

## **LABOUR AGREEMENT**

### **1. Agreements for the performance of labour**

With regard to agreements for the performance of work against compensation, the Civil Code explicitly states three sorts of agreements. These are:

1. the agreement of contracted work;
2. the agreement for the performance of fixed service;
3. the working agreement.

#### **Contracted work**

The contract for work is an agreement whereby one party, the contractor, commits himself towards the other party, the contractee, to execute a fixed work of material nature for a specified price determined by the contractee; in this case one has a specific result in mind.

#### **Agreement for performance of fixed services (services rendered)**

In practice agreements for the performance of fixed services can fall under several categories (rest group).

It generally concerns the relation between a professional (e.g. lawyer, notary, accountant, guide, etc.) and his client. Plus all other sorts of agreements where there is work conducted but there is no work agreement (the authority element is absent), e.g. gardening, car-wash, etc.

#### **The working agreement**

The working agreement is an agreement whereby one party, the employee, commits himself to perform work in the employ of the other party, the employer, against wages during a fixed period of time.

If a person has worked for someone else for remuneration during three consecutive months for at least eight hours per week or at least 35 hours per month, it is assumed that a working agreement exists, unless the employer can prove otherwise. This folder only deals with the working agreement.

### **2. When does an agreement qualify as a working agreement?**

A working agreement should have the following elements in order to qualify as a working agreement:

#### **A. Wages**

## **B. Work**

### **C. Authority (supervision) element (in the employ of)**

**Ad A.** Wages are the agreed upon exchange of the employer for the work done by the employee.

Money (fixed amount, provision, share in the profit), food, work-clothes, production and use of housing can be elements of wages. The employer must take into account the provisions of the Minimum Wages Ordinance .

**Ad B.** The employee must perform the work; the work must be of value and must be performed by the employee himself; meaning no third party is allowed to perform the work.

**Ad C.** The employee is in the employ of the employer; the employer is authorized to execute authority; the employer is authorized to give orders (binding indications/ instructions); the employer is authorized to supervise the work.

The factual situation is decisive; not how parties call their relation towards each other.

### **3. The form / content**

The working agreement is form free, meaning that it can be concluded both verbally as in writing. However, for a number of provisions the written form is prescribed. The written form has preference over the verbal one with regard to the evidence possibilities; the costs are for the employers account.

In general the parties involved, when concluding a working agreement, will have to make arrangements concerning the duration, the nature of the work to be conducted, the position to be held, the salary, vacation, certain allowances, etc.

### **4. Trial period**

The parties involved can agree that the first two months (maximum) will be considered a trial period. During this trial period both parties have the right to terminate the agreement immediately without giving a reason. A trial period can be agreed upon only in writing. A trial period of more than two months is void.

### **5. Duration**

The service can be entered into for a fixed (e.g. one week, six months, one year, for the duration of the work, as long as the replaced employee is sick) or for a non-fixed period of time (the so-called "permanent service").

Since the coming into force of the Ordinance Flexibilization of the Labour legislation (August 1, 2000) it is no longer possible to extend labour agreements for a fixed time period indefinitely. Notice is no longer required for the termination (not between) of an extended temporary labour agreement, so the extended temporary agreement (up until

the third temporary agreement) also ends automatically.

However, after a series of four extended labour agreements in succession, with no more than three months between each, the fourth contract automatically becomes an agreement for an indefinite period ("permanent service"). The same applies if less than four fixed time agreements follow each other at less than three months intervals and these labour agreements combined (including the interruptions) exceed a 36 months period.

A labour agreement for a fixed period can only be terminated before it's ending date if both parties have agreed thereupon in writing.

The difference between a fixed and a non-fixed period of time is of importance, on the one hand for the way the service is terminated and on the other hand, for the prolongation of it. (see folders employee and dismissal and employer and dismissal).

## **6. Reward**

The employer has the obligation to pay the employee at least the hourly minimum wage.

Per August 1, 2001 the system of minimum wages was adapted in such a way that from this date only hourly minimum wages are applicable. For current minimum wages see folder 4: minimum wages.

In the new system minimum weekly wages are determined by multiplying the number of hours worked per week by the minimum hourly wage. Monthly wages are calculated by multiplying the hourly minimum wage first by the number of hours worked per week and then by 4.33 (see also the folder on minimum wages).

## **7. Payment which is due**

Wages fixed according to span of time (for example hourly-, weekly-, fortnightly-, monthly wage) are payable from the point of time when the employee entered service until the time of termination of the service relationship.

In principle the employer does not have to pay the employee his wages owed for the time during which the employee has not performed the stipulated work (no work no pay).

However, the employee retains his right to wages in case of:

a. Sickness or accident

If the employee is unable to perform his work due to sickness or accident, he will have to receive for a relatively short period (a couple of weeks) his full salary. Only by written agreement (e.g. collective labour agreement) one can deviate from this.

(Mind you: those who fall under the Social Security Bank (SZV) (these are persons who enjoy, as of 1-1-'12, a day's wages of max. fl. 191,20 for a 6-days workweek or a day's wages of max. fl. 229,44 for a 5-days workweek or a month's wages of fl. 4971,20) have a right to sickness benefits for a maximum of 2 years.)

b. Fulfilment of legal "duties"

If an employee is not able to work due to the fulfilment of a by general ordinance stipulated obligation, which could not be performed in his free hours (e.g. casting his vote, notification at the registrar's office), he will have to receive for a relatively short period, to be calculated according to fairness (= a couple of hours) his full salary.

c. Special circumstances

If an employee is unable to work due to special circumstances (e.g. the confinement of his wife, the death and burial of one of his housemates or his parents, grandparents, children, grandchildren, brothers and sisters), he will have to receive for a relatively short period, to be calculated according to fairness (= one of more days) his full salary.

In collective labour agreements these and other cases can be regulated more precisely under the heading: short absenteeism or extraordinary leave.

d. Employer's absenteeism

If an employee is willing to perform work, but the employer does not make use of this, then the employee has to receive full payment of his salary.

## 8. Overtime

The Labour Regulation 2000 distinguishes between scheduled workers and non scheduled workers. A scheduled worker is an employee whose working hours fall completely or partly outside the normal office (business) hours.

It is important to know whether an employee is a scheduled worker or not because different rules concerning working hours, rest time, overtime, etc. apply to both groups (see also the folder: flexibilization of the labour legislation).

Overtime can arise as a consequence of:

- work during the rest time/period;
- work that exceeds the maximum number of hours per day or per week.

### Overtime compensation

The compensation for overtime in case of:  
Compensation (incl. regular wage)

Exceeding the maximum number of hours (per day or after four weeks)  
150%

Overwork during breaks  
150%

Overwork on half day that the employee is free according to his work schedule  
175%

Overwork on day of rest  
200%

Overwork on public holiday  
250%

Overwork in combination with night duty (only for scheduled workers)  
175%

Employer and employee can agree in writing, that overtime instead of being compensated in money, will be partly or wholly compensated in time back, in proportion to the above mentioned compensation percentages.

For hotels, restaurants and casino's different rules apply. See the folder: labour ordinance hotels, restaurants and casino's.

Also for household personnel separate rules apply. For this group see the folder; flexibilization of the labour legislation.

## **9. Vacation**

In the Ordinance Vacation Regulation the minimum number of days of vacation per year is stated: three times the number of workdays stipulated per week.

So if somebody works 4 days a week, he or she is entitled to a minimum of  $4 \times 3 = 12$  paid days of vacation. However, if an employee works six days per week, he/she does not need to have more than 15 days of vacation, but more is allowed.

During the vacation the wages must be paid. Half of the vacation should be given jointly. Payment of the days of vacations, that have not been taken, is only allowed at the end of the working agreement. (see the folder: vacation and public holidays).

## **10. Termination of the working agreement**

The working agreement can be terminated in the following ways:

a. Mutual consent

Under certain conditions parties can agree on termination with mutual consent of the working agreement.

b. Death of the employee

The working agreement between an employer and an employee will terminate due to the death of the employee. However, the death of the employer does not terminate the working agreement.

c. When the time has elapsed

The working agreement with a fixed period of time terminates, insofar nothing else has been agreed upon, automatically when the time agreed upon has lapsed. This means that prior notice of termination is not needed, unless agreed upon. If the working agreement with a fixed period of time is prolonged tacitly or explicitly, prior notice of termination is not needed, this means that the prolonged (up and till the third) temporary working agreement terminates automatically.

d. Dissolution of the working agreement by court

The service can also be terminated because a judge has, at the request of one of the parties concerned, dissolved the working agreement on grounds of grave (important) reasons. The petitioner usually has to pay an indemnification to the other party.

e. Termination during the trial period

During the trial period the agreement can be terminated at any time, without being liable for damages.

f. Dismissal "on the spot"

Both the employer and the employee can terminate the service with immediate effect due to an urgent reason. The dismissal has to be "on the spot" (taking effect immediately) and the party concerned has to be notified immediately of the urgent reason.

g. Notification

The working agreement can be terminated by notification.

One has to take into account the day of notification and the terms for notification. The day of the notification (the day the agreement is terminated) is the day on which the working agreement ends as a consequence of notification (so this is not the day notification takes place). Nowadays notice can be given at any day unless parties have agreed differently in writing. The period of notice starts from the day notice has been given. So if the notice period is one month and notice is given on e.g. March 20, then the labour agreement has ended on April 21.

The period of notice the employer has to take into consideration depends on the duration of the employment:

- a. if the employment lasted less than five years: one month;
- b. if the employment lasted more than five years, less than ten years: two months;
- c. if the employment lasted more than ten years, less than fifteen years: three months;
- d. if the employment lasted more than 15 years: four months.

The period of notice for the employer may only be shortened through a collective labour agreement (CLA). The period of notice can be extended through a written agreement.

The period of notice for the employee (whether paid monthly, weekly or biweekly) is one month. This period can be shortened or extended through a written agreement. The notice period for the employee cannot be extended to more than six months.

On St Maarten employers in all industries need a dismissal permit for terminating employment.

## **11. The severance pay scheme**

An employee who has not caused the termination of his working agreement, is entitled to severance pay. The severance pay is an one-time payment calculated on the basis of the number of years of employment.

The severance pay scheme is as follows:

- for the first till the tenth year in service one week's wages per year of employment;
- for the eleventh till the twentieth full years in service one and a quart times the week's wages per year;
- for the following years twice the week's wages per year

(see the folder: severance pay after dismissal)