specify whether the regulations on working time will apply in full to occasional telecommuters. However, this must be specified. During their day of telecommuting, occasional telecommuters will not necessarily work only during the normal schedule in force within the company. Taking a short break at lunchtime to fetch their children from school, for instance, can easily be compensated for by working a little later in the evening. On that day, the occasional telecommuter will therefore work outside of normal schedules, which is prohibited in principle.

This problem does not arise under the current legal framework. Regular telecommuters are often home workers as the employer does not exercise direct control. However, home workers are excluded from a major part of the regulations on working time. Whether or not an occasional telecommuter will also be qualified as a home worker can also provide fodder for discussions.

EVALUATION

Even without this measure, the employer may already organise any form of telecommuting. The current legal framework provides sufficient possibilities for developing a company-specific scheme. The employer and the worker may conclude agreements, for instance as regards a fixed-sum compensation for costs, accessibility and IT support in an annex to the employment contract. In the Peeters Plan, the employers and the workers will also have to conclude such agreements.

04 THE MENU – ACTIVATION AT SECTORAL LEVEL

MEASURE 5. OVERALL REFORM OF WORKING TIME

The overall reform of working time must provide workers and employers with more flexibility.

The measure enables workers to work up to 11 hours per day and 50 hours per week, without being allowed to exceed the annual average of 48 hours per week. In this context, there must be an interruption of 11 hours between two working periods. Night work is any work performed after 22:00 (instead of 20:00) and before 06:00.

Before entering into force, this measure must be activated through a sectoral CBA. Failing a sectoral CBA, the proposal may be activated through a company CBA or the works rules (if there is no union delegation), provided that a representative organisation has requested such at sectoral level and after a waiting period of six months.

EVALUATION

The Peeters Plan places a strong emphasis on the industry's role at the expense of the company. The company may only implement the measure after a period of six months. The industry is able to conclude a CBA in the meantime.

In practice, it is therefore necessary to be a member of an employers' organisation. A company may not add the introduction of new working arrangements to a joint bargaining committee's agenda.

Although the employer is entitled to begin negotiations after the waiting period of six months, they must first convince all the members of the union delegation. This is not required, in principle, in the event of negotiations relating to a CBA: the agreement of a single organisation representing workers will suffice.

MEASURE 6. ADJUSTMENT OF WORKING HOURS

The Peeters Plan wants the rules for moving from one work schedule to another be specified in the works rules. Employers must inform workers of any change to their work schedules beforehand.

All full-time schedules must be included in the works rules. No change here. This obligation continues to restrict the company's flexibility. A change of schedule involves an amendment to the works rules. The employer must comply with a strict procedure which requires a workplace agreement with the workers (their representation).

EVALUATION

This measure does not offer any additional flexibility. It seems appropriate to aim for consistency with measure 10, simplification of part-time work.

MEASURE 7. THE PLUS MINUS CONTO

The plus minus conto (plus-minus account) is a system of atypical work periods: periods containing long weeks of work alternating with periods of short weeks of work. The existing system is focused on the automotive industry. The Peeters Plan intends to enable the other industries to introduce the system.

The plus minus conto provides companies with the possibility of developing customised work arrangements. A company CBA sets the concrete terms for application of the system.

The limits on working time are increased to 9 hours per day and 45 hours per week.

ENTITLEMENT TO TIME OFF IN LIEU?

Time off in lieu must be granted in order to ensure the normal average weekly working time over the reference period that applies to the company. The reference period is increased to 6 years at most. The reference period is normally a maximum of one year.

ENTITLEMENT TO EXTRA PAY?

Extra pay is not due if the conditions and limits of working time under the plus minus conto system, as well as the work schedules, are complied with.

EVALUATION

The Peeters Plan does not specify which companies may introduce their own plus minus conto systems.

Very few companies meet the criteria that the legislation currently imposes. Companies must meet no less than four criteria:

1. they must be part of an industry subject to strong international competition
2. they must have long production cycles (extending over several years), such that the company is faced with a substantial and prolonged increase in work or with a decrease in work
3. they must have to offset a sharp rise or fall in demand for a newly-developed industrial product
4. they must be faced with specific economic reasons that prevent compliance with the average weekly working time within the standard reference periods

This measure's impact will therefore be limited if the criteria are not relaxed. The entire service industry could be excluded from using the system.

MEASURE 8.
PERMANENT TEMPORARY WORK CONTRACTS

Temporary agency work is currently subject to strict regulations. Employers may only employ temporary agency workers in very specific circumstances and the duration of temporary work contracts is inherently limited.

The measure intends to enable temporary work agencies to conclude permanent temporary work contracts. This type of employment contract is no different to any other permanent employment contract.

This provides employers with greater flexibility. For temporary agency workers, this means that:

1) the temporary work agency guarantees the wage between two assignments
2) temporary layoffs between two assignments are forbidden.

Companies may only call on temporary agency workers in specific cases (for instance, replacement, increase in workload or with a view to hiring). The Peeters Plan does not modify these conditions.

EVALUATION

Permanent temporary work contracts are only possible if a collective bargaining agreement is concluded within the joint bargaining committee for temporary agency work (JBC 322). Such a sectoral CBA will determine when a permanent temporary work contract must be concluded and under which conditions.

MEASURE 9.
REFORM OF THE EMPLOYER GROUPING SCHEME

The Peeters Plan aims to make it easier to create employer groupings. Employer groupings enable two or more employers to group together in order to hire workers, whose services will be shared between the grouping's members. Through this independent legal structure, the workers alternate working for the companies that are members of said structure. The employer grouping is the legal employer.

This co-sourcing has many practical benefits. It enables companies to employ workers as and when their business so requires. The companies are also able to more easily and quickly use specialised workers.

Company groupings are therefore an exception to the prohibition on the making available of staff. More information about this prohibition and the unexpected consequences for violations of this strict legislation are provided further on in this issue.

EVALUATION

The existing employer grouping system has not been a success. It involves too many uncertainties. It is in fact a pilot project whose registration period has been constantly extended.

Employer groupings simply cannot start without the prior authorisation of the Minister of Employment; it is the latter who sets the duration of validity of the authorisation. A reform of the system should lead to transparent rules.

Currently, the Minister of Employment is largely responsible for setting wages and working conditions. The Minister determines the relevant joint bargaining committee when all members of the grouping do not belong to the same industry. It is necessary to have clear and transparent rules in this regard also.

MEASURE 10. SIMPLIFICATION OF PART-TIME WORK

Part-time work is subject to strict formal requirements and burdensome administrative obligations. The Peeters Plan intends to simplify the system and provide extra flexibility: a simplification of the existing rules using the opportunities provided by new technologies.

The measure cuts the red tape, particularly when a part-time worker is employed with a variable work schedule.

In such cases, the **employment contract** (drawn up on an individual basis, in writing, no later than the date on which the work starts) only needs to mention the work arrangements and not the work schedules.

The works rules no longer need to contain all the part-time work schedules, whether they are fixed or variable.

The **works rules** must, however, provide for a general framework applicable to part-time workers working with a variable schedule. The framework determines:

- the daily time range of the work,
- the days of work,
- the maximum and minimum duration of work,
- the means through which and the period within which part-time workers will be informed of their work schedules.

Part-time workers employed under a variable work schedule must be informed of the work schedule in writing, either in paper format or in electronic format.

The notice must be brought to the notice of part-time workers at least one business day in advance. This proposal caused a stir. The Peeters Plan does not, however, intend to change the existing period of information. Individual notification must in principle take place at least five days in advance. This period may be modified by a CBA (sectoral). The lower limit of one business day is a new development.

Any deviation from the part-time workers' normal work schedule must be indicated in a control document, except in cases where the company has a reliable time registration system.

EVALUATION

The measure is a significant administrative simplification for part-time workers.

The other measures relating to working time could be further strengthened if this administrative simplification also applied to full-time workers.

MEASURE 11. BANKED PTO

Banked PTO enables workers to save up time in order to finance a career interval at a later date. The underlying idea is nothing new. Employers may already provide their workers with the opportunity to save up contractual or company holiday rights that they may take at a later date during their careers.

The Peeters Plan creates a framework but leaves it up to the unions to define its specific terms. Through a sectoral CBA, the employers' and workers' representatives will have to determine, among others:

- which periods may be banked,
- the duration for which such periods may be banked,
- the way in which the worker can take the days off at a later date.

In the absence of a sectoral CBA, the measure may be activated by a company CBA, provided that a representative organisation has made the request for such and after a waiting period of six months.

For the time being, it is not yet clear whether banked PTO can be exported to a new employer.

A FEASIBILITY STUDY

It may seem surprising that banked PTO is still included in the proposed draft law submitted by the Minister of Employment to the unions on 15 July. The Minister commissioned a feasibility study to be conducted, the interim report of which on the system's possible introduction in Belgium was presented on 20 June. The feasibility study, conducted by IDEA Consult and KU Leuven, should be finished in late September 2016.

Five starting points for the establishment of banked PTO in Belgium were developed in order to end up with five concrete starting points and an initial conceptual reflection.

Five starting points:

1. The banked PTO system must have a sufficiently broad scope. Workers are given true independence in the management of their working time.
2. The banked PTO system cannot be limited to simple "tinkering". It must have its own identity.
3. The banked PTO system cannot function without consultation at company level. This consultation will enable a system adapted to the companies' realities to be developed. The sectoral level will play a secondary role. Now that this measure is included in the Peeters Plan, this starting point seems less important. The sectoral CBA will be crucial.
4. Workers must have freedom of choice. A company's participation in the banked PTO system does not mean that workers are obligated to use the system. The question remains as to whether the sectoral CBA can obligated companies to introduce the banked PTO system. Why does the proposed draft law not provide for the employer's freedom of choice?
5. Broader systems remain possible at company level. Currently, many companies already involve their workers in the composition of their wages. A smaller company car in exchange for more holidays remains possible.

Definition of the terms

A first proposal was developed on the basis of the five starting points. It involves a simple system of banked PTO which can be exported to the new employer. A combination of time-saving and money-saving could be considered as an alternative.

Constitution of the saving

The following components were suggested for the constitution of the saving.

1. Company or contractual holiday rights
   The current legal framework already enables company or contractual holiday rights to be saved up and to be carried forward from one year to the next. The possible exportation to the new employer is a new development. It is prohibited to save up statutory holidays. European Directive 2003/88 guarantees 4 annual weeks of statutory holidays.
2. Long service leave days
   The granting of long service leave days is often governed by a sectoral CBA, which cannot be modified on a whim.
3. Lieu days (RTT days)
   An employee who works 40 hours in an industry having set the working time at 38 hours per week can bank 2 hours per week or 12 days per year.
4. Overtime
   The interaction between the banked PTO system and the new system of "voluntary hours of overtime" (measure 2) can therefore be optimised. Workers can therefore decide whether to ask to be paid for their voluntary hours of overtime or to bank them.

The constitution of the saving should also be capped:

1. A maximum number of days that a worker can bank per year
2. A maximum amount of banked PTO
3. Exportability to a new employer must also be limited.

Without these three ceilings, the proper functioning of the company and the worker's mobility on the labour market could be compromised.

Using banked PTO

The worker may use the banked PTO in phases (enabling them to work on a part-time basis), fractionally throughout their career or at the end of their career.
A worker using banked PTO will receive compensation. The compensation is based on the worker's wages at the time of banking the PTO.
Why would a worker be interested in the banked PTO system?
"Time is money", but this expression does not apply to banked PTO. A Worker banking working time has no compensation for inflation over the long term. A person placing money in a financial institution receives interest as compensation; a portion of the interest compensates the devaluation of the money. An adapted tax and social security treatment for banked PTO could provide a solution, but such an adjustment would run afoul of budget neutrality.

MEASURE 12. ADJUSTMENT OF LEAVE SCHEMES

In order to maintain a balance between professional and private life, there are a certain number of leave schemes enabling workers to take time off for certain life events or when (family) circumstances so require. Workers are entitled to a "bonus" to compensate for lost wages. Time credit without appropriate justification - "to travel around the world", as used to be said with a certain degree of condescension - was withdrawn from 1 January 2015.

The Peeters Plan provides for:

- An additional three months of time credit for healthcare reasons.
  Workers are therefore entitled to a maximum of 51 weeks of time credit to care for seriously ill member of their household or family.
- One additional month of time credit for palliative care.
  Workers are therefore entitled to a maximum of 3 months of specific leave for palliative care.

EVALUATION

The conditions under which time credit is granted (CBA No. 103 entered into within the National Labour Council on 27 June 2012) do not correspond with the conditions for time credit allowances (Royal Decree of 30 December 2014, Belgian Official Gazette of 31 December 2014). A worker may, in certain situations, meet the conditions for entitlement to time credit without necessarily being entitled to a career break allowance (or inversely). The Peeters Plan does not eliminate this discrepancy.

MEASURE 13. PREFERRED HOURS FLEXI-TIME

All workers must work the hours specifically defined in the works rules. Under a preferred hours flexi-time scheme, workers work fixed ranges of hours and mobile ranges of hours. Start and end hours vary on a daily basis – within certain limits, however – such that this obligation cannot be met. From a legal standpoint, the preferred hours flexi-time scheme is a sensitive point.

The Peeters Plan intends to confer a legal anchoring point to the preferred hours flexi-time system. A (company) CCT or the works rules (companies without a union delegation) shall determine:

- the functions, jobs and categories of workers to which the preferred hours flexi-time scheme applies
- the periods of the day during which the worker's presence is mandatory, flexible time bands during which the worker determines the start and end of their workday and their breaks (e.g. lunch break) and mandatory breaks, if any
- the maximum working time per day and per week
- the average value of a day's work
- the time registration system
- the reference period
- the maximum number of credit or debit hours that a worker may accumulate.

The reference period corresponds to the period over which a worker's total number of hours is assessed. The average weekly working time must be observed during the reference period. During the reference period:

- hours may, if applicable, be credited or debited
- recovery of a possible credit is authorised
- making up for a possible debit is required.

EVALUATION

The measure provides companies with legal certainty. In practice, a policy of tolerance already exists. The inspection services expect employers to provide the necessary guarantees as regards the use, for instance, of a time clock that checks the work performed and stores the data recorded.

MEASURE 14. GIFTING LEAVE

All workers are entitled to 20 days of statutory leave per year (5-day work week). This is often too little for workers who have to care for a seriously ill child.

The measure aims to enable workers to voluntarily gift their days of leave. There is currently no framework in our country enabling colleagues to gift each other days of leave.

EVALUATION

The scheme for gifting leave is particularly limited. In practice, workers may only gift company or contractual holiday rights. European Directive 2003/88/EC on the organisation of working time guarantees every worker at least 4 weeks of paid leave per year.

In order to avoid compromising the functioning of the company, the employer's prior approval is required.

05 CONCLUSION

The main problem as regards labour flexibility is the complexity of the current legislation. The Peeters Plan does not make any major changes. Taken together, the 14 new measures serve to make labour law just a little more complex. The existing systems and schemes are not replaced, they continue to exist alongside new measures.

Consistency remains crucial, particularly in the field of labour law. The menu that the industries will have to develop is a necessary evil and presents the risk of scattering itself further.

Brigitte Dendooven, Legal expert
Yves Stox, Senior Legal Counsel

CASE LAW

PROSCRIBED LOAN OF WORKERS: INVOICE NOT PAYABLE

An ICT service provider offered its clients a full product package, which was delivered and installed. However, the service provider needed to follow up with an intensive service input. Its workers were deployed virtually full time at the client's premises. The problems mounted up and the project took longer than initially foreseen, and so the service provider put some of its staff at the client's disposal. Fundamentally, this is prohibited, owing to issues raised by the direct instructions that the client gave to the workers.

By failing to adhere to the prohibition against loans of staff, the company risked not being able to demand payment of its bill. Though the services had been duly and properly provided, breach of the prohibition rendered the contract void ab initio. The Court of Cassation confirmed that the company cannot claim payment of the invoice for its services or claim any set-off even though the client benefited from the loan (Court of Cassation judgment, 15 February 2016, C.14.0448.F. It is available on www.juridat.be).

THE GENERAL RULE IS THAT LOANS OF WORKERS ARE PROHIBITED

Belgian labour law proscribes loans of workers (section 31 of the Interim Work Act of 24 July 1987). The prohibition was introduced to fight abuse by suppliers of labour. In practice, however, the prohibition's ambit is much broader and strikes at any form of partnership in which services are provided under a loan of staff. The interim staffing sector is subject to special rules, which are not relevant to this article.

However, it should be noted that lending staff is not ruled out in all cases. Employers cannot lend staff to a user who exercises might exercise all or any part of the employer's authority over them. This is a question of the facts. No exhaustive list of permitted and prohibited cases is set down in the act.

FOR EXAMPLE

A company breaches the loan prohibition where its worker works with the user's staff in a coordinated, integrated manner, such as where the user lists the worker in their "who's who" database or fixes the dates when the worker can take holidays.

That said, a loan is not prohibited where the user exercises no authority over the worker. Where staff work together within, say, a single economic and financial group, a fixed employee can be lent on a temporary and occasional basis (section 32 of the Interim Work Act of 24 July 1987).

Where an employee grouping is set up, there is also an exception to the loan prohibition (sections 186-193 of the Social, Budgetary and Miscellaneous Provisions Act of 12 August 2000). Together, several companies can create an employee grouping, in which each of them can use the services of their respective workers. Minister Kris Peeters would like to promote this system of employee groupings more. For further information, see our article on the "Feasible work and employment agility" in this memo.

THE SERVICE OR PARTNERSHIP AGREEMENT

The legislation seems to show some understanding for companies. Users can give practical instructions to workers provided the following conditions are met:

1. the instructions have to be given pursuant to the service or partnership agreement with the employer; and
2. the agreement has to set out exactly what instructions can be given by the user; and
3. the user's instructions cannot undermine the employer's authority; and
4. instructions must de facto be given in accordance with the written agreement's terms (section 31(1), second paragraph, of the Interim Work Act of 24 July 1987).

In the real world, setting up a partnership or providing services without devolving into a prohibited loan situation is a veritable challenge. The agreement has to list in detail all the instructions that the user is precisely allowed to give. Though formulation cannot be too vague, setting down overly precise instructions that are allowed in the contract can also risk being difficult to implement. It is impossible to foresee every single possible case. And, what's more, the circumstances can shift.

Ultimately, the user could also require compliance with the laws on workers' well-being, without there thus being any question of (prohibited) exercise of the authority.

PENALTIES

Till recently, the negative consequences of a proscribed loan were essentially borne by the user. This is, in the end, logical, given how difficult it is for the employer to do checks. In practice, it's the user that often decides whether and to what extent they give instructions.

- The prohibited loan gives rise to a new open-ended employment contract between user and worker.
- The initial employer and the user are jointly and severally liable for payment of social security contributions, salary and other benefits.
- The new employment contract with the user and the one you signed with the worker can co-exist (unless the worker was hired for the very purpose of being loaned).

However, the initial employer does not fully get off scot free, since, on the same basis as the user, they may be liable to a criminal or administrative fine or even be barred from operating or practising a profession and the company could be closed down (section 177 of the Labour Criminal Code).

AGREEMENT VOID AND INVOICE NON-PAYABLE

The Court of Cassation has recently underscored the fact that the onerous consequences resulting from a user exercising or being able to exercise employer authority have to be borne by it (Court of Cassation judgment, 15 February 2016, C.14.0448.F, see www.juridat.be). The service or partnership agreement is void ab initio in the case of prohibited loans.

The company therefore risks not being able to sue the client for payment of the invoice for the services that were performed. The Court of Cassation has ruled that the employer cannot claim any set-off from the user for the benefit it has procured from the loan of staff, since any such claim could impinge on the preventive principle underlying the loan prohibition.

The Court of Cassation made no pronouncement on the question of whether the user is entitled to claim a refund of invoices already paid. A court may turn down a user's claim for refund of services paid for on the ground that they contributed to performance of a void service or partnership agreement.

TWO IMPORTANT POINTS

1. To avoid any problems, it is crucial to draw up a precise, realistic service or partnership agreement.

2. To avoid their employer authority being misused, the employer must stay in contact with the worker and client whilst the service or partnership agreement is being performed and, in so doing, also make sure that the client's instructions do not exceed what is set down in the agreement.

Yves Stox, Senior Legal Counsel

SOCIAL NEWS

CASH PAYMENTS OF SALARY FROM 1 OCTOBER: IN WHICH SECTORS?

Starting 1 October 2016, salary can no longer be paid in cash unless an exception is laid down at sector level. Salary can be paid in cash provided it is allowed under a sector collective bargaining agreement, implied agreement or custom in the sector.

AGREEMENT OR CUSTOM – STRICT PROCEDURE FOR FORMALISING IT

Implied agreement or custom is not sufficient in and of itself. The implied sector agreement or sector custom allowing salary to be paid in cash has to be formalised with the relevant joint commission and published on the website of the FPS Labour, Work and Social Dialogue.

FORMALISATION PROCEDURE LAUNCHED FOR FOUR SECTORS

Only four sectors'agreements are subject to a procedure with publication on the website of the FPS Labour, Work and Social Dialogue (http://www.emploi.belgique.be/ > Thèmes/Thema's > Rémunération/Verloning > Protection de la remuneration/Loonbescherming > Rémunération en espèce/Uitbetaling in geld > Paiement de la main à la main ; consultation au 14 septembre 2016/ Uitbetaling van het loon van hand tot hand - sectoraal akkoord in onderhandeling).

TRANSITIONAL MEASURE UNTIL 1 APRIL 2017

There is a transitional measure allowing cash payments until 1 April 2017 if the formalisation procedure is launched with the relevant joint commission before 1 October 2016 but has not yet been completed by then. If the formalisation procedure is still on-going on 1 April 2017, cash payments will have to be stopped.

The transitional measure therefore applies to the four sectors named above in the event that the formalisation procedure is still on-going on 1 October 2016.

Yves Stox, Senior Legal Counsel

Joint commission	Scope
Joint commission 144 for agriculture	Occasional and seasonal workers
Joint commission 145 for horticultural undertakings	Occasional and seasonal workers
Joint commission 201 for independent retail trade	Students employed by bakeries, patisseries producing fresh products intended for immediate consumption whose storage life is very limited, and by shops selling pastries for on-site consumption
Joint commission 324 for the diamond industry and trading	Certain employers

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