

EMPLOYMENT LAW OVERVIEW

NETHERLANDS 2019-2020

Palthe Oberman / Proud Member of L&E GLOBAL



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I. GENERAL OVERVIEW

1. INTRODUCTION

Dutch employment law is elaborate and relatively complex. It is divided into individual and collective law and is closely related to social security law. In 2015, the Work and Security Act entered into effect in different stages. The Work and Security Act has fundamentally changed Dutch employment law, especially the dismissal law. The following text will report the latest developments in Dutch employment law.

2. KEY POINTS

- Employment law is not consolidated into a single code.
- Employees have a strong legal position.
- Preventive dismissal assessment.
- Relatively long period of salary payment during illness.
- New Dutch employment law as from 1 July 2015: the Work and Security Act.

3. LEGAL FRAMEWORK

Dutch employment law is not consolidated into a single code. The employment relationship under Dutch law is governed by the compulsory statutory regulations laid down in (for example) the Dutch Civil Code. The relationship can furthermore be governed by (among other things) the conditions laid down in a Collective Labour Agreement (if applicable), internal regulations (if applicable) and the individual employment contract. Judicial precedent is an important part of the legal framework because many employment matters are influenced by case law.

4. NEW DEVELOPMENTS

The Work and Security Act is effective since the 1st of July 2015. The Act introduced far-reaching changes in Dutch employment and dismissal law. Now, more than three years later, there is still a lot of discussion amongst professionals, about the interpretation of certain changed provisions in the

new law. Case law provides more certainty, but for some part it is still unclear how the new provisions should be interpreted.

As of the 1st of January 2019, extra birth leave has been introduced. Partners will now have five days of birth leave at full pay after the birth of their child (based on fulltime employment). Partners can take this leave immediately after the birth of their child, but they can also spread it over the first four weeks after the birth.

Another development is that the state pension age will be increased. As of the 1st of January 2019, the state pension entitlement age has been increased to 66 years and four months. The state pension age increases in stages to 67 years in 2012. From 2022 onwards, the state pension age will be linked to the life expectancy. In 2022 and 2023, the state pension age is expected to be 67 years and three months.

Also, from the 1st of January 2019 the maximum transition payment will increase to EUR 81.000,- gross or a maximum of one annual gross salary if it exceeds EUR 81.000,-. In such situations, an employee is entitled to a transition payment (will be described under VIII.3. below).

II. PRE-EMPLOYMENT CONSIDERATIONS

1. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers can hire employees in the Netherlands either through a local entity or a foreign entity. Before deciding on how to structure their business in the Netherlands, foreign employers are advised to consider the tax consequences.

2. LIMITATIONS ON BACKGROUND CHECKS AND RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

During the pre-employment phase, only personal data specifically required for the position that the applicant applied for, can be screened. Standard screening procedures are normally not allowed in the Netherlands. In the pre-employment phase no extraordinary personal data of the candidates may be screened. This is only allowed if there are exceptional requirements for the vacancy that make this type of screening necessary. The employer can only ask about an applicant's health situation if a medical examination is required for the job by law. Of course, it is prohibited to discriminate against applicants on the grounds of – among others – gender, race, age, civil status, religion, and so on. On 25 May 2018, the new EU Regulation on privacy entered into effect. All companies were given two years to comply with the new rules laid down in the

regulation. If the employer fails to do so, fines up to EUR 820.000 or 10% of the yearly turnover can be given.

The Recruitment Code of the Dutch Association for Personnel Management and Organizational Development (in Dutch: Nederlandse Vereniging voor Personeelsmanagement & Organisatieontwikkeling, abbreviated to: NVP) contains basic rules that employers should observe during the recruitment and selection process. The purpose of this code is to provide a standard for a transparent and fair recruitment and selection procedure. This Code is not binding, but employees can derive protection from these rules. The Code for example prohibits the requirement of a photo of the applicant prior to the applicant being invited to an interview.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

An employment contract under Dutch law may be concluded orally or in writing. Pursuant to Article 7:655 of the Dutch Civil Code, however, the employer will nonetheless need to inform the employee in writing with respect to (among other things):

- The name and residence of the parties;
- The place where the work is to be carried out;
- The position and a job description;
- The hiring date;
- If the employment contract is for a fixed period of time, the time period;
- The vacation rights or the method of calculating vacation rights;
- The duration of the notice periods to be observed by the parties or the method of calculating these periods;
- The salary and the payment intervals and, if the remuneration depends on the results of the work to be performed, the amount of work to be performed per day or per week, the price per item and the time that will be involved in performing the work;
- The customary number of working hours per day or per week;
- The employee's pension rights (if applicable);
- The Collective Labour Agreement (if applicable).

2. FIXED-TERM/OPEN-ENDED CONTRACTS

An employment contract can be agreed upon for a fixed period of time (fixed-term contract) or for an unspecified period of time (open-ended/permanent contract). If the identity of the employment has not changed (for example, with respect to the work to

be performed, salary and secondary employment conditions), a fixed-term employment contract that follows an open-ended employment contract (that has not terminated in a way as provided by Article 7:677 paragraph 4 of the Dutch Civil Code) will become an open-ended employment contract by operation of law.

Pursuant to Article 7:668a of the Dutch Civil Code, a fixed-term employment contract will automatically convert into an open-ended employment contract if:

- a chain of temporary employment contracts covers 24 months or more;
- a chain of three fixed-term employment contracts is continued.

A chain is a series of fixed-term employment contracts that succeed each other with no more than six months in between. This rule is also applicable to employment contracts between an employee and various employers that must reasonably be deemed to be each other's successors with regard to the work performed.

A. NOTIFICATION OBLIGATION

One month before the termination of a fixed-term employment contract of six months or longer, an employer must notify the employee whether the employment contract will be extended or not (in Dutch: aanzegverplichting). If so, the employer must also inform the employee about the terms and conditions for extension. If the employer does not inform the employee, the employee has a right to claim salary during the period in which the employer is in violation (up to a maximum of one monthly salary). For fixed-term employment contracts shorter than six months or contracts with no fixed end date, such as for the length of a specific project, this notification is not required.

3. TRIAL PERIOD

A probationary period must be laid down in writing. In case of an open-ended employment contract, an employment contract for an indefinite period of time or an employment contract fixed for a period of two or more years, the maximum probationary period is two months. In employment contracts for a fixed-term of more than 6 months, but less than two years, the maximum probationary period is one month. As from the 1st of January 2015, it is no longer possible to agree upon a probationary period in an employment contract that has a term of six months or less.

The probationary period for both the employer and the employee should be equal. A probationary period is not valid if the employee involved is already employed at the employer, but at a different position and will be carrying out more or less the same work that he/she has done elsewhere within the company. A probationary period conflicting with the law is null and void.

4. NOTICE PERIOD

Dutch law provides for the following statutory notice periods for an employer:

- Fewer than 5 years of service: 1 month
- More than 5 years, but fewer than 20 years of service: 2 months
- 10 or more years of service, but fewer than 15 years of service: 3 months
- 15 or more years of service: 4 months

The employee must take into account a notice period of one month. A longer notice period may be agreed upon if it is laid down in writing. In that case, the notice period the employer has to observe must be twice the notice period the employee has to observe. The notice period may be reduced under a Collective Labour Agreement. Please note that any variance should be within statutory limitations, in default of which the statutory notice period is applicable. Unless agreed otherwise, the notice period starts running at the beginning of the month following the month in which notice is given.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

The Working Conditions Act (in Dutch: Arbeidsomstandighedenwet) contains the most general provisions and requirements regarding working conditions and stipulates that an employer and employee are jointly liable in supporting health, safety and wellness in the work place. The employer has to set up a working conditions policy within the company. The employer must, among other things, prevent sickness and any danger to the health of employees and make an effort to reintegrate sick employees in the working process. The employer is required to use the services of a working-conditions service, an institution that assists the employer in the overview and evaluation of the risks, assists sick employees, advises the employer on reintegration of sick employees, and more.

2. SALARY

In principle, employer and employee are free to agree to the wages to which an employee shall be entitled. However, the Act on Minimum Wages and Minimum Holiday Allowances (in Dutch: Wet minimumloon en minimumvakantiebijslag) contains certain minimum wages and minimum holiday allowances, which are normally adjusted each year. A collective labour agreement, if applicable, may also contain salary scales that are binding on individual employees.

3. MAXIMUM WORKING WEEK

The legislation on working hours and working conditions is based on the Working Hours Act (in Dutch: Arbeidstijdenwet). The amount of working

hours depends upon the sector of industry and the kind of labour performed. In general, an employee is only allowed to work a maximum of 12 hours per day, for a maximum of 60 hours per week. Over a period of 4 weeks the maximum number of working hours is 55 per week. Over a period of 16 weeks the maximum number of working hours is 48 hours per week. The arrangements on working hours included in an individual employment contract, which are not in conformity with the Working Hours Act, can be declared null and void. The Working Hours Decree (in Dutch: Arbeidstijdenbesluit) provides exceptions and additions for certain industries (inter alia the care sector).

4. OVERTIME

There is no specific Dutch legislation on compensation for working overtime. Whether overtime will have to be compensated, should follow from what was agreed in the employment contract, employee handbook or - if applicable - Collective Labour Agreement. If neither of those state that overtime will be compensated, it is still possible that the employer is obliged to do so. It can be ruled that an employee should be compensated for working overtime by the employer, because this is what may be expected from a “good employer” in the same circumstances.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER’S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Following the Working Conditions Act, the employer is obliged to provide a healthy and safe

work environment for its employees. The specific rules for employer and employee to ensure a healthy and safe workplace are further laid down in the Working Conditions Decree (in Dutch: Arbeidsomstandighedenbesluit).

Employers are obliged to make a Risk Inventory and Evaluation, which mentions all the risks in the working environment, and the preventive measures that are taken, or will be taken, to minimise those risks. Employers are also obliged to enter into a service agreement with a certified occupational health and safety service agency.

B. COMPLAINT PROCEDURES

In principle, employees should first discuss any complaints with their employer. Employers are advised to have a proper complaint procedure in place. In case the company has a works council, employees may also report health and safety related matters to the works council. In addition, employees have the right to address health and safety related matters with the company's occupational health and safety service agency. Employers have the obligation to inform their employees about that possibility. In the last instance, employees may report violations of health and safety regulations with the Social Affairs and Employment Inspectorate.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

According to Dutch legislation, discrimination on any ground whatsoever is prohibited.

In the Dutch Equal Treatment Act (in Dutch: Algemene wet gelijke behandeling), discrimination on the following grounds is explicitly prohibited: religion, personal beliefs, political opinion, race, sex, nationality, hetero- or homosexual orientation and civil status.

In addition, in specific employment laws, discrimination on the following grounds is explicitly prohibited: age, sex, handicap and chronic disease, temporary/permanent employment contracts and working hours (part-time/full-time).

2. EXTENT OF PROTECTION

In principle, discrimination directly based on the grounds mentioned above is never permitted, except for certain situations in which discrimination is explicitly allowed by law.

The discrimination laws also cover indirect discrimination. Indirect discrimination occurs when a neutral behaviour (e.g. a policy or practice) results in discrimination based on one of the grounds mentioned above.

Indirect discrimination – and direct discrimination with respect to age, temporary/permanent employment contracts and working hours – can be justified if objectively necessary to achieve a legitimate aim and proportionate to the aim sought.

Agreements between employers and employees contrary to discrimination laws can be void or voidable. The employee can also hold the employer liable for damages resulting from discriminating behaviour of the employer.

3. PROTECTIONS AGAINST HARASSMENT

The Dutch Equal Treatment Act prohibits harassment and sexual harassment. The Working Conditions Act contains an obligation for employers to prevent harassment from occurring at the workplace. If the employer fails to do so, administrative fines can be given, and the employer can be held liable for damages resulting from discriminating behaviour of the employer.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The Dutch government encourages companies to hire disabled persons. As an incentive the government may grant financial benefits. An employer is responsible for all the employees. If an employee is disabled, his/her workplace should still be safe and accessible. The employer is responsible for this. If the workplace needs to be adapted, the employer can ask the Work Placement Branch of the Employee Insurance Agency for financial compensation to establish this.

All employees should be able to fulfil their religious duties. The employer cannot interfere with this, until a certain point. For example, the employer is not obligated to set up a prayer room for his/her

employees. There are no specific laws about this subject in the Netherlands.

5. REMEDIES

In employment relationships in the Netherlands, discrimination claims are not that prominent. In practice, the employer and employee as well as Dutch Courts tend to search for reasonable, pragmatic and practical solutions.

An employee can ask the Netherlands Institute for Human Rights (in Dutch: College voor de Rechten van de Mens) for an opinion about discrimination. The Institute can give a (non-binding) opinion and advice, but the Institute will not award a financial compensation. An employee is not obliged to ask an opinion of the Institute before going to Court. The Court is not obliged to follow the opinion of the Institute, but the opinion of the Institute can play an important role because of the expertise of the Institute.

VI. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The employer can restrict the use of Internet and social media during working hours by a guideline/code of conduct that states the rules about this usage. The employer must inform the employees about the email and Internet-policy within the company. The employer is allowed to check whether these rules are being followed, but the surveillance of private use of Internet during work cannot conflict with the employee's fundamental right of privacy.

If the employer checks this by using investigation equipment, the employees must be informed beforehand about this. If the employer notices a violation, the employee must be informed about this as well. Especially with the new EU Regulation on privacy that entered into effect on 25 May 2018, employers must decide in each situation what level of privacy is required.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

In the Dutch Civil Code, it is laid down that an employee may never insult his/her employer. Also, the employee is not allowed to disclose confidential information about the company. In Dutch employment law, a severe insult of the employer or his/her family members, as well as divulging confidential information about the company may result in an urgent reason for dismissal.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

A. EMPLOYMENT PERMIT

If an employer wants to hire a foreign employee in a legal manner, several requirements have to be met. First of all, the foreign employee has to be in the possession of a residence permit. Secondly, the employer is obliged to obtain an employment permit. Employees with Dutch nationality and employees from one of the countries of the European Economic Area and Switzerland are exempt from these rules.

B. THE EMPLOYMENT RELATIONSHIP

When an employee works in the Netherlands, Dutch law does not necessarily govern the employment relationship. A foreign employee could remain in the employment of his foreign employer on the basis of his foreign employment contract with a choice of law in favour of the laws of the foreign country and then (for example) be seconded to the Netherlands. In other words, the employer is not obliged to offer employees from another country a Dutch employment contract when they are transferred to the Netherlands. Employees can continue to work on the basis of their current (foreign) employment contract.

The Netherlands is a party to the (EU) Convention on the Law applicable to Contractual Obligations/ Rome I Regulation. This Convention/Regulation is applicable to international employment law issues. It states that regardless of the governing law of the employment contract, the parties are entitled to the

protection afforded by the compulsory regulations that would apply if no applicable law had been chosen. The more an employee is legally or socio-economically integrated in the Netherlands, the sooner a Court will decide that the employment contract is linked to the Netherlands, as a result of which Dutch law would be applicable. The Posting of Workers Directive (in Dutch: Detacheringsrichtlijn) and the Terms of Employment (Cross-border Work) Act must also be taken into account.

In case of an international employment relationship, the Dutch tax authorities grant special tax benefits to foreign employees who are temporarily assigned to a Dutch subsidiary or branch from abroad, e.g. employees who reside in the Netherlands or employees who are recruited by a Dutch employer. Under the so-called 30% Ruling, 30% of the employee's salary may be paid out as tax-free compensation for costs. In general, an addendum should be added to the employment contract declaring the applicability of the 30% Ruling in respect of the agreed wages. The main conditions related to the 30% Ruling pertain to:

- If the employee has a specific expertise, which is (almost) not available in the Netherlands;
- The employee has obtained a valid individual decision of the Tax and Customs Administration;
- In a period of 24 months before the employment in the Netherlands commenced, the employee must have lived more than 150 km in a straight line from the Dutch border.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

A fixed-term employment contract or a contract for a specific project ends by operation of law upon expiration of the term or completion of the project, without notice being required. However, as from the 1st of July 2015 an employer is obliged to notify the employee at least one month before the ending of a fixed-term contract of six months or longer whether the employment contract will be extended and, if so, subject to what terms and conditions. Furthermore, pursuant to Article 7:657 of the Dutch Civil Code, the employer is obliged to inform an employee who has a fixed-term contract about vacancies with an open-ended employment contract.

An open-ended employment contract can be terminated by:

- The employer giving notice after receiving permission from a governmental organisation;
- The employee giving consent after the employer has given notice without the abovementioned permission;
- Court proceedings;
- Mutual consent;
- Dismissal because of an urgent reason;
- Notice given by the employee.

REGARDING (A) TERMINATION BY GIVING NOTICE

In case of dismissal on economic grounds or because of long-term incapacity of work, an employer can terminate an employment contract by giving notice after the Employee Insurance Agency (in Dutch: UWV) has given permission to do so by a dismissal permit. The Employee Insurance Agency will grant

permission only if there is a reasonable ground for dismissal and redeployment within a reasonable period of time is (even after training) not possible or reasonable. The Employee Insurance Agency procedure takes approximately four weeks as soon as it has received all the necessary information.

After permission has been granted, notice is to be given with due observance of the notice period. Due to the time involved in obtaining permission from the Employee Insurance Agency, the employer can deduct the duration of the procedure from the notice period (provided that at least one month of notice remains).

Notice must be given with effect from the end of the calendar month, unless another day has been designated by written agreement, internal regulations, a Collective Labour Agreement or by custom. Please see III.4. above for the notice period that has to be observed.

Permission will not be granted in case – among others – termination is impossible because of a statutory prohibition against terminating an employment contract by giving notice, for instance, during illness shorter than 104 weeks (unless the illness starts after the request for permission to give notice was received by the Employee Insurance Agency), pregnancy, if the employee is a member or the secretary of the works council.

Since the 1st of July 2015, there is a possibility of appeal against a decision of the Employee Insurance Agency.

REGARDING (B) EMPLOYEE GIVING CONSENT

In case an employer has given notice without permission of the Employee Insurance Agency, an employee can give his/her consent concerning

the termination of the contract. However, there is a reflection period of 14 days, during which the employee can withdraw his/her consent. The employer has to point out the reflection period within two days after the employee has given his/her consent. If the employer fails to do so, the reflection period will be extended to 21 days.

In principle, the employee does not waive his/her right to receive the benefits on the basis of the Unemployment Insurance Act (in Dutch: *Werkloosheidswet*) when he/she gives consent, if he/she meets the conditions of that Act.

REGARDING (C) TERMINATION BY COURT PROCEEDINGS

The Court can terminate an employment contract in case a reasonable ground for dismissal exists and redeployment within a reasonable period of time is (even after training) not possible or reasonable. An employment contract can be terminated by decision of the Court, by filing a petition for dissolution in case of:

- Frequent and disruptive absence due to illness;
- Unsuitability for the position / underperformance (other than because of illness);
- Culpable acts or omissions of the employee;
- Refusal to work due to a serious conscientious objection;
- Impaired working relationship as a result of which the employer cannot reasonably be required to continue the working relationship;
- Other reasons and/or circumstances (by way of an exception).

After filing the petition with the competent Court, the employee is offered the possibility to file a statement of defence. The Court will then set a date for a hearing, during which the parties can explain their opinions. The Court could grant the request for termination and dissolve the employment contract, or it could deny the request. The Court must take into account the notice period in the case where the contract is dissolved.

Since the 1st of July 2015, there is a possibility of appeal against a Court's decision.

REGARDING (D) TERMINATION BY MUTUAL CONSENT

An employment contract can be terminated by mutual consent. No notice period needs to be observed (although it is usual to do so) and the employer and the employee can agree on a reasonable severance package. An employee is (in principle) entitled to unemployment benefits in case he/she accepted the proposal of the employer to terminate the employment contract.

If the parties agree on termination by mutual consent, the employer would of course not need to substantiate its reasons for termination to either the Court or the Employee Insurance Agency. However, the employer would still need to convince the employee to agree. If the employer does not have sufficient reasons, the employee may not be willing to accept a termination by mutual consent at all or only if the employer pays a fair amount of severance.

The employee has a reflection period of 14 days, during which the employee can terminate the termination agreement in writing. If no written reflection period is inserted in the termination agreement, the reflection period will be extended to 21 days.

REGARDING (E) DISMISSAL BECAUSE OF AN URGENT REASON

Pursuant to Article 7:678 of the Dutch Civil Code, the employer may summarily dismiss an employee if the employee has engaged in such misconduct that the employer cannot reasonably be expected to continue the employment relationship any longer. An urgent reason must exist, in which case the employment contract will be terminated with immediate effect. The urgent reason must be communicated to the other party immediately and the employment contract must be terminated without notice.

REGARDING (F) NOTICE GIVEN BY THE EMPLOYEE

An employee is always permitted to terminate the employment contract with due observance of the applicable notice period.

2. COLLECTIVE DISMISSALS

If an employer wants to dismiss 20 employees or more within a term of three months within one of the working areas of the Employee Insurance Agency, it must, according to the Dutch Collective Redundancy (Notification) Act (in Dutch: Wet Melding Collectief Ontslag), notify and consult the relevant trade unions and notify the Employee Insurance Agency of its intention to do so. It is also necessary to take into account all employment contracts that will be terminated by mutual consent. If the employer fails to comply with its obligation under this Act, the employee has a right to nullify the termination of his/her employment contract.

3. INDIVIDUAL DISMISSALS

A. IS SEVERANCE PAY REQUIRED?

Until 1 July 2015, Dutch employment law did not provide a statutory severance payment. Until that date the Dutch Courts generally applied the 'Cantonal Court Formula'. This formula was also often used to calculate the severance payment in case of termination of the employment contract by mutual consent.

As from the 1st of July 2015, a statutory transition payment (in Dutch: transitievergoeding) is introduced. Every employee is entitled to this payment when an employment contract has lasted at least 24 months and is terminated on initiative of the employer or by operation of law, subject to a few exceptions (including dismissal for urgent cause).

When calculating the amount of the statutory transitional payment, only the length of employment will be taken into consideration. For calculating the duration of an employment contract one or more employment contracts between the same parties (or successors) that have followed each other with intervals lasting no longer than six months will be counted together.

The transition payment is 1/6th of a monthly salary for every half year for the first 10 years of service and 1/4th of a monthly salary for all years of service above 10 years. The transition payment is capped

at EUR 81.000,- gross or - if the employee is entitled to a higher annual salary - one annual salary. The transitional payment is not due in case the employee terminates the employment contract, unless this termination is a result of seriously culpable actions on behalf of the employer.

B. FAIR DISMISSAL PAYMENT

In addition to the statutory transitional payment, the Court may also award a fair dismissal payment. In case of seriously culpable acts and omissions on the part of the employer. This only applies to exceptional situations.

C. EXCEPTIONS TO THE ENTITLEMENT OF THE TRANSITIONAL PAYMENT

There are a number of exceptions regarding transition payment, the most important of which are set out below. Until 1 January 2020, employees over the age of 50 with an employment contract lasting at least ten years must be paid a transition payment of 1/2th of their monthly salary for every six months that the employment contract with the employer has continued after reaching the age of 50. This does not apply if the employer had less than 25 employees in the second half of the calendar year preceding the calendar year in which the employment is terminated.

In case of 'small' employers who employed fewer than 25 employees on average in the second half of the calendar year previous to the calendar year in which the employment contract was terminated because redundancies were necessary by economic circumstances resulting from the employer's poor financial situation, it will only be necessary to take the duration of the employment from 1 May 2013 into account when calculating the transition payment. The years of service prior to this date will not be taken into account. This exceptional arrangement will continue until 1 January 2020. Please note that it will not be easy to qualify for a poor financial situation within the meaning of this arrangement.

The statutory transitional payment will not be owed if the employee is younger than 18 and the average working hours did not exceed 12 hours

per week. The transitional payment will also not be owed if the employee's employment contract ends because of reaching the pensionable age or another age at which the employee is entitled to a pension. Furthermore, transitional payment will not be owed if the employment is terminated or not continued as a result of a grave culpable act or omission on the part of the employee. In the latter case, the cantonal Court may also grant the transitional payment in part or in whole in case no payment at all would be unacceptable according to the criteria of reasonableness and fairness.

D. ADDITIONAL DECISIONS AND REGULATIONS

In 2015 additional orders and decrees became effective. These orders and decrees have further developed a number of provisions from the Work and Security Act. The 'Decision on conditions for deducting costs from transitional payments' stipulates for example the conditions under which it is allowed for an employer to deduct costs that were made for the benefit of the employee during the employment from the transitional payment. A distinction is made between transition costs (such as costs for retraining and outplacement) and employability costs (costs that increase an employee's employability outside the employer's company).

4. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

In Dutch employment law separation agreements are used when the employment contract will be terminated with mutual consent (the so-called settlement agreement). In an agreement as such, the employer and employee arrange under which conditions they may terminate the contract. A settlement agreement is not a legal requirement but is considered best practice (as an employee is also able to apply for unemployment benefits after concluding a (legally correct) settlement agreement).

B. WHAT ARE THE STANDARD PROVISIONS OF A SETTLEMENT AGREEMENT?

The settlement agreement usually includes provisions - among others - on:

- The names of the parties involved;
- The reason of termination;
- The dismissal payment (can be zero);
- The termination date;
- Whether or not the employee will be exempted for work;
- Payment of the maintaining number of holidays (if any, or in derogation of the statutory provision);
- The right of the employee to dissolve the settlement agreement within 14 days after conclusion. If this is not included in the agreement, the reflection period will be extended to 21 days after conclusion;
- Usually full and final discharge when all the provisions of the settlement agreement are fulfilled.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

Under Dutch law everyone from the age of 16 years old is considered to be legally competent to sign a (employment) contract. However, when the employee is under 18 years old, the legal representative of the underage employee can void a signed contract. Therefore, it would be wise to involve the legal representative(s) of an underage employee when signing a settlement agreement.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Possible additional provisions in the settlement agreement to be considered are how to settle the non-competition, non-solicitation and non-poaching clauses (if any), to reconfirm the secrecy clause and penalty clause, to return company property and to refrain from negative statements about one other.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

After concluding a settlement agreement, the employee has a reflection period of 14 days. During that period the employee can withdraw the given consent at any time, without having to give an explanation for his/her change of mind. When this period is over, it is still possible under Dutch law to void a contract. A contract is voidable if for example one of the parties misused the circumstances that the other party was in while signing the settlement agreement, or if a party was misled into signing the contract by the other party. The time limit for invoking a voidable settlement agreement on one of the above-mentioned terms is 3 years. If the employment contract is not terminated by a settlement agreement, the possibilities for an employee to challenge a wrongful termination are discussed under VIII.1. above.

6. WHISTLEBLOWER LAWS

In the Netherlands, we have the Dutch Whistle-blowers Authority, which is for employees who want to report an abuse in the workplace within the public or private sector. The Whistle-blowers Authority provides advice, support and, if necessary, carries out investigations. The Whistle-blowers Authority Act, which came into force in the Netherlands on the 1st of July 2016, underlies the establishment of the Whistle-blowers Authority. This Act obliges all organisations in the Netherlands with more than 50 employees to introduce an internal reporting procedure for reporting abuses. The Act also bans retaliation against the reporters who have reported a possible abuse in the proper manner.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

A restrictive covenant is a clause included in the (signed) employment contract that prohibits the employee from engaging in certain activities for a specified period of time. The clauses must be written down in a language the employee understands. Examples of restrictive covenants are:

- a non-compete clause;
- a non-solicitation clause;
- a secrecy clause.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

Since the Work and Security Act entered into force it is in principle no longer permitted to include a non-competition clause in a fixed-term employment contract, unless the employer has a substantial business interest in including a non-compete clause (which must be substantiated in the employment contract).

Non-competition clauses, effective for a certain scope of activities, a certain geographical area and/or for a certain number of years, must be agreed upon in writing. Furthermore, the employee must be at least 18 years old at the time of signature.

The restriction must be limited to what is reasonably necessary to protect the employer's business interests. Typically, a duration of one year is considered reasonable. Limitations as to territory and the nature of activities depends on the branch in which the employer operates and the position of the employee.

The employer can enforce the non-competition clause in Court and claim damages from the employee. In practice, a penalty clause is usually agreed upon between the parties on the basis of which the employee has to pay an agreed amount to the employer, if the employee breaches the non-competition clause. The employer might also take the new employer to Court as the new employer might act unlawfully by hiring an employee while knowing that the employee breached the non-competition clause with the previous employer.

Enforcement of the non-competition clause can also be mitigated or denied by a Court. A non-competition clause may become (in whole or partly) invalid if the responsibilities ensuing from the employee's position are substantially amended. If the non-compete clause prevents the employee from being employed elsewhere, the Court may order that the employer has to compensate the employee during the period in which the employer holds the employee to the non-compete clause. The employer can unilaterally release the employee from his/her obligations under the non-compete clause in which case the employer will no longer be required to pay any compensation.

B. NON-SOLICITATION CLAUSES

Employment contracts can also contain a non-solicitation clause, which stipulates that the employee is not allowed to solicit his/her employer's customers or employees during or after his/her employment. The clause has to be in a language the employee understands. There are no other requirements as to form.

The employer can enforce the non-solicitation clause in Court and claim damages from the employee. In practice, a penalty clause is usually agreed upon between the parties on the basis of which the employee has to pay an agreed amount

to the employer, if the employee breaches the non-solicitation clause. Enforcement of the non-solicitation clause can be mitigated or denied by a Court.

a similar situation. If a good employer would have never reasonably given a release/suspension in this situation, it would be unlawful for the employer to do so.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

A restrictive covenant can be enforced in Court if an employee does not comply with the restrictions, which follow from contract. In Court, it will first be decided whether the restrictive covenant in the employment contract is valid, and secondly, whether the employee breached it.

The clause is valid if the prohibition is limited to what is reasonably necessary to protect the employer's business interests. Typically, a duration of one year is considered reasonable. Limitations as to territory and nature of activity depend on the branch in which the employer operates and the area where the employee lives.

If it is decided that the employee did not comply with a validly agreed restrictive covenant, the employer can request the Court to issue a ban and to impose a penalty. The employer can also claim damages from the employee for not complying with what they agreed upon.

An employee can also go to Court and ask to (partially) void a restrictive covenant.

4. USE AND LIMITATIONS OF GARDEN LEAVE

In principle, garden leave is not a concept recognised under Dutch law. Unilaterally releasing an employee of his/her duties without the employee's consent, is prohibited. If an employee does not agree to a release, the employer can suspend the employee. However, the employer should be able to substantiate the reason behind the suspension and if a fair reason is not in place, the employee can claim reinstatement (even in Court). The main question is what a "good employer" would do in

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

A. GENERAL

The Directive on employee rights and obligations in connection with a transfer of undertaking is implemented in Articles 7:662 – 666 of the Dutch Civil Code. According to these articles, a transfer of undertaking is “a transfer resulting from an agreement, merger or split of an economic entity, which entity maintains its identity.” It is explicitly stipulated that a part of a company may also be regarded as an economic entity.

In other words, the applicability of Articles 7:662 - 666 of the Dutch Civil Code depends on whether or not the identity of the transferred entity remains the same. A direct contractual relationship between the transferor and the transferee is not required for the Directive to be applicable: the transfer may take place through the mediation of a third party, such as the owner or the person putting up the capital.

It is necessary to assess the facts in order to conclude whether or not the identity of the entity will transfer. According to case law, the identity of (part of) a company can be determined by various factors, including (but not limited to): (a) the type of business; (b) whether or not its tangible assets, e.g. buildings and movable property, are transferred; (c) the value of its tangible assets at the time of the transfer; (d) whether or not the majority of its employees are taken over by the new employer; (e) whether or not its customers are transferred; (f) the degree of similarity between the activities carried on before and after the transfer; and (g) the period, if any, for which those activities were suspended.

The European Court of Justice has - for example - ruled that in a labour-intensive company, the group of employees who do the work constitute the economic entity. If an essential part (in terms of quantity or expertise) of these employees is employed directly by the acquirer, in principle, preservation of the identity of the enterprise can be assumed as a result of which the regulations pertaining to a transfer of undertaking are applicable. In another case, the European Court of Justice ruled that the identity of the company was not based on its employees, but on its tangible fixed assets (in that case, buses).

If the criteria of the articles 7:662 – 666 of the Dutch Civil Code are met, upon the transfer of a business, the rights and obligations of the employer and that business under the existing employment contracts with the employees will be automatically (by operation of law) transferred to the acquirer of the business. A prohibition of termination is applicable in case the reason of such termination is the transfer of undertaking.

B. EMPLOYEE REPRESENTATION

The employer has to consult the works council (or other employee representative body) about a proposed decision regarding the transfer of activities. The employer has to provide the works council or employee representative body with information on the grounds of the intended decision, the consequences for the employees, and the intended measures to be taken. The employer also has to inform the individual employees about the transfer of an undertaking and the consequences thereof for the employee.

2. LIABILITY OF FORMER EMPLOYER

For one year after the transfer of the business, the seller and the acquirer are jointly and severally liable for the fulfilment of the obligations under the employment contracts insofar as these obligations are accrued before the transfer.

A. PENSION RIGHTS

In principle, the buyer has to continue to apply the pension scheme of the seller. There are three exceptions: 1) if the buyer has its own pension scheme which he offers to the transferring employees; 2) if the buyer has to apply a mandatory sectoral pension scheme; 3) if a Collective Labour Agreement deviates from the pension scheme.

B. OBJECTION OF EMPLOYEE

If an employee explicitly objects to the transfer, the employee will not enter into the employment of the transferee. The employment contract of the employee will thus end by operation of law at the time of the transfer.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Only in case of a collective dismissal, or if provided by a Collective Labour Agreement, the employer is obliged to inform the trade unions when it reports its intention to implement the dismissal to the Employee Insurance Agency. The dismissal can be reported to the trade unions by sending them a copy of the written notification to the Employee Insurance Agency (provided that any applicable Collective Labour Agreement does not oblige the employer to inform the trade unions at an earlier stage).

As set out under VIII.2. above, after the report has been made, there is a one-month waiting period. No waiting period applies if the report is accompanied by a statement of the trade unions confirming that they were consulted and that they agree with the termination of the contracts.

Frequently, a social plan (e.g. termination packages) is negotiated. There is no legal obligation for the employer to negotiate the content of a social plan with the trade unions. Nevertheless, a social plan often forms an important part of the negotiations with the trade unions, as they will base their support on the content of that plan. If the employer and the trade unions conclude a social plan, a Court will usually award the employee a severance amount in accordance with that social plan, unless application would be clearly unfair to the employee.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Trade unions play important roles in case of collective dismissals, strikes and collective bargaining. Trade unions can also represent the individual interests of employees. Contrary to the Works Council (see below) there is no statutory number of members and everyone can become a member of a trade union.

3. TYPES OF REPRESENTATION

Trade unions are involved in collective dismissals, strikes and collective bargaining. Members of a trade union can also be represented in case of an individual dismissal.

A. NUMBER OF REPRESENTATIVES

There is no minimum or maximum number of representatives to form a trade union. Nevertheless, trade unions with a large number of representatives obviously have more influence.

B. APPOINTMENT OF REPRESENTATIVES

Dutch law does not provide rules for the appointment of representatives of trade unions.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

Dutch law does not provide rules about the tasks and obligations of representatives of trade unions.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

All employees (including managers) can become members of a trade union. Please note that an employer cannot terminate an employment contract of an employee because of his/her membership of a trade union. However, the employee is obliged to act in accordance with rules regarding the concept of "good employeeship". An employee may not interrupt the business of an employer unreasonably, because of trade union work and such activities may only be performed during office hours if the employer provided consent beforehand.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

A. TYPES OF REPRESENTATION

According to the Dutch Works Council Act (in Dutch: Wet op de ondernemingsraden), an entrepreneur maintaining an enterprise in which, as a rule, at least 50 employees work, is obliged to establish a works council for the purposes of consultation with and representation of the employees employed by the enterprise. The obligation to establish a works council may also result from a provision to this effect in a Collective Labour Agreement.

B. NUMBER OF REPRESENTATIVES

The number of works council members is calculated as follows:

- 50 employees: 3 members
- 50 – 100 employees: 5 members
- 100 – 200 employees: 7 members
- 200 – 400 employees: 9 members
- 400 – 600 employees: 11 members
- 600 – 1000 employees: 13 members
- 1000 – 2000 employees: 15 members
- With every 1000 employees after 2000 employees, 2 members more with a maximum of 25 members.

If the employer gives permission, the works council can determine another number of members in its regulations.

C. NOMINATION OF REPRESENTATIVES

Employees can stand for election for the works council if they have been in service for at least one year. The election of the members of the works council is executed by a secret written vote on the basis of one or more lists of candidates.

An employee is allowed to vote if he/she has been in service for at least six months.

D. TASKS AND OBLIGATIONS OF REPRESENTATIVES

Information Right of the Works Council

The works council is entitled to receive all information, which it reasonably needs to properly perform its duties. The information shall be provided in writing, if requested. At least twice per year the employer shall inform the works council orally or in writing of the expectations regarding the activities and the results of the enterprise in the coming period, in particular with respect to matters in which the prior advice of the works council is required and to all investments in the Netherlands and abroad. Furthermore, the employer must provide the works council with specific information concerning any proposed decision on which the prior advice of the works council is required.

Right of Advice

Pursuant to Article 25 paragraph 1 of the Dutch Works Council Act the employer is obliged to

request the advice of its works council in advance in case of an intended decision regarding the (among others):

- Transfer of control of the company or a part thereof;
- Establishment, take-over or relinquishment of control of another company, or entering into or making a major modification to or severing a permanent co-operative venture with another company, including entering into or effecting major changes of or severing of an important financial participation on the account of or for the benefit of another company;
- Termination of the operations of a company or a major part thereof;
- Major reductions or expansions or other changes to the company;
- Major changes in the organisational structure of the company or in the allocation of powers within the company.

The advice must be requested within a reasonable time frame to allow the works council to have a say in the decision that is to be taken. The request for advice must include a summary of the reasons for the decision, the expected consequences (if any) and the measures proposed in response. The works council cannot issue its advice until the matter has been discussed in at least one consultation meeting. If, after the advice has been issued, the employer decides to go through with the planned decision, it must inform the works council accordingly in writing.

Should the employer's decision deviate from the advice given by the works council, the employer must give a full account of the reasons why (in writing). The execution of the decision must be postponed for one month. During that month, the works council may lodge an appeal with the Companies Chamber of the Court of Appeal in Amsterdam (in Dutch: Ondernemingskamer van het Gerechtshof Amsterdam). An appeal may also be lodged if the employer fails to request advice. An appeal may only be lodged if, in weighing the interests involved, the employer in all reasonableness could not have arrived at the decision. The Companies Chamber can reject the decision only if the decision was "manifestly unreasonable."

Except for the one-month waiting period, there are no statutory terms for the works council

consultation. The Dutch Works Council Act only requires that the advice should be requested within a reasonable time frame to allow the works council to have a say in the decision that is to be taken. In general, approximately two months pass between submitting the request for advice to the works council and receiving the works council's advice. The decision to reorganise can only be taken and implemented if the works council renders a positive recommendation or, if it issues a negative recommendation or no advice, after a one-month waiting period.

Right of Consent

Pursuant to Article 27 paragraph 1 of the Dutch Works Council Act the employer is obliged to request the prior consent of its works council for decisions regarding the establishment, modification or withdrawal of regulations concerning (among others) pension insurance, profit sharing, working hours, job classification and remuneration. If the works council refuses to give its consent, the employer can ask the cantonal Court to give consent. The cantonal Court will only give consent if the decision of the works council is unreasonable or if the intended decision of the entrepreneur is necessary because of compelling business interests.

The request for consent must be in writing and must include a summary of the reasons for the intended decision and the expected consequences for the employees (if any). The works council cannot give consent until the matter has been discussed in at least one consultation meeting. After the consultation meeting, the works council must inform the employer as soon as possible about the decision, written and reasoned. After the decision of the works council, the employer has to inform the works council as soon as possible about the decision that has been taken by the employer and on which date the decision will be implemented.

The consent is not required if the matter is included in a Collective Labour Agreement or a regulation of employment conditions established by a public body.

If any decision as mentioned in Article 27 paragraph 1 of the Dutch Works Council Act is taken without the consent of the works council or the cantonal Court, that decision is void if the works council invokes the nullity of the decision within one

month after being informed about the decision, or in absence of being informed, within one month after the decision was implemented and the work council was aware of that.

The works council can ask the cantonal Court to oblige the employer not to execute the decision. The employer can ask the cantonal Court to declare that the works council wrongly invoked nullity of the decision.

Right of Advice appointment / dismissal director

The employer must give the works council the opportunity to give advice about every intended decision to appoint or dismiss the director of the employer. The advice must be requested within a reasonable time frame to allow the works council to have a say in the decision that is to be taken. The employer informs the works council about the reasons of the intended decision. In case of the appointment of the director the employer has to provide information so that the works council can give an opinion. The works council can request for the matter to be discussed in at least one consultation meeting. If, after the advice has been issued, the employer decides to go through with its intended decision, it must inform the works council accordingly in writing. Should the employer's decision deviate from the advice given by the works council, the employer must give a full account of the reasons why (in writing). There is no right of appeal.

Employees' Representation in Management

In principle, every employee (including managers) can stand for election for the works council if the employee has been in service for at least 12 months. Only the executive director is excluded from election.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

Social security in the Netherlands can be subdivided into social insurance benefits (in Dutch: sociale verzekeringen) and social welfare benefits (in Dutch: sociale voorzieningen), depending on the source of the funding. Social insurance is funded from the contributions paid by employees. This system is compulsory. All employees are automatically insured and pay a contribution. Social welfare benefits are financed from central governmental funds.

A. REQUIRED CONTRIBUTIONS

Dutch law requires employers to make certain withholdings from the employee's salary for income tax purposes and the employee's national insurance contributions. An employer is furthermore required to pay certain social security premiums for its employees.

2. HEALTHCARE AND INSURANCES

In the Netherlands, there is no obligation for the employer to provide for a healthcare insurance policy.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Pursuant to Article 7:634 of the Dutch Civil Code, employees are entitled to a statutory minimum number of vacation days equivalent to four times the weekly working hours. For example, an employee with a full-time workweek of 40 hours is statutorily entitled to a minimum of 20 vacation days per year. As from the 1st of January 2012, vacation days will lapse if they are not taken within six months after the year in which they were accrued, unless the employee was not reasonably

able to take them, but the scheme applies only in respect to the statutory minimum of vacation days. In addition, ill employees will be entitled to accrue the same full number of vacation days as employees who are not ill.

In general, the vacation period is fixed according to the employee's wishes. If compelling business reasons would not allow the employee to take vacation during that specific period, the employer should inform the employee (in writing) within two weeks after the employee's request (in writing), in default of which the period is fixed according to the employee's wishes.

In addition to vacation days, employees are entitled to a holiday allowance, which, in general, equals 8% of the annual salary, insofar as the annual salary does not exceed three times the annual equivalent of the minimum wage.

B. MATERNITY LEAVE

Female employees have the right to (at least) 16 weeks of maternity leave. During this maternity leave, the Employee Insurance Agency will pay 100% of the daily wage, not to exceed the maximum daily wage. The maximum daily wage in the Netherlands is currently EUR 214,28 per day.

C. BIRTH LEAVE

As of the 1st of January 2019, partners will have five days of birth leave at full pay after the birth of their child (based on fulltime employment). Partners can choose to take this leave immediately after the birth of their child, or to spread the leave over the first four weeks after the birth.

D. PARENTAL LEAVE

An employee with a child under eight years old in his or her care, is entitled to parental leave. The employee can take at most 26 times his/her number of weekly contractual hours as parental

leave. The right of parental leave ends when the child becomes eight years old. Parental leave is unpaid leave and no holiday entitlements will be built up during the hours of parental leave.

E. SICKNESS LEAVE

Pursuant to Article 7:629 of the Dutch Civil Code, employers are obliged to continue to pay the salaries of sick employees for the first two years of illness. The employer is obliged to pay 70% of the employee's salary. The salary paid by the employer during the first year of sickness cannot be less than the minimum wage. For the second year, the minimum wage limit does not apply. The 70% is not calculated on the amount of salary that exceeds the maximum daily wage. Most employees in the Netherlands are bound to a diverging clause laid down in either an individual employment contract or a Collective Labour Agreement (such clauses are often more favourable to the employee).

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

In general, an employer is not obliged to provide pension benefits to an employee unless it has promised the employee that it would provide for a pension scheme, or if a Collective Labour Agreement or government initiative requires so. If the employer has offered a pension scheme to one of the employees, it is obliged to offer the same pension scheme to all other employees.

Christiaan Oberman, Partner
Palthe Oberman Advocaten
oberman@paltheoberman.nl
+31 203 446 100



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This memorandum has been provided by:

Palthe Oberman
Prins Hendriklaan 41
1075 BA AMSTERDAM
The Netherlands
P +31(0) 20 344 61 00
www.paltheoberman.nl

CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org





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