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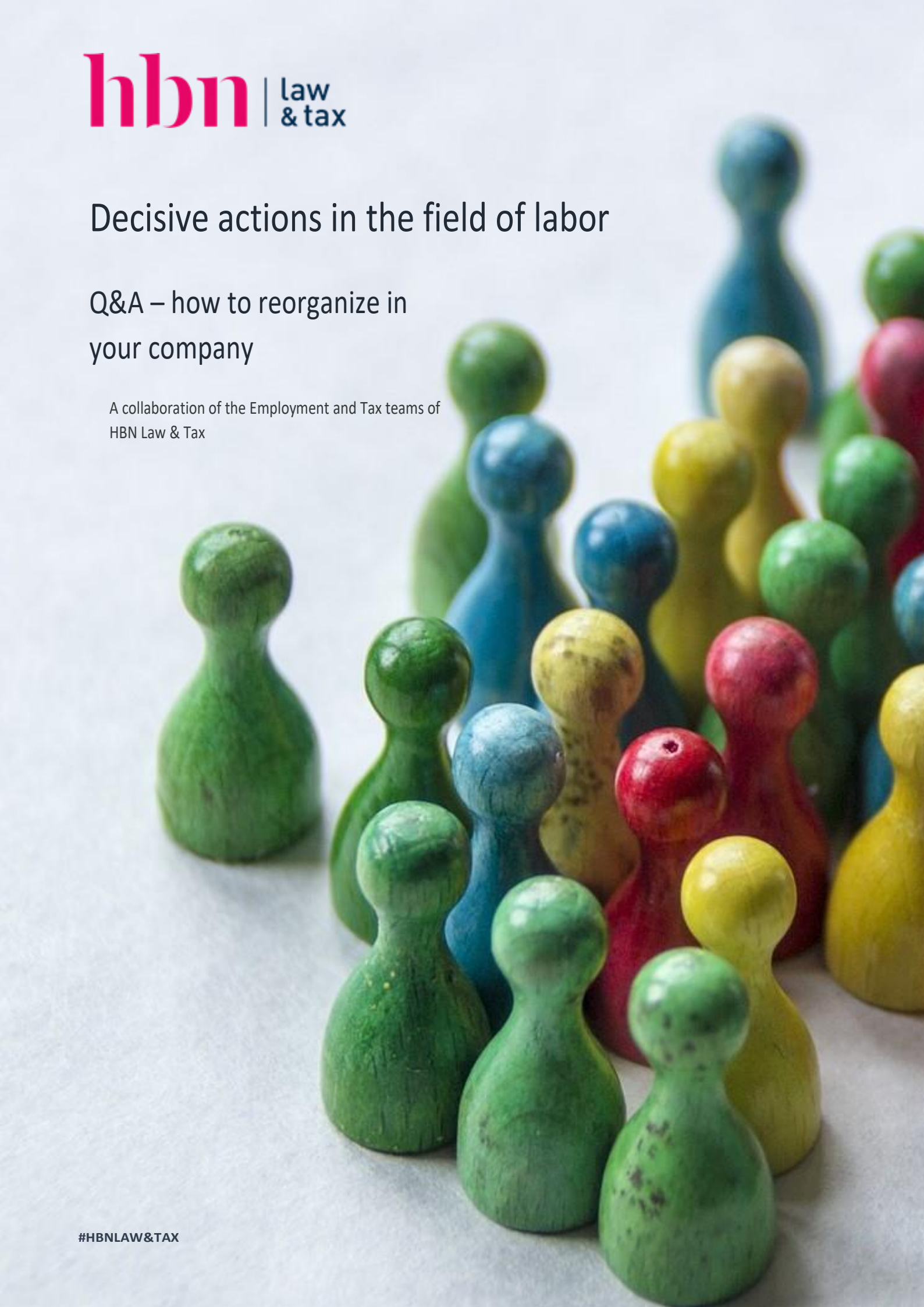
Decisive actions in the field of labor

Q&A – how to reorganize in your company

A collaboration of the Employment and Tax teams of HBN Law & Tax



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Since the outbreak of the corona virus, we have received various questions with regards to the possible consequences of the corona crisis on employment relationships. Despite the fact that the government of the Netherlands created the Emergency Measure on the Bridging of Employment (in Dutch: *de Noodmaatregel Overbrugging Werkgelegenheid*) ("NOW") to keep businesses and jobs afloat as much as possible, the crisis will inevitably lead to a loss of turnover and therefore employment. In these difficult times, companies wish to stay sustainable in the employment field. Therefore, we have summarized the most relevant and frequently asked questions in this document regarding reorganizing.

If you have any questions or should you wish to receive more information, please contact the attorneys and/or tax specialists from our Employment Law team and/or Tax team.

Sincerely,

On behalf of the Employment Law team and the Tax team
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REORGANIZATION

1. What does the term reorganization mean?

Reorganization literally means organizing and structuring a company again. The current work practices are (partially) set aside and/or exchanged with new work methods and practices with the purpose of having reduced costs, an improvement in efficiency and the right of number of employees who are better suited for the new structure of the company.

2. What are the reasons to reorganize a company?

There are several reasons why a company is reorganized. The most common reasons are:

- The company is suffering losses and the employer does not see any other way to save the company from suffering these losses (or it is expected that the company will shortly incur losses and the employer wishes to prevent said situation by reorganizing the company).
- There are technological developments which lead to new methods and, as a consequence thereof, every person within the company must and/or can work differently; or
- There is a reduction in work.

3. Are a reorganization plan and a timetable important when reorganizing a company?

Yes, it is important for you to have a detailed reorganization plan and a timetable. A reorganization requires a thorough preparation. This is definitely the case when you wish to lay off at least twenty-five (25) employees or more than twenty-five percent (25%) of the employees (provided that this percentage does not result in five (5) or less employees being laid off) in a company within a period of three (3) months. This is called a collective redundancy.

4. Am I obliged to first consult with the (representatives of the) employees in case I wish to file a dismissal application at the Labor Department?

We suggest that, in any case, you do so as there is a fair chance that the Labor Department will inquire with the employees whether you have consulted with them or their representatives already. Such obligation is also incorporated into the regulations of the Labor Department. In addition, it may be mandatory in the collective labor agreement to first consult with the trade union. If all employees (mutually) agree to your proposal regarding the reorganization of the company, then it is not necessary to file a dismissal application for a mass layoff at the Labor Department.

5. What does a dismissal application for business reasons entail?

To file a dismissal application, you must fill and complete an application form which must then be sent to the Labor Department. You must provide the Labor Department with the following information:

- Details of the employer;
- Details of the employee;
- The reason for dismissal;
- The detailed explanation of the business reasons;
- Applicable termination prohibitions (if any);
- Adherence to the order of dismissal; and
- The efforts taken to first re-assign/relocate employees.

6. Is a redundancy plan required in case of a collective redundancy or mass lay off?

Yes, it is required.

7. What are the requirements of a redundancy plan?

The redundancy plan must include dismissal regulations with possible specific arrangements with regards to temporary contracts and relocation schemes for expat employees. Furthermore, it must include a new job application procedure in case old functions are set aside and new functions are created which are better suited for the structure of the company and its financial situation in the future.

8. How to determine the severance pay for the dismissal regulations of your company?

Under the local laws there are two methods to calculate the severance pay: (i) "cessantia"; and (ii) the subdistrict court formula, which is often used in negotiations, also called the ABC formula. In addition, there may also be a dismissal arrangement in the (collective) labor agreement that applies. Our employment law attorneys can of course advise you further with regards to the most feasible method which can be applied to your case.

9. How to determine the "cessantia" amount?

"Cessantia" is payable if the employee has worked for the employer for at least one (1) full year and when the employment of the employee ends other than through his/her own fault or as a result of circumstances that are not under the employee's control. The employee will receive "cessantia" based on the actual total number of years which he/she has completed at the end of his/her employment contract. The "cessantia" amount is calculated as follows. For the first and up to and including the tenth (10th) full year of service the employee will receive one week's wages for each year of service. For the eleventh (11th) and up to and including the twentieth (20th) full year of service the employee will receive one and a quarter times the weekly wage for each year of service and for the subsequent full years of service, twice the weekly wage for each year of service.

10. How to calculate the amount of the severance pay based on the ABC formula?

This method can be used if the employee has worked for the employer for at least one (1) full year. The formula is based on the following:

Severance pay = A x B x C

A = number of "weighed" years of service;
B = the remuneration;
C = correction factor.

The A factor is not the actual years of service of an employee. It is the total amount of "weighed" years of service which is calculated on the basis of various factors including but not limited to the employee's age at employment and his/her age at the end of employment. The B factor does not only include the gross basic monthly salary of the employee. It also includes other fixed remunerations which the employee receives in a year such as bonusses, commissions, overtime pay, holiday allowances, et cetera. The C factor is a correction factor which makes it possible for parties to modify the amount of the severance pay after the A factor and B factor are calculated. If the correction factor is less than 1.0, then the amount of the severance pay will be low(er). If it is more than 1.0, then the amount of the severance pay will be high(er).

11. Can HBN Law & Tax provide my company with an overview of all possible outcomes based on both calculation methods?

Yes. We can do so relatively quickly after receiving the following information on the employees:

- Names;
- Dates of birth;
- The dates of employment;
- The (expected) dates of termination of employment;
- The gross basic salary;
- The other remunerations (such as holiday allowances, bonusses, overtime pay etc.) in a year.

For assistance in this regard you can contact us via helpdeskcorona@hbnlawtax.com.

12. Is it possible to limit the amount of severance pay for almost pension beneficiaries?

Yes. However, this can only be done under certain conditions. Those conditions are further elaborated on the basis of the circumstances of each case, including the applicable occupational retirement conditions.

13. What is the definition of the term "almost pension beneficiary"?

That depends in principle on the internal regulations of your company. You must assess in each individual case which pension date is considered to be plausible based on what is commonly used for example within a certain branch or (a group of) companies.

14. Can I, as an employer, determine which employees will be dismissed?

In principle, it is not possible. You must take into account the requirements of the "reflection principle" (in Dutch: *afspiegelingsbeginsel*). This means that employees with interchangeable positions will be divided in various age groups. Within every age group you must determine which employee has been employed on a later date. The employees who are employed later must be dismissed first (in accordance with the "last in first out" principle).

15. Can I determine the age groups?

No. The age groups are fixed:

i. From 15 up to and until 24 years;
ii. From 25 up to and until 34 years;
iii. From 35 years up to and until 44 years;
iv. From 45 up to and until 54 years; and
v. From 55 years and above.

16. Is it possible to deviate from the "reflection principle"?

Yes. However, this can only be done under certain conditions. This is the case if for example a certain employee is considered to be indispensable for the company. An indispensable employee is someone who has the knowledge and skills which are essential for the operation of the business of a company. If there is such an employee, then you can put forward another employee who will be dismissed instead. Please note that in such case you must provide a proper explanation with regards to the reasons on the employee being an indispensable part of your company.

17. My company has branches on other (Dutch) Caribbean islands as well. Do I include all employees of all the branches to the total number of employees to be dismissed when requesting a collective redundancy?

No. The total number of employees to be dismissed when requesting a collective redundancy is calculated per branch.

18. Are employees, who have agreed upon singing a mutual termination agreement, included in the total number of employees to be dismissed when requesting a collective redundancy?

No. Only employees who are to be dismissed (for business reasons) without signing such an agreement are included.

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