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AMENDMENTS TO LABOR LEGISLATION ARUBA

On April 1, 2013, some amendments were introduced to Aruban labor legislation. It concerns amendments to the Civil Code of Aruba, the Labor Ordinance, the National Ordinance on the Assignment of Workers (temporary employment agencies), the National Ordinance on Minimum Wages, and the National Ordinance on the Administrative Enforcement of Legislation.

Below you will find a summary of the most important amendments. Please note: it concerns amendments; all provisions already existing remain in force. This memo serves as a general guideline and cannot be considered an advice in specific situations.

Civil Code of Aruba

Employees can no longer be considered on-call workers, if there is a presumption of the existence of an employment contract. The following criteria apply to this:

- the employee has been working for three months, and
- works at least 20 hours per week, or
- at least 80 hours per month.

Even if these criteria are not fulfilled, it can be determined, based on reasonableness and fairness, that there is question of an employment contract.

Employers can no longer unilaterally modify the employment contract, for instance by reducing the number of hours to be worked and the salary during low season. The employee has to agree to this in writing.

If an employment contract has been/is entered into after April 1, 2013, it is possible to agree that the contract will end when reaching retirement age (currently 60 years). In all other cases, the contract will remain in force after reaching retirement age.

It is possible to enter into an employment contract for a definite period with a pensioner, if this is agreed on in writing.

A trial period (usually two months) can only be agreed on in writing and should be the same period for both parties.

Notice of termination of an employment contract can only be given before the 1st day of the following month (or: if one gives notice of termination on the 15th, the notice period will not take effect as of the 16th, but only as of the 1st of the following month).

- The notice period for the employer is one month per five years' employment up to a maximum of four months; the notice period for the employee is one month.

The employer cannot give notice to terminate the employment contract in the following cases:

- occupational disability (during one year);
- maternity leave, plus six weeks after the leave;
- transfer of the enterprise (new owner/shareholder(s) or other company);
- refusal of the employee to work on a Sunday (if this is not a regular workday for the employee);
- marriage of the employee;
- pregnancy (and childbirth) of the employee;
- membership of a labor union.

In case of occupational disability, the employer is obligated to pay 100% of the salary for at least six weeks. The Department of Labor & Research ('DAO') can fix a longer period based on age, the nature of the occupational disability, and the duration of the employment. After six weeks, the employer can pay 80% (if the employee is covered by the health insurance of the 'SVb' [Social Insurance Bank] or discontinue the payment of the salary (if the employee earns more than the maximum amount of the health insurance).

If, within four weeks after having been fit for work, an employee becomes unfit for work again because of the same disease, the new period of sickness will be added to the previous period, meaning that a new period of 100% payment during six weeks will not start again.

In case of sickness, the employer does not have to pay any wages, if:

- the sickness was caused intentionally (for instance, drugs or alcohol);
- incorrect information was intentionally provided about physical disorders;
- the sickness procedure rules have not been complied with (SVb or company regulations);
- the employee impedes his recovery;
- the employee has been suspended (this must have been agreed on in writing in the contract, the company regulations, or a collective labor agreement).

In other words, the employee should, in fact, prove that he or she is sick ('ao'). If an occupational physician declares him or her fit for work, and the employee does not come to work, the employer is not obligated to pay wages, irrespective of the decision of the SVb physician.

If the occupational disability lasts longer than one year and it concerns the same sickness, the employer may apply for a dismissal permit to DAO. An exception to this is occupational disability caused by pregnancy and childbirth.

A male employee is entitled to two days' paid paternity leave, to be taken within four weeks after the baby has arrived home, provided he is married or has a long-term (at least one year) cohabitation with the mother.

At least the minimum salary must be paid to on-call workers. Furthermore, the salary should at least be the average of the past three months.

Each call should be paid for at least three hours, even if the on-call worker worked less than three hours.

If an enterprise changes owner, or if the employees are transferred to a new enterprise, the employment contracts will remain in force. The former employer will continue to be jointly and severally responsible, in addition to the new owner, for the fulfillment of the obligations to the employee(s) from before the takeover during a period of one year.

In case of a takeover after a bankruptcy, the buyer is obligated to make strenuous efforts to offer an employment contract. The conditions may be worse, and a change of position is possible in that case.

During each salary payment, the employer is obligated to issue a salary slip. In case of termination of the employment, the employer is obligated to issue a testimonial. The employer may only state the reason of termination and information about the performance of the work by the employee, if the employee agrees to this.

When entering into an employment contract, as regards the conditions to be stipulated, in case of promotion, and in case of giving notice of termination, no discrimination based on the gender of the employee may take place (discrimination prohibition).

- Exceptions are: if the position is gender-specific (an actor that has to play a father cannot be a female), or if an affirmative action policy should be pursued to promote equality).
- The employer is obligated to see to it that the employee is not exposed to sexual harassment, insult, humiliation, and threats with regard to his or her gender.

Contracts for a definite period may be terminated prematurely, if this has been agreed on in writing and it applies to both parties. If this has not been agreed on in writing, the employer is obligated to continue paying the full period agreed on, even if the employee no longer performs any work.

If two contracts for a definite period follow each other within a period of three months, and the contracts, including the intervening period, exceed a period of 36 months, the final contract is considered a contract for an indefinite period, which should be terminated by DAO, if necessary.

National Ordinance on the Assignment of Workers (temporary employment agencies)

This National Ordinance mainly entered into force to bar so-called labor-only subcontractors who do not pay any social insurance contributions. The National Ordinance provides for inter alia the following:

- A temporary employment agency requires a permit from the Minister of Labor to be allowed to act as a temporary employment agency. DAO will decide.
- The main objective of the company should be the supply of workers.
- A temporary employment contract is considered an employment contract between the temporary employment agency and the temporary employee.
- The Civil Code applies to the relationship between the temporary employment agency and the temporary employee.
- Persons who have (require) a permit may not work as a temporary employee.
- A worker may not be assigned to a job longer than twelve months (this will become effective as of July 1, 2013).
- The salary of the temporary employee should be equal to the salary of the permanent employees of the company as much as possible.

Labor Ordinance (new)

The Labor Ordinance does not apply to employees earning more than twice the gross minimum wages per month (currently more than AWG 3,273.40 per month). Furthermore, the Labor Ordinance does not apply to inter alia civil servants.

The normal maximum working hours have been set at:

- six days per week: 45 hours per week / eight hours per day at most;
- five days per week: 40 hours per week / eight hours per day at most;
- four days per week: 36 hours per week / nine hours per day at most.

This does not yet apply to the hospitality industry and casinos! The Casino and Hospitality Industry Decree will be rewritten and become effective as of January 1, 2014.

A request for longer working hours during a certain period can be submitted to DAO, if necessary for reasons of efficient business operations. The maximum workweek can be extended by a maximum of four weeks up to a maximum of 60 hours (including overtime).

Rest periods regular working hours:

- between 00:00 a.m. and 06:00 a.m. (used to be between 06:30 p.m. and 06:00 a.m.);
- at least 1.5 days per week (not necessarily consecutively) per week (used to be 'Sunday');
- public holidays and remembrance days (used to be 'days considered equivalent to a Sunday');
- for enterprises with closing hours (such as stores) the rest period will start 30 minutes after closing;
- working during a rest period is overtime!

Rest periods for shift workers:

- between 00:00 a.m. and 06:00 a.m.;
- 1.5 days per week (not necessarily consecutively) per week according to work schedule, including at least one Sunday per month;
- at least five public holidays or remembrance days per year;
- for enterprises with closing hours (such as stores) the rest period will start 30 minutes after closing;
- working during a rest period is overtime!
- changes to the schedule should be communicated to the employee(s) at least 48 hours in advance.

Employees with normal working hours of more than six hours per day should be able to take a break of at least half an hour after five hours. A break of less than 15 minutes is not considered a break.

Working during a break is overtime!

Stand-by or on-call employees are obligated to be reachable.

- Stand-by/on-call hours worked should be considered overtime and be paid accordingly.
- At least 30 minutes have to be paid per call. If the employee is called again within 30 minutes after the end of the call, the working hours are considered to have continued.
- Stand-by or on-call employees are entitled to payment of at least 1% of their gross monthly wages per day.

Exceptions as regards workweek and rest periods are made for continuous operation companies (refineries, hospitals, etc.):

- the rest period between 00:00 a.m. and 06:00 a.m. does not apply;
- 0.5 day off per week does not apply;
- a minimum of five public holidays and remembrance days off does not apply;
- mandatory break after five hours worked only applies, if the service so permits;
- one Sunday off per month is mandatory;
- the maximum workweek is 60 hours, including overtime;
- the 'normal' labor rules apply to employees with a normal workweek within a continuous operation company (such as administrative staff).

There is question of overtime, if

- it concerns work outside the regular working hours;
- the employer gives an assignment;
- the work has to be performed expeditiously and this can be demonstrated.

An employee may not work more than 55 hours per week and 12 hours per day, including overtime.

The overtime percentages to be paid are as follows:

- after working hours: 150% (working hours are: the regular working hours of the employee during that day);
- during the employee's break: 150%;
- during the half day of rest: 150% (after January 1, 2014: 175%);
- during the full day of rest: 200%;
- during a public holiday or a remembrance day: 200% (after January 1, 2014: 250%);
- overtime up to 15 minutes is not considered overtime; overtime as of 15 minutes should be rounded to 30 minutes. Overtime is always rounded upwards to half hours (20 minutes is 0.5 hour of overtime; 45 minutes is one hour of overtime);
- if overtime is worked on a day of rest, at least three hours x [...] % should be paid;
- if an employee has worked more than ten hours per day, he or she is entitled to a hot meal or a meal allowance, and any additional transportation costs incurred in connection with the overtime have to be compensated.

Time back is only possible if this has been agreed on in writing with the employee. Time back should be calculated based on the overtime percentages.

National Ordinance on Minimum Wages

The minimum wages apply to a 40-hour workweek, meaning that they should be converted on a pro-rata basis, if, for example, the employee has a 45-hour workweek. The basic salary may not be supplemented anymore with, for example, commissions, service charge, and tips to arrive at the minimum wages. Therefore, the basic salary must be at least the minimum wages.

National Ordinance on the Administrative Enforcement of Legislation

This National Ordinance stipulates that the Department of Labor & Research is authorized to inspect and impose sanctions.

In general, the above can and may be deviated from by a collective labor agreement or company regulations.

