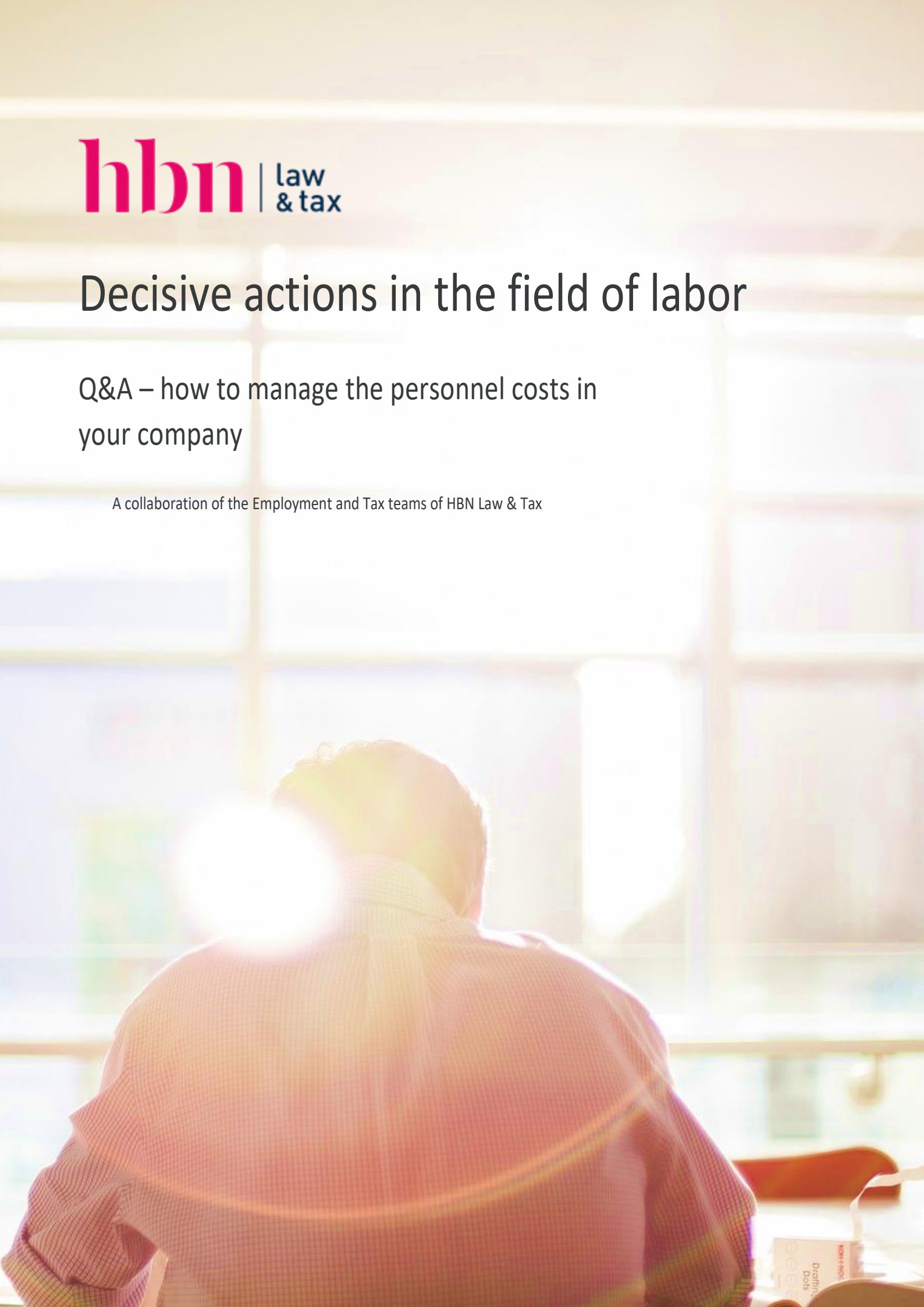
Decisive actions in the field of labor

Q&A – how to manage the personnel costs in your company

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



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 Aruba created *Fondo di Asistencia Social di Emergencia* and the subsidy scheme 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 this matter.

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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AMENDING EMPLOYMENT CONDITIONS

1. The labor costs are too high in comparison to the (expected) turnover of the company, what are my options?

Firstly, it is important to set forth the (expected) turnover and the labor costs associated with said turnover. When this becomes clear, it is advisable to discuss the adjustment of labor costs to the new reality with the employees and/or the employees' representatives. If the latter does not lead to the desired effect, you can – under certain circumstances - consider requesting the court to amend the terms of employment.

2. How do I approach the employees?

In such cases a thorough preparation is important. Employees will understand the matter if you set forth a detailed explanation of the financial situation of the company, the exact amendments with regards to the labor costs and/or other employment conditions and the expected duration thereof. It is also advisable to mention to the employees that the proposed amendments are important as they can prevent or lead to less dismissals.

3. Am I obliged to discuss the matter with the trade union if a collective labor agreement is applicable to the employment relationship?

Some collective labor agreements include an obligation to consult with the trade union. In such case, it is advisable to first discuss the matter with the trade union in any case if said trade union is party to the collective labor agreement. If there is no obligation to consult with the trade union or if the trade union is not very cooperative in this regard, then it is advisable to (also) approach each employee individually. We suggest that you contact an employment law specialist to discuss the matter in this regard before taking any further steps.

4. Does it matter which employment conditions are amended?

Yes. Amendments with regards to (for example) the basic salary of an employee will have an effect on the employee's bonus, holiday allowance, premiums etc. In addition, the taxes which apply to each employment condition can also play an important role in this regard. Our tax experts can of course provide you with more information.

5. How can I amend the labor costs without the consent of my employees?

The requirements of good employer (in Dutch: *goed werkgeverschap*) and employee practice and the principle of reasonableness and fairness form an important basis for an amendment of the contractual terms and conditions as agreed upon by and between the employer and the employees. The employee is in principle obliged to accept the proposed amendments with regards to changes in work circumstances made by the employer insofar as these amendments are reasonable. However, in some cases the employee cannot be reasonably expected to accept the proposed amendments.

Whether the proposed amendments are reasonable depends on each individual case. We suggest that you contact an employment law attorney before proceeding in this regard.

6. The employment contract includes a unilateral change clause. Can I freely make use of it?

No, a unilateral change clause is void and null in Aruba based on article 7A:1613h of the Civil Code and can't therefore be used.

7. The employment contract includes a clause with regards to unforeseen circumstances. Is this clause applicable?

This depends on how the clause is phrased in the employment contract. According to case law the Corona virus is considered to be an unforeseen circumstance for contracts which were concluded at least before January 1, 2020. In case such a clause is included in the contract, it means that parties have foreseen the circumstance and it is in fact not considered to be an unforeseen circumstance within the scope of the Aruba Civil Code. Whether said provision is applicable in this situation and whether the employees' rights must be set aside due to the applicability of said provision, must be assessed on a case-by-case basis.

8. What can I do if the consultations with the (representatives of the) employees are not successful?

You can approach the Court of First Instance. The Court will assess whether the proposed amendments with regards to the employment conditions are reasonable and fair and whether said amendments must be accepted by the employees. If this is the case, the employment conditions can be amended accordingly.

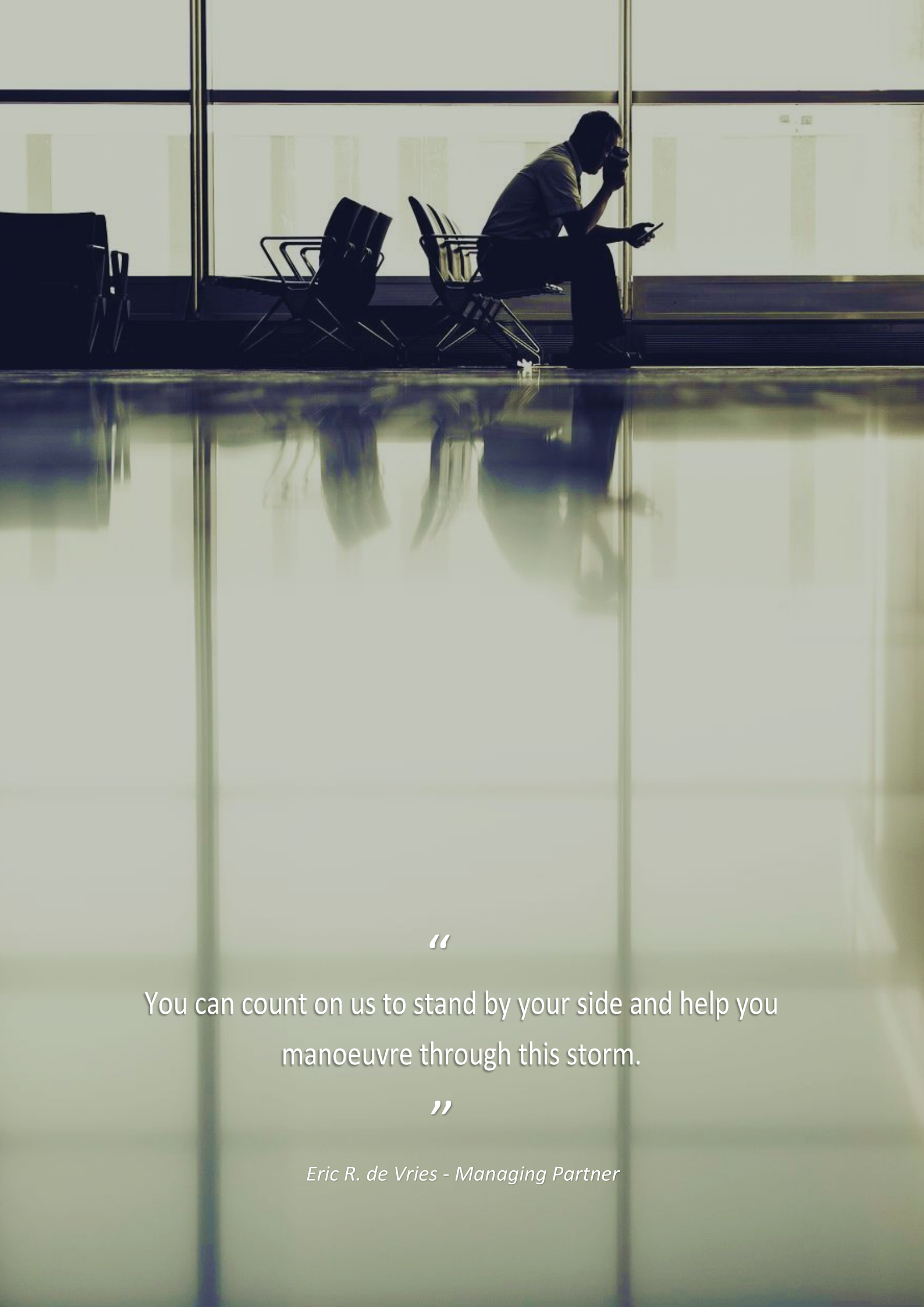
9. What is a reasonable proposal?

This depends on each individual case. As an employer you must take certain aspects into account such as:

- is the proposal to intervene in the terms of employment a last resort and proportionate, or could there be less drastic cuts elsewhere?
- Will there be less dismissals as a result of the amended employments conditions?
- If the employments conditions are not amended, will the company become bankrupt?
- Have you followed the principle of "a good employer" in the negotiation process (e.g. obligation to inform etc.)?

10. I have reached an agreement with the employees. Am I required to offer them a new employment contract?

If you have reached an agreement with the employees with regards to the amendment of certain employment conditions, we suggest that you include them in a separate agreement. If you wish so, we can send you a standard draft of such an agreement which you can use in such cases.



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”

Eric R. de Vries - Managing Partner

DISMISSAL PROCEDURE

1. Is it possible to terminate the employment agreement by giving notice without the approval of DAO?

An employer is only able to terminate the employment agreement by giving notice after receiving the approval of the Director of DAO to do so. If the employer has the approval of DAO to terminate the employment agreement, the employer (still) needs to adhere the conditions as set forth in the Civil Code. No approval of DAO is needed in the following situations:

a. instant dismissal;
b. termination by mutual consent;
c. termination during the trial period;
d. termination as a result of the bankruptcy of the employer;
e. termination of the employment agreement for a definite period of time at the end date;
f. while using a resolutive condition;
g. termination by the courts.

2. Can I, as an employer, apply to dismiss an employee for business reasons at the Labor Department ("DAO") despite the fact that I am using the benefits of the subsidy scheme?

No, employers who receive the benefits under the subsidy scheme are obliged to pay all their employees who are registered with SVB as long as said scheme is being used. They may not file any application to dismiss their employees.

3. Can I, as an employer, file a dismissal application at DAO if I am not eligible to receive the benefits of the subsidy scheme?

Yes, but the Minister of Labor and Social Affairs has announced that no dismissal permits will be granted at this moment of time. However, the expectation is that the Minister will start granting its permission for dismissal permits on a relative short term. This will possibly happen with additional conditions to the granting of such permission.

4. Can I file a dismissal application at DAO in case I am eligible to receive the benefits of the subsidy scheme without in fact applying for it?

After the Minister starts granting its permission for dismissal, then there is in our opinion, if you choose not to apply for the subsidy scheme, no impediment to file a dismissal application at DAO and receive a dismissal permit. However, please note that you must provide DAO with a detailed explanation of the reasons for not applying for the subsidy scheme and that this financial support could not have prevented the dismissal application.

5. Is it advisable to set aside the subsidy scheme and already start reorganizing the company instead?

Yes, might be advisable as soon as the Minister of Labor and Social Affairs issues instructions that dismissal permits can be

issued again. This is mainly the case if you already know that the consequences of the crisis will affect your business operations for a longer period of time, even after the disappearance of or despite the subsidy scheme.

6. Which documents are necessary for the dismissal application for business reasons at DAO?

The employer must provide DAO with a detailed explanation of the (bad) financial situation of the company which is considered the main reason to lay off the employee(s) in question. It is advisable to provide the annual accounts, orderbooks, turnover data and audit reports of the company and the financial expectations of the company to prove its (weak) financial position.

7. Is it possible to submit the necessary information and supporting documents (as requested in the application form) at a later stage in the dismissal procedure?

No. The employer is based on the regulations of DAO obligated to submit the necessary information and supporting documents in the initial request. The dismissal request is not considered to be submitted in case the necessary information and supporting documents (as requested in the application form) have not been added to said request.

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

We suggest that, in any case, you do so as there is a fair chance that DAO 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 DAO.

9. Which grounds are valid for dismissals based on business reasons?

- A bad or worsening financial situation of the company;
- Reduction of work;
- Organizational and/or technical developments within a company;
- (Partial) cessation of business activities or operations;
- Company relocation.

10. Is it possible to file a dismissal application for business reasons at the Court of Instance of Aruba instead of DAO?

Yes, that is possible. In such case, you can a file a petition to terminate the employee's employment contract. In principle, most dismissal applications for business reasons are filed at DAO. However, there are various reasons which make it more feasible for an employer to file the dismissal application at the Court of First Instance instead of DAO. Our employment law

attorneys can of course advise you further in this regard. In this Q&A we will further discuss filling dismissal applications at DAO.

11. What is the dismissal procedure at DAO?

The employer must first submit a reasoned request for permission to grant dismissal to DAO. There are special forms for this, available from DAO. A DAO official then calls on the employee to put forward a defense against the request. After this, the employer will be approached to comment on the defense. Finally, the employee gets another chance to respond to the employer. The "adversarial process" phase takes place in writing. The officer handling the case draws up a file. DAO sends this file to the dismissal committee. This committee, which is made up of 3 employer and 3 employee representatives, usually meets once a week to advise the Director of DAO on the requests for permission to grant dismissal. The latter can then issue a dismissal permit or refuse the dismissal permit. The decision is communicated to the employer and employee (s) by means of a written decision.

12. Are the same terms applicable in case of collective redundancy?

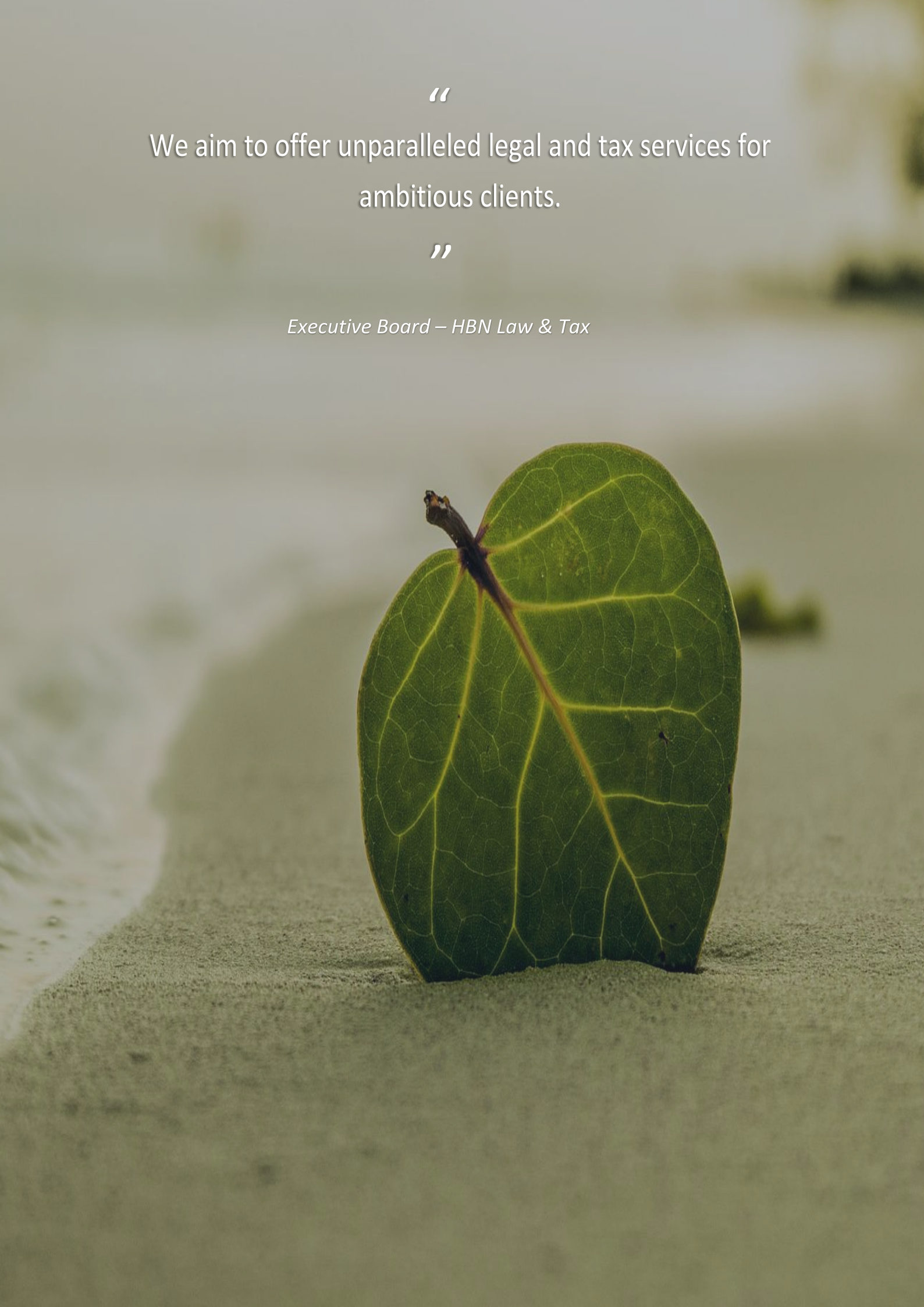
No. If an employer wishes to apply for a collective redundancy, then he/she is obliged to inform DAO at least two (2) months prior to terminating the employees' employment contracts. According to article 5, paragraph 2 of the National Ordinance on the Termination of Employment Contracts, the employer must provide DAO with a redundancy plan within eight (8) days after informing them regarding the collective redundancy.

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

Yes, it is required.

14. 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.



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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. 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 DAO. You must provide DAO 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.

5. 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.

6. 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 (10^{th}) full year of service the employee will receive one week's wages for each year of service. For the eleventh (11^{th}) and up to and including the twentieth (20^{th}) 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.

7. 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 holiday allowances, bonusses, commissions, overtime pay, 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).

8. 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.

9. Is there a special tax treatment of cessantia and how is it taxed?

Yes. The employee has the right - and the employer shall not inhibit the employee - to conduct a discussion on his income tax consequences with the tax authorities, to submit requests for a special tax rate regarding his income tax consequences with the tax authorities, to take (a) position(s) in his income tax return and to appeal to income tax assessment(s). The special tax rate is for Aruba is 25%.

10. Is the cessantia payment subject to social security premiums?

Yes, the cessantia payment is subject to social security premiums.

11. Are there other possibilities to provide a tax benefit?

There is also a possibility for the ex-employee to use the severance payment to set up an “Stamrecht BV” or the severance payment to be transferred to a local insurance company. HBN Law Tax can provide assistance in this regard.

12. Might it be possible to form a (Corona) provision for entrepreneurs for the 2019 financial year?

In Aruba, there is no possibility for entrepreneurs to claim a carry back for tax losses, neither under the income tax act nor the profit tax act. It therefore may be considered to include a cost item in 2019 by means of a Corona related provision. This provision may subsequently be released in 2020, the time that the Corona crisis crystalizes. By doing so the taxpayer lowers its (profit) income tax burden for the year 2019. Under certain circumstances, a provision may be formed for this. HBN Law Tax can provide assistance in this regard.

13. 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.

14. 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.

15. 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).

16. 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.

17. 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.

18. 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.

19. 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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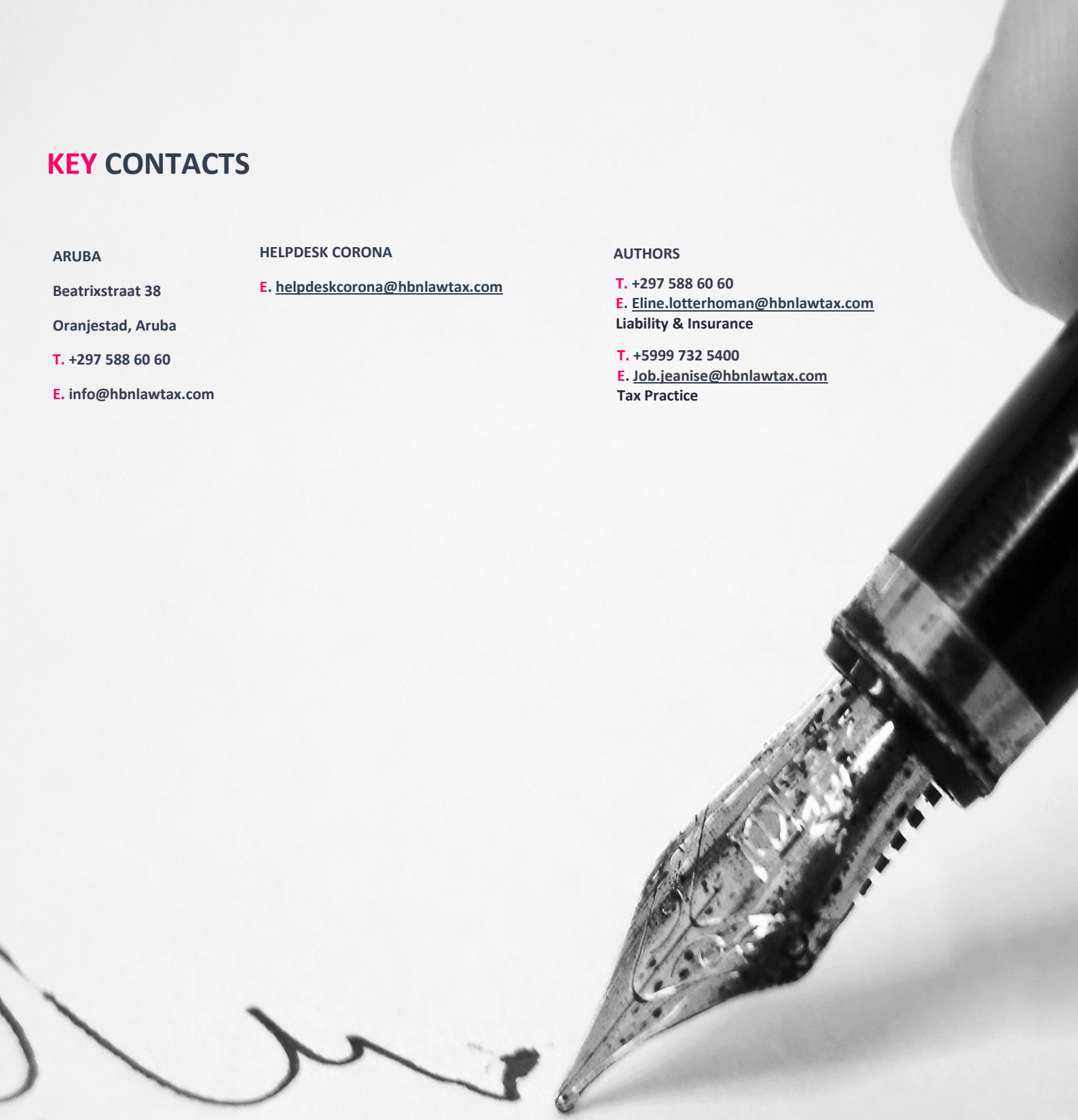

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