



## Global Employer Services Individual tax

### Updated FAQs on “one-third rule” for night and shift work tax incentives issued

On 16 November 2021, the Belgian tax authorities published updated frequently asked questions (FAQs) ([Dutch](#) | [French](#)) on the calculation of the “one-third rule” applicable for the purposes of the partial exemption from withholding tax on remuneration paid for night and shift work. The FAQs have been amended to align the tax authorities’ administrative guidelines with case law and will apply as from 1 January 2022.

#### Background

Article 275(5) of the Belgian Income Tax Code (ITC) provides a partial exemption for employers from the payment of the wage withholding tax required to be withheld from an employee’s remuneration in respect of certain night and shift work. While the employer must withhold the tax from the payments made to the employee, the employer does not have to pay the amount withheld over to the Belgian tax authorities.

The one-third rule is an essential – but not in itself sufficient – condition for benefiting from the partial withholding tax exemption. According to the rule, the incentive is granted only in respect of workers who, in accordance with the work regime to which they are subject, have performed shift or night work for at least one-third of their working time during the relevant month. The same rule applies in respect of the partial withholding tax exemptions for continuous work schedules and shift work related to construction work.

The tax authorities issued detailed FAQs on 9 September 2015 ([Dutch](#) | [French](#)) regarding the calculation of the one-third rule, stating that the employer may choose to calculate it on an hourly basis or on a daily basis, provided that the method is applied consistently, i.e., once a calculation method is chosen, the employer must use that method every month.

## Case law

The tax authorities distanced themselves from their own administrative guidelines, considering that the calculation of the one-third rule on a daily basis may lead to unwanted results that were not the intention of the legislator. A litigation finally reached the Court of Appeal of Mons, which ruled on 21 October 2020 that based on the wording of article 275(5) of the ITC, the one-third rule must be calculated based on the number of hours worked by the employee in the relevant month and not on the number of days in that month.

The updated FAQs align the administrative guidelines with the court's decision.

## Tax audits

Tax audits reveal that the practical application of the wage tax incentive measures raises several difficulties that may result in protracted discussions and potentially litigation with the tax authorities, which is a source of uncertainty for employers.

Within the context of tax audits, tax authorities sometimes refer to the case law of the Court of Appeal of Mons to require employers using the daily method to reassess the one-third rule based on the hourly method, which has led to a number of tax adjustments and refunds of tax incentives.

## Government policy

On 9 November 2021, the government published a general policy note (finance) revealing its intention to limit the increasing cost of wage tax incentive measures. Although the details of the upcoming legal initiative have not been confirmed, the current proposal is that various key concepts may be clarified to remedy problems of interpretation. This would both increase legal certainty and help to avoid or mitigate the risk of misuse. In addition, in accordance with the recommendation of the Court of Audit, systematic tax audits would be carried out to ensure the correct application of the measures.

## Comment

The updated FAQs on the one-third rule reflect the general trend in this area. The following aspects of the FAQs are notable:

- The tax authorities consider that the Court of Appeal of Mons' decision that the calculation with respect to night work must be made on an hourly basis applies not only to night work but also to shift work, continuous work schedules, and construction work.
- The updated administrative guidance will enter into force as from 1 January 2022. As a result, it will still be possible until 31 December 2021 for employers to use the daily basis of calculation to determine whether the one-third rule has been satisfied for the purpose of claiming the wage tax incentives, provided that the method is applied consistently.
- The delayed entry into force allows those eligible for the wage tax exemptions to adapt their IT systems so that, as from 1 January 2022, the calculation of the one-third rule always is carried out on an hourly basis.
- Explanations are provided for the calculation of the one-third rule in several specific situations such as overtime and recuperation days (*ADV-dagen* in Dutch and *jours RTT* in French).
- A significant section of the FAQs and numerous examples are devoted to the method of calculation for employees of temporary work agencies for whom the practical application of the provisions and the burden of proof are particularly complex to manage.

# Recommended actions

In light of the updated FAQs and the general trend of increased scrutiny of wage tax incentives, employers may wish to consider **reviewing** their **internal processes** and adjusting their IT systems to ensure that they apply the incentives to which they are entitled and that internal controls and processes are in place to ensure correct implementation and calculation of the exemptions.

In addition, having regard to the increased rigorousness and growing number of audits of payroll tax incentives, it is essential to **ensure** the required **supporting documentary evidence is available** to respond to any questions raised by the tax authorities.

Deloitte's payroll incentives team can help guide you through the process. We are closely monitoring this area and will keep you informed of any developments.

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## Contacts

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