



Brussels, November the 14th, 2018

Excellency,

We have the great pleasure to send you the second brochure edited by the Intersyndicale of Diplomatic Missions. The theme of this brochure is: the applicability of Belgian labour laws to the non-diplomat staff members of Diplomatic Missions, followed by an analysis of a concrete example, indexation.

As you know, the Intersyndicale represents all the staff members working in Diplomatic Missions, Consular Posts, Permanent and Regional Representations and International Organizations based in Belgium. We are also member of the Commission for Good Offices.

After the workshop organized by the Protocol Direction of the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation of the Kingdom of Belgium, on April the 24th 2018, regarding the new Epis law of January the 15th 2018, many questions have arisen.

Some Heads of Diplomatic Missions have feared an interference in their strategic organization. A common communication from several Diplomatic Missions has been sent to the Protocol in May 2018, questioning the compatibility of the new Law with the Vienna Conventions, and with the public nature of diplomatic and consular missions.

The Ministry of Employment has recently answered this through the Protocol channel, by a document of 4 pages sent to all Diplomatic Missions. No ambiguity shall remain, the Epis Law is in contradiction neither with the Vienna conventions nor with the public nature of the employers and missions.

In order to strengthen the message, to clear up all doubts by answering the questions that have been frequently asked to us, and to offer our assistance, the Intersyndicale has decided to send to all Diplomatic Missions the present explanatory brochure.

As a consequence of the application of the law Epis of January the 15th 2018, we also wanted to take the opportunity to explain about the mechanism of salary indexation, since the salaries of all your staff members should be increased through indexation from October on.

You will find hereafter our explanation and decoding and, as usual, all the legal texts on the basis of which our explanations are founded.

Since we had several demands following the previous brochure, this one has been edited in English and French. We wish you compelling reading.



**Intersyndicale
Of
Diplomatic
Missions**

We would like to take this opportunity to seek your assistance to relay this information to all your staff members and to express our gratitude for your kind cooperation.

We remain at your entire disposal, had you any question or remark.

Please accept, Excellency, the assurances of our higher consideration.

For the Intersyndicale
Laure Mesnil
*CNE Staff Representative
Diplomatic Missions and
International organizations*
Rue Pletinckx 19. 1000 Bruxelles
GSM : 0470.32.99.20
Fixe : 02.557.86.10
Laure.mesnil@acv-csc.be



ON THE APPLICABILITY OF BELGIAN PRIVATE SECTOR LEGISLATION TO ALL STAFF MEMBERS WHO DO NOT HAVE A MISSION OF PUBLIC ORDER

1) The structure of Belgian Labour Law

In Belgium, labour Law is created in two distinct ways:

- The vote of a law in federal parliament (ex: the law of April the 3rd 1978 on work contracts)
- The negotiation of new regulations and rights within a Joint Committee (ex: the collective agreement on indexation of December the 6th 2016, in Joint Committee 337)

It is important to explain that in Belgium, the rules of Labour law that apply to workers and employers are mostly set out by these conventions (CLA), and not by laws voted by parliament.

Since the law Epis has been voted on January the 15th 2018, all the collective agreements of National Labour Council (Conseil National du Travail) and of Joint Committee 337 (Commission paritaire 337) apply to all your staff who “*are not enjoying a privileged status in accordance with the Vienna Conventions of 18 April 1961 on Diplomatic Relations, and 24 April 1963 on Consular Relations*”.¹

In our last brochure, we explained that it applies of course to all the local staff, but also extends to people who are under S and P cards with no public order missions, since their immunity is only functional and cannot be qualified as a ‘privileged status’.

But even before the law Epis, Belgian legislation (general laws) applied to these staff members, with no contradiction with the Vienna Conventions or any public character of the employer.

2) The fundamental distinction between the missions of Diplomatic Missions

The important law concept enhanced by a constant jurisprudence is that there is an essential difference between

- the strategic missions of a diplomatic mission, those of representation of the State, the missions of public order, which fall under the sending state legislation,
- and the not-public-order, daily functioning missions, such as human resources management, which fall under the local legislation.

Of course, no interference can be made with the strategic tasks and responsibilities of the Diplomatic Mission representing the sending State, that is fully guaranteed and protected by the Vienna Conventions. This is why the persons of diplomats and the premises of the Mission are untouchable. The public order missions are within the sole discretion and competence of the sending State, and no local law can interfere with this.

¹ Loi Epis of January the 15th 2018, Chapter 2, article 2; 1/1



But it is not the case of the non strategic acts regarding work contracts, work conditions or relations, which are day-to-day operation matters and have no legitimacy to claim the protection of the Vienna Convention. These acts fall under the local labour legislation.

For the same reason, the public nature and missions of the State employing the staff members of Diplomatic Missions is also not a reason why these staff members should be submitted to the sending state legislation, since they are not emissaries of public authority.

In Case Vanaverbeke v USA from october the 7th 2015 (case confirming the decision of labour tribunal of September the 25th 2012), the Bruxelles Labour Court of Appeal has estimated that, notwithstanding the public nature of the employer, it is the private labour law (in this case, the law of March the 16th 1971 on working time) that applies to the staff members with no public order mission.

This is why all Diplomatic Missions must apply the Epis Law, without delay or exceptions, and comply to their employer's obligations according to Belgian private labour law.

3) A constant national and international jurisprudence confirms this principle

In Case C-154/11 Ahmed Mahamdia v Algeria from July 2012, that I am attaching to the present brochure, the European Court of Justice has confirmed that " A foreign State cannot plead immunity in response to employment law proceedings brought by an employee of its embassy, where the employee carries out functions which do not fall within the exercise of public powers".

This position was held by the Belgian courts before the Mahamdia case :

- C. trav. Brux., 19 juin 2007, immunity applies only to the exercise of public authority and not to management tasks such as work contracts and work relation;
- C. trav. Brux., 9 janvier 2013, competence of Belgian labour courts to hear of work conditions and relations within diplomatic missions ;
- In case 2012/AB/714 of September 17th 2014, the Labour court of appeal reminds that the staff members who do not have missions of public order must be registered to Belgian Social security.

It means that a foreign state cannot invoke it's sovereignty to refuse applying Belgian private labour law to all their staff members who do not have a public order mission.

This foreign state, through its Diplomatic Mission, must grant to all these staff members

- A work contract referring to Belgian labour law of July the 3rd 1978
- The benefit of all rights granted in Belgian labour law and conventions (national and within joint committee)
- A registration to social security

We therefore ask you, if you have not already done so, to comply to your employer's obligations. And we remain at your disposal to assist you in the process.



ON THE OBLIGATION TO INCREASE THE OCTOBER 2018 SALARIES THROUGH THE MECHANISM OF INDEXATION

1) What is indexation ?

In Belgium, salaries increase when the cost of living (inflation) increases. It is quite normal. If it were not so, if the price of food, rent, petrol...increased while the salaries did not, people would get poorer all the time. This mechanism is called indexation.

The wage increase happens when the cost of living exceeds a certain threshold index ('indice-pivot'). It is the Bureau du Plan (Office of Planning and Budget), a public body, that is in charge of economic forecasting for the government, who establishes when the threshold index will be exceeded. And the last time was in August 2018.

When the threshold index is exceeded, the month following the exceeded threshold index, first social benefits (unemployment and medical disability benefits) are increased by 2%. The second month following the exceeded threshold index, the wages of civil servants and contracted employees are increased by 2%.

2) What about the Diplomatic Missions Staff ?

Since the Law Epis of January the 15th 2018, all staff members of Diplomatic Missions who do not have a privileged status by the Vienna Convention, are considered as private sector workers, included in Joint Committee N°337.

They can therefore benefit from all the rights granted by national Collective Labour Agreements (CLA), and those of this Joint Committee.

Within this Joint Committee, the Union Representatives and the Employers Federation have signed, on December the 6th 2016, a CLA on indexation.

This CLA states that :

- *Article 2 : Both the expected and actually paid wages, are linked to the health index established every month by the Ministry of Employment and Economy, and published in Moniteur Belge*
- *Article 4 : Each time that the health index reaches one of the threshold indexes, the amounts referred to in article 2 of the present CLA, are re-calculated by adding or withdrawing 2% (! Decrease can only happen in times of rude recession, author's note)*
- *Article 6 : the increase or decrease of salaries (...) shall apply from the first day of the second month following the month of index overpassing justifying the modification*
- *Article 7 : the coupling mechanism linking the 2 indexes does not apply if, at the moment of entry into force of the present convention, existed [within the organization]an internal system of indexation at least equivalent to the one established in the present CLA, granted by an internal CLA, by the règlement de travail, or by customs*



3) Concretely, what does it mean ?

It means that the October salary of all your non-diplomatic staff members (all staff except the bearers of D and C Protocol cards) must be increased of 2%.

The only exception to this rule is if your Diplomatic Mission already had a system of salary indexation since December 2016 at the latest, equivalent or better than the one established in the CLA of Joint Committee 337.

The Joint Committee has interpreted the CLA précisant that the pre-existing 'home-made' system has to be an indexation system, linked with the cost of life increase, and not

- A salary increase (in % or amount) due to salary scales based on seniority
- A salary increase (in % or amount) due to collective bargaining (salary revision)
- A salary increase (in % or amount) due to performance related mechanism

If you used to increase the salaries because of one of these 3 mechanisms, it does not exempt you from increasing the salaries in October, and every time there will be an indexation. This October indexation and the following are indeed compulsory.

And the labour law and law on contracts forbid you to reduce any of the other types of wages increase, in order to compensate or to pay indexation. Those mechanisms are cumulated with indexation, not deducted from it.

4) When will happen the next indexation after this one ?

According to the 'Bureau du Plan', December 2019 is the next time the health index will exceed the pivotal point index. Thus, the social benefits will increase of 2% in January 2020, and the salaries of your staff members will increase of 2% in February 2020.

If you have not applied indexation to the October salaries of your staff members, please regularize the situation as soon as possible, by paying backwards the indexation from October.

We can help you do so, please feel free to contact us.

It would be a pity, and it is not our wish, that we shall be forced to sue your Diplomatic Mission to the labour courts, in order to obtain the payment of this wage increase for your staff members. The justice, lawyers and procedure fees would be an unnecessary expense, while you can still regularize the situation with no additional costs.