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Employment Newsletter May 2012

This May briefing from the Clifford Chance Amsterdam Employment and Pensions group gives a brief description of the impact of developments on employers in the Netherlands that can no longer be ignored: the new world of working (*het nieuwe werken*) and the use of social media by employees. This newsletter also provides an update on whistleblowing policies and the implementation of the Alternative Investment Fund Managers Directive in the Netherlands, and describes changes to the dismissal protection for expats in the Netherlands.

Topics

- The new world of working in the Netherlands (*het nieuwe werken*)
- Social media enters Dutch case law
- Whistleblowing: an update
- AIFMD
- Expats in the Netherlands
- New and pending legislation

The new world of working in the Netherlands (*het nieuwe werken)*

In September 2011, a legislative proposal was brought forward to use the (existing) Working Hours Amendment Act (*Wet Aanpassing Arbeidsduur*) to introduce a right for employees to work in a more flexible manner. The relevant legislative proposal, (which has been updated recently), provides for a right of employees to ask their employer for changes to their working hours and location. Again this proposal aims to support a better work life balance. Opponents have argued that there is no need for a statutory right for employees to, eg work from home or at self-chosen times, as this can be arranged between employees and employers in mutual consultation, or the trade union representatives will take the lead. Many initiatives in the Netherlands to introduce the new world of working have indeed proven to be successful without the help of relevant rules and regulations. Even if the legislative proposal does not reach the next phase, it is clear that the new world of working can no longer be ignored. Progressive developments towards a more flexible working environment will bring changes to organisations and their existing policies and procedures. You might, for example, consider changes to reporting lines, appraisal systems, health and safety regulations, data privacy issues etc, which may require works council involvement. To set the tone and in order to remain in the driver's seat, you may consider designing a policy regarding the implementation of the new world of working within your organisation.

Social media enters Dutch case law

In a recent ruling, the Court of Arnhem terminated the employment of an employee without any compensation as a result of the employee repeatedly posting messages on Facebook that were insulting to both his employer and his colleagues. The employee claimed that his postings were private statements that fell under the freedom of speech. This defence was not accepted by the Court. The Court ruled that postings on Facebook should be deemed to be public since such postings can be 're-tweeted' and as such could be made available to a wider group than only the employee's Facebook friends. Furthermore, the Court considered that the employee has a duty of care towards the employer and should refrain from making public statements that had the potential to damage the employer's good name. The ruling of the Arnhem Court ties in with previous rulings of other Courts. From the case law, it follows that employees are expected to be aware that information posted on social media websites such as Facebook, LinkedIn and Twitter can become part of the public domain and can in principle be retrieved and used by any person. In order for employers to effectively enforce instructions in

this regard, our recommendation is to have a social media policy in place dealing with the do's and don'ts when using social media. It may now be clear to employees that posting messages of an insulting nature may have adverse employment consequences. A policy can, however, also deal with questions such as: Can you use social media for posting a message that you are on a business trip, have worked on a deal all night, or to link up with a friend at a competitor?

Whistleblowing: an update

On 14 May 2012, a legislative proposal was brought forward introducing statutory protection and support for whistleblowers. In the recent past, whistleblowers in the Netherlands have revealed issues of great public interest. The price they had to pay was, however, high. Whistleblowers have often lost their job and their reputation and have suffered substantial financial damages.

The legislative proposal provides for the establishment of a so-called "home for whistleblowers" (*Huis voor klokkenluiders*) for employees to turn to for advice and support if they suspect the presence of an irregularity which is of public interest. Furthermore, the legislative proposal provides for both dismissal protection and financial protection for whistleblowers. At this moment, several political parties have declared their support for the proposal.

The legislative proposal aims to remove hurdles for employees who may be aware of an issue of public interest, but are reluctant to take action in view of the possible adverse consequences that whistleblowers have been confronted with in the past.

For employers, the legislative proposal and the proposed increased protection of whistleblowers is a good reason to review their whistleblowing policy. By blowing the whistle, employees can not only cause financial and reputational damage to their (former) employers, but also frustrate their employers' option to plead for leniency within the context of the merger control rules and regulations.

Case law has shown that if an employer has implemented a whistleblowing policy that requires the employee to first report any alleged irregularities internally, non-compliance with this procedural step shall in general justify a termination of the employment agreement without, or with relatively low, severance pay. Employees may even be liable towards their employer when the required procedures have not been followed. Since damages can be substantial, this should provide an incentive for the employee to follow the correct procedure.

However, the mere presence of a whistleblowing policy is of limited value if the employees are not aware of the required procedures nor of the circumstances in which these should be followed. Information on the leniency rules relating to cartels may also be of relevance to employees, since this will raise awareness of the fact that leniency for the employer will also include leniency for the employee, but that it does not apply the other way around.

All the more reason to have a whistleblowing policy in place and to communicate its existence regularly to protect the interests of the company. But even when a whistleblowing policy is in place, as is the case for many larger listed companies as a result of the best practice provisions of the Dutch Corporate Governance Code, we see often see scenarios which had not previously been considered yet may need to be dealt with.

For example, it is common for whistleblowing to take place where employees who have already left the employment of the organisation denounce its abuses in public. Employers have encountered varying degrees of success when trying to claim compensation from former employees that caused damage by whistleblowing. Case law has shown that those claims are rarely awarded, since most of the time the employer can only claim non-compliance with post-contractual secrecy obligations. If these circumstances are taken into account when drawing up a whistleblowing policy, the policy can be made more effective.

The proposed "home for whistleblowers" may advise the potential whistleblower to initially report the alleged irregularity internally. In our view, the presence of an adequate internal procedure will encourage such an outcome, which will not only allow the employer the possibility to resolve problems internally but, if relevant, also plead for leniency. Since politicians are focusing on protecting the whistleblower, it is especially important for employers to focus on protecting themselves by optimizing their whistleblowing policy.

AIFMD

The draft bill implementing the European Directive applicable to Alternative Investment Fund Managers (AIFMD) has recently been submitted to the Dutch parliament. The AIFMD regulates the majority of investment funds such as hedge funds, private equity funds and any non-retail funds active in infrastructure, real estate and raw materials unless these can be considered an undertaking for

collective securities (*instelling voor collectieve belegging*).

One of the various requirements for relevant funds is to implement a remuneration policy that is consistent with sound and effective risk management for those employees whose professional activities have a material impact on the risk profile of the fund manager and/or the funds managed. To this end, the AIFMD introduces remuneration principles which are broadly in line with the remuneration principles already in place for financial institutions such as banks and insurance companies. The principles contain, for example, limits on the extent to which bonuses can be paid in cash (maximum 50%) to *inter alia* senior management and a requirement for partially deferred bonuses.

The funds are allowed to apply the principles on remuneration policies in different ways depending on their size and the size of the funds managed, internal organisation and the nature, scope and complexity of activities. The numeric criteria, such as the requirement that at least 40% of the variable remuneration component should be deferred over a period of at least three to five years, must be applied by each of the relevant funds. A remuneration committee, however, does not need to be established in each case. It is crucial to realise that the term 'remuneration' is interpreted widely. The requirements apply not only to remuneration of any type paid by the fund manager, but also to any amounts paid directly by the fund, including carried interest.

The AIFMD contains also information and notification obligations towards the works council or employees if a fund manager acquires control over a non-listed company.

The new rules are likely to come into force by mid 2013. Fund managers will have to review the remuneration arrangements and structures currently in place and adopt a remuneration policy taking the proposed legislation into account.

Expats in the Netherlands

Until recently, employees working temporarily in the Netherlands as expat or non-Dutch employees were deprived of the Dutch dismissal protection rules if they would not remain part of the Dutch labour market after their dismissal. This meant it was of relevance, for example, whether the foreign national would return to his or her home country upon termination. As a result of a recent ruling of the Dutch Supreme Court, the dismissal protection under Dutch law for employees in international employment relationships may improve. The relevant dismissal protection rules imply that, in principle, an employment agreement may not be terminated unilaterally, but that a dismissal permit or a decision of the relevant Dutch court is required.

In the case in question, where the employee in question had the American nationality, the Court of Appeal ruled that the employee had a similar right to Dutch employees to invoke dismissal protection because: (i) the employment agreement was governed by Dutch law, (ii) the employment was performed in the Netherlands, (iii) the employer was registered in the Netherlands, and (iv) the employee had no (concrete) prospect of long-term employment in another country. The Court of Appeal, as confirmed by the Supreme Court, ruled that dismissal protection applies in the event that the situation of the foreign employee does not differ significantly from Dutch employees in a similar case. Unilateral termination in this case was therefore not possible.

As a result of the decision of the Supreme Court, whether the employee will revert to the Dutch labour market is no longer the decisive factor for the requirement to obtain a dismissal permit, but is one of many circumstances that will be considered when determining whether the situation of the foreign employee is sufficiently distinguishable from the situation of other employees working in the Netherlands. Further to this decision, it may become more difficult for employers to dismiss foreign employees/expats without a dismissal permit, though each case will depend on the specific circumstances. The relevant dismissal protection may also apply when a contract is not governed by Dutch law.

New and pending legislation

Change in commencement date of general old age pension benefits (*AOW-uitkering*)

With effect from 1 April 2012, the general old age pension benefits will no longer commence as of the first day of the month in which the employee becomes 65, but will be paid from the day the employee actually turns 65. In this regard, alignment of the termination date of the employment contract may need to be considered.

Parental leave rules amended according to European Directive

As of 12 April 2012, the European Parental Leave Directive (2010/18/EU) has been implemented in Dutch Law. From this date, the employee has the right to request for a temporary amendment of his or her working hours after his or her right to parental leave has been fully utilised.

New information obligation as regards temporary workers (*uitzendkrachten*) the Dutch Works Council Act

Following a recent change to the Dutch Works Council Act, companies have the obligation to provide the works council, at least annually, in writing with general information regarding the work force employed within the organisation as temporary workers, and must also inform the works council (orally or in writing) on the expected developments regarding the number of temporary workers for the next year.

Introduction Act on Management and Supervision (*Wet Bestuur en Toezicht*) postponed

The Act on Management and Supervision, pursuant to which, for example, the number of (supervisory) board positions held by an individual will be limited and the board members are presumed to no longer be employees, will not enter into force on 1 July 2012. A new date has not yet been set.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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