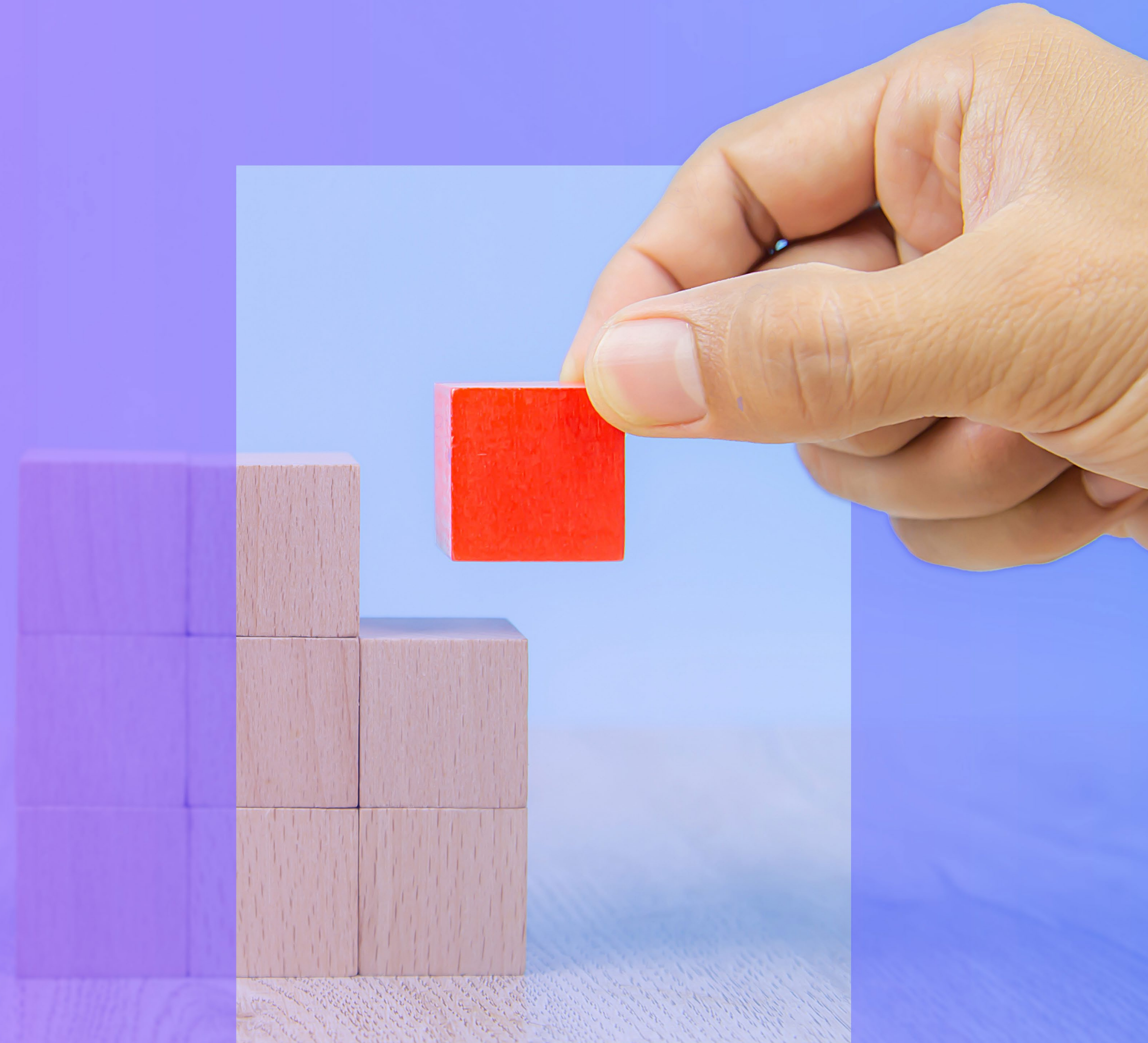


Checklist: Dismissal

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Introduction

Belgium is ranked one of the most expensive countries when it comes to dismissal costs. In addition, errors made during the termination procedure can substantially increase the termination costs for the employer. There are several ways of terminating an employment contract and the price tag varies according to the method of dismissal. The exact cost of dismissal for you as an employer will depend on the case at hand. We at KPMG Law can be your one-stop shop for all dismissal related matters and any challenges your organization may encounter.

Objective

This practical checklist is intended to provide a useful outline of the most important items to consider regarding dismissals, and to point you, the employer, in the right direction.

Target audience

This practical checklist is intended for all employers – of small and medium-sized enterprises (SMEs) and large businesses alike – who employ individuals in Belgium, as well as for HR professionals and other managers working in human resources.

How to use

The menu at the top of each page lists the chapters of the main points an employer needs to consider when it comes to dismissals. After selecting a theme you want to know more about, you will be directed to a list of the most important questions – and answers – an employer should address with a view to avoiding errors in dismissal proceedings.

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1. General

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1.1 Is the employment contract subject to Belgian labor law?

Mainly important for international employment relationships (e.g. expats, secondment and simultaneous employment).

1.2 Is the employment contract to be terminated a fixed-term contract?

a. First period

During the first half of the fixed-term employment contract, but limited to the first six months, both the employer and the employee are entitled to terminate the contract ahead of term by serving the other party with a notice period which must end before the deadline of the first period expires.

b. Second period

After the first period (i.e. during the first 50% of the contract or the first six months, whichever period is shorter) both the employer and the employee may terminate the employment contract ahead of term. However such termination is subject to payment of severance pay equaling the wages that would have been due up to the originally planned end-date of the contract.

Note: The amount in severance pay may not exceed a sum equaling twice the wages corresponding to the notice period that should have been observed had the contract been an indefinite-term employment contract.

Note: If the employer and the employee have concluded several successive fixed-term employment contracts, which are not presumed to be of an indefinite duration, the possibility of termination during the first period may be applied only to the first contract concluded by the parties.

2. Notice period

- 2.1 Have all the statutory validity formalities in relation to dismissal with notice period been observed?**
- 2.2 Was the employment contract terminated by the employer or by the employee?**
- 2.3 What is the start date of the terminated employment contract?**
- 2.4 Which position did the employee hold at the time of the dismissal?**
- 2.5 Insofar applicable, what was the gross annual wage of the dismissed white-collar employee/sales representative on 31 Dec 2013?**
- 2.6 Was the dismissed employee's employment contract suspended at the time of the dismissal?**

2.1 Have all the statutory validity formalities in relation to dismissal with notice period been observed?

The law stipulates that the start and duration of the notice period as well as the method of notification of the termination – i.e. by registered mail or bailiff’s writ in the case of termination by the employer – must be specified in the termination letter; the failure of which would make the termination void.

2.2 Was the employment contract terminated by the employer or by the employee?

The following notice periods apply depending on whether the employer or the employee terminates the employment contract:

Seniority after 1 Jan 2014	Dismissal by the employer	Resignation by the employee
0 to 3 months	1 week	1 week
3 to 4 months	3 weeks	2 weeks
4 to 5 months	4 weeks	2 weeks
5 to 6 months	5 weeks	2 weeks
6 to 9 months	6 weeks	3 weeks
9 to 12 months	7 weeks	3 weeks
12 to 15 months	8 weeks	4 weeks
15 to 18 months	9 weeks	4 weeks
18 to 21 months	10 weeks	5 weeks
21 to 24 months	11 weeks	5 weeks
2 to 3 years	12 weeks	6 weeks
3 to 4 years	13 weeks	6 weeks
4 to 5 years	15 weeks	7 weeks
5 to 6 years	18 weeks	9 weeks
6 to 7 years	21 weeks	10 weeks
7 to 8 years	24 weeks	12 weeks
8 to 9 years	27 weeks	13 weeks (max.)
...	...	13 weeks (max.)

Note: The notice period starts on the Monday following the week in which notice was given.



2.3 What is the start date of the terminated employment contract?

Additional seniority to be taken into account:

- Past period of employment as a temporary employee, limited to a maximum of one year;
- Past employment in an organization belonging to the same group;
- Transfer of the organization by another organization;
- Successive fixed-term employment contracts;
- Conventionally agreed seniority;
- Etc.

2.4 Which position did the employee hold at the time of the dismissal?

a. Blue- or white-collar employee

This qualification affects the notice period for employment contracts that started prior to 1 January 2014. For blue-collar employees the first part of the notice period is expressed in calendar days; for white-collar employees it is expressed in months.

b. Sales representative

In the event of a seniority of one year, the sales representative is possibly entitled to a goodwill compensation (**see point 5.1.b**).

2.5 Insofar applicable, what was the gross annual wage of the dismissed white-collar employee/sales representative on 31 Dec 2013?

Note: This question is only applicable if the employee was employed prior to 1 January 2014.

Part I of the notice period varies depending on the gross annual wage:

Gross annual wage	Dismissal by the employer	Resignation by the employee
≤ EUR 32,254 (low-level white-collar employees)	3 months for every commenced period of 5 years of service	1.5 months for every commenced period of 5 years of service (with a maximum of 3 months)
> EUR 32,254 (middle-level white-collar employees)	1 month for every commenced year of service (with a minimum of 3 months)	1.5 months for every commenced period of 5 years of service (with a maximum of 4.5 months)
> EUR 64,508 (top-level white-collar employees)	1 month for every commenced year of service (with a minimum of 3 months)	1.5 months for every commenced period of 5 years of service (with a maximum of 6 months)

For middle- and top-level white-collar employees any deviating notice clause can be included in the calculation of part I, to limit the notice period to 3 months' per 5 years seniority.

Note: For part-time employees a fictitious full-time gross annual wage must be taken into account.

2.6 Was the dismissed employee's employment contract suspended at the time of the dismissal?

By law, the notice period cannot start or continue during a suspension of the employment contract in the following cases:

- Sickness or occupational accident;
- Annual holidays;
- Maternity leave;
- Temporary custody;
- Time off in lieu;
- Full career interruption;
- Full suspension in view of time credit or thematic leave;
- Temporary unemployment for economic reasons (so-called economic unemployment);
- Temporary unemployment due to bad weather;
- Etc.

3. Severance pay

3.1 Which benefits is an employee entitled to in the event of termination with severance pay?

3.1 Which benefits is an employee entitled to in the event of termination with severance pay?

The severance pay should equal the current wage that matches the term of the notice period or the remaining term of said period (if the contract is terminated prior to the end of the notice period or if the notice period is too short).

In addition to the current wage, the severance pay also includes the following benefits obtained under the employment contract:

- Year-end bonus (so-called thirteenth month);
- Variable compensation (the average of the previous twelve months);
- Employer's contributions to group insurance, hospitalization insurance and meal vouchers;
- Benefits in kind (e.g. housing, meals, smartphone and laptop);
- Double vacation pay (not 'single' vacation pay as that involves simple continuation of wage payment);
- Private use of a company car;
- Non-statutory child benefit;
- Stock options.

Note: For part-time employees the severance pay shall be calculated on the effective part-time activity – i.e. the real part-time wages – at the time of termination of the employment contract. The annual wages are only converted to a fictitious full-time basis for employees who have (temporarily) reduced their activities in view of time credit, care leave, palliative leave or parental leave.

4. Prohibitions and limitations in relation to dismissal

- 4.1 Who within the organization is authorized to sign the dismissal documents?
- 4.2 Have other dismissals taken place in the two months preceding the dismissal?
- 4.3 Was the employee in any type of particular situation or did they hold any particular position at the time of the termination?
- 4.4 What was the reason behind the dismissal?

4.1 Who within the organization is authorized to sign the dismissal documents?

For the dismissal papers to be valid they must be signed by a person who is authorized to represent the organization. An organization's articles of association often contain a signature clause.

4.2 Have other dismissals taken place in the two months preceding the dismissal?

Multiple dismissal, a term that is not included in any legislation but is used by certain sectors (e.g. Joint Committees No 111, 149.04, 209 and 226), refers to the situation whereby several employees are being dismissed at the same time or within a short period of time and often for the same reason (e.g. in view of a reorganisation). In this case the sector regulation often also provides for particular requirements concerning information and consultation of the employee representatives before the dismissal may take place.

Note: Individual sectors use different definitions with respect to multiple dismissal.

Multiple dismissals which meets certain conditions is called a "collective dismissal". A collective dismissal is any dismissal – taking place for economic or technical reasons – affecting a certain number of employees within a period of sixty days.

Average number of employees	Number of dismissals
21 to 99	10
100 to 299	10%
At least 300	30

Any organization that meets the above conditions must apply the statutory provisions relating to collective dismissals (Collective Bargaining Agreement No 10 and Collective Bargaining Agreement No 24), such as establishing an employment unit, paying special compensation on top of unemployment benefits, informing and consulting employee representatives and temporary dismissal prohibition up to thirty days following the notification of intent.

4.3 Was the employee in any type of particular situation or did they hold any particular position at the time of the termination?

a. Particular situation

Other than for reasons that are unrelated to the situation at hand, the employee may not be dismissed in the following situations:

- Pregnancy;
- Time credit;
- Thematic leave (e.g. parental leave);
- Paid educational leave;
- Political leave;
- Post complaint or procedure.

b. Particular function

Employees holding the following types of functions may not be dismissed except under the strictest of conditions:

- Union representative;
- Health & safety officer;
- (Prospective) Member of the Committee for Health and Safety and Protection at Work or the Works Council.

4.4 What was the reason behind the dismissal?

a. Dismissal for serious cause

The law describes “dismissal for serious cause” as any fault as a result of which the continuation of any professional cooperation between employer and employee becomes definitively and immediately impossible. The party dismissed for serious cause is not entitled to any severance pay or notice period.

The termination must take place no later than on the third day following the day on which the fact that has been invoked as the serious cause has been established with certainty by the employer. No other cause than the one which has been notified within three days following the termination may be put forward as justification of the dismissal for serious cause.

b. Abuse of right of dismissal

“Abuse of right of dismissal” occurs when the right is exercised in a way that apparently exceeds the limits of normal exercise of said right by a careful and diligent employer. Abuse of law in relation to termination principally requires a particular fault on the part of the employer that can be distinguished from not observing the rules on termination of the employment contract. Furthermore, the fault must result in specific material or moral damage for the employee which is unrelated to the damage caused by the termination itself and which is compensated for by the severance pay.

c. Manifestly unfair dismissal

“Manifestly unfair dismissal” refers to the dismissal of an employee with an indefinite-term employment contract that is based on reasons unrelated to the suitability or the behavior of the employee or unrelated to the necessities concerning the company operations and to which no normal and reasonable employer would ever have decided. The compensation amounts to at least three, but no more than seventeen weeks’ wages

5. Particular clauses

- 5.1 Does the employment contract of the white-collar employee/sales representative contain a non-compete clause?**
- 5.2 Does the employment contract of the white-collar employee/sales representative contain an education clause?**

5.1 Does the employment contract of the white-collar employee/sales representative contain a non-compete clause?

a. Non-compete compensation

In principle, the dismissed white-collar employee (other than a sales representative) is entitled to payment of fixed compensation equaling half of the employee's gross wages during the application period of the non-compete clause (i.e. six months wages at most), even if the validity conditions have not been met, unless within a term of fifteen days following the termination of the employment contract the employer explicitly waives applicability of the non-compete clause.

Note: Except in the case of a divergent non-compete clause the non-compete clause applies only if the employment contract was terminated after the first six months of the employment contract, either by the employer for serious cause or by the employee not for serious cause.

b. Goodwill compensation

Fixed compensation is not a mandatory requirement in a non-compete clause of a sales representative's contract. However, the clause does give rise to the presumption that the sales representative has introduced new clients to the business, which means that at least one of the conditions of the entitlement to goodwill compensation has been fulfilled.

Note: The amount of the goodwill compensation equals three months wages plus one months wages for each additional period of five years of employment with the same employer.

5.2 Does the employment contract of the white-collar employee/sales representative contain an education clause?

The following reimbursement of training costs by the employee applies:

- 80% in the case of departure before one-third of the agreed period has passed;
- 50% in the case of departure after one-third and before two-thirds of the agreed period has passed;
- 20% in the case of departure after two-thirds of the agreed period has passed.

Education clauses are subject to a maximum term of applicability of three years.

6. Additional rights

- 6.1 What is the age of the dismissed employee?
- 6.2 Is the employee exonerated from performing any duties during the statutory notice period?
- 6.3 Is further use of the fringe benefits permitted after the end of the employment contract?
- 6.4 Do any statutory bank holidays occur shortly after the departure of the employee?
- 6.5 Has the dismissed employee sent you a request by registered mail to provide the reason for the dismissal?
- 6.6 Does the employee plan to take leave of absence during working hours for the purpose of finding new employment?
- 6.7 To which Joint Committee does the employer belong?

6.1 What is the age of the dismissed employee?

a. Outplacement

Outplacement is mandatory if the dismissed employee's notice period (or the corresponding severance pay) is at least thirty weeks, unless in the event of dismissal for serious cause.

Outplacement is also mandatory for dismissed employees whose notice period (or corresponding severance pay) is less than thirty weeks, who are 45 years of age or more and who have completed at least one year of uninterrupted service with the employer, unless in the event of dismissal for serious cause.

b. Early retirement

Eligibility to early retirement is subject to the following conditions:

- The dismissed employee must meet the age and seniority conditions;
- The dismissed employee must be entitled to unemployment benefits;
- A valid collective bargaining agreement must exist.

In the general scheme, the basic age is 62 years old with a required professional career of 40 years.

c. Statutory retirement age

If the employer terminates the employment contract due to the approaching retirement age of the employee, a maximum notice period of twenty-six weeks applies from the first day of the month following the month in which the employee reaches the statutory retirement age of 65 years old (66 years old as from 2025 and 67 years old as from 2030).

6.2 Is the employee exonerated from performing any duties during the statutory notice period?

This always requires written approval from the employee involved. In addition, the employer must inform their employee in writing about the latter's obligation to register as a job applicant at the regional job center of their place of residence within a month following the exoneration.

Note: It is important to bear in mind the activation contribution that was introduced in 2018. The employer owes this contribution for any employee who during a full quarter does not perform any duties for the same employer, except in case of exoneration during the statutory notice period.

6.3 Is further use of the fringe benefits permitted after the end of the employment contract?

a. Termination with notice period

The employment contract remains in effect during the full term of the notice period. This means that the employer has the obligation to ensure that the dismissed employee continues to receive their wages, including any provided smartphone, tablet, laptop and/or company car. In the event of a unilateral withdrawal of (any of) these benefits the employer runs the risk that the employee will invoke an act equivalent to termination and demand payment of severance pay equaling the remainder of the notice period.

b. Termination including severance pay

If the employer dismisses the employee with severance pay, any smartphone, tablet, laptop and/or company car that had been provided must be returned immediately, unless otherwise agreed in writing. It is recommended to explicitly include the return obligation in the letter of termination.

Note: Case-law provides that if an employee has maintained the fringe benefits during the period covered by the compensatory severance pay, such benefits need no longer be included in the calculation basis of the severance pay (non bis in idem). In addition, the employer will have to declare the further use of the benefits in kind to the National Social Security Office and the Federal Public Service Finance.

c. Dismissal for serious cause

A rule of thumb, all company property (e.g. smartphone, tablet, laptop and/or company car must be returned immediately).

6.4 Do any statutory bank holidays occur shortly after the departure of the employee?

The dismissed employee who has been employed for a period exceeding one month is entitled to wages relating to any statutory bank holidays occurring within thirty days following the end of the employment contract. If the employment lasted between fifteen calendar days and one month, the dismissed employee is entitled to wages relating to one statutory bank holiday occurring within fourteen days following the end of the employment contract.

Note: Employees who have resigned, have been dismissed for serious cause or have begun working for a new employer in the meantime, are not entitled to wages relating to a statutory bank holiday.

6.5 Has the dismissed employee sent you a request by registered mail to provide the reason for the dismissal?

For a period of two months following the end of the employment contract the dismissed employee may request the employer, by registered mail, to provide the reason for their dismissal.

Any employer who fails to provide such reason within two months by registered mail shall incur a fine equaling two weeks' wages and, in addition, shall bear the full burden of proof that the dismissal was not manifestly unfair.

6.6 Does the employee plan to take leave of absence during working hours for the purpose of finding new employment?

An employee who is being dismissed is entitled to paid leave during working hours for the purpose of finding new employment (so-called application leave). During the last twenty-six weeks of the notice period the employee may take leave of absence once or twice a week, provided that said leave does not exceed a total of one full working day per week. In the preceding period they may take no more than half a day's leave per week.

Note: The right to application leave applies up until the end of the notice period, even if the employee involved has found new employment in the meantime.

6.7 To which Joint Committee does the employer belong?

Application of any sector-specific deviations (e.g. job security clauses, outplacement and collective dismissal).

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