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Employment Update

Newsletter | August 2017

Dear reader,

Welcome to the new edition of the Employment Update of Baker McKenzie Amsterdam's Employment & Compensation Practice.

With this digital newsletter, we will keep you up to date with the current developments in the field of Employment law that may be of interest for your practice.

As a result of the current "off-season," this summer edition of the Employment Update only discusses three topics. For this reason, we have decided to provide you with a more in-depth review of these topics.

If you would like to find out more about this newsletter, please do not hesitate to contact us.

Kind regards,

On behalf of the Employment & Compensation Practice,

Mirjam de Blécourt
Partner

Remke Scheepstra
Partner

In this edition

Supreme Court provides guidelines for determining reasonable compensation – individual circumstances can be taken into account

As opposed to earlier presumptions, the Supreme Court has ruled that when determining reasonable compensation (*billijke vergoeding*), the consequences of the termination for the employee should be taken into account.
According to the Supreme Court, what the (former) employee would have earned if he/she were reinstated instead of terminated can play a role. The (hypothetical) duration of the employment contract in that case would depend on the specific circumstances of the case. For instance, whether the employer could have terminated the employment contract lawfully – and if so – what the applicable notice period would have been. When assessing if and to what extent the pay the employee would have received if the termination were declared void, the following circumstances could be of importance:

- the level of culpability attributed to the employer
- whether the reason the employee did not request reinstatement can be attributed to the employer
- whether the employee has already accepted a new job, and what his/her income is
- the income that the employee can reasonably earn in the future
- the transition payment paid

Unfortunately, this decision does not yet provide a fixed formula for determining the reasonable compensation. It merely provides a list of factors that could play a role in determining the reasonable compensation. We will keep you informed of further developments.

Evaluation of the 30% facility

Recently, the results of an investigation into the effectiveness of the 30% facility were published in an evaluation report. Based on this report, it turns out the facility has accomplished most of its intended effects. However, there is still room for improvement.
As you may know, the 30% facility is a specific tax regime for foreign employees that meet certain criteria, and who are temporarily assigned to, or hired from abroad by, an employer in the Netherlands. When meeting certain requirements, 30% of the employee's salary can be paid out as a tax-free allowance to cover extraterritorial costs. In addition, the employee may, at his/her request, benefit from a tax treatment as a non-resident taxpayer regarding income from a substantial interest and income from savings and investments.
The investigation resulted in the following conclusions, among others:

- The 30% facility has proven to be effective on all fronts. The facility reduces the administrative burden and helps attract employees with scarce specific expertise to come to the Netherlands. In addition, the Netherlands has become increasingly attractive for foreign companies.
- The 30% tax-free allowance for extraterritorial expenses is not entirely sufficient for those employees earning a low income or coming from less prosperous countries. While for high-earners coming from prosperous countries, the fixed tax-free allowance of 30% is too high.
- Although the 30% facility has been found to be both effective and efficient, several suggestions were included in the report to make the facility more effective. A reduction of the duration of the facility from eight years to five or six years, an increase of the 150 kilometer-limit and a reduction of the fixed sum for income in excess of EUR 100,000 have all been suggested.

Although the report and the future of the 30% facility will only be discussed in parliament, it is important to be aware that the 30% facility might be changed in the future and to keep this in mind when concluding employment agreements with new employees from abroad.

Opinion of the Article 29 Working Group on data processing at work

The European Data Protection Authorities, organized in the Article 29 Working Group, have issued an opinion on data processing at work (the "**Opinion**"). This opinion provides new guidelines for establishing a balance between the legitimate interests of the employer on the one hand, and the protection of the employee's privacy on the other hand.

The Opinion describes several new technologies that are being used at work to a greater extent. In addition, it also includes the use of wearables and the use of personal data from the social media accounts of (future) employees. With the help of examples, for every technology, the Opinion describes how employers can make use of these technologies in a privacy-friendly way. The fact that an employer possesses electronic devices does not rule out employees' rights to confidentiality of their communication, location data and correspondence.

Furthermore, the Opinion once again emphasizes that employees are hardly ever in a position to freely give their consent, given the dependency that results from the employer/employee relationship. Except for extraordinary situations, employers will have to rely on a legal ground other than consent in order to legally process the personal date of employees. This rule covers all situations where there is an employment relationship, regardless of whether this relationship is based on an employment contract.

The legal ground for monitoring will most likely be the necessity to achieve a legitimate purpose of the employer. Based on the Opinion, it is important that employers only monitor employees if:

- the monitoring is necessary
- the legitimate purpose cannot be achieved by other means that are less intrusive
- the processing is proportionate

In addition, employers must always inform their employees sufficiently in advance of the possibility that the use of certain technologies may result in them being monitored. Moreover, employers must indicate what the purpose of the use of these certain technologies is, as well as provide any other information that is relevant in order to guarantee data is processed with due care.
Please click **here** for a PDF file of the Opinion.