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CONTENT



Topics

Reimbursement of employee expenses >

What is expense reimbursement? >

Exemption from social security contributions under certain circumstances >

A tax exemption for “employer-specific costs” >

Is a flat-rate allowance during holidays or sick leave permitted? >

How to best develop and implement a flat-rate allowance >

In search of greater certainty >

Treatment in salary administration and the calculation of holiday and severance pay >

The flat-rate allowance is reclassified as disguised salary. What do I do? >

Conclusion >



News

Working as a director in different EU Member States: new interpretation rules >



Topics

Reimbursement of employee expenses

You want to provide your employees with an allowance - net, untaxed and not subject to social security contributions.

The allowance is intended to reimburse employees for certain expenses they have incurred. However, you are not sure how to properly implement it. You conclude that a quick and easy way would be to increase your employees' net income.

Yet, somehow it seems too easy - and it is.

Instead, you can give your employees a flat-rate allowance, but you must be able to justify it. The reimbursement you offer must be realistic. Do not use it as a way of giving your employees a bonus, otherwise your allowance will likely be reclassified as salary, and the financial consequences can be significant.

Expense reimbursements remain a priority for social and tax inspections. However, the tax authorities and the National Social Security Office do not always share the same opinion. Developing a watertight system is thus no easy task. We explain how you can create a proportionate flat-rate allowance. The allowance should consist of a number of different elements but precisely which will depend on the employees' specific employment situations. We also give you some guidelines on how to handle the implementation. For example, it is worth considering a prior agreement (ruling) with the tax authorities. In any case, a policy at company level is a must.

We look further into the future, into what happens after the flat-rate allowance has been implemented. Should you include the allowance in your salary administration? Do you owe holiday pay or holiday pay for departing employees? And what happens if the employment contract is terminated?

Since this article will cover the subject in general terms, we will not be exploring two specific forms of expense reimbursement:

- Mobility allowance as a fixed arrangement for reimbursing transportation costs (professional transportation costs and commuting);
- Flat-rate allowances for foreign business trips and foreign executives.

Some figures

Did you know that 8% of all employees receive a form of reimbursement? That does not seem very much, but that figure is based on a sample across all sectors and regardless of the type of employee. Reimbursements are, however, typical for non-manual workers: 8 out of 10 of those receiving reimbursements are non-manual workers. The amount is usually limited, about EUR 60 a month.

The number of employees receiving a reimbursement may be higher than 8%. Our sample was based on the data processed in the salary administration. Experience has shown that many employers grant expense reimbursements, but (incorrectly) do not include them in the monthly salary administration because no social security contributions and withholding tax on wages have to be deducted.

What is expense reimbursement?

Expense reimbursement can take many forms such as a remote working allowance, a representation allowance or a clothing allowance, etc. As a company, your task is to grant expense reimbursements that are in line with the position and employment situation of the employees concerned. Whatever type of reimbursement you offer, the basic principle is the same. The reimbursement should cover any professional expenses incurred by your employees¹, or rather, any expenses that you as the employer are responsible for bearing.

Labour law, social security and tax guidelines are all in agreement on this.

- The employer is obliged to provide employees with the “help, tools and materials necessary to perform their work”.² The parties can, however, themselves agree who among them will bear the costs associated with the execution of the work.³
- The “costs borne by the employer” are not subject to social security contributions.⁴
- For tax purposes, there is a similar exemption for “reimbursements of employee expenses by the employer”.⁵

Tip

Distinguish between the reimbursement of expenses incurred by the employee on behalf of the company and the granting of a flat-rate expense reimbursement. When reimbursing expenses, you reimburse the employee who incurred the expense and advanced the amount. You can reduce the administrative load with flat-rate expense reimbursements. A refund is made based on, for example, invoices and expense reports. With regard to flat-rate expense reimbursements, you will not structurally request and maintain these supporting documents.

In particular, this concerns small costs that are difficult to prove, although the employer must, of course, be able to justify the fixed amount used.⁶

If you reimburse an employee's personal expenses, this is considered part of the salary and therefore social security contributions and income tax are owed. The line between professional and personal expenses will depend on specific circumstances.

An example

You give an employee an allowance that is intended to be used to repay the mortgage on his or her private residence and to pay for utilities (water, electricity, etc.).

These are generally considered to be personal expenses and therefore the reimbursements you provide are actually part of the salary. On the other hand, if an employee regularly works from home, you can provide an allowance as a reimbursement of the professional expenses associated with working from home. (The National Social Security Office provides two flat-rate amounts, which we will cover in more detail below.)

Exemption from social security contributions under certain circumstances

Social security contributions are not owed on the genuine expenses an employer is obliged to bear as a result of employing an employee, even if these expenses are not essential to the implementation of the employment contract. The employer is obliged to cover these expenses but this obligation may be derived from several sources, for example:

- the law; The employer is obliged to provide employees with the "help, tools and materials necessary to perform the work".
- a collective labour agreement;
- the employment contract or an addendum to the employment contract;
- the work regulations;
- company policy;
- a unilateral commitment from the employer.⁷

Summary: three conditions

For the expense reimbursement to be exempt from social security contributions it is required that:

- it is a genuine expense reimbursement that does not benefit the employee.
The flat-rate allowance must be proportional to the actual amount of the expenses. In addition, “duplicate reimbursements” must be excluded.
- The expenses stem from employment. However, the expenses do not need to be essential to the implementation of the employment contract;
They must therefore not be personal expenses. The expenses must be professional in nature.
- the employer is obliged to bear these costs;
It is for this reason that the employer and employee often add an addendum to the employment contract.

Examples — Limited creativity

A shop selling perfume and beauty products gives its retail staff gift vouchers. In some cases, the gift vouchers may be considered expense reimbursements, which are thus exempt from social security contributions, but this will not always be the case. In this case, the exemption from social security contributions is based on the argument that the reimbursement helps employees to do their jobs better. By purchasing perfume and beauty products with the gift vouchers, the employees stay abreast of developments within the world of perfume and beauty products.⁸

Employers are obliged to provide their employees with drinking water or suitable beverages. If an employer provides its employees with an allowance in order to meet this obligation, it may be exempt from social security contributions. If the employer also provides a coffee machine for employees, this is not a problem as long as the employees have to pay for their drinks as this prevents “duplicate reimbursement”.⁹

The burden of proof lies with the employer

Although an expense allowance may be exempt from social security contributions, the burden of proof lies with the employer. It is thus the employer who can prove the correctness of the amount and the real nature of the flat-rate allowance. If there are no supporting documents, the employer can call on other means of proof, such as presumption.¹⁰ A tax ruling (prior agreement) does not bind the National Social Security Office. It can, of course, be a form of evidence, along with other means of proof. An employer who can only appeal to a tax ruling is weak during an NSSO inspection.

Without supporting documents, an employer is in a weaker position. At the same time, flat-rate allowances will be introduced to simplify administration and avoid having to keep track of supporting documents such as invoices and expense reports. A company policy will certainly help the employer to provide evidence.

The National Social Security Office accepts flat-rate allowances. This is why the National Social Security Office has published standard amounts for certain costs, such as teleworking from home.

But even then, the employer continues to bear the burden of proof. The employer must therefore be able to justify its system of reimbursement of expenses. Using the company policy, you can demonstrate that it is an employee for whom the cost intended by that fixed sum is plausible, considering the job description and working conditions.

A tax exemption for “employer-specific costs”

An allowance for “employer-specific costs” is not a taxable income for the employee and is generally a deductible professional expense for the employer. This applies not only to the reimbursement of professional expenses, but also to flat-rate expense reimbursements. Whether costs are really costs borne by the employer and not the employee’s own costs is always a question of the facts. Reimbursement of professional expenses may under no circumstances lead to any enrichment of the employee. The basic rules applied by the tax authorities are in line with the basic rules that apply to the National Social Security Office.

There is a double burden of proof for tax purposes

- 1 The reimbursement covers costs specific to the employer;
- 2 The reimbursement is also actually spent on such costs.

The courts assume that the burden of proof lies with the tax authorities. It is therefore up to the tax authorities to prove that the flat-rate expense reimbursement in fact constitutes taxable remuneration.

It is up to the tax authorities to prove whether the expense reimbursement is a disguised salary or not. The courts apply a refutable presumption of non-taxability of expense reimbursements. The tax authorities must therefore provide positive and verifiable proof that this would not be the case. This is possible because the tax authorities demonstrate that

- the employee and the employer make contradictory statements about the costs that are covered by an expense allowance;
- the allowance is not applied consistently;
- that there is duplicate reimbursement, with the result that the employee is reimbursed for a certain expense on the basis of a flat-rate expense reimbursement and on the basis of a reimbursement.

The rules of evidence for the tax authorities and the National Social Security Office are therefore completely different.

Expense reimbursements in salary administration

Even though fixed allowances are not subject to social security contributions and withholding tax on wages, they must nevertheless be included in the salary administration. This applies to both the monthly payslip and the annual individual account.

The annual individual tax sheet 281.10 and summary statement must also state the expense reimbursements. If this does not happen, the employer may incur a special tax on secret commissions. The “monster fine” of 309% has fallen to 103% since the 2015 tax year (for payments to natural persons for whom no tax sheets were drawn up).

“Duplicate reimbursement” is not permitted

It goes without saying that your employees may not receive a duplicate reimbursement. You cannot reimburse costs that are already covered by a flat-rate allowance. This form of “duplicate reimbursement” puts your flat-rate allowance on shaky ground. If you are audited, there is always a risk that the allowance will be reclassified as salary.

On the other hand, there is no reason why you cannot combine two different forms of reimbursement. There are two options:

- You can provide a reimbursement of actual expenses for certain categories of expenses and provide a flat-rate allowance for other categories.
- You can also provide a combination of a reimbursement of actual expenses and a flat-rate allowance for one and the same category of expenses. However, the National Social Security Office will closely scrutinise this type of approach as it is a derogation from the general rule of thumb that only one system should be used for each expense category.

An example

You grant an employee EUR 15 a month as a reimbursement of minor parking fees and the employee uses his or her company car primarily for professional purposes. The National Social Security Office will allow this allowance to be exempt from contributions (see below).

But what happens if the employee has had to pay an unusually large parking fee because he or she had to park his or her car in the city centre all day long? In this case, the employee can ask for a separate reimbursement of this expense.

It is however important to decide on certain rules in advance. What is the cap on minor parking expenses covered by a flat-rate allowance? Determine the amount as from which the employee can ask for reimbursement. It can definitely be helpful to carry out a survey.

Is a flat-rate allowance during holidays or sick leave permitted?

If you continue to pay employees a flat-rate allowance during a suspension of work, such as a holiday or period of sick leave, you run the risk of having the flat-rate allowance rejected by authorities. If the employee receives a fixed monthly amount, this may lead authorities to believe that the flat-rate allowance is not based on real expenses.

You should therefore never pay a monthly allowance during periods of a suspension of the employment contract if the employee is not incurring any expenses, as is usually the case for disability, time credit, parental leave with a full suspension of work activities or unpaid leave.

However, it is possible for an employee to incur certain basic fixed costs during a period of suspension, even if he or she is not performing work during that time. For example, it may be appropriate to provide a monthly allowance for remote work during a holiday or if an employee is incapacitated for less than one month.

You could also possibly consider providing the allowance on a pro rata basis, determined by the employee's work output.

How to best develop and implement a flat-rate allowance

Coherence and transparency are two goals that should always be aimed for when developing a flat-rate allowance. It is difficult to prove the realistic nature of a flat-rate allowance if, for example, one trade representative receives a monthly allowance but another does not. Providing a monthly allowance without ensuring transparency regarding the various costs covered by the allowance also puts you in a very vulnerable position.

Here are four simple and logical steps to help you to develop a coherent and transparent system of flat-rate allowances:

- 1 Determine which categories of employees will be eligible.
- 2 Determine which expense categories will be covered by the flat-rate allowance.
- 3 Determine the amount of the flat-rate allowance.
- 4 The best way to implement a flat-rate allowance system is to devise a company policy and to add an addendum to the employment contract.

Step 1: Determine which categories of employees will be eligible for a flat-rate allowance.

Decide which employees will be eligible for the flat-rate allowance on the basis of the nature and level of the different employee categories at your company. Consider each case on an individual basis.

Do not be misled by only considering a role's place in the hierarchy or on the organisational chart. For instance, the actual role and job description of a communication specialist in middle management with many external contacts may warrant a higher reimbursement than that of a financial controller, which is primarily an internal position, in a more senior role.

Step 2: Determine which expense categories will be covered by the flat-rate allowance

The nature and level of the various employee categories can serve as a basis for developing the flat-rate allowance. Once again, it is important to look at each case on an individual basis in order to create a transparent and coherent system.

What expense categories can a flat-rate allowance include? We will provide some examples below.

Remote work expenses

NSSO standard amount: EUR 122.01/month (or 10% of the gross salary relating to work performed at home)

Recent tax rulings: from EUR 15/month to EUR 125/month, depending on the position.

This primarily includes the following expenses: heating and electricity costs, small office supplies costs, maintenance costs, etc.

For this expense category, make a distinction between the level and nature of the position.

- The National Social Security Office will only allow a flat-rate allowance if it is clear from the employee's position that he or she regularly works from home.
- The National Social Security Office will not accept a flat-rate allowance given to non-managerial employees (who are subject to working time regulations) if the roster shows that the employee almost always works at a location owned by the company.

BYOD (bring your own device)

NSSO standard amount and tax authorities: EUR 40/month in total¹¹

Your employee uses his or her personal computer for professional purposes (standard amount: EUR 20/month) and internet connection (standard amount: EUR 20/month). You are permitted to provide a flat-rate allowance that is not subject to social security contributions. The employee must however "provably and regularly" use his or her own computer and internet connection. This will be the case, for example, if an employee works from home every Friday.

Duplicate reimbursements are not permitted but it is possible to provide this reimbursement alongside a specific allowance for remote work.

Company car expenses

NSSO standard amount and recent tax rulings:

- EUR 15/month carwash
- EUR 15/month parking costs
- EUR 50/month garage

You expect employees to regularly clean the cars you provide for them. This means that they incur carwash expenses. Clearly establish a link between the company car allowance and employees in representative roles. The representative nature of their position also means that they regularly incur minor parking fees. Condition is that the company car must primarily be used for professional purposes.

For costs associated with the garage, the National Social Security Office adds that the employer must require garage parking for the safety of the vehicle or its contents. This allowance may only be granted if the obligation to safely park the vehicle is required from all employees who are in the same situation. It is not relevant whether the employee owns or leases a garage. Recent tax rulings indicate that the car policy must impose the obligation to park the car safely.

Representation expenses

No NSSO standard amount. In practice, an amount of EUR 25/month to EUR 50/month can be accepted as reasonable.

Recent tax rulings: from EUR 20/month to EUR 125/month, depending on the position.

Employees in representative roles may incur a number of additional expenses such as:

- expenses arising from meetings with existing or potential and internal or external contacts with the aim of establishing or maintaining business and/or commercial relationships;
- minor expenses incurred at meetings in Belgium;
- membership fees for professional associations and business clubs.

It concerns employees who represent the company externally.

The National Social Security Office does not provide a standard amount. Therefore, take extra care in determining the amount you set for this expense category.

The list above concerns external representation costs. But what about internal representation costs? Employers often want to provide a representation allowance to employees who perform internal roles. Internal representation costs may arise from participating in team building activities, organising receptions for teams or purchasing gifts for colleagues. Reimbursements for these types of representation

costs are not explicitly forbidden by the National Social Security Office but, in practice, these expense categories are often difficult to prove. Does your company not often organise team building activities itself to stimulate mutual contacts and relationships between employees? Remember that informal social activities such as dinners with colleagues or baby showers do not constitute professional expenses.¹²

Clothing

NSSO standard amount: EUR 1.67/day for purchasing and EUR 1.67/day for maintaining work clothing

Not considered to be part of the salary: “benefits granted in the form of tools or work clothing”.¹³ The National Social Security Office’s standard amount only applies to work clothing in the strictest sense of the word and clothing the employee is required to wear, such as a uniform.

Clothing that is not required and can also be worn outside work is not work clothing. Therefore, normal street clothes are not work clothing.¹⁴ If you provided an allowance for this type of clothing, it would fall under personal expenses and would therefore be subject to social security contributions.

Jurisprudence shows that specific circumstances do play an important role. Expensive work clothing that is provided in the form of a budget to sales assistants working at a luxury clothing shop and can be worn outside work should partially be considered as a benefit in kind, and is therefore subject to social security contributions.¹⁵

Costs of training and professional documentation

No NSSO standard amount

Recent tax rulings: from EUR 20/month to EUR 100/month, depending on the position.

If you are considering providing an allowance for training and professional literature, this expense category will require extra attention. As a rule, the National Social Security Office will not allow a flat-rate allowance for this category. Nevertheless, this expense category appears in fiscal rulings and is accepted by the courts.¹⁶ Ensure, at the very least, that the nature of the position warrants a flat-rate allowance for professional literature. Providing an allowance for professional literature that employees can already access via for example a company subscription will not be accepted during an audit (duplicate reimbursement).

Step 3: Determine the amount of the flat-rate allowance

The flat-rate allowance must be based on real expenses. The allowance must always reflect the actual amount of the expenses. Proving this is not always easy. Standard amounts help, but they are not always fool-proof (more on this below).

Survey

Consider conducting a survey of a sample of employees at your company when developing the flat-rate allowance. How should you go about this?

- For each relevant job category, select a certain number of employees to be included in the sample. The exact number will of course depend on the number of employees working in each job category.
- Ask your employees to record their professional expenses for a few months, preferably not during the holiday periods. The employees should also provide you with relevant supporting documents (such as invoices and VAT receipts). You could ask employees to only record and report the specific expenses you wish to include in the allowance. However, it is generally better to include as many expenses as possible in your survey. This reduces the likelihood that your employees will misinterpret the expense categories.
- On the basis of the survey results, you can develop a progressive system of flat-rate allowances. Keep a record of the results, as you may need to use them as evidence if the allowance is called into question.

Progressive approach

Consider the job's position in the company hierarchy and the employee's salary. The salary and the flat-rate allowance (the total of the various expenses) must not be disproportional. It is difficult to give concrete guidelines here, however, a total allowance that is greater than 10% or 20% of the fixed gross salary will be difficult to defend.

Use the National Social Security Office's standard amounts as a guideline of course. However, the National Social Security Office does not believe that these standard amounts should be granted without justifiable basis. They must cover genuine expenses. The National Social Security Office may ask you to substantiate the flat-rate allowance.

Depending on the job description and the job's position in the hierarchy, it may be more plausible to provide an allowance that is lower than the standard amount.

Therefore create a system in which you set a different allowance for each expense category. For part-time employment provide an allowance on a pro rata basis, according to the employment hours.

Step 4: Devise a company policy and add an addendum to the employment contract

The company policy should emphasise the transparency and coherence of the system of flat-rate allowances. The company policy should describe which categories of employees are eligible for

a flat-rate allowance, give reasons why and list which expenses each expense category includes. Include rules for the reimbursement of costs that are not covered by the flat-rate allowance to clearly show that you wish to prevent "duplicate reimbursement".

In the addendum to the employment contract, you should establish the employee's right to a flat-rate allowance. Specify the rules in the company policy in the addendum, namely the amounts for each expense category based on the employee's specific position.

Two examples

A company distinguishes between two categories of employees:

	Teleworking	Representation	Liberalities	Documentation	Total
Managerial staff	100	100	50	10	260
Non-manual workers	50	60	20	20	150

This approach has four weaknesses:

- The matrix takes too little account of the duties of the employees. The division between managerial and non-manual workers is too general and too crude.
- The difference between the elements of representation and liberalities is unclear. The two expense categories are very likely to overlap.
- What could the fee for documentation entail? In practice, it appears difficult for companies to demonstrate that employees do not have sufficient documentation in the office. Newspaper and magazine subscriptions are usually private expenditure.
- The teleworking allowance is relatively low.

In this example, the company goes one step further and makes a distinction between five employee categories. In this way, the company can optimally take into account the roles and expectations for each job category:

	Telework-ing	Internet BYOD	Representa-tion	Company vehicle parking	Company vehicle carwash	Total
Top management	120	20	125	15	15	295
Middle management	100	20	100	15	15	250
First-line management	100	20	50	15	15	200
Senior employee	80	20	30	X	X	130
Operational employee	80	20	X	X	X	100

The company cannot sufficiently justify giving a flat-rate allowance to the lower categories of employees.

This system of flat-rate allowances allocates a progressive amount for each expense category, taking into account the managerial nature of a position and the regular nature of teleworking. Allowances for company car expenses are only given to categories of employees who use a company car.

No best practice

Certain methods of determining flat-rate allowances should be avoided:

- Flat-rate allowances as a percentage of the salary;
- Flat-rate allowances as a percentage of the turnover;

In these examples, the link between the nature of the position, the actual expenses and the final amount of the flat-rate allowance is indirect. Nevertheless, this approach is sometimes accepted by the courts.

- A flat-rate allowance calculated as a percentage of a variable salary is considered an expense allowance if the additional costs it is supposed to cover reasonably match the actual expenses.¹⁷
- A flat-rate allowance calculated as a percentage of the turnover will be permitted on the condition that the employer can demonstrate a reasonable relationship of proportionality between the turnover and the actual expenses.¹⁸

In search of greater certainty

As an employer, the burden of proof vis-à-vis the National Social Security Office lies with you if your expenses are called into question. You can demonstrate that your allowances are based on real expenses using supporting documents, including your basic assumptions.¹⁹ Therefore, a company policy that underlines the transparency and coherency of the flat-rate system will certainly be useful.

When confronted with the National Social Security Office, you must be able to give evidence of the actual expenses incurred. However, for flat-rate allowances, you do not need to demonstrate the expenses of each individual employee.²⁰

You can ask the tax authorities to make a prior decision (ruling). This ruling offers legal certainty as the tax authorities commit themselves to accepting the flat-rate allowance. However, you cannot gain a binding approval like this from the National Social Security Office. In addition, the National Social Security Office is not bound by fiscal rulings.²¹

The standard amounts from the National Social Security Office offer some security. However, the decisions made by the ruling committee are sometimes at odds with the standard amounts. Even if you do not exceed the National Social Security Office norms, you must still be able to demonstrate that the allowances are based on actual expenses. These standard amounts therefore do not give you a free pass to indiscriminately offer a flat-rate allowance to every employee.

Finally, it is important to stay on the ball. Periodically evaluate whether your flat-rate allowance and/or its amount is still appropriate and be sufficiently critical in this regard. If you regularly conduct a survey, this will put you in a better position in the future to prove that the reimbursements are in line with actual expenses.

Treatment in salary administration and the calculation of holiday and severance pay

The flat-rate allowance must be included in the payroll:

- **Monthly payslip²² and annual individual statement²³**

The flat-rate and other allowances and reimbursements must be stated on the monthly payslip and the annual salary statement. (For the purposes of the Salary Protection law, flat-rate allowances are part of the salary.)

- **Annual tax sheet**

Although the flat-rate and other allowances and reimbursements are not taxable income, you must report them on the tax sheet 281.10 (employees).

Flat-rate allowances are not part of the salary according to the Employment Contract law (nor are they subject to social security contributions). You should therefore not include them in the calculation of **holiday pay for existing or departing employees**.

You should not include flat-rate allowances in the calculation of **severance pay** because they are not considered to be part of the salary according to the Employment Contract law.

The flat-rate allowance is reclassified as disguised salary. What do I do?

Social security contributions

The basic principle

You are not able to demonstrate that the allowance is based on real figures and your flat-rate allowance is reclassified as disguised salary. This means that you owe social security contributions on this amount. As an employer, you are responsible for paying the employer and the employee contributions. You may not ask the employee to pay the employee contribution, even if he or she agrees to do so.

Since the social security contributions were not deposited within the specified period, you owe:

- a contribution premium of 10%;
- a late payment penalty of 7%;
- a limitation period of three years. (The extended limitation period of seven years applies to fraudulent activities or false or deliberately incomplete returns submitted by the employer. This generally does not apply to flat-rate allowances that are reclassified as salary.)

Gross or net?

The law does not explicitly state how the basis for the calculation of social security contributions has to be determined. Should you calculate social security contributions based on the net flat-rate allowance or should you first add the employee contributions and withholding tax (gross)?

In practice, social inspectors who reject a portion of the flat-rate allowance will usually agree to a correction of the social security contributions based on the net amount.

Tax regularisation

If the flat-rate allowance turns out to be a hidden wage, the expense allowance will be considered as taxable income. An additional assessment in the personal income tax can then be carried out in respect of the employee.

Also take into consideration:

- a tax increase of 10%-200%;
- a late payment penalty of 4% per year;
- a limitation period of five years.

However, the tax authorities can claim the withholding tax that has not been withheld and has not been paid from the employer, as long as the additional tax has not been registered with the employee.

Severance pay

If it is established that the flat-rate allowance is not a genuine expense allowance, it will be included in the calculation of the severance pay.²⁴ Only the portion of the allowance that exceeds the actual expenses must be reclassified as salary.

Other consequences

Holiday pay is owed if the flat-rate allowance is reclassified as salary, according to the Employment Contract law, and is also subject to social security contributions.

In addition, you, the employer, are obliged to compensate the employee for any loss he or she sustains as a result of your failing to pay the social security contribution. The employee may namely suffer a loss with regard to his or her pension. The fact that the limitation period for a portion of the social security contributions has expired does not prevent a judge from deciding that the employer must undertake a regularisation of the expired portion of the contributions.²⁵ The damages are usually compensated in kind. If the employer fails to compensate the employee, the employee can claim damages for the reduced pension he or she will receive.

Consider other consequences as well. The reclassified allowance may also be included in the calculation of the contributions to the complementary occupational pension (2nd pillar).

Conclusion

These four steps will help you to devise a sound flat-rate allowance. A lack of transparency and coherence will complicate matters during an inspection. This may cause not only retrospective issues but also problems - maybe even the biggest ones - in the future. The allowance may be reclassified and added to the salary, which has many unpleasant knock-on effects.

Yves Stox
Senior Legal Counsel

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- 1 Court of Cassation 14 February 2000, JTT 2000, 189.
 - 2 Art. 20, 1° Employment Contracts law.
 - 3 In contrast, with regard to the expenses incurred by the employee when commuting between his or her usual place of residence and the workplace, there are guidelines in place that compel the employer to reimburse these expenses partially in certain cases.
 - 4 Art. 19, §2, 4° NSSO RD.
 - 5 Art. 31, paragraph 2, 1° Income Tax Code 1992.
 - 6 See, for example, Cass. 7 September 2015, S.15.0016.F, www.juridat.be.
 - 7 Court of Cassation 14 February 2000, JTT 2000, 189; Court of Cassation 6 November 2000, JTT 2001, 47.
 - 8 Brussels Court of Labour, 4 September 2008, List no. 49.878, <http://www.terralaboris.be/>
 - 9 Court of Cassation 21 November 2011, Sociaalrechtelijke kronieken/Chroniques de droit social 2013, 59.
 - 10 Art. 14, §4 NSSO Act.
 - 11 Circular Ci.RH.241/616.975 of 16 January 2014.
 - 12 Brussels Court of Labour 12 November 2015, JTT 2016, 42.
 - 13 NSSO RD, Art. 19, § 2, 5°.
 - 14 Brussels Court of Labour 23 November 2016, JTT 2017, 75.
 - 15 Brussels Court of Labour 12 November 2015, List no. 2014/AB/924, www.juridat.be.
 - 16 Bruges Court of Labour 22 March 2013, JTT 2013, 444 (subscriptions offered for free or at a discount by the employer or a third party to editors or editing staff are “tools” and exempt from social security contributions).
 - 17 Brussels Court of Labour 23 April 1998, JTT 1999, 25; Brussels Court of Labour 13 October 1999, Sociaalrechtelijke kronieken/Chroniques de droit social 2000, 490.

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- 18 Liège Court of Labour 16 December 2011, Sociaalrechtelijke kronieken/Chroniques de droit social 2013, 33 (in which it was held that, in this case, the evidence was insufficient).
 - 19 Art. 14, §4 NSSO Act. This burden of proof regulation came into force on 1 January 2010.
 - 20 Court of Cassation 7 September 2015, List no. S.15.0016.F, www.juridat.be. In this case, the National Social Security Office claimed that the flat-rate allowances the employer provides to its employees as a reimbursement of the costs of commuting to the site should be classified as salary unless the employer can show evidence of each employee's expenses. The Court of Cassation pointed out the National Social Security Office's error.
 - 21 Art. 111 law of 25 July 2005 establishing various provisions
 - 22 This statement must be provided for each definitive salary payment in accordance with Art. 15 of the Salary Protection law; Royal Decree of 27 September 1966 establishing, in the case of the private sector, the data that the statement must contain and which must be provided for each definitive payment of the salary to the employee.
 - 23 Art. 13 Royal Decree of 8 August 1980 concerning the retention of social documents.
 - 24 Court of Cassation 15 January 2001, JTT 2001, 135. The fact that the flat-rate allowance is extremely large in proportion to the salary does not give sufficient reason to reclassify the allowance as salary (Liège Court of Labour 3 November 1994, JTT 1996, 100; Liège Court of Labour 6 November 1995, JTT 1996, 339).
 - 25 Court of Cassation 3 April 2017, List no. S.16.0039.N, www.juridat.be; Brussels Court of Labour 1 April 2009, Sociaalrechtelijke kronieken/Chroniques de droit social 2011, 335



News

Working as a director in different EU Member States: new interpretation rules

An employee can work either simultaneously or alternately in two or more EU Member States. He or she can do this for the same employer or for different employers. It can become even more complex than that. Consider the case of a remunerated director in different EU Member States. Which social security contributions are payable?

Two questions arise:

- 1 Which EU Member State is competent to levy social security contributions? This competence is determined by European Social Security Regulation 883/2004.
- 2 What social security contributions will the EU Member State then levy: as an employee, as a self-employed person, or as both? Each EU Member State determines these rules for itself.

The answer to this second question for Belgium cannot be found in the legislation. It depends on the interpretation of the NSSO and the NISSE. That policy will change retroactively as from 1 October 2018. We will demonstrate its impact using a specific example.

Step 1 - A series of positions and mandates at home and abroad: Belgium is competent

A Belgian holding company is the main shareholder of a number of Belgian companies in the retail sector. The CFO of one of these subsidiaries is a remunerated director of the Belgian holding company. She holds the position of CFO within the framework of an employment contract. She lives in Belgium with her family.

The company pays social security contributions to the NSSO from the salary as CFO. Directors' remunerations are subject to self-employed social security contributions.¹ The CFO pays these to the NISSE via a social insurance fund for the self-employed.

The Belgian holding company is growing and acquiring companies in the Netherlands and Germany. The CFO is now also appointed as a remunerated director in the Dutch and German limited liability companies. Do social security contributions have to be paid in the Netherlands and Germany?

No. European Social Security Regulation 883/2004 designates Belgium as the country competent to levy social security contributions. The CFO is an employee in Belgium, and the directorship also qualifies as an employee activity in the Netherlands and in Germany.² Since she is domiciled in Belgium, only Belgium may levy social security contributions. The CFO can obtain an A1 certificate as proof.

Step 2 - What social security contributions are payable in Belgium?

If Belgium is competent, Belgium also determines which social security contributions are payable: as an employee, as a self-employed person, or both. This is clear for Belgian functions: Social security contributions on the CFO's salary and NISSE contributions on the director's remuneration. But what about the remunerations for the Dutch and German directorships?

Belgian policy in this area is changing drastically. According to the old position, the Dutch and German classification as an employee would be adopted for the purposes of Belgian social security contributions.

In concrete terms, this means that Belgian social security contributions would be due on Dutch and German income as a director.

In principle, the Dutch and German companies should thus start up their own Belgian payroll administration for the payment of social security contributions.³

According to the new position, Belgium does not adopt the Dutch and German classification as an employee. Belgium will classify income related to foreign mandates as self-employed income as if they were Belgian mandates. This is thus different from the application of the European allocation rules (see Step 1). All company mandataries are treated in the same way, without distinguishing between domestic and foreign mandates.

In concrete terms, this means that Belgian NISSE contributions would be due on Dutch and German income as a director. If the income from the Belgian mandate is higher than or equal to EUR 88,119.80 - the maximum NISSE ceiling - then no additional social security contributions are due on the Dutch and German income.

Retroactive as from 1 October 2018

The Belgian policy changes retroactively as from 1 October 2018. Compliance with the previous policy is retained until 30 September 2018. For situations as from 1 January 2018, the amended policy can be applied upon request from the start of the situation (i.e. no earlier than 1 January 2018).

Depending on the situation, retroactive affiliation to a Belgian social insurance fund for the self-employed will be necessary. Contributions paid into the employees' scheme can then be recovered.

Getting started

Record the activities of the management of your company. Also take into account their foreign activities. Don't just think about the activities within your own company or concern. Positions and mandates with other companies or other groups also have an impact. Partena Professional will gladly help you to determine the social security position of the management. Together with you, we will elaborate the most cost-efficient solution. Contact us via Legal@partena.be.

Yves Stox,
Senior Legal Counsel

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- 1 The new Belgian Company Code confirms that directors must always act as self-employed persons and cannot exercise their mandate as employees. This does not prevent a director from also being a salaried employee in the company being managed. In other words, the employment contract may not relate to the duties of a director. The activity of a salaried employee must be completely separate from the duties of a director.
 - 2 The Netherlands and Germany consider a director to be under the employer's authority of the general meeting of shareholders. Belgium has an entirely different approach. Because a director (company mandatary) must act in the interests of the company, he or she has to be free. Any employer's authority is thus precluded. That is why the social status of self-employed persons is so important.
 - 3 It can be done more easily in practice. The NSSO allows work performed on the territory of different countries to be declared by the employer established on Belgian territory. The various employers must then belong to the same financial group.

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