



# Bird & Bird & Illness & incapacity

How to handle long-term sick employees?

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1 Figures on long-term sickness

2 Long-term work incapacity

3 Obligations of employees and employers

4 Relapses

5 Possibilities for employers



# Figures

## *Long-term sickness in Belgium*



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**53%** of Belgian employees have had a workplace absence of one month or longer

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**400,000** long-term absences in 2017

- **68.5% more** than 10 years ago

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**1/3** of cases are due to **psychological illnesses**

- Burn out, bore out, etc.

**Significant increase of (long-term) work incapacities**

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# Long-term work incapacity

## *Disadvantages for the company*

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- 1 No "immediate" additional cost but the absent employee stays on the payroll

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  - 2 Possible return, sometimes after years

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  - 3 Organisational disturbance (return, replacement, work atmosphere)

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  - 4 File summary proceedings and obtain Court injunction

# Long-term work incapacity

## *Actors*



Family  
doctor or  
personal  
physician



Prevention  
advisor or  
company  
physician



Medical  
advisor of  
the health  
fund



*Arbitrating  
physician (if  
views differ) &  
controlling  
physician*

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# Obligations of employees and employers

## *What to do in case of long-term work incapacity*

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### Employee obligations

- ✓ Notify the employer immediately (cfr. Working regulations)
- ✓ Valid medical certificate
- ✓ Controlling physician

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### Employer obligations

- ✓ Guaranteed salary (first 30 days)
- ✓ Respect the employee's right to privacy
- ✓ Reinstatement in previous tasks and benefits upon work resumption

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# Relapses

## *Succession of work incapacities*

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### - *without interruption(s)*

- Only one period of work incapacity
- No new guaranteed on each renewal

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### - *with interruption(s)*

- New work incapacity after work resumption
- New guaranteed salary (14 days of work resumption + other cause)

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# Possibilities for employers

## *Counter-examination by a controlling physician*



- Cannot be the prevention advisor – company physician



- Possible appeal of his decision on the work incapacity before an arbitrating physician



- Utility in case of long-term sickness? (e.g., burn out, bore out, etc.)

# Possibilities for employers

## *Reintegration process*



Prerequisite for termination  
by force majeure



At employers' initiative for  
work incapacities longer  
than 3 months

# Possibilities for employers

## *Reintegration process – reintegration assessment*



### ***Procedure (1)***

#### 1. Reintegration assessment (prevention advisor)

- Written report
- Examinations + consultations
- Possible decisions:
  - possibility or not to resume the (agreed) work
  - in the same tasks / adapted tasks / for other tasks OR
  - too soon to tell
- Deadline: 40 working days
- Appeal

# Possibilities for employers

## *Reintegration process – reintegration plan*



### ***Procedure (2)***

#### **2. Reintegration plan (employer)**

- Possible consultations
- Content:
  - description of the necessary accommodations / adapted work / other work / training (work volume, schedule, etc.) + plan duration
  - no specific form but several "musts"
- Deadlines

# Possibilities for employers

## *Reintegration process – implementation + examples*



### ***Procedure (3)***

#### **3. Implementation of the reintegration plan, unless**

- Employer refuses to prepare a reintegration plan:
  - Technically or objectively impossible; or
  - Cannot be carried out for duly justified reasons
- Employee refuses the reintegration plan

# Possibilities for employers

## *Reintegration process – implementation + examples*



### ***Procedure (3)***

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Example one: administrative employee



Example two: truck driver

# Possibilities for employers

## *Medical force majeure*



- Immediate employment termination without notice nor indemnity in lieu
- Only if reintegration process leads to:
  - Reintegration assessment: definitively unfit for work + avenues of appeal exhausted
  - Valid refusal to prepare a reintegration plan
  - Employee refuses the reintegration plan
- Challengeable in court by the employee

# Possibilities for employers

## *Dismissal (with notice or termination indemnity)*

### **Risks** (mutually exclusive)

#### **Discrimination on the basis of current or future health status**

(6 months' indemnity)

- ✓ Difference in treatment – Legitimate goal – means are fitting and necessary
- ✓ Burden of proof
- ✓ Case law: company organisational needs sometimes accepted as "legitimate justification"

#### **Blatantly unreasonable dismissal - CBA no. 109**

(3 - 17 weeks' indemnity)

- ✓ Grounds unrelated to (i) the employee's behaviour or capacities nor (ii) the business needs
- ✓ A reasonable employer would never have taken this decision
- ✓ Case law

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To avoid these risks:  
**Settlement agreement**

# Thank you & Bird & Bird

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