EMPLOYERS IN THE NETHERLANDS: PREPARE FOR CHANGES TO LABOR AND DISMISSAL LAWS IN 2020

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INTRODUCTION

On May 28, 2019, the Dutch Senate adopted the Labor Market in Balance Act (*Wet Arbeidsmarkt in Balans*, the "Act"), which will go into effect on January 1, 2020. The Act is designed to benefit both sides of the labor market, offering opportunities for employers and employees.

The year 2015 saw the first significant changes to Dutch dismissal laws since 1945, which changed the labor law landscape profoundly. These changes were intended to make dismissal laws "simpler, less costly for employers and to [sic] create more legal fairness for employees." Soon after implementation, however, it appeared that the changes achieved the opposite effect. Dismissal laws became more complicated, more time consuming, and more expensive for employers, leading to pressure on the legislator to come up with proposals to mitigate the undesirable consequences. Once the Act becomes effective, employment laws in the Netherlands will undergo additional changes.

The Act introduces new grounds for termination and changes to the statutory transition fee and extends the limitation on fixed-term contracts to 36 months, thereby reinstating the pre-2015 threshold. Other legal protections are adopted, as well.

With these changes, the Dutch government intends to encourage the signing of indefinite term employment agreements, instead of the fixed-term contracts that have become more popular with employers.

WHAT TO EXPECT AND HOW TO PREPARE FOR 2020

The anticipated changes will affect the hiring process, the cost-effective allocation of "flex workers," the substance of boilerplate contract language, the process of extending fixed-term contracts, the prerequisites for termination, and the consequences of forced terminations.

Prudence suggests that all companies doing business in the Netherlands should review the Act carefully and take measures to ensure proper implementation and compliance, specifically if any of the following circumstances apply:

- It employs staff or hires flex workers through payroll agencies, fixed-term employment contracts, or on-call contracts
- It used standard or template severance calculation tools
- It maintains a company social plan that provides for severance packages

- It plans to renegotiate the social plan and collective labor agreements ("C.L.A.'s") with works councils or trade unions
- It addresses rights and payments in dismissal matters on a case-by-case basis
- It dismissed employees after 104 weeks of continuous illness at any time since the Dutch Work and Security Act became effective in 2015 or intends to do so in the future

New Grounds for Termination – I Ground or Accumulation Ground

Dutch dismissal law is renowned for a high degree of employee protection. Employment contracts can be validly terminated only in certain circumstances:

- Mutual consent – deemed voluntary
- Resignation – deemed voluntary
- Notice of termination with the employee's consent – deemed voluntary
- Notice of termination – involuntary dismissal. Employers must obtain prior approval from the UWV (the employee insurance administration agency) before giving notice that will lead to valid dismissal
- Court rescission – involuntary dismissal

The Dutch Civil Code lists eight statutory reasonable grounds for involuntary dismissal (the "A-H Grounds"):

a. Redundancy due to shut down of the company or restructuring/ re-organization;

b. Long term illness (104 weeks);

c. Regular inability to perform the agreed work due to illness;

d. Employees incapability/lack of competence to perform the agreed work for another reason than illness;

e. Culpable behavior of the employee;

f. Employee refusing to perform the agreed work due to serious conscientious objections;

g. Work related conflict between the employer and employee;

h. Other circumstances that are out of scope of the above grounds but are of such nature that the employer cannot reasonably be expected to prolong the employment contract.

Under the current legislation, involuntary dismissal due to employee conduct can occur only if at least one of the last six conditions is met ("C-H Grounds"). In the event that the employer unilaterally terminates the employment agreement under one of the eight grounds, the employee is entitled to a statutory transition fee (*transitievergoeding*).

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From available case law, it appears that these grounds are not easy to prove, and the requirement is burdensome for employers who must endure a lack of flexibility, high costs of building a case file, and time-consuming litigation which is often costly. The legislator has introduced a ninth ground that allows employers to combine facts and circumstances that would otherwise not meet the requirements of one of the C-H Grounds but present a compelling case for dismissal. This additional basis for dismissal is referred to as the "I Ground" or the "Accumulation Ground."

This improvement however comes at a price. If the court terminates the employment contract based on the I Ground, the court is allowed to grant the employee additional compensation up to half the amount of the transition fee.

In addition, the court can award increased "reasonable compensation" if it determines that the employer was seriously culpable in the dismissal. This compensation is by nature subjective. The court assesses the overall facts and circumstances and sets an amount that it deems "reasonable" based on its exercise of judgment. The subjectivity of court proceedings often results in a high level of out-of-court settlements, generally including more generous severance packages. If a settlement cannot be reached, the employer has no other choice than to seek termination through court proceedings. A court ruling in first instance is open to appeal and cassation.[1]

The overhaul of dismissal laws in 2015 continues to leave its mark on labor relations, and it will take many more years before the outcome of employment cases can be predicted with relative accuracy. Until then, employers must continue to carry on procedures to build accurate cases to be heard in court. This entails empowering Human Capital departments and legal teams to craft workforce management procedures that meet legal requirements and commercial objectives. As now seen in much of Europe, proactive education programs are required to ensure that managers understand the "do's and don'ts" necessary to prevent allegations of seriously culpable behavior by the company. The goal is to create bottom-up and top-down awareness of the legal and financial consequences of excellent or poor people management. The driver for this type of program is not necessarily the creation of a better product or higher profits, but the optimization of the company's legal position when justifying forced dismissals and countering claims of seriously culpable behavior by the company.

Transition Fee – Statutory Severance: The Changes

Transition Fee from First Day of Employment

As of January 1, 2020, employees will be entitled to receive statutory severance payments (the *transitievergoeding* or transition fee) from their first day of employment, including any trial period. Currently, employees are entitled to the transition fee only after two years of employment.

No Transition Fee

The transition fee is not due in the case of company downsizing or shutdown (A Ground) when the company is subject to a C.L.A. that was concluded with a trade

[1] "Cassation" refers is a second level of appeal to the Supreme Court. The Court has discretion when deciding to accept the appeal.

union includes measures aimed at limiting unemployment, offers reasonable financial compensation, or a combination thereof.

Transition Fee Calculation

The formula for calculating the transition fee will change to one-third of the monthly gross salary for each full year of service plus a *pro rata* share for each month or day of service regardless of the employee's age or duration of service. The current distinction between the first ten years of employment, which is based on one-third of the monthly salary, and subsequent years, which is based on half of the monthly salary, will be eliminated.

Over 50: No Preferential Treatment

As of January 1, 2020, the measure entitling employees age 50 or older to greater compensation will no longer apply.

Reimbursement for Employers

In 2020, compensation will be available to employers for transition fees paid upon dismissal due to long-term illness or disability.

In the Netherlands, employers must continue salary payments to employees on sick leave for a maximum of 104 weeks. If the employer has met all obligations during this period, the employment agreement can be terminated, with approval from the UWV ("B Ground"). Upon dismissal, the employee is entitled to receive a transition fee, which must be issued within a month of termination. The requirement to pay the transition fee has been viewed as onerous on employers and has led to prolonged employment in order to avoid paying the fee.

"With these changes, the Dutch government intends to encourage the signing of long-term or permanent employment agreements instead of the shorter fixed-term contracts that have become popular with employers."

As of April 1, 2020, employers can apply for reimbursement from the UWV for transition fees paid for B Ground terminations since July 1, 2015. In order to benefit from this provision, companies must keep accurate records of any such transition fees. Requests for reimbursement on a retroactive basis (*i.e.*, terminations that took place from July 1, 2015 to March 31, 2020) can be submitted beginning April 1, 2020, until six months after that date (*i.e.*, September 30, 2020). The reimbursement is also available if an employment contract is terminated due to a company shutdown resulting from the retirement, illness or disability, or death of the employer. Reimbursement requests for transition fee payments made from April 1, 2020, onwards must be submitted within six months of the payment date. Reimbursement requests that are not timely will be rejected.

Successive Fixed-Term Employment Contracts: Back to 36 Months

In 2015, the contractual sequence of fixed-term contracts was limited from "3x3x3" to "3x2x6" (outlined below).

Consequently, employers were allowed to enter into a maximum of three consecutive fixed-term contracts, each covering a period of 24 months, with a maximum of six months of unemployment between the contracts. If parties entered into a fourth contract or the period of 24 months was exceeded, an indefinite-term contract would be deemed to exist by operation of law.

As of 2020, employers will be allowed to conclude three fixed-term contracts of 36 months. The maximum period between contracts will remain six months. The

36-month period will also be applicable to current fixed-term employment contracts provided that they remain in effect until or after January 1, 2020. After 36 months or if a fourth fixed-term employment contract is agreed, the employment contract is deemed to be an indefinite-term contract.

Before 2015: 3 x 3 x 3
3 employment contracts
3 years (36 months)
3-month intervals

Current Rule: 3 x 2 x 6
3 employment contracts
2 years (24 months)
6-month intervals

Effective January 1, 2020: 3 x 3 x 6
3 employment contracts
3 years (36 months)
6-month intervals

On-Call Employment Contracts

Timely Notice

The time between when an employer contacts an on-call employee and when the employee must report to work is not regulated under current law. However, as of 2020, employers must provide at least four days advance notice to on-call employees. The on-call employee will be entitled to the agreed wage if the work is cancelled within those four days.

Deviation Under a C.L.A.

For employers who are subject to a C.L.A. with a trade union, the notice period may be reduced to 24 hours under the C.L.A.

Accrued Rights to Hours

An on-call employee who has been engaged or contracted by the company for 12 months is entitled to “guaranteed working hours.” These hours must be based on the average number of hours the on-call employee worked in the preceding 12 months. If the employer does not offer sufficient hours to meet the guarantee, the employee is still entitled to the associated wages.

Equality for Payroll Employees

"Payrolling" is a form of employment where companies hire workers from a third-party "payroll company" that has no other activity than employing workers to be posted at their customers' offices. The payroll company assumes all the employer's risks and obligations. This form of labor allocation caters to many companies' desire to eliminate employer liabilities and reduce operational and overhead costs and their need for a flexible workforce.

The differences in compensation and benefits created a business case for some payroll companies to offer their services at commercially attractive fees. However, these practices have not received much support from the trade unions and the legislator. The main concern relates to compensation, as payroll employees generally received lower pay and fewer employment benefits than direct employees of companies.

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As of 2020, the benefits of payrolling will be largely eliminated. Payroll employees will be entitled to the same compensation and benefits as employees of the company where posted. They will also be entitled to an "adequate" pension plan. It is likely that these legislative changes will increase the costs of employing payroll employees. The rules will not apply to temporary workers and seconded employees.

Lower Unemployment Insurance Contributions

Unemployment Insurance Contributions

In the legislator's quest to promote indefinite term employment, social security insurance contributions for unemployment will no longer be differentiated depending on the sector category of the employer.

Beginning in 2020, unemployment insurance contributions for employees with indefinite-term employment agreements will be lower than contributions for employees with fixed-term contracts, with the exception of (i) on-call employment contracts and (ii) employees who are under 21 years of age and work for less than 12 hours per week.

Paystub Requirements

From 2020, paystubs must mention whether the employee works under a fixed-term or indefinite-term employment agreement. If the employer applies the lower unemployment insurance premium, a copy of the indefinite-term employment agreement must be kept on file in the salary administration office of the employer. This allows the tax authorities to verify whether the employer has correctly applied the lower premium.

Increased Premiums

In certain circumstances, the employer must retroactively adjust the lower unemployment insurance premium to the higher rate. This is applicable in the following instances:

- The employment contract is terminated within five months after the commencement date.
- Actual paid work amounts to 30% more than the agreed working hours specified by contract for a calendar year. This rule aims to prevent abuse by

employers who would deliberately require an excessively low number of working hours in order to pay lower unemployment contributions.

These changes will generally be implemented by the payroll company effective 2020. The percentage of unemployment premiums for 2020 will not be determined earlier than at the end of 2019. The government indicated a lower insurance premium of 2.78% and a higher unemployment insurance premium of 7.78%.

Premiums by Sector

Classification System Will Remain in Place

The premiums for the Work Resumption Fund (*Werkhervattingskas*) consist of charges relating to two components: (i) partial disability insurance (*Regeling Werkhervatting Gedeeltelijk Arbeidsgeschikten*) and (ii) sick benefits. For small and medium-sized employers, both components are partly determined based on commercial sector. This classification system remains in place.

Temporary Employment Agencies

Since May 18, 2017, temporary employment agencies (*uitzendbedrijven*) cannot be classified as part of the professional sector. Under a transitional rule, temporary employment agencies that were classified as in the professional sector were allowed to retain that classification. As of 2020, the transitional law will no longer apply, and all temporary employment agencies will be classified as part of the temporary employment sector.

Payroll Companies

Payroll companies will no longer be classified under the temporary employment sector but in business services. A split allocation (*gesplitste aansluiting)* may apply if the payroll company also assigns (*uitzenden*) its employees.

Personnel Companies

An exception continues to apply for limited liability legal entities (*besloten vennootschappen*) that serve as personnel companies. These companies will be classified as part of the sector to which the actual work or duties of the employees is allocated.

Self-Employed Workers: Stay Tuned, More Changes to Come

The government is currently preparing new legislation aimed to offer a legal and tax framework for self-employed workers, the equivalent of freelancers in the U.S. More clarity on these forthcoming measures is expected before 2020.

In addition, the government has installed a committee to advise on the regulation of new forms of labor, such as freelancers and members of the sharing economy, who are connected to work via digital platforms.[2] This advice is expected to be published in November 2019.

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[2] "The Sharing Economy Part 1: New Business Models + Traditional Tax Rules Don't Mix," *Insights* 4, no. 8 (2017).