Drastic changes to Dutch employment law

On 1 January 2015 the first part of the Work and Security Act (*Wet Werk en Zekerheid, WWZ*) came into effect. This has already raised a fair number of questions from clients wondering how these new rules impact their day-to-day business, whether a transitional period applies and whether amendments to their existing employment agreements are necessary.

We provided an overview of the main changes of the WWZ in our previous client briefings of March and September 2014. This update is a follow up on those briefings in which we will briefly set out the implications of the WWZ per 1 January 2015 and provide for practical suggestions to deal with these changes.

The following changes are applicable as per 1 January 2015:

Notification duty

As per 1 January 2015, there is a duty for the employer to notify an employee, who is employed on the basis of a fixed-term contract of six months or more, whether or not the employment contract will be extended, and, if so, under what terms and conditions (*aanzegverplichting)*. The employer must notify the employee at least one month prior to the expiration of the fixed-term.

Penalty: In case of a breach of this notification duty, a penalty of a maximum of one monthly salary (or a pro rated part thereof) will be payable to the employee. If the employer does not pay the penalty on its own initiative, the employee can enforce payment in court proceedings. The employee can only initiate such proceedings within three months after the moment at which the notification duty exists. Failure to comply (timely) with this notification duty does not hold any consequences for the expiration of the contract.

Example: In the event that the notification is two days overdue in February, this will result in a penalty equal to 2/28 x of the monthly wage. The monthly wage is the gross hourly wage multiplied by the agreed working hours per month.

The notification duty does not need to be included in the fixed-term employment contracts. It is, however, important to keep record of each contract to which the notification applies, such record to include the ultimate notification dates and, accordingly, take relevant steps to comply with the notification duty.

The notification duty entered into force on 1 January 2015 and this means that a notification is required for all fixed-term employment contracts of six months or more that will expire on or after 1 February 2015, even if such contracts have been entered into before 1 January 2015.

Non-compete clause

In principle, it is no longer allowed to include a non-compete clause in fixed-term employment contracts that have been entered into on or after 1 January 2015. There is an exception if the employer has consequential company interests that justify the

inclusion of a non-compete clause in a fixed-term employment contract. These consequential interests need to be substantiated in the employment contract. It should also be duly justified that in relevant individual situations a non-compete clause is necessary in order to protect these consequential interests.

Penalty: In case, after 1 January 2015, a fixed-term employment contract is entered into that includes a non-compete clause without explanation and justification of the consequential company interests, the non-compete clause is void.

If the abovementioned interests have been set out properly, a court could still nullify the non-compete clause if it rules that the motivation for the inclusion of a non-compete insufficiently substantiates the necessity for the non-compete clause. The court will also assess if the necessity to include the non-compete clause actually existed at the moment at which the non-compete was entered into and if such necessity is still present at the moment when the employer invokes the non-compete clause.

Do not include a non-compete clause in the standard fixed-term employment contract, but consider to do so only for certain individuals or categories of employees. In any event make sure that the consequential company interests have been duly substantiated in the employment contract.

A valid non-compete clause in a fixed-term employment contract requires a case-by-case assessment resulting in a tailor-made clause that duly substantiates the consequential company interests. As soon as the contract converts into an indefinite-term employment contract, specific attention should be paid to (the inclusion of) a non-compete clause and its wording.

For the avoidance of doubt, the above mentioned restrictions as regards the inclusion of a non-compete clause only apply to fixed-term employment contracts. These restrictions do not apply to non-competes in fixed-term employment contracts that have been entered into before 1 January 2015, indefinite-term employment contracts, purchase agreements, shareholders agreements or management agreements.

Probationary period

As per 1 January 2015, it is no longer allowed to include a probationary period in a fixed-term employment contract of up to six months.

Penalty: A probationary period in a fixed-term employment contract of up to six months entered into on or after 1 January 2015 is void.

It could be considered to enter into an employment contract of seven months. In that case, a one-month probationary period can be agreed upon. The probationary period needs to be agreed upon in writing.

We will elaborate on the Dutch employment law changes that enter into force per 1 July 2015 in the next WWZ update. Such changes include the maximum number, term and interval period of consecutive fixed-term employment contracts ('chain rule'; *ketenregeling*), the introduction of the so-called transition allowance (*transitievergoeding*) and the changes to the Dutch dismissal laws. Below, we offer you a glimpse of what to expect (please be also referred to our earlier client briefings):

- The 'chain rule' will change as a result of which fixed-term employment contracts will sooner convert into an indefinite-term employment contract.
  - Where possible, consider to take advantage of the more lenient possibilities under the current 'chain rule' by (where possible) extending fixed-term employment contracts before 1 July 2015. It could also be possible that collective labour agreements currently in place provide for such more lenient provisions, which will continue to apply for a certain period after 1 July 2015.
- As part of the new dismissal laws, per 1 July 2015 a so-called transition allowance (*transitievergoeding*) will be implemented. This statutory allowance will be payable to employees whose employment is terminated by the employer or (in the event of a fixed-term employment contract) not extended, provided that their employment has lasted for at least two years.
  - Payment of the transition allowance can be prevented by entering into fixed-term employment contracts for a maximum period of 23 months. For the calculation of the term of two years period, the total duration of employment is relevant, which also includes any years of service prior to 1 July 2015. In this regard, fixed-term employment contracts that succeed each other with intervals of

six months or less (as opposed to the three months or less interval period under the current 'chain rule') will be taken into account when calculating the two years term relevant for the transition allowance.

- Also other elements of Dutch dismissal laws will substantially change. The possibilities to anticipate on these changes are limited. However, for example, the test for a dismissal on the basis of poor performance will become more strict. In this regard, having clear job requirements as well as thorough documentation will be essential and necessary under the new laws in order to meet the relevant requirements. Of course, that is something you can already start with!

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