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CHANCE

Client briefing Spring 2017

Employment update: recent developments

In this spring 2017 Employment update we set out a number of material developments regarding Dutch employment law, such as legislative proposals and regulations that have entered into force in the last few months or that will take effect in the short term.

Changes to Working Conditions Act

The legislative proposal providing for changes to the Dutch Working Conditions Act (*Arbowet*) was adopted on 24 January 2017 and is expected to enter into force with effect from 1 July 2017. With this Act the government aims to improve the prevention of occupational illnesses and work related health problems. This is done by enhancing the involvement of the employer and employees where the company's health and safety services are concerned. The most important aspects of the new legislation can be summarized as follows:

- Open consultation hours – employees should have the possibility to consult the company doctor (*bedrijfsarts*) during the 'open consultation hours' without intervention or permission of the employer and without the employer being informed.
- Second opinion – employees may request a second opinion from another company doctor (ie a company doctor from another health and safety service provider instead of the provider engaged by the employer). The request needs to be made with the company doctor and the costs of the second opinion are to be borne by the employer.
- Enhancement of the position of the company's in house health & safety officer (*preventiemedewerker*) – the position of the in house health & safety officer is to be made clearer. For this purpose a right of consent for the works council or employee representative body as regards to the appointment and positioning within the company of the in house health & safety officer will, amongst others, be introduced.
- Base contract with health & safety service provider – the new legislation provides for certain minimum requirements as regards the contents of the contract with the health & safety service provider. Where the role of the company doctor is concerned, the contract should amongst others deal with:
  - the possibility for the company doctor to visit the work place;
  - the cooperation with and the provision of advice to the in-house health & safety officer, the works council or other form of employee representative body;
  - the possibility of a second opinion; and
  - the tasks of the company doctor:
    - to advise the company regarding preventative measures;
    - to report occupational illnesses to the Netherlands Center for Occupational Illnesses (*Nederlands Centrum voor Beroepsziekten*).

Every contract concluded from 1 July 2017 and onwards will need to meet the criteria from the Working Conditions Act. Existing contracts will need to be updated before 1 July 2018, which means that companies may need to renegotiate terms with their health & service provider. Please note that relevant changes to the contract may be subject to consent of the works council, if any. The Social Affairs and Employment Inspectorate ("Inspectorate SZW") will monitor and uphold the presence of the 'base contract' as described above. Non-compliance with the Working Conditions Act may be sanctioned with a penalty, which may vary per breach, of up to EUR 13,500 for companies with 500 or more employees.

We are of course happy to provide you with further information on this new legislation and the impact it may have to your organisation.

Immigration – ICT Directive

The Dutch law implementation of the Intra Corporate Transferees Directive ("ICT Directive") has resulted in a different immigration regime for employees who fulfill roles at university/higher professional educational level in international groups of companies, but do not have the nationality of one of the EU or EEA member states or Switzerland[1], if these employees:

- have an employment contract (at least for three months) with an undertaking established outside the EU; and
- will temporarily be transferred to one or more branches of this undertaking within one or more member states in the EU.

For relevant employees a combined permit for residence and work is available for a maximum period of three years (one year for trainees). After this period, a new permit can only be requested after a stay of at least six months outside of the EU. On the basis of the relevant permit, there are more flexible conditions for a subsequent intra group transfer to another EU member state (within the three-year period). Bear in mind, however, that each EU member state applies other conditions in this regard. For qualifying foreign nationals, the process pursuant to the Dutch law implementation of the ICT Directive takes precedence over the procedure for highly skilled migrants (*kennismigrantenprocedure*).

Update Dutch dismissal system

- Transition allowance – A legislative proposal was published on 23 March 2017 providing for measures in relation to the (statutory) transition allowance for dismissals as a result of business economical circumstances, or long-term illness.
  - *Termination for business economical circumstances* – according to the proposal, no transition allowance will be due in the event of a termination for business economical circumstances if an applicable collective bargaining agreement provides for replacement benefits in the form of facilities that contribute towards:
    - Preventing unemployment, or limiting the duration thereof;
    - a reasonable compensation, or
    - a combination of the foregoing elements,

    whereby such collective bargaining agreement will need to explicitly state that no transition allowance will be payable.

    If relevant conditions are met, the requirement that the replacement benefits will need to be equivalent to the transition allowance no longer applies. In practice this means that parties to the collective bargaining agreement may agree to an arrangement that will ultimately result in a reduction of the termination costs of individual employers when redundancies are concerned. The current arrangement providing for the possibility to agree to benefits replacing the transition allowance in a collective bargaining agreement also for dismissals on personal grounds will – after a transition period - lapse. The intended date of this act coming into effect is 1 January 2018.
  - *Termination after 104 weeks of illness* – the proposal provides to compensate employers for the costs of the transition allowance payable upon termination of long-term ill employees. After 104 weeks of illness, the dismissal prohibition during illness will in principle lapse and a relevant termination will entitle the employee to payment of the transition allowance. The government has committed to this legislative change in view of the public indignation resulting from occasions where employers continued the employment of relevant employees (without paying salary, which is allowed after 104 weeks of illness) solely to prevent payment of the transition allowance. Relevant employers on their turn found it unjustified that after they had continued the ill employee's salary for 104 weeks and were also confronted with the costs of the transition allowance. It is proposed that compensation will be payable as of 1 January 2019 with regard to qualifying transition allowances paid as of 1 July 2015. The compensation will then be payable by UWV on account of the General Unemployment Fund (*Algemeen werkloosheidsfonds*), and indifferent to the manner of termination, which means that it also sees to terminations by mutual

[1] For Turkish nationals specific rules may apply.

consent for reasons of long-term illness once the dismissal prohibition during illness has lapsed.

- Age discrimination and the transition allowance – Dutch law provides that no transition allowance is due if the termination or non-continuation of the employment occurs in relation to or after the date on which the employee becomes entitled to state-provided pension benefits (*de AOW-gerechtigde leeftijd bereikt*), or another date on which the employee becomes entitled to pension benefits. A Dutch Court of Appeal has referred questions to the Dutch Supreme Court to have assessed whether this provision results in discrimination on the basis of age.
- Consideration period – It follows from case law that the 14-day consideration period following the execution of a termination agreement providing for a termination by mutual consent, starts at the time agreement is reached on the contents thereof. This does not necessarily coincide with the moment of signing the termination agreement, as a result whereof the consideration period may start before the date of execution of the termination agreement.
- Assessment of financial need – The basic principle for dismissals for business economical circumstances is that UWV will assess the necessity for the redundancies solely on the basis of the business economical circumstances of the entity where jobs are to be made redundant rather than on the basis of the situation of the group of companies as a whole, or other group companies. A Dutch Court of Appeal has however recently confirmed that redundancies may also follow from cost cutting measures that are not related to the employer's own financial situation, but that follow from the sacrifice that is being requested in the larger group of companies' interest.

Posting of employees to the Netherlands from other EU countries

If employees employed in another EU member state are temporarily seconded to the Netherlands, the Act regarding Employment Conditions of Posted Workers in the European Union (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*) is relevant. This Act provides for a minimum level of employment conditions, eg with regard to minimum wages and minimum holiday pay, working hours, working conditions, equal treatment etc. In sectors where generally binding collective bargaining agreements apply, provisions with regard to relevant topics will also need to be complied with, which for example may result in the need for a foreign service provider to increase the wages of the workers posted to the Netherlands as a result of a salary increase provided for in the collective bargaining agreement applicable to the sector. The Act may also be relevant to secondments within Europe: certain provisions of Dutch law may become relevant despite the fact that the laws of another member state will govern the employment relationship.

The Act provides for administrative measures to ensure that the so-called hard core of the terms of employment can be enforced adequately. Information such as pay slips and overviews of hours worked by employees posted to the Netherlands will need to be available at the workplace, and a contact person will need to be appointed for possible questions of the Inspectorate SZW. Non-compliance can be sanctioned with an administrative fine of up to EUR 20,250. In addition, there will be a notification duty for the service provider who posts employees to the Netherlands regarding where and when and with which employees the work will be performed. The notification needs to be made prior to the start of the activities in the Netherlands, and the service recipient in the Netherlands will need to verify whether relevant information is correctly filed. The Act is already effective and will be enforced. The notification duty will enter into force as soon as a digital reporting system is in place. This part of the Act is intended to enter into force per 1 January 2018.

Supreme Court ruling relevant to triangular working relationships, even if no allocation function is present

Dutch law provides for specific rules for temporary employment contracts whereby it is the contractual employer's business or profession to make his workforce available to others to work under the third party's supervision and control (*uitzendovereenkomsten*), so-called temp agencies. In the past, the general opinion was that relevant provisions only see to relationships involving contractual employers that actively mediate between the supply and demand of temporary staff. The Dutch Supreme Court has now confirmed that this so-called allocation function is not a requirement to assume the existence of a temporary employment contract within the meaning of the relevant legislation.

As a consequence, employers who assign employees to third parties, even if they do not qualify as a temp agency within the traditional meaning of the word, may –provided

certain further conditions are met - be confronted with eg the mandatory participation to the pension fund for the temporary agency workers ("StiPP"), and mandatory applicability of the collective bargaining agreement for employment agencies ("ABU CBA"). On the other hand, a more flexible dismissal regime may be open for relevant employers.

It is important to assess the impact of the Supreme Court's ruling to existing triangular relationships within your organisation to prevent possible claims pursuant to alleged applicability of the ABU CBA or participation to the StiPP pension fund. Please note that intra group posting of employees may also qualify as a relevant triangular relationship, albeit that this kind of secondments are exempted from the mandatory applicability of the StiPP pension fund.

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