

# **6 INFORMATION FOR EMPLOYERS ON THE LAWS GOVERNING DISMISSAL**

## **1 Introduction.**

This document gives an outline of the legal provisions for the termination of a labour contract in St. Maarten. In everyday usage, these provisions are commonly referred to as the provisions for the termination of employment.

We will try to answer the most common questions concerning dismissal.

This document is meant in the first place for employers and those who, from an employer's point of view, often have to deal with the legislation concerning dismissal. Also for those who intend to set up a business with personnel in St Maarten; this document may clarify a few things.

There is a separate document on dismissal law for employees.

## **2. Employment protection**

Legislation concerning dismissal should primarily be considered in the light of employment protection for the employee. To a certain extent, the legislator tries to protect the interests of the weaker party in the labour market, the employee. However, the legislator also has the interests of the employer in mind. For the latter, good functioning of the business comes first. This implies that, depending on the business performance there should exist the possibility to discharge employees within a relatively short period of time. A dysfunctional employee may also hamper the proper execution of tasks in a company. In this case too it should be possible for the employer to terminate the work relation with such an employee. Dismissal legislation provides for this.

## **3. The termination of a labour contract**

A labour contract may be terminated by giving notice. In certain cases, the employer needs the approval of the Secretary General of the Ministry of Labour Affairs to do so. For this purpose the employer has to file a request with this department.

This procedure, in which the validity of the dismissal is examined before it can be executed, is a unique form of employment protection in the region.

Especially because this scenario is not very familiar, it has led to the persistent misunderstanding that once he/she is hired on a labour contract for an indefinite period of time, an employee can hardly ever be dismissed.

If, however, there is a valid and convincing reason for dismissal, the Secretary General of the Ministry of Labour Affairs will always give permission for dismissal.

The dismissal law ("lei de retiro") does not apply to the following persons and agreements:

employees working in a public organization

employees working for the government on the basis of a labour agreement;

teachers;

persons who occupy a religious post (e.g. pastors and preachers);

employees who perform household work in the household of private persons (servants);

the labour agreement of a director;

a labour contract for a fixed term; with the exception of a contract for a fixed-term which was directly or indirectly preceded by a contract for an indefinite period of time in which the same worker has successively worked for different employers, who can reasonably be considered to be each other's successor with regard to the work performed;

cases of bankruptcy.

#### **4. Grounds for dismissal**

The three most important reasons to terminate a labour contract are:

1 Business-economic reasons, for instance the closure of the company, reorganization or the reduction of economic activity.

In this case it must be clear that a temporary bridging of the difficulties is not possible.

2 The employee is unfit to do the job.

Here it must be clear that there is no other position in the same company for the employee concerned.

3 A disturbed work relationship between employer and employee.

The question who is to blame may play a role in this context.

It is very important that the employer's application for permission for dismissal substantiates the reason for the proposed dismissal. For instance, if as an employer you want to dismiss an employee because of disappointing business results, you will have to substantiate "business-economic reasons" as a reason for dismissal by means of supporting financial data. If you submit this data to the Department together with your request, this will shorten the time it takes to process it.

## **5. Dismissal procedure**

What is the dismissal procedure and what are you supposed to do as an employer?

The employer files a corroborated request with the Labour Affairs Agency. For this purpose there are special forms, which can be obtained at this department.

The civil servants of the department then summon the employee to defend himself. After that, the employer can be called (if necessary) to comment on the defence. This phase of hearing both parties as much as possible is done in writing.

At the same time, mediation between the two parties takes place. The civil servant handling the case writes a report with his findings and conclusions. This is sent to the dismissal commission. This commission, consisting of at least two employer representatives, two employee representatives and an impartial chairperson, usually meets once a week to advise the Secretary General of the Ministry of Labour Affairs on the applications for permission to dismiss employees. The Secretary General can grant or refuse permission for dismissal. Employer and employee(s) will be notified of the decision in writing.

At first glance the procedure described above seems to be rather time-consuming. However, thanks to its many possibilities for dialogue and consultation, this structure is a guarantee for impartiality in the weighing of the interests of employer and employee.

In practice the dismissal procedure takes some time. However, the procedure is usually shorter than an ordinary legal procedure.

Moreover, the Department has adopted internal guidelines to shorten the administrative processing of an application. The maximum period for the administrative processing of an application for permission to dismiss employees is six weeks. In special cases this period can be extended by six weeks after the Minister of Labour Affairs has given his consent.

As soon as the Secretary General of the Ministry of Labour Affairs has granted his permission, the employee may be given notice of termination of the labour agreement. However, the period of notice and the effective date of termination have to be observed. By the latter date is meant the actual day of termination of labour relations. The period of notice, which the employer has to observe, depends on the duration of the employee's employment and is as follows:

one month, if the employment lasted less than 5 years;  
two months, if the employment lasted 5 years or longer but shorter than 10 years;  
three months, if the employment lasted 10 years or longer but shorter than 15 years; four months, if the employment lasted 15 years or longer.  
In the case of an individual dismissal after the Secretary General's consent and in the case of collective dismissal, the term of the assessment of the request and/or the assessment of the redundancy plan can be deducted from the period of notice, if the remaining period of notice remains at least one month. The period of notice for the employer can only be shortened by way of a collective labour agreement. An extension of the period can only occur in writing.

The rules for the day and period of notice also apply to cases of dismissal in which no consent is needed from the Secretary General of the Ministry. If an employee wishes to resign, other rules apply. In this case the employee must bear in mind one month's period of notice.

Please note: in a written labour agreement the parties concerned can make an exception to the above rules. For example, they can agree to stipulate a longer period of notice (up to six months).

The duration of the period of notice is often stated in the labour agreement. It can also be stated in the collective labour agreement or in a regulation filed in the clerk of the court's office.

Notice can be given orally or in writing. The latter option is preferred.

## **6. Collective dismissal**

If an employer intends to terminate within a period of three months at least twenty-five employees, or more than 25% of the number of employees in his establishment (with a minimum of five employees), this is referred to as a collective dismissal.

If an employer intends to start a collective dismissal procedure, he is obliged to report this intention to the Secretary General of the Ministry of Labour Affairs not later than two months before the termination of the employment agreements. Furthermore, the employer must submit a redundancy plan within eight days of notification to the Secretary General.

Such a redundancy plan must contain at least the following elements:

- a. the number of employees the employer intends to dismiss, with a specification of function, age, sex and seniority;
- b. the date of the intended termination of the labour agreements;
- c. the result of the consultation with the labour union if the employees are represented by a trade union;
- d. the measures the employer has taken to alleviate the consequences of the dismissal for the employees involved.

## **7. When dismissal is not possible**

There are a few cases in which an employer cannot terminate a permanent labour agreement, not even if a permission for dismissal has been granted.

These exceptions to the rule are laid down in the Civil Code, article 1615h.

The labour agreement cannot be terminated during illness or a disablement incurred after the employee has had an accident. However, if an employee has been disabled for longer than a year uninterruptedly, and he/she does not expect to recover partly or fully for his/her own work or another suitable job, the Secretary General will normally grant his permission to terminate the labour relationship. If an employee, who has been disabled for at least one year uninterruptedly, can make plausible that he/she will be partly or fully recovered within three months to exercise his/her own work or other suitable work (which is available within the employer's company), the

Secretary General will normally withhold his permission to terminate the contract.

As of 1 August 2000 each regulation, by virtue of which employment ends due to the employee's marriage or due to pregnancy, is nullified. In addition, an employer is not allowed to dismiss an employee because the employee is a member of a trade union or participates in trade union activities, unless the employee takes part in the activities during work hours and the employer has, for legitimate reasons, not given the employee permission to do so.

## **8. Other ways in which employment can be terminated**

Besides the termination of a labour agreement outlined in paragraph three, there are a few other ways to terminate employment. Approval by the Secretary General of the Ministry of Labour Affairs is not needed in those cases.

The most important are:

### **a. BY MUTUAL CONSENT.**

In this case, both you and your employee have agreed to terminate the labour agreement. Although not mandatory, it is prudent to put this mutual consent in writing. This will prevent later misunderstandings.

### **b. DISMISSAL "ON THE SPOT".**

Dismissal "on the spot" terminates the employment with immediate effect. However, this must be based on an urgent reason of which the employee must be notified immediately.

A few examples of possible urgent reasons are:

- Theft by the employee;
- gross neglect of duties by the employee;
- drunkenness or debauchery by the employee during work.

Before proceeding to dismiss an employee on the spot, it should be duly considered whether there is an urgent reason indeed. If this is not the case, the employee can apply for a nullification of the termination at the court of first instance. The employee may also file a claim for damages.

For the employee too there are reasons that allow a resignation to occur "on the spot", for instance if wages are not paid on time.

c. A LABOUR CONTRACT CAN END "BY RIGHT".

This is the case with labour contracts for a fixed period of time.

It is also possible that a certain event is mentioned in the agreement instead of a date, for example the termination of a project, the labour agreement also ends in this case. In certain cases a series of contracts for a fixed period can automatically be changed into a contract for an indefinite period (see the folder on the flexibilization of the labour legislation). In that case, however, a notice of termination is required.

d. TERMINATION OF THE LABOUR AGREEMENT DURING THE PROBATIONARY PERIOD.

If in a labour contract or a collective labour agreement a trial period has been agreed upon, the labour agreement may be terminated unilaterally with immediate effect during the trial period. For this, approval by the Secretary General is not needed.

Mind you: the probationary period has a maximum of two months and has to be agreed upon in writing.

e. DISSOLUTION OF A LABOUR AGREEMENT FOR GRAVE REASONS.

Besides the above-mentioned ways of terminating a labour agreement, there is always the possibility of requesting the court of first instance to dissolve the labour contract "for grave reasons". A lawyer can tell you more about this.

## **9. More information**

This document cannot possibly sum up all the rules and regulations and their exceptions. If you want to have precise information, you may consult the dismissal law. You will find the National Ordinance on the Termination of Labour Agreements in Official Gazette 1972, No. 111 and Official Gazette 2000, nr. 68.

Articles 1613 to 1629 inclusive of the Civil Code cover the labour agreement. Article 1615e to 1615x (fifth section) deals specifically with the different ways in which a labour agreement can end.