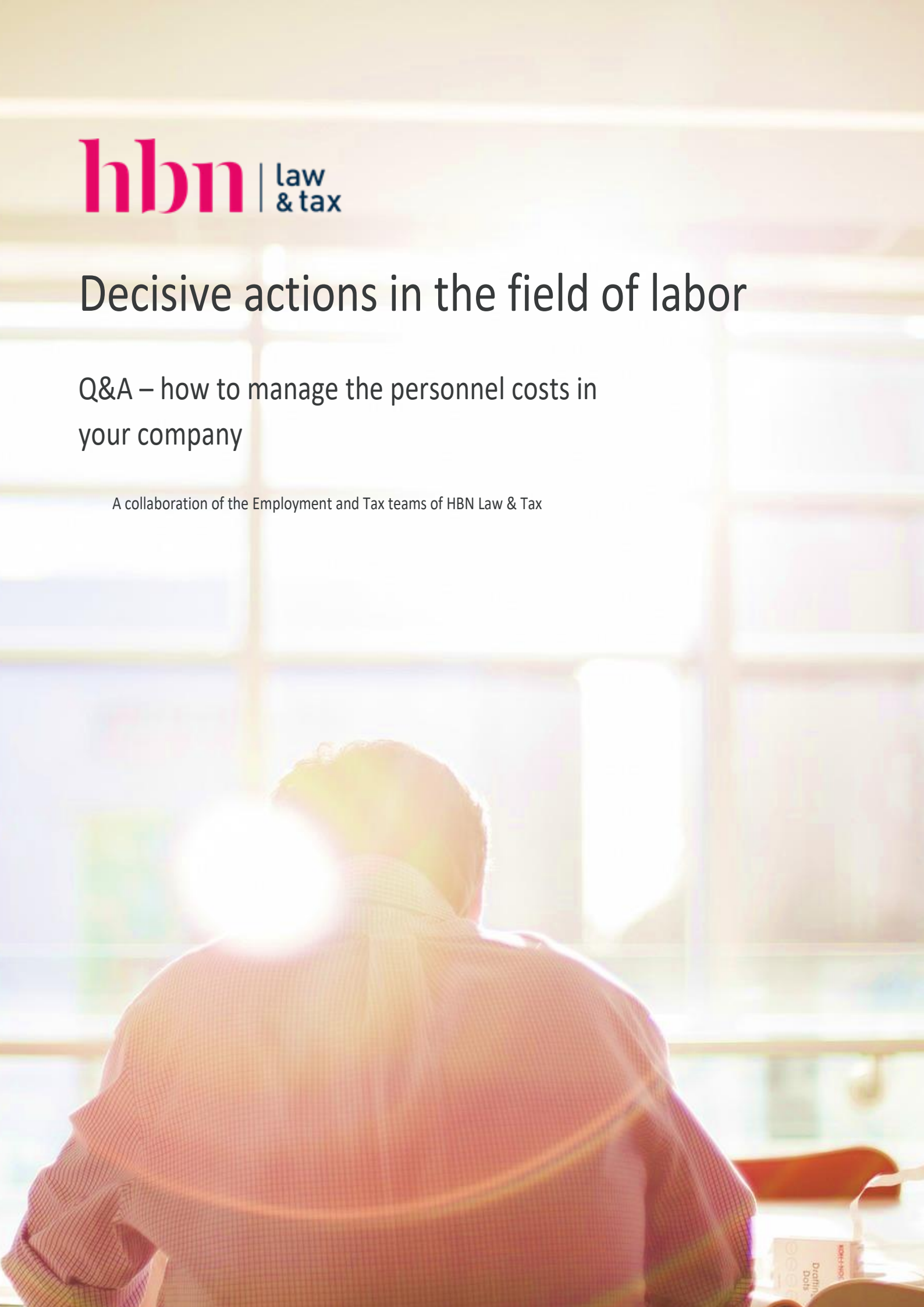
Decisive actions in the field of labor

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 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 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
Lucas Drissen | Attorney

E. Lucas.drissen@hbnlawtax.com

T. +(599) 717 6944

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 amendment of the terms of employment unilaterally.

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. Despite the fact that an employment contract includes a unilateral change clause, the employer must take into account the principle of reasonableness and fairness. This means that the employee is not obliged to accept the proposed amendments if said amendments are not reasonable and fair.

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 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.

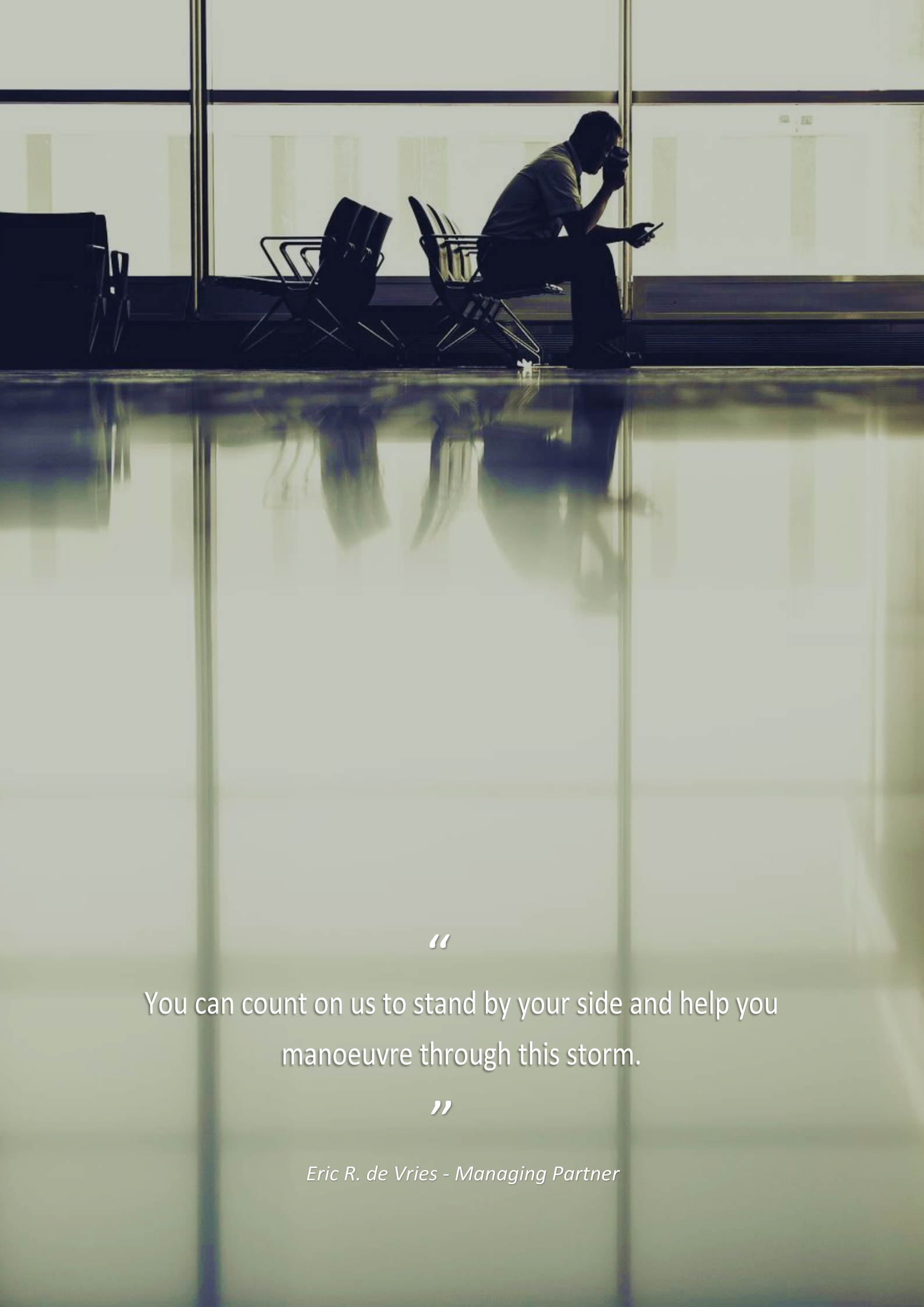
9. What is a reasonable proposal?

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 the Labor Department?

An employer is only able to terminate the employment agreement by giving notice after receiving the approval of the Director of the Labor Department to do so. If the employer has the approval of the Labor Department to terminate the employment agreement, the employer (still) needs to adhere the conditions as set forth in the Civil Code. No approval of the Labor Department 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. Is it correct that the Labor Department didn't gave its approval for termination of the employment agreement based on business reasons which are a result of the corona crisis during NOW 1.0 and 2.0?

Yes. In article 21 of the relevant regulation of the NOW 1.0 and 2.0 is incorporated that the Labor Department will not approve a request of terminating an employment agreement based on business reasons if those reasons are a result of the corona crisis or the related (governmental) measures.

3. Will the Labor Department grant its permission to may terminate the employment agreement based on business reasons which are a result of the corona virus during NOW 3.0?

Yes, in the explanatory notes of NOW 3.0 is incorporated that the Labor Department will start approving such requests as off October 13, 2020.

4. Which documents are necessary for the dismissal application for business reasons at Labor Department?

The employer must provide the Labor Department 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.

5. 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 the Labor Department 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.

6. 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.

7. 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.

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

9. Is it possible to file a dismissal application for business reasons at the Court of Instance of Bonaire instead of the Labor Department?

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 the Labor Department. 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 the

Labor Department. 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 the Labor Department.

10. What is the dismissal procedure at Labor Department?

If the dismissal application is accepted by the Labor Department it will be sent to the employee. The employee has five (5) working days to submit a defense. If necessary, the employer can respond the employee's defense which is followed by the possibility for the employee to comment on the employer's response. Within two (2) weeks of receiving the last documents, the Dismissal Committee will give its advice to the Director of the Labor Department. The Director of the Labor Department then has to (2) weeks to take his/her decision with regards to the dismissal. In principle, the Labor Department must take its decision with regards to the dismissal within eight (8) weeks of receiving the dismissal application. However, this time frame can be extended.

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

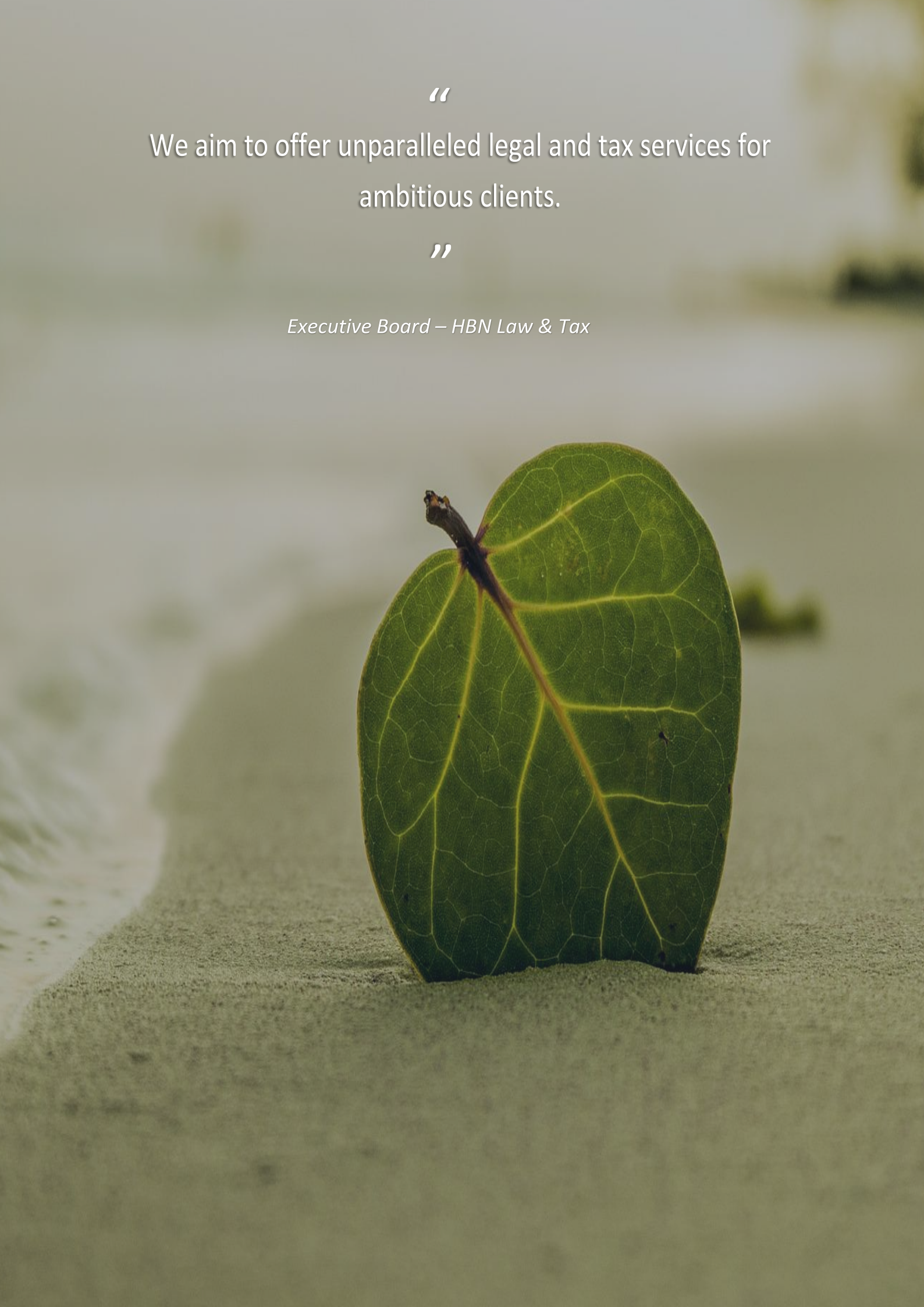
No. If an employer wishes to apply for a collective redundancy, then he/she is obliged to inform the Labor Department at least two (2) months prior to terminating the employees' employment contracts. According to article 5, paragraph 2 of the Termination of Employment Contracts Act BES, the employer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

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

Yes, it is required.

13. 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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Executive Board – HBN Law & Tax

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 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.

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 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).

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 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.

10. 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.

11. 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).

12. 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.

13. 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.

14. 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.

15. 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.

KEY CONTACTS

DUTCH CARIBBEAN

Bulevar Gob. N. Debrot 20

Kralendijk, Bonaire

T. +599 717 69 44

E. info@hbnlawtax.com

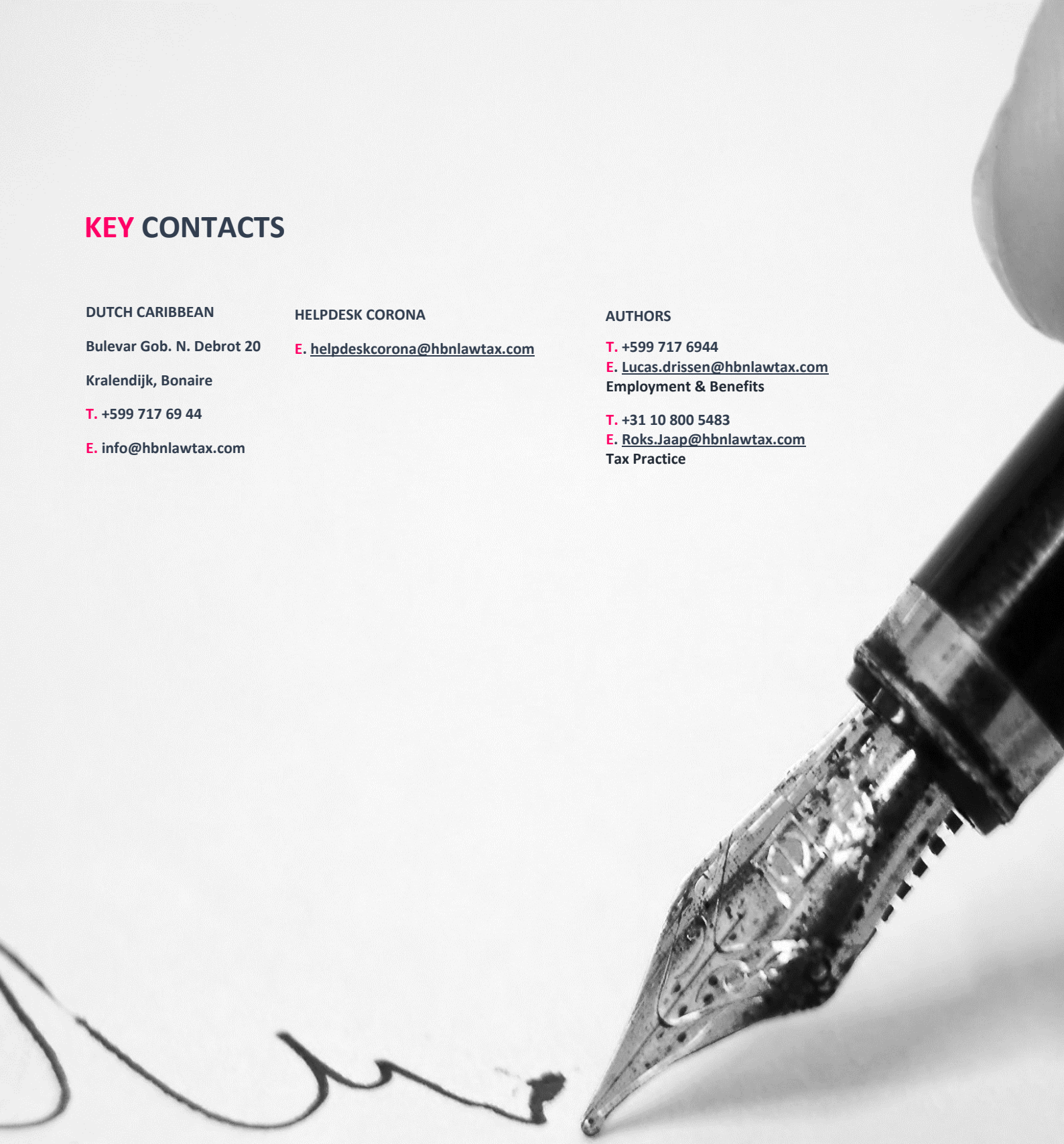
HELPDESK CORONA

E. helpdeskcorona@hbnlawtax.com

AUTHORS

T. +599 717 6944
E. Lucas.drissen@hbnlawtax.com
Employment & Benefits

T. +31 10 800 5483
E. Roks.Jaap@hbnlawtax.com
Tax Practice



T. +599 717 6944
E. Chris.debres@hbnlawtax.com
Litigation & Arbitration

T. +599 717 6944
E Floortje.debruijn@hbnlawtax.com
Public & Administration

T. +599 717 6944
E. Lucas.drissen@hbnlawtax.com
Contracts & Claims

T. +5999 434 3300
E. Marcha.woudstra@hbnlawtax.com
Zoning & Environment

T. +31 20 303 3020
E. Jan.pas@hbnlawtax.com
Corporate / M&A

T. +5999 434 3300
E. Jeroen.eichhorn@hbnlawtax.com
Banking & Finance

T. +31 10 800 5483
E. Roks.Jaap@hbnlawtax.com
Tax Practice

DUTCH CARIBBEAN

Bulevar Gob. N. Debrot 20

Kralendijk, Bonaire

T. +599 717 69 44

E. info@hbnlawtax.com