

Association performance and employment law compliance

- ▶ **Sophie Maes**
- ▶ **Annabelle Truyers**
Lawyers Claeys & Engels

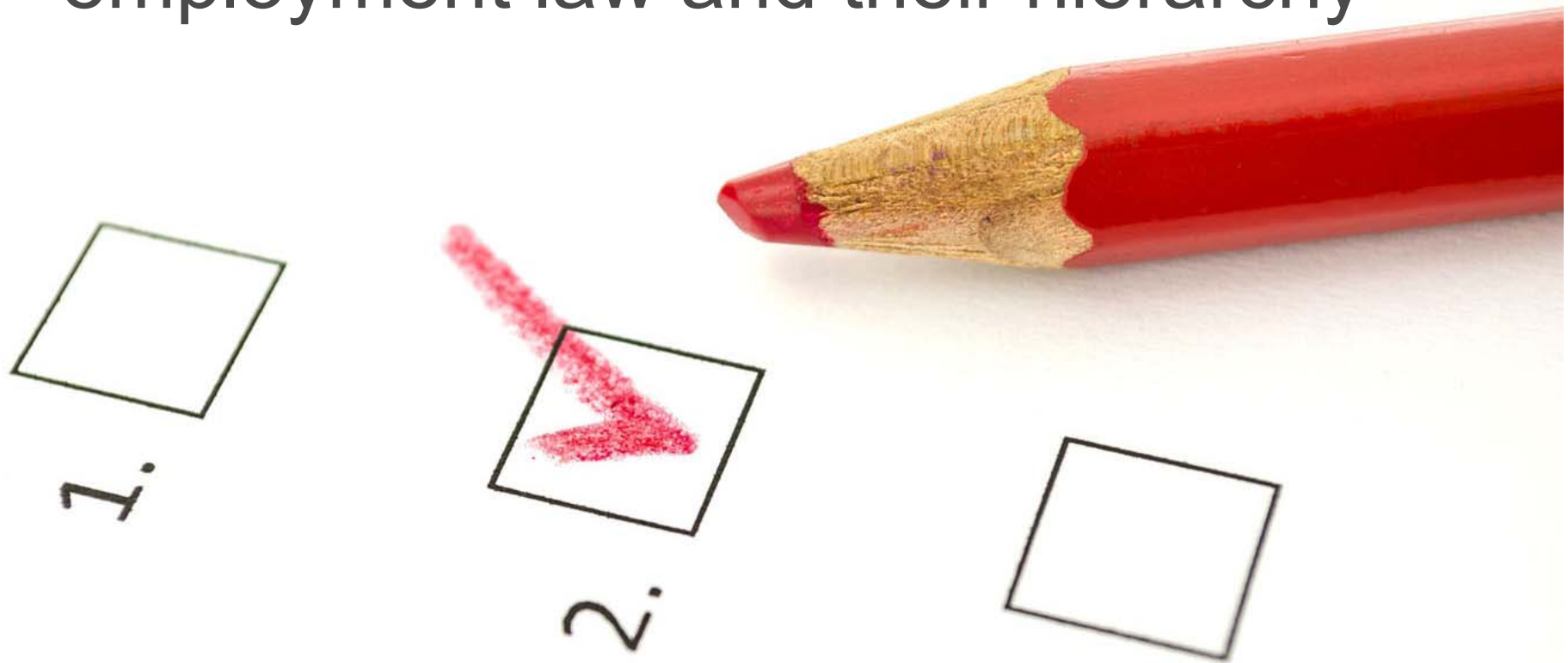
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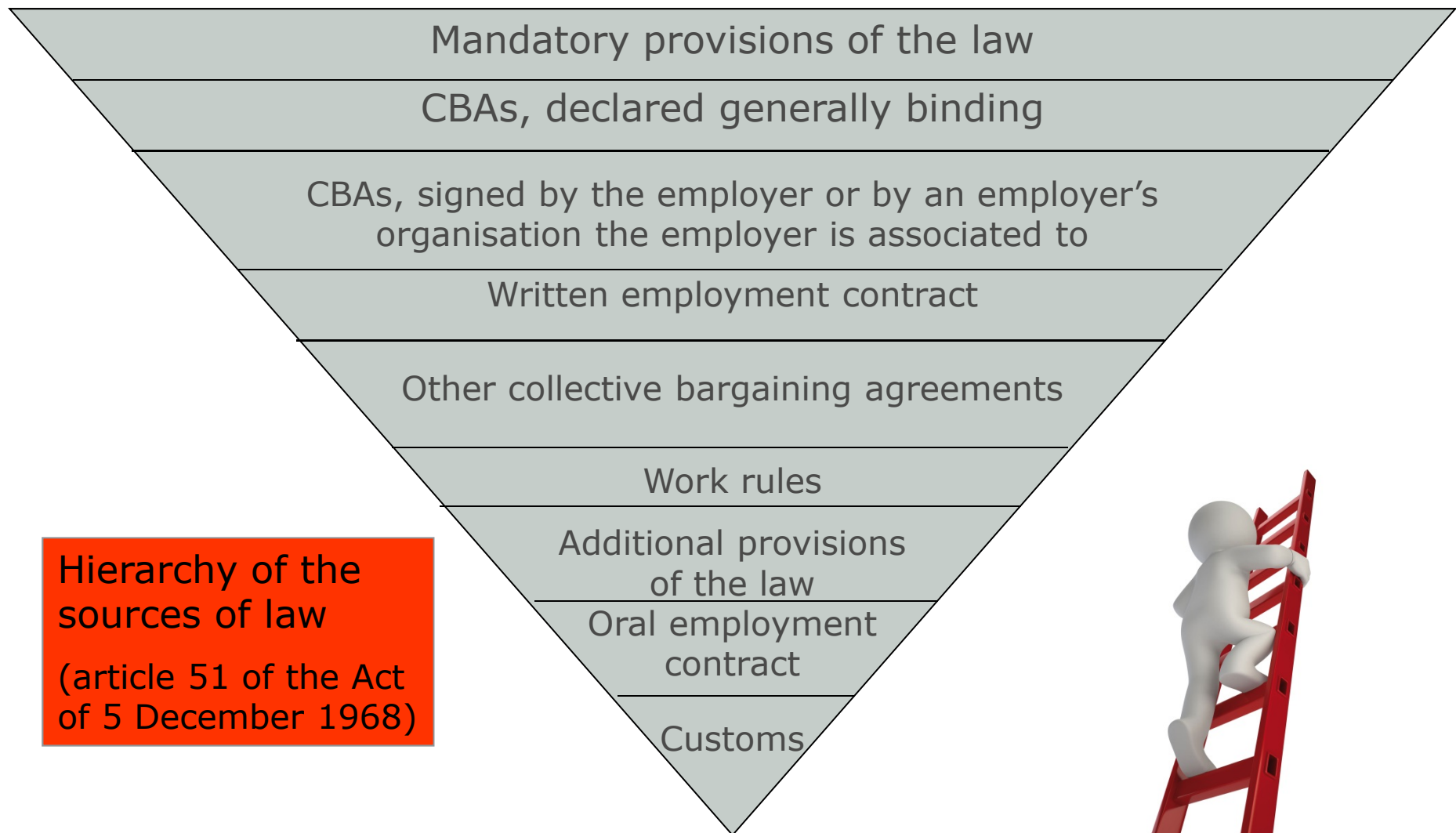


Overview

- I. Starting point: sources of employment law and their hierarchy
- II. Employment contract
- III. Work rules
- IV. Policies
 - 1. Concept
 - 2. Useful policies in practice

I. Starting point: sources of employment law and their hierarchy





II. Employment contract



Overview

- A. Prohibited clauses
- B. New probationary period?
- C. Confidentiality clause
- D. Non-compete clause
- E. Schooling clause
- F. What are other employers doing?



A. Prohibited clauses

- Stipulations limiting the employee's rights or extending his or her obligations: art. 6 Employment Contracts Act
- 'Modification clause': clause in which it is stipulated that the employer reserves the right to unilaterally change the employment conditions: art. 25 Employment Contracts Act: prohibition!
 - Court of Cassation: only related to significant modifications of essential employment conditions

A. Prohibited clauses

► Resolutive condition:

- Valid if:
 - not in conflict with legislation (art. 36 and 36*bis* Employment Contracts Act: marriage, maternity, retirement age)
 - fulfilment of condition does not exclusively depend on the will of one party

► Arbitration clauses

B. New probationary period?

► Context?

- Employment contracts as of 1 January 2014: probationary period no longer possible
- Exceptions: student agreement + temporary agency agreement

► What?

- Topic still pending – no final legislation yet!
- New “probationary period”?

Seniority	< 1 month	< 2 months	< 3 months	< 4 months	< 5 months	< 6 months
Currently	2 weeks	2 weeks	2 weeks	4 weeks	4 weeks	4 weeks
Future	1 week	1 week	1 week	3 weeks	4 weeks	5 weeks

► Evaluation?

- Will be useful to ‘test’ qualities of employees

B. New probationary period?

► Other clauses regarding termination employment contract?

- Before 2014:
 - General rule: not possible
 - Exceptions
 - Blue-collars < 6 months seniority
 - White-collars > 64.508 EUR (in 2013)
- 2014: New regulation
 - General rule: valid if in favour of employee
- Alternatives?
 - Conventional seniority
 - Additional indemnification in case of termination

C. Confidentiality clause

► Context?

Art. 17 Employment Contracts Act: employee may not disclose or use following confidential information, nor during nor after the employment contract:

- Industrial secrets
 - *Information of a technical nature regarding the production process of the employer*
- Business secrets
 - *Commercial and financial knowhow of employer constituting a competitive advantage because not known to the public*
- Secrets related to personal or confidential matters, of which the employee was able to gain knowledge during the employment
 - *All confidential information not necessarily related to economic activity of employer*

C. Confidentiality clause

► What?

- Employee undertakes not to disclose or use certain 'confidential' information during an/or after employment contract
- *Clarification* of previously mentioned categories, however no *expansion*!
- Avoid discussion regarding concept 'confidential information'

► Extra – more extensive – confidentiality provisions

► Evaluation?

- Useful for specific functions; case by case assessment

D. Non-compete clause



► What?

- Employee undertakes not to carry out similar activities, nor by personal competing business nor by entering into the service of competing employer
- Different types of non-compete clauses:
 - National non-compete clause
 - International non-compete clause
 - Companies with international field of activities or with significant economic, technical or financial interests on the international markets; OR with own research department;
 - For employees entrusted with duties which allow them, directly or indirectly, to obtain knowledge of practices specific to the company of which the use outside the company could be harmful for the company.
 - *[Non-compete clause for sales representatives]*

D. Non-compete clause



► Validity depending on annual remuneration (2018):

- < 68,361 EUR
- 34,180 EUR – 68,361 EUR
- > 68,361 EUR

► Conditions?

- In writing
- Validity depends on annual remuneration
- Prohibition restricted to similar activities
- Geographical scope: places where the employee can actually compete with the employer (max. Belgium) **[exc.: international non-compete]**
- Temporal scope: limited in time (max. 12 months)
[exc.: international non-compete]
- Non-compete indemnity equal to at least 50% of the employee's salary during the non-compete period

D. Non-compete clause

► Application?

Non-compete clause has no effect:

- During first 6 months as of start of employment contract
- Termination after 6 months by employer without serious cause
- Termination after 6 months by employee for serious cause
- Renunciation (15 days)

} *[exc.:
international
non-compete]*

► Penalty in case of infringement by employee?

- Reimburse non-compete indemnity + equal amount

► Evaluation?

- Useful if company wish to restrict competition after end employment contract
- At least psychological effect

E. Schooling clause

► What?

- Employee agrees to reimburse (part of) training costs if he would leave the company during specific period after training

► Conditions?

- In writing (at the latest when the training course starts)
- Annual salary > 34,180 EUR (2018)
- Employment contract for unlimited duration
- Details concerning training course, cost,...
- Duration: in function of cost and duration training course, limited to 3 years
- Amount to be paid back to employer: must be decreased gradually according to the duration of the clause (80%, 50%, 20% of cost training course), but may never exceed 30% of annual gross salary

E. Schooling clause

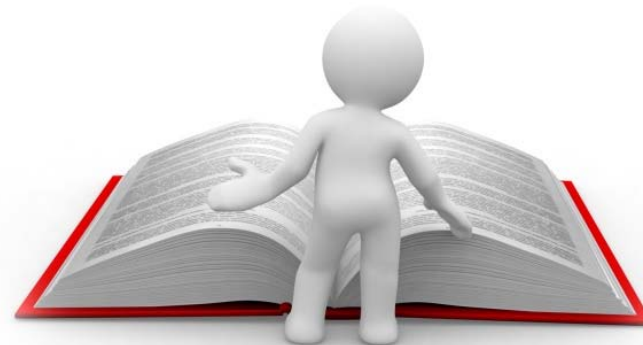
► Application?

Schooling clause has no effect:

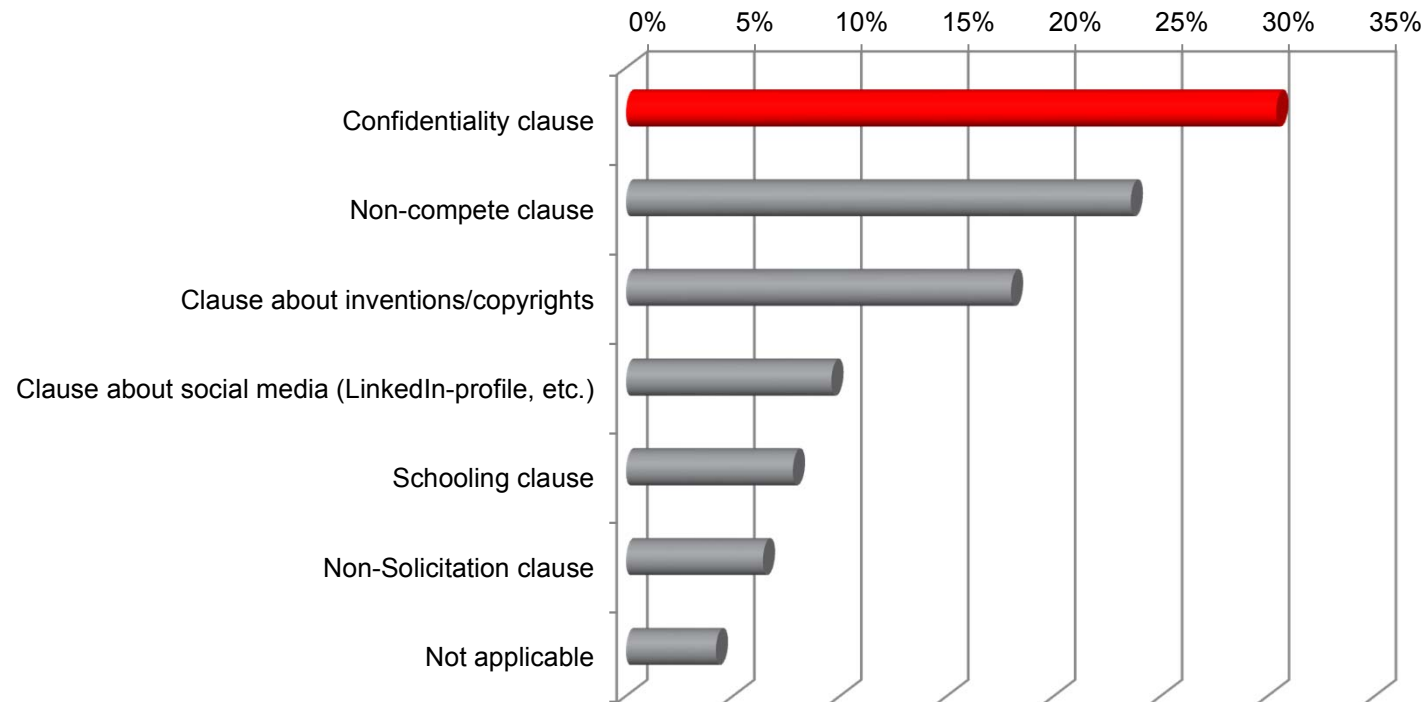
- During first 6 months as of start of employment contract
- Termination after 6 months by employer without serious cause
- Termination after 6 months by employee for serious cause
- Termination in case of restructuring

► Evaluation?

- Useful if specific training is provided



F. What are other employers doing?



III. Work rules



Mandatory items (1/2)



- All possible working schedules;
- Methods of monitoring working time;
- Method, time and place of payment of the remuneration;
- The provisions of the national CBA n° 25 of 15 October 1975 ('equal pay')
- Duration notice periods or applicable rules;
- Serious causes justifying the dismissal without notice or indemnity in lieu of notice;
- Procedure in case of employee's absences;
- Rights and duties of the supervising personnel;
- Disciplinary penalties + appeal procedure + conduct they are sanctioning;
- The purpose of fines (if any);
- Dates of the collective annual vacation (if any);
- Dates of the public holidays, the procedure of the replacement days and the working time compensation in case of work on a public holiday;
- The duration of the annual vacation and the conditions under which this vacation will be granted or applicable rules;

Mandatory items (1/2)

- Measures to prevent psychosocial risks at work;
- Prohibition of discrimination;
- Prohibition of smoking inside the company's premises;
- The company's alcohol and drugs policy;
- Location + identification of the person in charge of administering first aid;
- Location of the first-aid kit;
- Location where the work rules are accessible to the personnel;
- *[Names of the members of the WC, CPPW and TUD (if any)]*;
- Names of the prevention counselor [mandatory] and *the person of trust* [not mandatory];
- Names of certain doctors responsible for treating work accidents;
- Address of the social inspections;
- Identity of the person(s) or the department responsible for the storing of electronic documents;
- Company CBA's and collective agreements (if any);
- Social facilities

→ **Non-mandatory items: advised not to include in work rules (but in policies?)**



Procedure (no works council)

Employer drafts company work rules/amendments + posts draft at a visible location on employer's premises + each employee may receive copy of text of work rules.		
During 15 days, remarks in a special register After 15 days, employer sends draft work rules + register to the Social Inspectorate.		
No remarks in the register ↓	Remarks in the register ↓	
The work rules enter into force (15 days).	The Social Inspectorate informs the employer (4 working days). Employer must post remarks. The Social Inspectorate tries to mediate (30 days).	
	There is a conciliation ↓	There is no conciliation ↓
	The work rules enter into force (8 days)	Social inspectorate communicates the report of non-conciliation to competent JC The JC tries again to conciliate. In the absence of conciliation, JC decides.
		Work rules enter into force (15 days). Decision is notified to the employer.

Reminder: 'new' provisions of Act Peeters

➤ Occasional telework

- 'Occasional' = incidentally, not on a regular basis
- In case of an Act of God (strike, car trouble,...) or personal reasons (visit to the doctor, fulfil administrative formalities, technician,...)

➤ Floating work schedules

- Legal framework for previous policy of tolerance (strict conditions!)
- Now also possible for employees with a fixed part-time work schedule

➤ Simplification formalities part-time work

- Abolition of the obligation to include all possible part-time work schedules that fit in full-time work schedule
- **TO DO:** framework for variable part-time work schedules **before 1 April 2018**

IV. Policies



IV.1 Concept



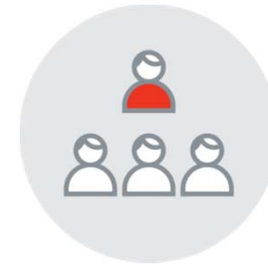
Concept

- Unilateral document from employer with guidelines for employees
 - ➔ Based on justified employer's instructions
- Very diverse:
 - Various topics: remuneration and benefits (bonus, company car,...), employment conditions (home work,...) and work equipment (laptop, mobile phone,...), working time (reporting,...) and absence from work (additional holidays,...), behaviour ("Code of Conduct")
 - Goes by many names: policy, handbook, guidelines,...
- Not mandatory, but can be advised

Implementation, modification and termination

► Implementaion

- Unilateral
- No specific procedure
- Employee can sign 'for receipt' (not 'for approval'!)



► Modification / termination

- Unilateral, however: transparency + reasonable notice period
- Possible by higher source of law (CBA, employment agreement, work rules,...)
- No constructive dismissal in event of correct modification or termination

Useful clauses

- Field of application: for who?
- Confirmation of unilateral character
 - Policy can always be modified
 - How? Potentially specific procedure?
 - Or only under specific circumstances?
 - Policy can always be terminated
 - No creation of acquired rights
 - If applicable: limitation in time
- Language requirements!
- Message of receipt



Follow-up of compliance

► Tips & tricks to impose compliance

- Transparency / known to employees (for example intranet)
- Actual control on compliance by employees
- React in case of infringement !!!
 - Important to avoid creating deviating custom
 - Credibility of policy in case of legal proceedings



► Sanctions (work rules!)



IV.2 Useful policies in practice



Overview

- A. E-mail and internet policy
- B. Data protection policy
- C. Code of conduct
- D. Homework and teleworking
- E. Car policy
- F. Other policies

A. E-mail and internet policy

- Clear rules regarding private use
- Main importance: monitoring of e-mail and internet use!
 - Strict conditions (CBA n° 81)
 - Only allowed for following purposes:
 1. Preventing unlawful or defamatory facts;
 2. Protection of employer's economic, commercial and financial interests;
 3. Safety and/or proper technical working of IT-network systems;
 4. Compliance in good faith with the employer's principles and rules with respect to the use of on-line technologies.

A. E-mail and internet policy

- Procedure: in principle indirect control



- Direct control for purposes 1-3

⇒ Policy!

A. E-mail and internet policy

- Information to employees (companies without social bodies):
 - policy on monitoring and employer prerogatives and supervising personnel;
 - pursued purpose(s);
 - whether personal data (in this case, e-mails) are stored or not, place and duration of storage;
 - permanent monitoring or not
 - use of the instruments put at employee's disposal for the execution of work, including limitations regarding the use as part of function;
 - rights, duties and obligations of employees and possible prohibitions regarding use of electronic on-line communication means of employer;
 - sanctions provided by work rules in case of non-compliance with rules



⇒ **Policy!**

A. E-mail and internet policy

- Risks in the event of non-compliance:
 - In theory: criminal sanctions + damages in court
 - In practice: irregularity of evidence obtained without respecting rules and procedures

Recent case law however sometimes allows evidence if (“*Antigoon*”):

1. no violation of a rule sanctioned with nullity
2. credibility of evidence is not affected
3. employee is not deprived of his/her right to a fair trial

Seems to be generally accepted by Flemish courts; less accepted by French courts

B. Data protection policy

➤ Processing of personal data

- Currently: Data Protection Act of 8 December 1992
- As of 25 May 2018: GDPR

➤ Multiple changes with GDPR:

- More extensive data subject rights
- More extensive duties for data controllers
 - Extension of the duty to inform
 - Documentation duty – record of processing activities
 - Mandatory designation of “*Data Protection Officer*” for some organisations
 - Stricter security measures for personal data
 - Duty to notify breaches

B. Data protection policy

► Most important: Extension of the duty to inform:

- Existing:

- Identity of the data controller
- Purposes of the processing
- (Categories of) receivers of the data
- (Categories of) data (if not obtained directly from the data subjects)
- Rights of access and rectification

- New:

- Legal basis for the processing: *implies preparation*
- Intention to transfer personal data to a third country + reference to appropriate or suitable safeguards
- Storage period (or the criteria used to determine that period)
- Right of data portability
- Right to erasure or restriction of or objection to processing
- Right to withdraw consent
- Right to lodge a complaint with the supervisory authority
- Coordinates identity of the Data Protection Officer
- Information on automated individual decision-making



⇒ **Policy!**

B. Data protection policy

➤ Higher risk of penalties with GDPR:

- Investigative powers of the supervisory authority
- Power to impose penalties of the supervisory authority – high fines:

Breach of the obligations of the controller	Breach of the: <ul style="list-style-type: none">- general principles of data protection- rights of data subjects
Maximum 10 000 000 EUR OR 2% of the total worldwide annual turnover of the organisation	Maximum 20 000 000 EUR OR 4% of the total worldwide annual turnover of the organisation

- Other possible corrective powers (issue warnings, issue reprimands, order to comply with the data subject's requests to exercise his/her rights, order the rectification or erasure of personal data,...)
 - Lodge complaint with supervisory authority + possibility to claim damages before court (reversed burden of proof)
-


C. Code of conduct

- Guidelines / instructions on how employer expects employees to behave

- Common content:
 - Company integrity (compliance of legislation, fraud, bribe,...);
 - Secondary activities and prohibition on competition;
 - Abuse of confidential information;
 - Conflict of interest;
 - Financial reporting;
 - Responsible behaviour towards colleagues, towards service providers,...
 - Health and safety expectations;
 - Environmental guidelines;
 - ...

D. Homework and teleworking

- “Structural” telework: Work performed outside the employer’s premises with IT equipment on a structural basis (not just occasionally) → **annex to employment contract**

- “Occasional” telework: Incidentally, not on a regular basis, in case of an Act of God (strike, car trouble, ...) or personal reasons (visit to the doctor, fulfil administrative formalities, technician, ...)
 - Conditions
 - Function or activity has to be compatible with telework
 - Employee initiative (by phone, e-mail ...) within a reasonable period
 - Employer can refuse (reasonable ground – in writing)
 - Agreement about: equipment, technical support and availability
 - Procedure
 - No special procedure, but a framework can be established in work rules or a CBA (no obligation)  **Policy!**

E. Car policy

- Providing of company car: type of car? Conditions?
Linked to specific function?
- Use of the car
 - Rules regarding private use, if applicable: limitations? Employee contribution?
Also abroad?
 - Prohibited use of car (for example rally)?
 - Who can use the car (for example partner,...)?
 - What in case of long term sickness?
 - Procedures in case of accident?
- Termination of employment contract: what to do with the car?
Use permitted after termination employment contract?

F. Other policies

- Variable pay/bonus/benefits
- Cost allowance
- Bring Your Own Device (BYOD)
- Social media
- Laptop and mobile phone
- Secondary activities
- Alcohol and drugs (work rules!)
- Whistleblowing





Sophie Maes
Advocaat – Partner

T +32 2 761 46 07
sophie.maes@claeysengels.be

Annabelle Truyers
Advocaat - Associate

T +32 2 761 46 08
annabelle.truyers@claeysengels.be

www.claeysengels.be



Partners with you.●