COMPARATIVE LABOR LAW DOSSIER
HEALTH AND SAFETY IN THE WORKPLACE IN BELGIUM

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Introduction

Health and safety at work is generally called 'the well-being of the worker at work (during his occupational performance). The Belgian legislation knows a large variety of obligations for the employers to prevent accidents or damage to the health of their employees. He has to install special services, mechanisms and institutions in his company to make sure that a good prevention is provided. These obligations are naturally more complicated for large companies than for SME's. Yet even for those the health and safety legislation can prove quite an administrative burden. However according to the 2013 year report of the Fund for Occupational Accidents the accidents at the work place decreased from 276.281 in 1990 to 126.726 in 2013.[1] The stricter legislation thus seems to have an effect. In 2013 there were 72 fatal occupational accidents, of which 18 were traffic accidents. With regards to occupational illnesses, some 2978 new cases were notified by the prevention advisors-physicians in 2013. In 2000 it was 1378, in 2005 it was 1647 and in 2010 1584. Looking to the other years, there only seems to be a significant augmentation of notifications since 2011. Unlike for occupational accidents, occupational illness are thus not declining, yet the causes of such illnesses could of course lay way further in the past.[2]

1. Which national law implements Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work? What prevention obligations does your country's regulation on health and safety in the workplace establish?

The basics of Council Directive 89/391/EEC were already present in the Prevention decree of 20 June 1975. Yet the Directive was more detailed, thus the legislation to look at is the Act of 4 August 1996 regarding the well-being of the workers during the performance of their work together with the decrees that execute its provisions. Those decrees are collected in the Code on the well-being at work.

[1] Statistics on occupational accidents can be found in the yearly reports of the Occupational Accidents Fund: http://www.fao.fgov.be/nl/publicaties.

[2] Statistics on occupational illnesses can be found on the site of the Occupational Ilnesses Fund : http://www.fmp-fbz.fgov.be/web/content.php?lang=nl&target=workers#/documentations-annual-report.

There are twelve general prevention principles for the employer, laid down in art. 5, §1, 2 of the Act on well-being at work:

1. To prevent risks.
2. To evaluate risks which cannot be prevented.
3. To combat risks at their source.
4. To replace what is dangerous by what is not or less dangerous
5. To give prevalence to measures of collective protection above measures of individual protection.
6. To accommodate the work to the people, with regards to the set-up of the workplace, the choice of work equipment and of work and production methods, in particular to make monotonous labour and pace bound labour more tolerable and to limit its consequences for the health.
7. To mitigate risks as much as possible, taking into consideration the evolution of technology and techniques.
8. To mitigate the risk on severe injuries by taking material measures with prevalence on any other measure.
9. To plan the prevention and execution of the policy on the well-being of the employees during the performance of their work, in order to create a systematic approach which includes the following elements: technology, organization of the work, work conditions, social relations and environmental factors at work.
10. To inform the employee about the nature of the work, the connected residual risks and the taken measures to prevent and mitigate these dangers:
    a. at the time of his enlistment
    b. whenever this is necessary with regards to the protection of the well-being.
11. To give fitting instructions to the employees and to install accompanying measures for a reasonable guarantee on the compliance with these instructions.
12. To make sure that fitting security and heath signaling (safety signs) are present on the work place, when risks cannot be prevented or cannot be mitigated enough by collective technical protection mechanisms or by measures, methods or actions in the sphere of the work organization.

These general principles are almost a literal copy of those in art. 6, 2 of Framework Directive 89/391/EEC. Yet some principles have been added (8, 10 and 12).

2. Is the obligation to prevent occupational hazards an obligation of means or an obligation of results?

The employer, when planning and taking measures with regards to the prevention of risk, has to take into account what is achievable for the undertaking on economical, ethical and social level. Thus there will have to be a balance between those values and the technical prevention measures. The preparatory works mention a general duty of care which has to be interpreted in a reasonable way. The general obligation of the employer thus has to be seen as an obligation of means. Yet many obligations, which result out of the general obligation and which are laid down in specific provisions constitute obligations of result. By example the obligation of art. 33, §1 Act on well-being at work to install an internal prevention service. Moreover art. 5, § 2, a of the Act obliges the employer to specify the means (budget) which will be used for prevention measures.

3. According to the regulations in your country, how can the employer organize or manage the prevention of occupational hazards in the company? Specifically, can the company manage its prevention internally or must it hire external preventive services?

Every undertaking, no matter the size, has to install an internal prevention (and protection) service with at least one prevention advisor (art. 33, § 1, 1 and 2 Act on well-being at work). The internal service exists out of multiple prevention advisors with different competences and skills. In particular they are specialized in security on the workplace, occupational medicine, ergonomics, hygiene and psychosocial aspects. The internal service is thus multidisciplinary. If not all of the skills are present in the internal service, the employer has to tend to external prevention and protection services (art. 33, §2 Act on well-being at work). These are additional and can never fully replace the internal service. Yet since Belgium counts a lot of small and medium sized enterprises a lot of companies will outsource the prevention and protection tasks to external services. In companies with less than 20 employees, the employer can take upon himself the function of internal prevention advisor (art. 33, § 1, 3 Act on well-being at work). This however does not mean he is a real prevention advisor, which indicates that he does not need to comply with the rules regarding the competences and skills (by example to have adequate knowledge of a certain skill) of the prevention advisors.

4. In your country does the company have the obligation to periodically monitor their workers' health in relation to the risks and hazards inherent in their workplace? If the answer is positive, does the worker have the obligation to bear these health surveillance measures?

According to art. 30 of the Royal Decree of 28 May 2003 regarding the health surveillance of workers the employer is obliged to install a periodical health surveillance system for workers who have a function with regards to security aspects, workers with a function which demands increased alertness, workers who execute an activity with a certain risk and workers who are in contact with food. This last category however will be abolished on 1 January 2016. The health surveillance will be carried out by a prevention advisor-physician, which has the necessary knowledge, skills and diploma/license to carry out his task. Normally the surveillance will take place once a year (art. 33, §1 Royal Decree of 28 May 2003), yet there are possibilities for the prevention advisor-physician to change the interval and more specific Royal Decrees could stipulate other intervals. The obligation of art. 30 is directed towards the employer, however the employer is not conform the law when he employs a worker who is not submitted to this periodical health surveillance. Moreover art. 13 states expressly that workers who refuse to submit themselves are not allowed to be employed by the employer.

5. What prevention obligations does the legal regulation establish regarding pregnant workers or women workers during breastfeeding?

This situation is governed by the Royal Decree of 2 May 1995 regarding the protection of maternity. Art. 2 of this decree states that a pregnant woman should inform her employer as soon as she knows about her condition. Hereafter the employer is obliged to do a risk-evaluation together with the prevention advisor-physician. This evaluation is laid down in art. 41 of the Labour act of 30 March 1971 and basically comes down to an evaluation of every activity in connection to her work which might form the slightest risk for her (or the unborn child's) health or which could have an impact on the pregnancy. On the basis of the evaluation the employer has to take the necessary measures. Art. 42 of the Labour act gives three possible measures:

1. A temporary adjustment of the conditions of work or of the risk related working hours.
2. In case the measures under 1. are not technically, objectively or because of any other justified reason possible, the employer makes sure the pregnant employee can perform other work which is acceptable for her condition.

3. If such a transfer of work cannot be demanded because of technical, objective or other justified reasons, the execution of the employment contract of the pregnant employee will be suspended. If the pregnant woman is a public servant, she will be exempted from labour.

These measures have to be taken immediately if the evaluation by the employer indicates that the pregnant worker risks to come in contact with the dangerous products listed in the annexes of the Royal Decree of 2 May 1995 (art. 7 of that Royal Decree).

Art. 43 of the Labour act prohibits employers to make pregnant workers perform during night time during the period of eight weeks before the expected date of delivery. Night work is also prohibited (before the period of eight weeks) if the pregnant employee can prove with a medical certificate that it has a negative influence or her health or the pregnancy. The employer will thus have to transfer her to daytime work or suspend the performance of the employment contract. Instead of the transfer or the suspension, the pregnant woman can also get an earlier maternity leave (from the 7th week instead of the 6th week before the expected delivery date).

The pregnant worker who is the subject of one of the measures of art. 42 or 43 of the Labour act has to be submitted to the health surveillance by the prevention advisor-Physician, regulated by the Royal Decree of 28 May 2003 (art. 9 Royal Decree of 2 May 1995).

What concerns breastfeeding, art. 4 of the national collective agreement no. 80 of 27 November 2001 states that the employer has to provide a discrete, well ventilated, well lighted, clean and decently heated space where the worker can feed her baby and where pregnant workers can rest. This place can also be common for multiple employers, it can be (under certain conditions) a place in the house of the employer or another place if the worker and employer come to an agreement.

6. Does the regulation on health and safety in the workplace in your country establish the obligation to adopt preventive measures regarding especially sensitive workers? What are these prevention obligations?

The Royal Decree of 28 May 2003 on health surveillance on the work only includes the surveillance in advance of the start of the employment relation, the periodic surveillance (for certain categories of workers) and the surveillance after a period of inactivity (suspension of the execution of the employment contract). In those cases the prevention advisor-physician can, on the basis of the medical examination suggest all kinds of measures to the employer. The measures can relate to the duration, frequency or

intensity of exposure to certain products or conditions, the adjustment or reorganization of the work place, to a training or information on the risks (or to prevent the risks), to the transfer of the worker to another position or function and others. However, this is merely a suggestion and does not really bind the employer.

In case the worker seems unfit for the occupation, the rules of art. 34 of the Act on the employment contracts of 3 July 1978 become applicable. In this case the prevention advisor-physician has to determine whether the unsuitability of the worker is definite or not, if so, the employer has the duty to try to adapt the work to the needs of the employee. If this is impossible, the employment contract takes an end. Not only technical or objective reasons are valid to refuse the adjustment of the occupation, also economic reasons, e.g. if it would be extremely expensive for the employer, are accepted to escape from this duty.

Following the example of art. 5 of EU Directive 2000/78/EC and the case law of the Court of Justice of the EU (*Chacon Navas, Ring, Skouboe Werge,…)* Belgium knows the principle of reasonable adjustment for handicapped workers. Yet also this reasonable adjustment can be refused by the employer for valid reasons. Moreover these measures seem to be more reactive than preventive.

A last option is the advice of the Committee on prevention and protection at work (see question 9), which is competent to investigate all matters relating health and safety on the work and can propose the employer to take fitting measures. These measures could include the adjustment of the work to sensitive or handicapped workers or to give this worker another function. However, the employer is not (strictly) bound by these proposals. The Committee can also advice the employer in case of unfitness for the occupation of a worker.

7. Does the regulation of health and safety in the workplace provides specific preventive obligations regarding psychosocial risks?

Chapter Vbis of the Act of 4 August 1996 on the well-being at work contains the regulation regarding the psychosocial risks on the work, including stress, violence, bullying and sexual harassment. These provisions have to be read together with those of the Royal Decree of 10 April 2014 regarding the prevention of psychosocial risks on the workplace. The employer has to do a general risk analysis (art. 32/2, § 1 Act on the well-being on the work and art. 3, 3 Royal Decree 10 April 2014). He or she has to identify the situation which could lead to psychosocial risks. On the basis of this analysis, the employer needs to take the necessary prevention measures to prevent the risks and to prevent damage or to mitigate the damage (art. 32/2, § 2 Act on the well-

being on the work). The employer needs to take into account the situations which could lead to stress or burn-out which is caused by the work or damage to the health which follows from conflicts on the work or from violence, bullying or sexual harassment (art. 3, 2 Royal Decree 10 April 2014). The responsibility of the employer is however restricted to the objective risks and dangers on which he could have had an impact.
The employer can ask the help of the prevention-advisor which is skilled in psychosocial risks to do the global analysis of the risks (art. 3, 4 and 5 Royal Decree 10 April 2014). The specific details of the analysis and the prevention measures are laid down in the Royal Decree. The choice of prevention measures is up to the employer, however there are some minimum measures which have to be implemented or applied:

1. Material and organisational measures to prevent to prevent actions of violence, bullying and sexual harassment on the work.
2. The (fixed) procedure for workers if they want to mention certain facts or lay down a complaint.
3. The specific measures to protect the workers who are in contact with third parties during the performance of their job.
4. The obligations of the responsible persons (with a place in the company's hierarchy) to prevent actions of violence, bullying and sexual harassment on the work.
5. The education and training of workers.
6. The education of the Committee on protection and prevention at work.

Next to the general risk analysis, the employer can do a specific risks analysis concerning the risks for a specific work situation (art. 6 Royal Decree 10 April 2014). He has to do this when asked by a person with hierarchical responsibilities or by at least 1/3rd of the members of the Committee on protection and prevention at work. This analysis is made with cooperation of the employees (art. 6, 2 Royal Decree 10 April 2014). The prevention advisor for psychosocial aspects is involved if the complexity of the analysis demands it (art. 3 Royal Decree 10 April 2014). After the analysis the employer has to takes fitting measures to prevent the danger or reduce the damage.

Last, the employer has to set up a global prevention plan. This is a five year plan in which the prevention measures (and the development thereof) are programmed. The plan takes into account the nature of the risks and the size of the enterprise (art. 10 Royal Decree 27 March 1998 regarding the policy on well-being on the work). It is set up with members of the hierarchy of the company and the Committee on protection and prevention on the work. Every year there will also be an action plan in which the obligations and prevention measures of the five year plan for the current year are

specified (art. 11 Royal Decree 27 March 1998 regarding the policy on well-being on the work).

8. What specificities does your country's regulation establish regarding prevention of occupational hazards in cases of business plurality?

Art. 7 of the Act on well-being at work states that companies who work together on one work place (and thus employ workers at the same place) are obliged to work together on the execution of the necessary measures regarding health and safety on the work. They have to coordinate their actions with regards to the protection against and prevention of risks at the performance of the work, taking into account the nature of their activities. Further they need to share information on the risks for the well-being and the prevention measures for every work post or function and activity, in as far this information is relevant for the coordination. They also need to inform each other about the measures taken for first aid, firefighting and the evacuation of the workers and the appointed employees who are charged to bring those measures into practice.

If multiple companies do not work in exactly the same work place but in neighboring or adjoining places in the same real estate property, with communal equipment and access-, evacuation- and rescue facilities, they have to work together and coordinate their actions to use and manage the equipment and facilities which can have an influence on the health and safety of the workers.

In case of the use of contractors the employer has to inform the contractors and subcontractors according to art. 9, §1 Act on well-being at work about all risks and taken measures. Also he needs to make sure that the contractors have the right training and instruction which are needed for the activity of the company. Further he needs to coordinate the work of the (sub)contractors and make sure they follow the rules regarding health and safety on the work of the company. Art. 9,§2 of the Act on Well-being at work makes sure the provisions of art. 9, §1 are enforced as it forbids the employer to work with (sub)contractors who are known to disobey the health and safety rules. It also obliges the employer and the (sub)contractors to sign an agreement in which (i.a.) the (sub)contractors recognize their obligations. Finally, art. 9, §2 also encloses an obligation for the employer to take the necessary measures himself if the (sub)contractor has failed to do so. Art. 10 further holds the obligations for the contractors. Art. 11 allows an agreement in which the employer and the (sub)contractors lay down that the employer will take upon himself all health and safety obligations (and measures).

Art. 12bis to 13 stipulate the rules in case the employer makes use of agency workers. Just like for contractors, the employer (user) has to refuse the services of employment agencies which are known to disobey the health and safety regulation. This obligation works vice versa too for the employment agency who know that the users are not following those rules. Further there is the Royal Decree of 15 December 2010 which provides all the obligations of the employment agency and the user to make sure that health and safety of his agency workers are safeguarded. It foresees a work post file which contains information regarding the person, his function and the situation regarding health and safety at work. This file makes sure that the user, the agency and the prevention services have the information they need to prevent risks or mitigate damage. Other provisions of the Royal Decree i.a. divide the obligations and the costs (of the measures) between the user and the employment agency.

A last addition to this answer is the possibility for groups of employers to ask permission to the King (the government) to install a communal committee (art. 54 Act on well-being at work).

9. Does the regulation of health and safety in the workplace provides for participation of workers' representatives in the prevention of occupational hazards in the company?

There is a Committee on protection and prevention at work. This Committee is installed in every company which has 50 or more employees (art. 49 Act on well-being at work). In smaller companies the workers representatives take over the tasks of the Committee (art. 52 Act on well-being at work). If there are no worker representatives, the employer has to consult the employees directly (art. 53 Act on well-being at work). The Committee consists of the employer (or his representatives) and elected members of the personnel (at least two, maximum 25) and the employers representation can never count more members than the workers representation (Art. 56 Act on well-being on the work). The election takes place every four years (art. 58 Act on well-being on the work). The prevention advisor who leads the internal prevention service is also the secretary of the Committee. The more detailed regulation on the working of the Committee is laid down in the Royal Decree of 3 May 1999 regarding the tasks and the working of the Committee on protection and prevention at work. The tasks of the Committee are listed in art. 2 to 13 (see also art. 65 of the Act on well-being at work), the most important are:

- To advise on the global prevention plan and the yearly action plan.
- To control and help the medical surveillance system of the prevention service.
- To advise on about all matters and measures which could impact or improve the health and safety on the work.

- Some specific legislation demands the agreement of the Committee for certain matters and decisions by the employer.
- To take care of the propaganda (on health and safety on the work) and of the welcoming of new employees and the information and education on health and safety on the work.
- To stimulate and follow up the internal prevention service.
- To investigate complaints regarding health and safety on the work and regarding the services which function in a procedure of unfitness for the occupation.
- To help the prevention advisor and responsible member of the management with the dynamic risk management system in order to do a yearly thorough investigation on health and safety on the work.
- Other tasks (also laid down in other legislation).

Important to know is that the Employer is not obliged to follow the advises of the Committee (art. 19 Royal Decree of 3 May 1999), unless if the Committee's advice was unanimous (in which case the employer should have agreed to it himself, since he is represented in the Committee).

10. What are the liabilities –tort, administrative and/or criminal– that can arise as a consequence of the company's breach regarding workplace health and safety?

The non-compliance with the rules regarding the prevention of occupational hazards is sanctioned by Capital 1 (violations against the person of the worker) of the second book of the Social Criminal Code. Employers (or their representatives and agents) are made responsible if the legislation on well-being at work is infringed and can be punished by criminal sanctions (prison and penal fines) or administrative fines. The general provision is art. 128 of the Social Criminal Code which lays down a sanction of level 3 for the non-compliance with the obligations in the Act on well-being at work. This means a penal fine of 100 to 1000 euros. The amount should be multiplied with the number of affected workers and with surcharges (x 6). Thus a basic sanction of 100 euros if the employer, by example, forgot to set up a global prevention plan, could lead to a sanction of 30.000 euros if the company counts 50 workers (100 x 50 x 6). The sanction is augmented to level 4 if the non-compliance has caused damage to the health of the worker or an accident at work. This means a sanction of 600 tot 6000 euros (with the same multiplications) or a prison sentence of six months to three years. There are specific provisions for the failure to take preventive measures against violence, bullying and sexual harassment on the work (art. 121 and 121 Social Criminal Code) which demand a sanction of level 2 (penal fine of 50 to 500 euros, with the same multiplications). Art. 126 provides for a sanction of level 3 for violations of the

regulation regarding pregnant and breastfeeding workers, including the preventive measures.