



## Laga Newsflash

### Long term incapacity: new measures

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The number of long-term incapacitated employees is increasing. Two new measures have therefore been introduced into Belgian legislation: (1) a re-integration procedure for long-term incapacitated employees and simultaneously, (2) a restriction of the "medical force majeure" termination modality which, going forward, can only be relied upon after the completion of the re-integration procedure.

Until now, Belgian employment law did not facilitate a re-integration procedure for employees in relation to (long-term) incapacity. As far as medical force majeure is concerned, a legal basis for this termination modality has been available since 2007, but never entered into force as it lacked a royal decree (RD) containing the implementation modalities.

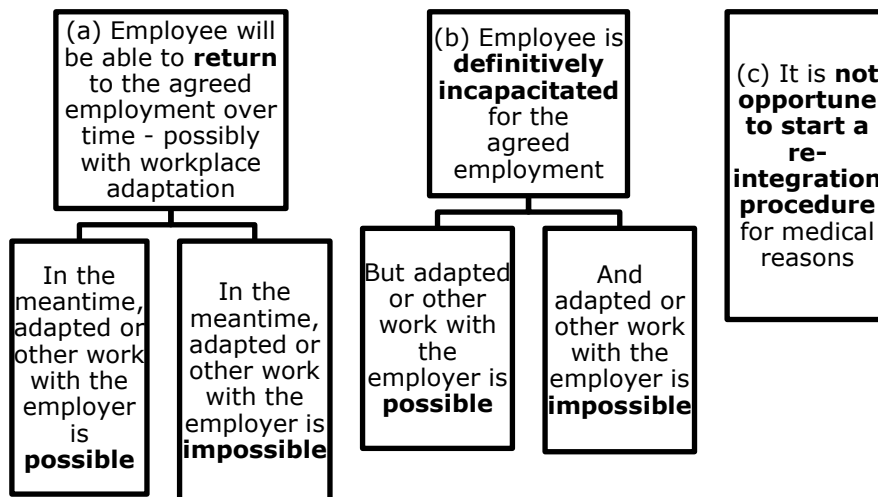
This situation has been unblocked following the following adoptions by the Belgian Government and Parliament:

- the RD of 28 October 2016 on the re-integration within a company; entered into force on 1 December 2016
- the RD of 8 November 2016 on the re-integration into the job market in general; also entered into force on 1 December 2016, and
- the Act on various regulations with regard to work disability

#### The re-integration procedure

The newly introduced re-integration procedure aims at guiding long-term incapacitated employees to a temporarily or definitively adapted (or other) employment within the company.

This procedure can be initiated by the employer, the employee or the advising doctor for the health insurance fund. Following the procedure's initiation, the prevention advisor-company doctor (PA-Doctor) will provide a health assessment and make a decision in accordance with below decision tree:



If the employee is considered definitively incapacitated by the PA-doctor (regardless of the possibility to perform other or adapted work), he/she can appeal against this decision.

If adapted or other work is possible (regardless of the possibility to eventually return to original employment), the employer should make a re-integration plan in consultation with the employee, the PA-doctor and other relevant parties.

The employer can refuse cooperation, if re-integration as suggested is technically or objectively impossible or unreasonable. In that case, the employer should justify this refusal. The employee also has a right to refuse the re-integration plan.

If the employee accepts the plan and returns to the workplace to perform adapted or other work, this activity is assumed to be performed under the existing employment contract. This means the employee is still entitled to salary, benefits and other working conditions in place on the basis of the original contract. It is nonetheless possible to conclude an addendum confirming certain deviating modalities (e.g. adapted working time/schedule, nature and volume of adapted or other work, adjusted salary for this adapted or other work). In that case, the amended terms and conditions apply during the period of adapted or other work.

The original employment contract is not suspended for the period of adapted or other work. If the employer served notice to the employee before the start of incapacity or serves notice after the employee's re-integration, the notice period will start or continue to run. If the employer terminates the employment contract by paying an indemnity in lieu of notice, this indemnity is calculated based on the original salary to which the employee was entitled before incapacity. Termination during the course of re-integration will certainly be looked upon with some suspicion. Attention should therefore be paid to the dismissal justification so as to avoid sanctions for manifestly unfair dismissal or discrimination.

Lastly, if the employee again becomes incapacitated during a period of adapted or other work, there will be no entitlement to guaranteed salary, except in work accident or a work related disease cases. After the re-integration period, i.e. when the employee has returned to his/her original employment, the guaranteed salary will again be due in case of incapacity (except with recurring work incapacity within 14 calendar days).

## Termination for medical force majeure

As from the Act's entry into force, a dismissal for medical force majeure (without notice period or payment of indemnity in lieu of notice) will, going forward, only be possible if the re-integration procedure results in the conclusion that the employee is definitively incapacitated while no adapted or other work is available for this employee.

## Recommended actions

Employers may consider taking the following actions:

- Consultation with the PA-doctor and preparation. Employees can start-up re-integration procedures as of 1 January 2017. Employers can do so as well for employees who became incapacitated as of 1 January 2016, but not before 1 January 2018 for employees who have been incapacitated since a date preceding 1 January 2016.
- Discussion of the new measures within a company's Committee for Prevention and Protection in the Workplace, in the presence of the PA-doctor, and determination of a collective "reintegration policy" (what is the company's policy regarding long-term incapacitated employees, what functions are suitable for adaptation, what kind of adaptations might be feasible at a collective level, etc.)
- If a termination is planned for the employment contract of a (long-time) incapacitated employee who is not in a situation of medical force majeure, particular attention is needed for the justification, to avoid claims of unfair dismissal or discrimination. Dismissals for reasons that are not linked to one's medical condition are technically still possible (e.g. for performance, organisational or economic reasons). Nonetheless, more restrictive case law as a result of these new measures should be anticipated. For example, in case of a dismissal for organisational reasons, an employer should be able to explain why initiating a re-integration procedure was not appropriate. It should be noted that the Labour Court of Ghent recently decided that the following justification was discriminatory: "dismissal for economic reasons and because the long-time incapacity compromised the proper functioning of the company and continuity of service". The plaintiff was awarded an indemnity of 6 months' salary.

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