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The Global Employer™

The Netherlands Guide 2018



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About the Guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of Dutch employment law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for the Netherlands on immigration, data privacy, trade unions and works councils. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as at August 2018.

IMPORTANT DISCLAIMER: The material in this guide is of the nature of general comment only. It is not offered as legal advice on any specific issue or matter and should not be taken as such. Readers should refrain from acting on the basis of any discussion contained in this guide without obtaining specific legal advice on the particular facts and circumstances at issue. While the authors have made every effort to provide accurate and up-to-date information on laws and regulations, these matters are continuously subject to change. Furthermore, the application of these laws depends on the particular facts and circumstances of each situation, and therefore readers should consult their attorney before taking any action.



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1 Overview

1.1 General overview

The Netherlands has more than 17 million inhabitants, with around 8.7 million of them making up the labor force. In January 2018, the unemployment rate was 4.2% (around 380,000 people).

In the Netherlands, relatively few days are lost to strikes or other forms of labor unrest, likely due to two main factors. First, the Netherlands has a long tradition of coalition and consultation, rather than confrontation. Second, Dutch labor law offers employees a large degree of job protection, supplemented by comprehensive social security schemes. The premiums for these mandatory schemes are shared by employees, employers and the government.

1.2 General legal framework

1.2.1 Sources of law

In principle, Dutch employment law applies to all employment relationships performed in the Netherlands, whatever the nationality of the employee or employer. However, there is a general principle allowing parties to choose a different applicable law (other than Dutch law) to govern employment relationships, provided certain imperative provisions of Dutch employment law are honored.

The primary sources of law that govern employment relationships in the Netherlands include the pertinent sections of the Dutch Civil Code and other statutes. Employment relationships in the Netherlands may also be governed by European decrees and rules such as the European Social Charter, or Dutch decrees such as the Decree on the Rules relating to Mergers of the Social and Economic Council 2015. In addition, legislation from other legal fields, such as corporate and pension law, and social security or tax law, might influence the employment relationship.

Employment relationships in the Netherlands are also governed by collective labor agreements, individual employment agreements and the internal regulations of the employer.

1.2.2 Collective agreements

Collective labor agreements (CLAs) are written agreements between employers (or employers' organizations) and trade unions that govern wages and employment conditions. A CLA is legally binding on the parties and its members. Employers who are party to a CLA must apply it to all their employees, irrespective of whether those employees are trade union members. The Minister of Social Affairs may decide that a CLA (or a part thereof) is applicable to all employment contracts between employees and employers in a certain type of trade or industry (or in a particular part of such trade or industry).

CLAs cover a great variety of employment terms and conditions, such as wages, general working conditions, schooling, working hours, vacation days, notice periods, dismissals, early retirement and pensions, disciplinary sanctions and working rules. Some terms and conditions under a CLA may even deviate from certain statutory provisions. Generally, employment contracts with more senior staff and executives are not subject to the mandatory provisions of a CLA. CLAs are usually entered into for two or three years, and are renegotiated from time to time.

1.2.3 Court framework

In the Netherlands, the civil and criminal judiciary comprises: (i) 11 district courts (with cantonal branches); (ii) four courts of appeal; and (iii) the Supreme Court. The district courts have general jurisdiction in the first instance over civil law disputes, administrative disputes and criminal cases, which are all judged by separate branches of the district courts. Employment matters are submitted to



the Cantonal Division of the District Court. The judgments given by both the civil branches and the cantonal branches of the district courts may be appealed before a court of appeal. The court of appeal fully reassesses the case, both factually and legally. A judgment given by the court of appeal may be submitted for review or cassation before the Supreme Court of the Netherlands on issues of law only.

1.2.4 Litigation considerations

In principle, the party against whom a matter is decided will be ordered to pay the legal costs. However, practice shows that the succeeding party never receives the full amount of the actual incurred cost, but only a fraction of it.

1.3 Types of working relationship

Individuals who provide their service broadly fall into the following main groups: (i) employees; (ii) independent (self-employed) workers; (iii) temporary employees; and (iv) payroll employees. The status of an individual is important because it determines what rights the individual has, e.g., certain important legal rights only apply to employees. In addition, an individual's status determines their tax and social security treatment. The table below provides more information on these groups.

Types of working relationship	
Employees	Employees are generally defined as individuals working under an employment contract, i.e., the employee engages himself/herself toward the employer to perform work for a certain period of time, in service of the employer and in exchange for payment. The essence of an employment contract is a relationship of authority exerted by the employer over the employee. An employment contract may be concluded for an indefinite term, for a specified term (a fixed-term contract), or for a specific task or project. The contract can be oral or in writing.
Independent (self-employed) workers	Independent (self-employed) workers are individuals who work under a "contract for services." The primary difference between independent (self-employed) workers and employees is that independent workers are not subject to any relationship of authority. Independent workers do not have the same level of rights and protection as employees.
Temporary employees	Temporary employees are individuals who have a contractual relationship with a temporary employment agency and who are deployed by such agency to perform work under the supervision and guidance of a third party (recipient). The relationship between a temporary employment agency and temporary employee legally qualifies as an employment agreement. No employment agreement comes into existence between the recipient third party and the temporary employee.
Payroll employees	Payroll employees are individuals who have a contractual relationship with a payroll company (who merely arranges the administrative organization of the employees), whereby the payroll employee is assigned to a recipient. Although no employment agreement comes into existence between the recipient and the payroll employee, the payroll employee should, in some cases, be treated as an employee of the recipient.



1.4 On the horizon

The state pension age is set to increase. It increased to 66 in 2018, is rising to 67 in 2021, and is thereafter linked to the increase in life expectancy (see **6.9**). In 2022, the state pension age will increase to 67 + 3 months. Due to the lower increase in life expectancy, the state pension age will remain 67 + 3 months in 2023. This applies to particular employees born after 30 September 1950 and before 1 January 1957. Those employees will have to work a few months longer than is now the case. As a result, the average age of employees may increase for some Dutch employers. The proposed enforcement of the Assessment of Employment Relationships Deregulation Act (“**Act**”) has been suspended. This Act has abolished the Declaration of Independent Contractor Status, which previously allowed individuals to submit declarations of their independent contractor status to the Dutch tax authorities. The new legislation provides the opportunity for contracting parties to submit their contract for assessment to the Dutch tax authorities to determine whether there is an employment relationship from a Dutch wage tax perspective. This would grant parties certainty with regard to the withholding obligations of the hiring party on the income tax and social insurance contributions due by the contractor.

The Dutch tax authorities have published several different general model contracts that can be used between contracting parties and which serve to demonstrate that there is: (i) no obligation for the contractor to personally perform the activities; (ii) no employer control; (iii) in the case of intermediation; or (iv) when hiring an external expert. Besides these general model contracts, the Dutch tax authorities also published several model contracts composed especially for different sectors.

The suspension of the Act is due to unrest, criticism and uncertainty concerning its implementation within companies and contractors (i.e., companies are reluctant to hire contractors). The State Secretary has concluded that this uncertainty should be eliminated and therefore initially delayed the implementation period for the full effectuation of the Act until 1 January 2020. Until that time, companies and independent contractors will not be penalized (i.e., receive an additional tax assessment).

2 Hiring employees

2.1 Key hiring considerations

Employees are generally hired through advertisements in newspapers, periodicals or on the internet. Specialized private recruitment agencies may be engaged to search for certain key or senior employees. In addition, the Employee Insurance Agency (*Uitvoeringsinstituut Werknemers Verzekeringen* — “**UWV**”), which has offices throughout the Netherlands, provides a free service to help individuals find employment. The UWV plays two important roles in dealing with immigration and dismissals (see further at **15** below).

Employers who wish to hire employees on a short-term or temporary basis will generally enlist the intermediary services of an employment agency. Employees who are hired through such an agency — temporary workers (*uitzendkrachten*) — are paid by the agency, not by the employer, although this is more expensive for the employer (who must pay the employee’s salary plus a fee to the agency). The temporary employee has an employment contract with the employment agency. There is no statutory maximum period of hire with respect to temporary employees.

2.2 Avoiding the pitfalls

The fact that the temporary employment relationship is seen as an employment contract has a number of important consequences, which curtail the freedom of the temporary employment. To ensure the function of a temporary employment contract, the Dutch Civil Code contains a provision that, for a period of six months, some “old freedoms” of temporary employment remain intact. This six-



month period may be extended in CLAs; after that period, the temporary employment relationship falls under labor law legislation (as laid down by the Dutch Civil Code).

The hiring of foreign nationals not permanently residing in the Netherlands is subject to a number of rules and regulations, which are not covered by this guide (see 4 below).

3 Carrying out pre-hire checks

3.1 Background checks

Background checks and reference checks are, in principle, only permitted if the screening is necessary for the conclusion of an employment contract and/or the carrying out of the position for which the candidate is considered.

It is not allowed to ask applicants for their consent to carry out background checks, since an applicant cannot give their consent unambiguously, i.e., freely and without the risk of suffering negative consequences in the employment context should they withhold their consent. The processing of the personal data should therefore be based on a legitimate interest.

The collection and processing of background and reference check information is also subject to the Dutch Data Protection Act (“**PDPA**”), which requires (among other things) that personal data be processed for well-prescribed and justified purposes.

3.2 Reference checks

See 3.1.

3.3 Medical checks

Pre-hire medical checks may be carried out only if special requirements apply to the position in question with regard to medical suitability. In such case, the medical checks must take place in accordance with applicable legal requirements, including data privacy requirements. The posting for the job opening should reflect the requirement to undergo a medical check in order to qualify for the position. With regard to the timing of a medical check (provided that it is required), the check may only take place at the end of the application procedure (i.e., when the potential employer intends to hire the applicant and the medical check is the last requirement that must be met). Prior to the check, the applicant must be informed in writing about the purposes of the medical check and the details of the procedure.

A medical check must be carried out by a registered (company) physician. During the medical check, the physician is only allowed to ask the applicant questions that are relevant to the purpose of the medical check. Medical checks cannot be used to assess certain conditions and/or diseases. The physician is only allowed to inform the employer whether or not the applicant is medically suitable for the position. The physician may not provide the employer with actual medical information.

3.4 Drug testing

Examinations focused on the use of drugs are considered a violation of personal privacy. In this respect, any violation of personal privacy must be justified, necessary and within reason. An employer must have a policy on the abuse of alcohol or drugs and have its employees sign such a policy for approval (the content and measures must be clear to all employees and the employee must agree hereto). Any examination for substance abuse must be carried out carefully, and the employee’s privacy must be respected as much as possible.



The information obtained through a drug test qualifies as the processing of “sensitive data” under the PDPA, since it includes data concerning an employee/candidate’s physical and mental health. Under the PDPA, it is prohibited to process health-related employee/candidate data.

4 Immigration

Please refer to our Handbook — The Global Employer: Focus on Global Immigration and Mobility, which is accessible [HERE](#), for information about the immigration system applying in the Netherlands.

5 The employment contract

5.1 Form of the employment contract

An employment contract may be oral or written. Under either form, the employer is legally required to provide the employee with a written statement setting out specific terms relating to the employment contract (such as the place of work, the position of the employee, the name and place of the employer and employee, etc.). If written, an agreement may take the form of a contract signed by both parties, an exchange of letters or a single confirmation (a single document).

A non-competition clause in an employment contract must always be agreed upon in writing with a person of age (i.e., 18 or older); otherwise, it will be deemed null and void. For obvious reasons, it is preferable to have a written contract. Mere reference to a non-competition clause in a CLA and/or internal rules and regulations will generally not be binding on the employee.

It is no longer possible to agree on a non-competition clause in fixed-term contracts, irrespective of their duration, unless the employer can substantiate that it has a weighty business or service interest that necessitates a non-competition clause.

5.2 Types of employment contract

An employment contract may be either for an indefinite period, for a fixed term, or for a specific temporary task or project. The table below provides further information on fixed-term contracts and those for an indefinite period of time:

Types of employment contract	
Fixed-term	<p>Fixed-term contracts have no typical duration; they differ from terms of one, two or three years.</p> <p>A fixed-term contract may be renewed by the employer; however, a fixed-term contract will automatically convert into an indefinite-term contract if: (i) the chain of fixed-term contracts covers 24 months or more without a rest period between contracts of at least six months; or (ii) the chain of fixed-term contracts consists of more than three fixed-term contracts without a rest period of at least six months between contracts (the “chain of contracts rule”). For employees who have reached the state old age pension age, different rules apply.</p> <p>If a fixed-term employment contract was agreed upon for at least six months, the employer will be required to notify the employee in writing at least one month before the fixed-term contract terminates by operation of law of:</p> <ul style="list-style-type: none"> • whether the fixed-term employment contract will be extended • if extended, the conditions of such extension



Types of employment contract	
	<p>If the employer does not comply with this obligation, the employer will be required to pay compensation equal to the employee's salary for each day it fails to provide such notification (up to a maximum of one month's salary). This obligation does not apply to temporary agency contracts, employment contracts with no specified end date, and employment contracts that have been entered into for a period of less than six months.</p> <p>Part-time employment is permissible.</p> <p>Part-time and fixed-term employees must not be treated less favorably than indefinite-term/full-time employees (e.g., with regard to salary, training or other benefits), based on the principle of equal treatment.</p>
Indefinite period of time	<p>An employment contract may be concluded for an indefinite term.</p> <p>If no term or specific task or project is specified, the contract will be considered concluded for an indefinite term.</p>

5.3 Language requirements

Employment contracts may be in any language as long as both parties are able to understand what the agreement says; a lack of clarity will be construed against the employer.

Employment contracts do not have to be in Dutch to be enforceable in the Netherlands and can be in English as long as the employee understands the content of the contract and its consequences. If, however, the employee requests a translation into Dutch, the employer must provide the employee with a Dutch translation of the terms and conditions.

6 Working terms and conditions

6.1 Trial periods

Parties to an employment contract may agree on an initial probationary period in writing only. The statutory maximum probationary period for an indefinite-term employment contract is two months. It is not possible to agree on a probationary period in fixed-term contracts that do not exceed six months. For a fixed-term employment contract exceeding a period of six months and less than two years, a one-month probationary period is allowed. A two-month probationary period is allowed if the fixed-term employment contract is entered into for a period of two years or more. Deviation to the detriment of the employee is possible only pursuant to a CLA or by an order of an administrative body.

6.2 Working time

The normal working week is between 36 to 40 hours, depending on the industry, and five days per week, excluding Saturdays and Sundays.

Both Dutch law and any applicable CLA contain standards for periods of rest, working hours, night work, work on Sundays, rest breaks, overtime and on-call shifts.

High-level employees and managerial staff (as identified in the Dutch Working Hours Decree) are generally exempt from the working hours requirements under the Working Hours Act if their yearly wages equal or exceed three times the Dutch statutory minimum wage.

It is common practice that overtime for higher personnel is deemed to be included in the salary.



Employees may request an adjustment of their working hours and workplace (i.e., work from home) according to the Flexible Working Act. Employees will be eligible to request an adjustment of working hours and workplace after being employed for six months. If the employer denies this request, the employee can file a new request after one year. Only employers with 10 or more employees fall under the scope of the Flexible Working Act.

6.3 Wage and salary

The employer has an obligation to pay the employee's salary from the outset of the employment. The salary is paid either on a weekly, four-weekly or monthly basis. In principle, no salary is due if the employee is prevented from working. However, if attributable to the employer, the employee is entitled to his or her salary. It is possible to depart from this latter provision in the employment contract during the first six months of employment. After this six-month period, departing from the obligation to continue to pay wages is possible only by way of a CLA. Employees who are on strike are generally not entitled to salary.

All employees between the ages of 23 and the state pension age are entitled to the statutory minimum wage. Generally, this minimum wage is reviewed twice a year, on 1 January and again on 1 July. As of 1 July 2017, the minimum wage will increase to EUR 1,551.60 gross per month and EUR 358.05 gross per week.

6.4 Making deductions

Salary may be withheld in specific circumstances, such as if an employee is prevented from working (see 6.3 above).

6.5 Overtime

Working time (including overtime) cannot exceed the limits dictated by the Working Hours Act. It is customary to agree on specified extra compensation for overtime in employment contracts and in CLAs. Reasonable overtime without extra compensation used to be required. As of 1 January 2018, the Minimum Wage and Minimum Holiday Allowance Act has been amended. Employers are now obliged to pay the minimum wage for overtime. However, it is still possible to not pay for overtime work as long as the employee earns at least the minimum wage over all hours worked (i.e., contractual hours worked plus overtime hours worked). In addition, as of 1 January 2018, overtime must be taken into account when calculating holiday allowance.

Overtime hours can be compensated in time in lieu paid leisure if this is stated in the collective agreement and this compensation has been agreed in writing with the employee.

6.6 Bonus and commission

An annual bonus may be agreed upon, such as a bonus equal to a month's salary or commission.

Many employees are paid bonuses or commissions, or are permitted to participate in profit-sharing schemes. Such compensation, however, is not mandatory unless required by the applicable CLA.

6.7 Benefits in kind

Many employees obtain benefits in kind, such as company cars, telephones, medical and disability insurance, life insurance and occupational pensions (see further at 6.9). Such benefits, however, are not mandatory, unless provided in an applicable CLA or certain statutory requirements.

6.8 Equity incentive plans

Employees are not typically invited to take part in equity incentive plans in the Netherlands.



6.9 Pensions

The Netherlands has a three-tier pension system, comprising (i) government pension, (ii) supplementary pension benefits and (iii) private pension insurance.

Government pension

The first tier of the Dutch pension system is the government pension, known as the State Old Age Pension (“**AOW**”). All residents of the Netherlands are entitled to an AOW pension when they reach the state pension age, subject to some conditions. The state pension age is currently 66, but is due to increase as follows:

Year	2017	2018	2019	2020	2021	2022	2023	2024 >
State old age pension age (in years + months)	65+9	66	66+4	66+8	67	67+3	67+3	Linked to increased life expectancy

Contributions to this AOW pension are paid by Dutch employers through the employer's social security contributions.

Supplementary pension benefits

The second tier of the Dutch pension system consists of supplementary pension benefits. These benefits supplement the AOW. Supplementary pension benefits are funded by contributions made by the employer and/or the employee to a pension fund, premium pension institution or pension insurance company.

Private pension insurance

The third and final tier of the Dutch pension system consists of private insurance of the employee in excess of supplementary pension benefits.

In general, the following types of pension schemes apply in the Netherlands, but variations also exist:

- **Final Pay System:** Under the Final Pay System, the pension will be accrued as a fixed percentage of the pensionable base. The pensionable base is the pensionable salary minus the “*franchise*,” i.e., the threshold above which salary pension is accrued. For future increases of the pensionable salary, pension claims are allocated to the previous years of service from the commencement date of employment or of the plan (past services). Therefore, the amount of the old age pension depends on (i) the employee's last salary prior to the pension date, (ii) the years of participation in the pension plan and (iii) the franchise.
- **Average Pay System:** In the Average Pay System, the pension accrual is a fixed percentage of the annual pensionable base. For each consecutive increase of the pensionable base, a pension is only accrued for years of service yet to come. In this way, the pension to be distributed on the pension date is calculated on the average of all pensionable bases over the entire period of participation in the plan.
- **Defined Contribution System:** Under a defined contribution system, it is not the final pension that is the standard, but the offered premium that forms the basis of the pension commitment. Thus, rather than a pension commitment, a premium commitment is involved. In this system,



the pension benefit depends on (i) the contribution paid, (ii) the interest percentage and (iii) the return on investment.

If the employer provides a defined contribution plan, it is common in the Netherlands for employees to contribute a certain maximum percentage of the gross annual base salary of the employee to its pension scheme (depending on the age of the employees, roughly between 4% and 10% of the gross annual base salary). Although it is common practice, employers are not obliged to provide a pension in the Netherlands, unless contractually agreed upon or if a government initiative so requires. The latter applies if the activities of the employer fall within the scope of a mandatory Industry Wide Pension Fund that applies for an entire branch (industry).

A new employee who forms part of a group of employees (where the group has been offered a pension plan by the employer) will be considered to have been offered the same pension plan, unless explicitly agreed otherwise with the employer.

Furthermore, various forms of legislation on equal treatment (e.g., based on age, gender, full-time/part-time work, temporary/indefinite labor contracts), existing CLAs, or some specific merger and acquisition situations, might also lead to pension obligations for the employer.

Coalition agreement: new pension

On 10 October 2017, the Dutch Government published the new government agreement (*Regeerakkoord*). The main task for pensions is to come to a revised pension model together with social partners. The new system will apply from 2020. The period up until 2020 will be used to have discussions with social partners and delineate the legislation process.

The government agreement describes the following steps:

- (i) The new system will be based on the models included in the SER reports and will consist of personal retirement assets with comprehensive risk-sharing and a collective buffer.
- (ii) The method of using a flat-rate premium (*doorsneepremie methode*) will be replaced by an age-dependent premium.
- (iii) The possibility of taking up part of the pension capital as a fixed amount on the retirement date will be investigated.

The SER will provide the government with additional advice on the renewed pension contract shortly. It is then up to the social partners to develop a new pension contract based on the new model.

The government has indicated that it will facilitate the transition to the renewed pension system by temporarily expanding the tax framework and facilitating a collective transition of existing pension entitlements into personal pension assets. During the implementation period, social partners will be able to adjust the pension schemes to the new system of pension accrual and transfer to the renewed pension system.

6.10 Annual leave

Employees are entitled to annual holiday leave equal to at least four times the number of working days in a week. Full time employees are entitled to at least 20 days' holiday.

In addition, businesses and industries are normally closed on the following paid public holidays:

- New Year's Day
- Good Friday



- Easter Monday
- King's Birthday
- Ascension Day
- Whit Monday
- Christmas Day
- Boxing Day
- 5 May (every five years)

All employees accrue vacation days in an equal fashion, regardless of whether they are ill or not. The European Court of Justice has ruled that if an employee becomes ill during a period of statutory annual leave then he/she must be allowed to take the statutory annual leave at some other time, even if this means that such leave must be carried over to the following leave year.

The employer has a statutory obligation to pay the employee a holiday allowance of at least 8% of his or her annual gross salary. If the employee's salary exceeds three times the minimum wage, the employer and the employee may agree in writing that the employee will not receive a holiday allowance. In addition, if the employee's salary exceeds three times the minimum wage, the obligation to pay the minimum holiday allowance applies to the portion of the wages that does not exceed three times the minimum wage. Deviations to the detriment of the employee are possible in a CLA or by regulations laid down by or on behalf of a public body. The holiday allowance is payable in addition to the employer maintaining the employee's salary while he/she is away on holiday. The allowance must be paid no later than the month of June. It is also possible to pay the holiday allowance monthly with the salary of the employee.

6.11 Sick leave and pay

If an employee becomes incapacitated, he/she will remain entitled to continued payment of wages for a maximum period of 104 weeks (i.e., two years), or up to the date of termination of the employment contract if that date is earlier, on the basis of the following conditions:

- The statutory minimum obligation for the employer to continue payment of the employee's salary during the first 52 weeks of the employee's illness amounts to at least 70% of the most recent gross base salary, on the (optional) understanding that base salary does not have to be observed to the extent that it exceeds the maximum daily wage (which is EUR 211.42 gross a day as of 1 July 2018) and that continued payment may not be less than the applicable minimum wage (which is EUR 73.58 per day as of 1 July 2018 for employees of 22 years of age or older) even if this amounts to more than 70% of the most recent gross base salary.
- As of the 53rd week up to and including the 104th week (second year) of illness, the employee remains entitled to 70% of the most recent gross base salary with the optional understanding that the salary does not exceed 70% of the maximum daily wage. There is no minimum payment applicable to the second year of illness.

Deviating rules apply for employees who have reached the state old age pension age.

It is common practice for the employer to commit itself to continue payment of 70% to 100% of the employee's most recent gross base salary during illness (without limitation to the maximum daily wage). Furthermore, CLAs may include additional requirements concerning continuing salary during illness.



Under the Gatekeeper Improvement Act, employers must report an employee's period of absence due to illness to the Occupational Health and Safety Service (*arbodienst*). The employer cannot determine whether the employee's illness truly makes him/her incapable to perform work activities. Instead, he/she will need to rely on the assessment of the Occupational Health and Safety Service. If the employer and/or the employee do not agree with the assessment, they can apply for a second opinion from the UWV.

Employers must also report an employee's period of absence due to illness to the UWV, ultimately on the first workday after the employee's absence has lasted 42 weeks.

Both the employer and the employee must fulfil all their reintegration obligations (e.g., notify the *arbodienst*, draw up plan of approach, maintain a reintegration dossier, etc.) that follow from the Gatekeeper Improvement Act. If the employer fails to observe its obligations sufficiently, the UWV may impose a sanction, such as extending the obligation to continue salary payments.

6.12 Taxes and social security

A distinction should be made between national insurance and employees' insurance.

National insurance

The types of insurance belonging to national insurance apply to all residents in the Netherlands, regardless of their nationality. The following acts belong to this category:

- AOW
- General Surviving Relatives Act ("**Anw**")
- Long-term Care Act ("**Wlz**," which replaced the Exceptional Medical Expenses Act)

The obligation to pay AOW contributions ends at the age of 66.

The national insurance contribution is currently due by the employee at a rate of 27.65% of his/her salary, of which AOW forms 17.9%, Anw forms 0.1% and Wlz forms 9.65%.

Employees' insurance

Employment almost always leads to compulsory insurance in compliance with the following:

- A return-to-work scheme ("**WIA**"), which came into force in 2006 (formerly known as WAO). The premium for this insurance is borne by the employer.
- Unemployment Insurance Act ("**WW**"), the premium for which is borne by the employer.
- National Health Insurance Act ("**Zvw**"). The Zvw obliges all residents of the Netherlands, and all individuals who work in the Netherlands and pay tax on wages, to take out at least a standard insurance for medical expenses. The employer is required to pay a mandatory income-related employers levy of 6.90%, with a current maximum amount of approximately EUR 3,768. The employee contribution, which the employer can deduct from the salary of the employee, is currently 5.65%.
- Employees' insurances are subject to an annual employee income ceiling of EUR 54,613 for 2018. Employers' contribution rates for each of these insurances are complicated and may differ depending on the specific circumstances of the employer or employee.

With regard to WIA and WW, the 2018 applicable contribution rates are as follows:

- WIA: 6.77% (including childcare of 0.5%)



- WW: 2.85% (fixed); 1.28% (average — this rate depends on the local subsidiary's industry)

The rules and regulations applicable under the Social Security Acts are extensive.

Wage tax: In the Netherlands, wage tax is a pre-levy for Dutch income tax. The wage tax agent (employer) needs to withhold the correct contributions (both tax and social security contributions on the gross salary) and pay them to the tax authorities. Progressive tax rates apply up to 52%.

The WW: This insures employees and civil servants under certain conditions against the financial consequences of unemployment. The WW benefit for the first two months is 75% of the most recent salary (capped at the maximum daily wage) and 70% from then on. The duration of the benefit will depend on the labor history of the employee and whether the employee meets certain conditions (e.g., not receiving other benefits, like incapacity benefits or WGA/WhK benefits).

7 Family rights

7.1 Time off for antenatal care

Based on the Dutch Work and Care Act, all female employees are entitled to statutory pregnancy/maternity leave of 16 weeks, which includes four to six weeks' pregnancy leave prior to the expected date of birth (paid by the government, up to the statutory maximum daily wage).

7.2 Maternity leave and pay

As mentioned above, all female employees are entitled to statutory pregnancy/maternity leave of 16 weeks. This includes 10 to 12 weeks' maternity leave following the actual date of birth (paid by the government, up to the statutory maximum daily wage) in addition to the four to six weeks' pregnancy leave prior to the expected date of birth. Employers often supplement the government compensation to equal 100% of the employee's wages if they exceed the maximum daily wage threshold. Partners are entitled to an unconditional right of three days of unpaid leave (deducted from parental leave, see 7.4 below) in addition to the two days of paid paternity leave, within the first four weeks starting from the day on which the child resides at the home address of its mother.

In the event of long-term hospitalization of the child, maternity leave may be increased by a maximum of 10 additional weeks.

The female employee can request to partition the maternity leave. The first six weeks must be taken from the day following the date of birth. However, the remaining period can be taken within a period of 30 consecutive weeks (which starts on the expiry of the first six weeks of maternity leave). The employee's request must be granted unless there are substantial business and/or service interests to justify a rejection.

Maternity leave will transfer from the mother to the father (or registered partner, person who is living together with the mother or the person who has recognized the child) in the event the mother dies in childbirth.

7.3 Paternity leave and pay

See 7.2 above and 7.4 below.

7.4 Parental leave and pay

All employees (male and female) are entitled to take statutory parental leave for each child under the age of 8. The maximum duration of parental leave is 26 times the weekly working hours per child. Further conditions and restrictions on when/how the employee will take parental leave must be



determined in joint consultation (i.e., employer and employer). Parental leave is a form of unpaid leave.

7.5 Adoption leave and pay

Employees are entitled to four weeks of adoption leave. Eligibility begins up to four weeks prior to the adoption and continues for 26 weeks. There are no restrictions regarding the age of the adopted child. If two or more children are placed with the employee simultaneously, the employee's adoption leave entitlement is not extended on a per-child basis. Adoption leave is a form of unpaid leave.

7.6 Other family rights

7.6.1 Short-term care leave

Short-term care leave is intended to give the necessary care to:

- a sick child living with the employee with whom the employee has a direct family/foster relationship
- a sick child of the spouse/registered partner of the employee, both living with the employee
- a sick, spouse/registered partner living with the employee
- a sick blood relative (other than a child) in the first ascending or descending line

Short-term care leave can be granted for the duration of twice the employee's weekly working hours during a consecutive period of 12 months (which starts on the first day of leave).

During short-term care leave, the employee is entitled to continued payment of wages, up to a maximum of EUR 211.42 gross per day as of 1 July 2018. Such continued payment may not be less than the applicable minimum wage (which is EUR 73.58 as of 1 July 2018 for employees 22 years of age or older) even if this amounts to more than 70% of the most recent gross base salary.

7.6.2 Long-term care leave

Long-term care leave is intended to give care to:

- a sick child with whom the employee has a direct family/foster relationship
- a sick child of the spouse/registered partner of the employee, both living with the employee
- a sick, spouse/partner, living with the employee
- a sick blood relative (other than a child) in the first ascending or descending line

To be eligible for long-term care leave, the individual receiving care must suffer from a life threatening sickness.

Long-term care leave can be granted for the duration of six times the employee's weekly working hours during a consecutive period of 12 months (which starts on the first day of leave).

Long-term care leave is unpaid.

8 Other types of leave

Employees are also often entitled to short periods of paid leave for events such as their wedding, death of a family member or other family obligations. These entitlements are not laid down in Dutch law but are often covered in applicable CLAs, handbooks and employment contracts.



While this is not a statutory requirement for an employer, it is common practice.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to **15.5**.

9.2 Payment in lieu of notice

In accordance with Dutch law, a party that terminates a contract at an earlier date than the termination date specified in the contract owes the other party a payment equal to the amount of the salary that would have accrued during the period that the employment contract should have continued had notice been given under the contract. This is called “fixed compensation” (*gefixeerde schadevergoeding*).

9.3 Garden leave

Employees can be placed on garden leave/non-active status, i.e., relieved of work duties, during the notice period and/or during negotiations pending the termination of the employment contract.

However, the employee cannot be required to go on garden leave, and has a right to continue work activities if so desired. Consequently, garden leave needs to be agreed to between the parties. It cannot be imposed unilaterally by the employer.

9.4 Intellectual property

Employment contracts usually include an intellectual property clause in which the intellectual property rights (i.e., copyright and patents) created during employment are assigned to the employer.

9.5 Confidential information

Confidentiality clauses are frequently included in employment contracts. It is a criminal offense for an employee to intentionally divulge confidential information of an active company if he/she has been instructed and required to keep such information confidential. In practice, however, it is very difficult to ascertain whether any confidential information has actually been passed on to a third party by a former employee. Therefore, confidentiality clauses are seldom enforced. Employers prefer to rely on non-competition clauses.

9.6 Post-termination restrictions

A non-competition clause is defined as a stipulation whereby the employee is restricted in his/her right to be actively engaged in a certain manner after the termination of his/her employment. Typically, a non-competition clause will prohibit an employee from seeking employment, or being directly or indirectly involved, in the same type of industry or business conducted by any employer. Such a clause will be effective for a fixed term (for example, six months or one year) and in a certain geographical area.

An employee can challenge a non-competition clause in court and such clause may be limited or reduced in time and/or scope, or the court may order the former employer to pay a fair compensation to the employee for the duration of the non-competition clause, if the employee can show his/her interests were unreasonably prejudiced. Post-termination non-competition restraints in fixed-term employment contracts are unlawful and unenforceable unless the employer has a weighty business need that truly requires protection. The business need must be substantiated in writing, included in the contract or an addendum and provided to the employee prior to him/her signing the non-compete.

Separate from the non-competition restraint, an employee owes his/her employer a post-contractual duty of care, which requires that the employee cannot systematically solicit the former employer's



employees and customers with the use of (business) information received/acquired during the former employment relationship, violate the former employer's trust (i.e., employees must keep their former employer's trade secrets confidential), or make misleading or derogatory remarks about the former employer or its business. The employee's new employer may also be liable if it knowingly benefited from or encouraged the employee's breach of his/her duty.

Absence of a non-competition clause

In principle, the absence of any non-competition clause means that the former employee is at liberty to compete with his/her former employer. The court has held that the risks involved in the failure to include a non-competition clause in an employment contract should be the employer's. However, the former employee can still be in breach of contract if he/she is in breach of his/her post-contractual duty of due care. It is generally accepted that this duty obliges a former employee not to:

- systematically approach and coax away his/her former employer's customers or (to a lesser extent) his/her former employer's employees
- violate his/her former employer's trust — he/she is under a duty to keep confidential his/her former employer's business and production secrets (e.g., technical expertise, lists of customers, calculations of quotations, etc.)
- make misleading or derogatory remarks about his/her former employer or his/her former employer's business

The former employee's new employers may commit a wrongful act if they knowingly benefit from the former employee's wrongful act, or encourage him/her to commit such acts.

9.7 Retirement

An employee can decide to retire early if the pension agreement offers this possibility. Early retirement means that the employee will retire before he/she reaches the Dutch target pension age, which increased to 68 on 1 January 2018. Dutch law contains a specific dismissal rule for retirement. The employer can terminate an employment contract, entered into before the employee reached the Dutch state pension age, on or after the moment the employee reaches the Dutch state pension age with one month's notice, unless the parties have agreed otherwise. In this case, no transition budget payment needs to be paid (see further at **15.9.1**). This rule does not apply if the employer terminates the employment contract before the employee has reached the Dutch state pension age. Termination of the employment contract before the employee has reached the Dutch state pension age may be seen as discriminatory, based on the Equal Treatment in Employment (Age Discrimination) Act — see further at **14.1**.

10 Managing employees

10.1 The role of personnel policies

There are no mandatory personnel policies in the Netherlands with the exception of the policies stated in **10.2**. It can be considered good practice to have a handbook in place. The employment contract usually includes a reference to the applicable employee handbook.



10.2 The essentials of an employee handbook

The table below sets out the policies and procedures that are, in general, required by law, and the main, recommended policies.

Policies required by law	Recommended policies
Risk and Inventory Evaluation (regarding work related risks and safeguards)	Use of internet, social media, email
Whistleblower scheme (required for 50 employees or more)	Use of mobile phone, computer, laptop and other company property (Acceptable Use policy)
Policies to address and mitigate potential workload/work floor related (psychological) issues (e.g., regarding sexual intimidation, aggression and violence, bullying, work pressure and any other potential issue that could trigger work related stress/burnout)	Code of Conduct
	Policies regarding aggression, violence and (sexual) intimidation/harassment (which, in principle, also qualifies as a requirement under the Working Conditions Act)
	Holiday regulations
	Sickness policy (including instructions that must be taken into account by the employee during sickness)
	Lease car/Travel policies
	International Travel policies (also including rules regarding the scheduling of travel and hotel bookings)
	Cost/Expense reimbursement policies
	Detailed bonus/commission policies (instead of, for example, relying on verbal arrangements)

If there is no CLA, the employer can choose to incorporate an employee handbook to set out the employment conditions and work rules that are not included in the individual employment contracts. The provisions of the employee handbook will form an integral part of the employment contract, provided the employment contract includes a clause indicating so, and provided the employee has given his/her consent to the applicability thereof and has been provided with a copy of the handbook. The employer may only amend the employment conditions (i.e., the provisions of the handbook or the employment contract) unilaterally if it has reserved the right to do so in a so-called unilateral amendment clause included in the employment contract/handbook and it has a substantial interest (for example, significant business reasons) that overrides the employees' interests. It is extremely difficult to amend employment conditions unilaterally, and prevailing case law shows that Dutch courts exercise great restraint in allowing a unilateral amendment of employment conditions.



If an employer intends to adopt, amend or withdraw a handbook, prior consent of the works council may be required. Whether this is the case or not must be determined on a case-by-case basis, based on the content of the provisions in the handbook to be amended, adopted or withdrawn. The works council's prior consent is required when the employer intends to adopt, amend or withdraw policies concerning, among others, working hours, pensions, remuneration, working conditions, data privacy, staff training, sick leave and monitoring staff.

10.3 Codes of business conduct and ethics

The Code of Business Conduct and Ethics ("**Code**") contains general guidelines for conducting the business of the Company consistent with the highest standards of business ethics. Ethical codes are often adopted by management, not to promote a particular moral theory, but rather because they are seen as pragmatic necessities for running an organization in a complex society in which moral concepts play an important part. Business ethics, and the codes that formally define it, always include elements that go beyond strict legality; they demand adherence to a higher standard. While having a code of conduct is not mandatory, it is highly recommended.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible [HERE](#), for information on data privacy and monitoring requirements in the Netherlands.

12 Workplace safety

12.1 Overview

Employers are obligated to provide a safe work environment and prevent employees from suffering damage while performing their working activities. Employees can recover damages from the employer, unless the employer can prove that it has fulfilled its obligations under Dutch legislation or that the employee's damage is a result of the intention or the conscious recklessness of the employee.

12.2 Main obligations

The employer is obligated to keep an inventory (in writing) and evaluation with respect to the risks of the work involved for the employees. This risk-inventory and evaluation must contain a description of the dangers, the risk-restrictive measures and the risks involved for the special categories of employees.

12.3 Claims, compensation and remedies

Pursuant to the Dutch Civil Code and the Dutch Working Conditions Act, employers are required to prevent employees from suffering damage while performing their work and must arrange for premises, equipment and tools, take measures and give instructions for that purpose, based on the general principal of employers' liability. To this end, the employer must implement safety measures and provide safety instructions to mitigate potential risks as much as possible. Furthermore, the employer is obligated to take out employee accident insurance that insures employees against accidents on the work floor and during their commute to work.

Prevailing case law shows that, especially where employees use their own cars for business purposes, the employer must provide the employee with either adequate liability insurance or enable the employee to take out adequate liability insurance. Furthermore, in the event the employer possesses motor vehicles, it is statutorily obligated to take out third-party (liability) insurance.



Employers should have a policy on sexual harassment at the workplace as part of their obligation to provide a safe work environment and prevent employees from suffering damage while performing their working activities, as described in **12.1** above.

13 Employee representation, trade unions and works council

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in the Netherlands, please contact us. See [Key Contacts](#) for contact details.

14 Discrimination

14.1 Who is protected?

The Dutch anti-discrimination law covers all aspects of the employment relationship including hiring, the provision of terms and conditions of employment, promotion, training and dismissal.

Under the Dutch Constitution, all individuals within the Netherlands are entitled to be treated equally in comparable cases. Under the equal treatment legislation, discrimination on the grounds of religion, (political) belief, life principles, race, sex, pregnancy, disability and age (in relation to different retirement ages for men and women) is prohibited. The Dutch Civil Code also provides for equal treatment of men and women who are employed by a private employer.

14.2 Types of discrimination

Discrimination for these purposes includes the following:

- Direct discrimination — treating someone less favorably than others in similar circumstances because of a protected characteristic.
- Indirect discrimination — applying a requirement or condition which puts a group of persons of a particular religion, sex, etc. at a disadvantage and which cannot be objectively justified. To justify indirect discrimination, it must be demonstrated that the distinction is made to serve a legitimate purpose not related to the particular type of discrimination. The applicable criteria must also comply with the demands of proportionality, legitimacy and efficiency. Arguments based exclusively on a financial nature are generally insufficient to result in an acknowledged, objective ground for justification. Certain objective grounds may also be expressly stipulated in the equal treatment legislation.
- Sexual harassment — undesirable sexual approaches, requests for sexual favors or other verbal, non-verbal or physical behavior of a sexual nature, which violates the individual's dignity or creates an intimidating, hostile, degrading humiliating or offensive working environment, or treating an individual less favorably because they reject or submit to sexual conduct.

14.3 Special cases

14.3.1 Discrimination against disabled and chronically ill people

The prohibition on disability discrimination includes the obligation on the part of the employer to make all necessary adjustments according to the existing needs of the employees, unless these adjustments can be considered to form a disproportionate burden on the employer.



14.3.2 Discrimination against fixed-term employees and part-time workers

In very broad terms, the anti-discrimination provisions prohibit treating part-time workers or fixed-term employees less favorably than colleagues doing the same work on a full-time or indefinite-term basis, unless there is an objective business justification for the different treatment. With respect to part-time workers, the law permits benefits to be provided on a pro-rated basis.

14.3.3 Discrimination against foreign employees

The terms and conditions of employment contracts entered into with foreign employees residing in the Netherlands, as well as renewal or termination of those agreements, may not be less favorable than those governing employees of Dutch nationality. Any provision that violates the above prohibition is null and void.

14.3.4 Training

The equal treatment legislation (and specifically the Act on Equal Treatment of Men and Women) prohibits sex discrimination in all acts connected with the recruitment of employees (e.g., advertising and dealing with job applications), and in vocational training and guidance given to employees (although an exception is made if being a member of a particular sex is a decisive factor for the profession to which the training relates – see **14.4**).

14.3.5 Equal pay

The equal treatment legislation aims to eradicate any differentiation in the payment of wages to those commonly paid to an employee of the opposite sex performing work of “equivalent value.” This applies to both individual employment contracts and CLAs. Any provisions that seek to depart from the principle of equal pay are void. “Wages” are defined to include salary, remuneration, allowances and reimbursement of expenses. However, the definition does not cover social security payments or claims pursuant to pension schemes.

To ascertain whether two particular jobs are of equal value, detailed rules must be followed in the Netherlands. The employer must first determine whether any employees within the organization do work of equivalent (or nearly equivalent) value as members of the opposite sex within the same organization. However, for such a comparison to be effective, the company must have proper and sound systems for job evaluation/ratings. If there are no such systems for job evaluation/ratings, the employer in question must evaluate the job in question on a reasonable (and non-discriminatory) basis. There are no specific binding rules dealing with how such job evaluation must be conducted.

An employee’s potential claim against the employer arises at the moment wages become due and he/she is entitled to the difference between his or her wages and those of the male or female comparator for up to five years in arrears. Employers may also be liable to pay a penalty in addition to the amount of deficit due to the employee in question.

14.3.6 Positive action

The anti-discrimination legislation contains provisions concerning lawful “positive action,” which are designed to apply where persons who share a protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. Employers can take certain actions to address these problems without opening themselves up to discrimination claims brought by people without the relevant protected characteristic, for example, setting targets to increase the participation of an under-represented group with a protected characteristic.

Employers must be careful, however, that any positive action does not amount to positive discrimination, which is unlawful.



14.4 Exclusions

The Dutch anti-discrimination legislation excludes cases where being a member of one sex is a decisive requirement for the job, e.g., a woman to model women's clothes. In addition, provisions to protect women in relation to pregnancy or motherhood do not infringe this legislation.

14.5 Employee claims, compensation and remedies

Discrimination

Any stipulation, provision or personnel decision that is inconsistent with the equal treatment legislation is void. It therefore follows that the dismissal of an employee for invoking his or her rights under that legislation is also void. In such a case, the employee can claim damages from his or her employer.

The Equal Treatment Act provides for a Netherlands Human Rights Institution ("**Institution**") — an independent body of experts installed by the Dutch government — to monitor compliance with several discrimination acts. While the opinion of the Institution has no legally binding effect, some decisions will be followed by Dutch courts. There are currently many (far-reaching) decisions of the Institution concerning older workers in social plans (for example, severance payment) and/or CLAs and whether these schemes constitute discrimination based on age.

Sexual harassment

The Working Conditions Act requires employers to protect employees against sexual harassment, aggression and violence taking place at or relating to the workplace. A diligent employer is primarily responsible for the prevention of sexual harassment. To prevent sexual harassment, the employer must evaluate the risk of sexual harassment, and subsequently formulate a prevention program in order to limit the risks as much as possible. The employer must ensure that the workplace is safe. If harassment occurs in spite of this, the employer must take more drastic measures. The employer can meet this obligation by appointing a confidant and by implementing a complaint procedure including sanctions.

14.6 Potential employer liability for employment discrimination

An employee can sue a company for discrimination, for which a court can award compensation for losses and even emotional damages.

There are cases in which emotional damages of approximately EUR 5,000 have been awarded. In the event of pay discrimination on the basis of gender, the employee can reclaim the deficit in pay under the Act on Equal Treatment of Men and Women, plus statutory interest under the Dutch Civil Code. In addition, a penalty may be imposed upon the employer of up to 50% of the amount owed.

14.7 Avoiding discrimination and harassment claims

Discrimination

Every employer has a duty to act as a "diligent" employer. According to that principle, an employer must adhere to all applicable legal provisions. In this context, it is important for an employer to take appropriate measures to prevent discrimination against employees and to create a non-discriminatory work environment.

Sexual harassment

Under the Dutch Civil Code, a diligent employer is primarily responsible for the prevention of sexual harassment and may not turn a blind eye to unwanted sexual advances within the company. To prevent sexual harassment, the employer must evaluate the risk of sexual harassment and subsequently formulate a prevention program in order to limit the risks as much as possible. The



employer must ensure, among other things, that the workplace is safe. If harassment occurs in spite of this, the employer must take more drastic measures. The employer can meet this obligation by appointing a confidant and by implementing a complaint procedure including sanctions.

Like the employer, the employee is also legally required to behave and act as a diligent employee and to observe the company's disciplinary code. If an employee fails to meet these requirements, he or she commits a breach of contract. A direct order to refrain from sexual harassment is not necessary but may be included in the employment contract, the company rules or the CLA.

Depending on the seriousness of the sexual harassment, the employer can impose sanctions in view of the breach of contract, varying from a reprimand to summary dismissal. The sanction must be in proportion to the seriousness of the misbehavior.

In the event of a complaint of sexual harassment, employers in the Netherlands are recommended to conduct a thorough investigation into the complaint. Sexual harassment should be an area of special attention in every working environment. It is the employer's task to prevent any form of sexual harassment. Thus, it is advisable to establish a clear code of conduct prohibiting any such behavior in the workplace. In consultation with the works council, personnel should be informed of the existence of a complaint process and the steps to be taken to assert a complaint.

15 Termination of employment

15.1 General overview

As of 1 July 2015, the procedural rules on the termination of employment contracts have changed. Before, employers had the choice of terminating an employee through the UWV (see 2.1) procedure or a court procedure. The court could award severance compensation to the employee, but the UWV could not, forcing employees to initiate a court procedure to claim compensation for obviously unreasonable dismissal. As such, employees in the same situation were not always treated equally, as compensation was calculated differently in the different procedural routes. Since 1 July 2015, the UWV procedure has been the compulsory route if the employment contract is to be terminated for economic reasons or in the case of incapacity for work due to illness for longer than two years. The court procedure is the compulsory route if the employment contract is terminated for performance-related or other personal reasons. In both situations, parties are allowed to appeal (and appeal in cassation) the decision of the UWV/court with the competent higher court and claim reinstatement.

15.2 By the employer

An employment contract can be terminated in the following ways:

- for "urgent cause"
- termination for a reasonable ground and no possibility of retraining with prior permission of the UWV or a court's decision
- termination by mutual consent
- termination during the probationary period
- expiry of a fixed-term employment contract

The different termination routes are explained briefly below:

Urgent cause

Employees can be dismissed without notice or prior approval for "urgent cause," i.e., a cause of such a nature that no employer could reasonably be expected to continue the employment relationship any



longer. Examples of urgent cause include serious incompetence, for instance obstinately refusing to obey the reasonable instructions of the employer. Even if the employee has committed such an offense, this does not automatically give rise to an immediate cause for dismissal, as the employee's conduct must be sufficiently serious so as to justify immediate dismissal. Performance issues typically do not justify a termination for urgent cause.

Lack of reasonable ground/no possibility of retaining employee

In the absence of "urgent cause," dismissals are, in principle, only allowed if (i) there is a reasonable ground for dismissal, (ii) there is no possibility of retaining the employee in a suitable alternative position (not even after training/education during a reasonable timeframe) and (iii) the employer needs prior permission of the UWV for the termination or dissolution of the employment contract by the court. There are eight "reasonable grounds" provided for by law:

- (a) headcount reduction for business reasons (redundancy)
- (b) long-term disability (more than two years), provided that recovery is unlikely to occur within 26 weeks and that the contractually agreed work cannot be performed in an adapted form
- (c) frequent and disruptive absence due to sickness
- (d) incapacity to perform the contractually agreed work other than for a medical reason (i.e., underperformance), provided that (i) the employer has informed the employee of the performance issue in due time, (ii) the employer has taken sufficient steps to enable the employee to improve his/her performance and (iii) the underperformance has not been caused by insufficient efforts by the employer to train the employee or by poor working conditions
- (e) serious misbehavior
- (f) refusal to perform contractual duties for reasons of conscience, provided that the contractually agreed work cannot be performed in an adapted form
- (g) the working relationship has deteriorated, provided that the impairment is so serious that the employer cannot reasonably be required to continue the relationship
- (h) other reasons that are of such nature that it cannot reasonably be expected that the employer should continue the employment relationship

This list of grounds for termination is exhaustive and the grounds cannot be combined. The governmental guidelines provide that ground (h) cannot be used as a "catch-all" for cases falling outside the scope of the list. Only truly exceptional cases will be accepted as falling within this ground.

Dismissals based on grounds (a) and (b) require a dismissal permit from the UWV. Dismissals under (c) to (h) can only be done by court decision. In both cases, the employer needs a sound business case for the dismissal which can be substantiated with objective facts and figures.

For dismissals based on performance (i.e., ground (d) above), the employer will need to file a petition with the court and prove that the termination is necessary. This means that the inadequate performance needs to be thoroughly documented (i.e., in a "performance file"). Such performance file should include performance reviews (rated insufficient and/or with critical improvement points), documentation showing that the employer offered the employee help on the improvement points (coaching and a Performance Improvement Plan) and that the employer worked with the employee on his/her performance, subsequent documents to the employee indicating that the improvement points have still not been met and therefore termination of the employment contract is inevitable, etc.



An employee who has been dismissed without his/her consent and in the absence of a dismissal permit or in breach of a dismissal prohibition may ask the court to annul the dismissal or to award a reasonable compensation. An employee is also entitled to appeal a UWV or court termination permit/decision in court.

Deviating rules might apply for an employee who has reached the state old age pension age.

Mutual consent

An employment contract can also be terminated by mutual consent (which is common given the high standards for termination by the court and the UWV). In cases of termination by mutual consent, it is common to sign a settlement agreement that outlines the conditions of termination. A settlement agreement is often used by the (former) employee to safeguard entitlements to unemployment benefits, if any, as much as possible. In the event parties reach an amicable settlement, the employee will be entitled to a two-week period after signing the settlement agreement to “reflect” on the settlement (three weeks in the event the employer does not notify the employee in writing of this right within two working days after signing the settlement agreement). During this “reflection” period, the employee may revoke his/her consent without providing any reasons for doing so.

During the probationary period

During the probationary period, either party will be entitled to give notice of termination of the employment contract with immediate effect, and there is no requirement to obtain UWV approval or a court decision, or show grounds for the termination. The employee is entitled to clarification/explanation upon request. Furthermore, case law and literature show that the reason for termination during the probationary period may not be based on a discriminatory ground and may not be contrary to the good employer standards and the principle of due care. In that case, the employee could be entitled to continued employment or compensation from the employer.

The employer will not be able to rely on a probationary dismissal if parties agreed to a probationary period exceeding the maximum statutory period (barring other provisions provided by an applicable CLA). In that case, the agreed probationary period will be void.

Expiry of fixed-term employment contracts

A fixed-term employment contract ends when the term of the employment contract expires and the employer has decided not to offer the employee an extension/a new employment contract. In that case, the fixed-term employment contract will end by operation of law.

Managing directors

The termination of the employment contract of a managing director appointed pursuant to the articles of incorporation of a legal entity differs from the termination of an employment contract of a regular employee. The reason is that a managing director has a two-fold relationship with the company: (i) a corporate relationship; and (ii) an employment relationship.

Depending on the company's articles of incorporation, the shareholders will be authorized to dismiss a managing director from his or her corporate position during a shareholders' meeting.

To convene a shareholders' meeting, invitations and letters, including an overview of the items on the agenda (i.e., the intended dismissal), should be sent in a timely manner to all shareholders, managing directors and members of the supervisory board (if any).

The managing director must be given the opportunity to defend himself/herself during the shareholders' meeting. Subsequently, all managing directors (i.e., including other managing directors of the company, if any) and members of the supervisory board (if any) should be offered the



opportunity to render their advisory vote during the shareholders' meeting before the ultimate decision to dismiss the managing director is made.

The employment contract of the managing director will also end as a result of his or her dismissal during the shareholders' meeting (i.e., the corporate and employment relationships end simultaneously). Consequently, the employer of the managing director does not need to apply for prior approval from the UWV to give notice of termination to the managing director. Nonetheless, parties should still observe the notice period in full. As an alternative, the employer can pay, in lieu of the notice period, (at least) the equivalent of the remuneration the managing director would have been entitled to during the notice period.

Since 2015, a managing director can only claim reasonable compensation (*billijke vergoeding*) if: (i) there is severe culpable conduct or negligence of the employer; (ii) the dismissal lacks reasonable grounds; and/or (iii) the managing director could have been reassigned to an alternative position within the organization of the employer. If the managing director falls sick before he or she receives the invitation to the shareholders' meeting, his or her dismissal during the shareholders' meeting will only result in the termination of the corporate position. During sickness, the managing director, as with every other employee, is protected by a statutory prohibition to give notice. Consequently, the employment relationship does not end simultaneously with the termination of the corporate relationship. Where the managing director has been unable to work due to illness, it is compulsory for the employer to seek approval from the UWV (see **15.1**).

A managing director is entitled to the transition budget (see **15.9.1**) as well, if: (i) the employment contract has lasted for at least two years; (ii) the managing director's termination is involuntary; or (iii) a temporary contract will not be extended.

In the event that the company has established a works council and the managing director is the consultation partner of the works council (*bestuurder*, within the meaning of the Dutch Works Councils Act), the prior advice of the works council on the intended dismissal of the managing director must be requested before the decision to dismiss him or her is adopted and implemented.

15.3 By the employee

The employee has a right to terminate his/her agreement. In the absence of a contractual agreement regarding the notice period in the employment contract, the statutory notice period applies. If the contractual notice period deviates from the statutory notice period, there are restrictions that need to be met. The term of notice to be observed by the employee may be shortened or lengthened in writing. This term of notice may, however, not be longer than six months and if it is lengthened the term of notice to be observed by the employer must always be at least twice (double) as long as that of the employee.

Terminating the employment contract without giving notice is only possible during the probationary period — see further at **15.6**.

15.4 Employee entitlements on termination

With regard to the termination of the employment contract, the employee is entitled to:

- any holiday accrued and yet to be accrued but not taken
- holiday allowance;
- pro rata bonus payments;
- severance payment i.e., based on the Transition payment (see further at **15.9.1**)



15.5 Notice periods

The notice periods to which employees are entitled are set out under the Dutch Work and Security Act. Notice must be given toward the end of the month, unless another day for giving notice is set by written agreement or by custom. The notice periods to be observed by the employer depend on the duration of the employment as at the date of notice:

- for employment lasting less than five years: one month
- for employment lasting five years or more but less than 10 years: two months
- for employment lasting more than 10 years but less than 15 years: three months
- for employment lasting 15 years or longer: four months

The notice period that must be given by the employer can only be shortened by a collective bargaining agreement or by an arrangement by or on behalf of an administrative body authorized to that effect. The notice period to be observed by the employee is one month. The notice period for the employee can be departed from in writing. If it is extended, this cannot be for more than six months. In addition, notice given by the employer must not be less than double that for the employee (e.g., if an employee is required to give six months' notice, the employer is required to give at least 12 months' notice). The maximum length of notice an employee can be contractually required to give is six months.

As mentioned in **9.2**, a party that prematurely terminates an agreement must pay fixed compensation.

15.6 Terminations without notice

No notice period is required when terminating an employment agreement during the trial period.

If the employment contract is terminated by giving notice without observing the notice period, the employee can claim damages (the salary of the disregarded part of the notice period).

If the employer is subject to dissolution by the court, the court must take into account the notice period. The notice period will be reduced by the duration of the court procedure, subject to a minimum notice threshold of one month, unless the termination of the employment contract is caused by severe culpable conduct or negligence of the employer.

Amicable settlement

Parties can reach an amicable settlement for termination of the employment contract, i.e., termination of the employment contract by mutual consent. The termination agreement has to be offered in writing, stating the reason for termination. The employee then has a cooling-off period of 14 days in which they can change their mind. It is mandatory for the employer to notify the employee of this cooling-off period.

Since the Dutch authorities will not grant statutory unemployment benefits until the notice period has expired, it is unlikely that an employee will agree to a termination date set earlier than the expiry of the notice period. In general, therefore, the employee will either agree to payment in lieu (hereinafter) or expect continuation of the employment relationship (and therefore remuneration) until a date set after — and with due observance of — the notice period.

15.7 Form and content of notice termination

The employer has to give written notice by the end of the month. However, parties can agree in the employment agreement that notice may be given taking effect on each day of the month.



The employee can be dismissed without notice for urgent cause or if the employment contract will end by operation of law.

15.8 Protected employees

15.8.1 Disabled employees

The employer cannot terminate the employment contract if the employee cannot perform his/her work due to illness, unless the incapacity has lasted at least two years. When calculating the two years, periods of incapacity as a result of pregnancy prior to maternity leave and periods of incapacity during maternity leave are not taken into consideration.

Periods of incapacity (other than pregnancy/maternity leave) are added up if they follow each other with an interruption of less than four weeks or if they immediately precede and follow a period in which maternity leave is taken. This only differs if the incapacity cannot reasonably be considered to have arisen from the same cause. The employer can still terminate the employment contract if the incapacity started after a request for permission from the UWV to terminate the employment contract or from the committee has been received. The prohibition does not apply if the employee fails, without proper grounds, to comply with his/her obligations to cooperate with the reasonable instructions of an expert, to cooperate with the action plan or to perform suitable work. The employer must first warn the employee to comply with his/her obligations and must have discontinued the salary in accordance.

15.8.2 Pregnant women

The employer cannot terminate an employee's employment contract during her pregnancy. To substantiate the pregnancy, the employer may require a statement by a doctor. Moreover, the employer cannot terminate the employment contract during the period in which she takes maternity leave, during the six weeks following maternity leave after resumption of work, or following a period of inability to perform work caused by the birth or the preceding pregnancy and that follows maternity leave.

15.8.3 Parental leave

The employer cannot terminate the employment contract due to the right to take parental leave, adoption leave, leave to take in a foster child, or short- and long-term care leave.

15.8.4 Works council members

The employer cannot terminate an employment contract with an employee who is a member of a works council, central works council, group works council, standing committee of those councils, business unit committee of the works council or employee representative body. Nor can the employer terminate an employment contract with an employee who is on a list of candidates for a works council or employee representative body or who was a member of a works council, central works council, group works council or a committee of those.

15.9 Mandatory severance

15.9.1 Transition compensation

An employee is entitled to a transition budget payment in the event that: (i) the employment contract has lasted at least two years; (ii) the termination of the employment contract is "involuntary"; or (iii) they are on a fixed-term contract which will not be extended. This transition budget will be paid as compensation for terminating the employment contract and transition the employee to alternative employment.



The transition budget is calculated as follows:

- for the first 10 years of service: one-sixth of the employee's monthly salary for each six-month period of service
- after 10 years' service: one-quarter of the employee's monthly salary for each six-month period of service

For employees over the age of 50, a transitional arrangement applies (until 2020) if the employee has more than 10 years of service with the employer per the end date. In that situation, the transition budget is one-half of the employee's monthly salary for each six-month period of service as of the age of 50. The years prior to 50 are calculated in accordance with the regular arrangement described above. This transitional arrangement does not apply for companies with fewer than an average of 25 employees during the second half of the calendar year prior to the calendar year during which the employment ends.

The transition budget is capped at EUR 79,000 gross for all employees or an amount equal to the employee's annual salary, whichever is greater.

The transition budget does not apply in the following circumstances:

- if the employment contract ends (by operation of law) due to an employee reaching the Dutch state pension age
- if the employment contract ends due to serious acts or omissions attributable to the associate (i.e., summary dismissal)
- if the employment contract ends prior to the employee reaching the age of 18 and the average working hours per week were 12 hours or less
- if the employee voluntarily leaves his/her job unrelated to any seriously culpable acts or omissions by the employer
- if the parties reach an agreement to amicably terminate the employment contract

Note that, in principle, employees will not be inclined to sign an amicable settlement if the offer reflected in the agreement is not favorable over what they would be entitled to without amicable settlement. Consequently, the amicable termination agreement will (almost always) include severance for a higher amount than the transition budget.

15.9.2 Fair compensation

At the employee's request, the court may nullify the notice of termination of its employment contract by the employer, or at his/her request award the employee reasonable compensation, if the employer terminates the employment contract without the permission of the UWV in violation of the prohibition of terminations set out in **15.9.1** above.

Furthermore, if an employee is of the opinion that the termination of his/her employment contract is caused by severe culpable conduct or negligence of the employer, the employee can request the court to award reasonable compensation. This could, for example, apply to the termination of the employment contract after long-term disability or in a situation where the employee is wrongly dismissed for business economic reasons, but where, in the meantime, the relationship with the employer is irreparably disturbed.



15.10 Collective redundancy situations

In the case of a redundancy, obligations to inform and consult are imposed under:

- the Collective Redundancy (Notification) Act, if a proposal is made to dismiss 20 or more employees within one UWV district and within a period of three months
- the Works Councils Act

The following dismissals are counted when determining the number of dismissals in order to determine whether the threshold of 20 (in accordance with the Collective Redundancy (Notification) Act) is reached:

- all terminations that require a dismissal permit (permission from the UWV)
- all terminations for business economic reasons (i.e., not for performance-related reasons) by means of amicable settlement

Terminations during a lawful probationary period are not counted, nor are fixed-term contracts that expire per their end date (without extension).

The Collective Redundancy (Notification) Act, if applicable, triggers a duty to notify the UWV and to notify and consult with the relevant trade unions.

The manner in which the employees must be consulted under the Works Councils Act depends on whether a works council or an employee representative committee has been set up. In any event, reorganizations and redundancies will require an employer to timely inform the works council (if any) prior to any proposed termination decision being finalized, and allow the works council to provide input on the proposed termination at a time when such input can still significantly affect the decision to be taken.

Failure to comply with applicable requirements can preclude any dismissals taking effect.

15.11 Claims, compensation and remedies

The Cantonal Court Formula was abolished in 2015 and replaced by the transition budget. Where an employment contract has lasted for at least two years, the employer must pay a transition budget to the employee if the employee's termination is involuntary or if a temporary contract will not be extended. Transition budgets serve as compensation for termination of an employment contract and help an employee in his or her transition to alternative employment. The transition budget is calculated as follows:

- (i) For the first 10 years of the employment contract one-sixth of the monthly gross salary of the employee for every six-month period
- (ii) After the first 10 years of the employment contract one-fourth monthly gross salary for every six-month period of the employment contract
- (iii) Transition scheme for older employees.

If the employee is 50 years or older at the termination date and the employment contract lasted for at least 10 years, the transition budget will be — after reaching the age of 50 — one-half monthly gross salary for every six-month period the employee was in the employer's service. A transition budget cannot exceed EUR 79,000 gross or an amount equal to the employee's annual salary, if this is higher than EUR 79,000 gross. Rules are expected to be laid down by order in council concerning what costs — particularly those related to facilitating a transition to alternative employment (e.g., education or outplacement) — may be deducted from the transition budget. The latter does not affect contractual



arrangements in individual employment contracts that entitle the employee to severance compensation (i.e., “golden parachutes”). If a company employs less than 25 employees, an alternative, cheaper transition budget will apply. Moreover, if an employee is of the opinion that the termination of his/her employment contract was caused by severe culpable conduct or negligence of the employer, the employee can request the court to award reasonable compensation (*billijke vergoeding*). This could, for example, apply in the case of termination of the employment contract after long-term disability or in a situation where the employee is wrongly dismissed for business economic reasons, but where, in the meantime, the relationship with the employer is irreparably damaged.

Most termination disputes between the employer and employee include claims for compensation by the employee regarding severance payment. The employee will often claim a higher severance amount than the statutory transition payment, including claims for a final payment that includes payment of outstanding holidays, pro rata holiday allowance, pro rata bonus/commission.

In exceptional cases, the employee — in addition to transition compensation — will (also) have a right to fair compensation. Such compensation is available in accordance with provisions set out in law and is granted in most cases only if the employer has committed “severely culpable acts or omissions.”

Furthermore, the employee could claim for reinstatement or for example if a non-competition clause and/or non-solicitation clause will continue to apply in full after termination, the employee could claim that the clause is too strenuous or that the clause is null and void.

15.12 Waiving claims

The employee can settle/waive a claim arising from the employment contract if the employer and the employee have agreed that after the reflection period (see **15.2**), the parties explicitly waive any right they may have to nullify, terminate, amend or cancel the termination agreement in full or in part or to cause the termination agreement to be nullified, terminated, amended or cancelled in full or in part.

In principle, it is possible for an employee to release an employer from termination indemnities (for example, in an employment agreement). Such a waiver, however, will not oblige a court to honor it. In a procedure, a court will weigh all the facts and circumstances, and judge the case on its own merits. However, a court might consider the release as a reason to mitigate the compensation, but that would depend on the specific circumstances of the case. These principles are also applicable in cases where parties explicitly agreed on a fixed termination package (a so-called golden parachute). The Dutch Civil Code requires the court to set a fair amount of compensation in the event of a termination, and the parties are not allowed to infringe the court’s authority in this respect.

16 Employment implications of share sales

16.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company. Therefore, the buyer inherits all those rights, duties and liabilities by virtue of being the new owner—employer of the former target company employees. If there is an integration of the target company’s business with the buyer’s business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations below will be relevant.

16.2 Information and consultation requirements

Where an enterprise employs 50 or more people, the employer must set up a works council. If an employer with 50 or more employees considers, for instance, transfer of control of the company, termination of or major change in the company activities, major investments, merger or takeover, it



must, prior to its decision on the matter, request the advice of the works council. If the employer disregards any dissenting advice of the works council, the latter can file a complaint against the employer's decision to proceed with the transfer. This complaint is made to the Enterprise Chamber of the Court of Appeal in Amsterdam, which court can force the company to reverse its decision.

17 Employment implications of asset sales

17.1 Acquisition of assets

The European Acquired Rights Directive has been implemented in the Dutch Civil Code ("**Transfer Law**"), which governs the transfer of undertakings. The automatic transfer of employees on an asset sale takes effect pursuant to the Transfer Law, provided that the asset sale comprises the sale of an undertaking, for example a sale of a business (or an identifiable part of a business). For the Transfer Law to apply, the transferred business must retain its identity.

Pursuant to the Dutch Civil Code (gathered from case law of the European Court of Justice), an "undertaking" can be defined as an "economic entity." This also includes services or non-profit making institutions.

Furthermore, pursuant to European case law, in order for the Directive to apply it is required that a permanently organized economic entity is transferred. An economic entity is defined as an organized body of persons and elements in which an economic activity with a purpose of its own is exercised (i.e., the outsourcing of cleaning services will be considered the transfer of part of an undertaking, even if only one cleaning person is involved). To determine whether an undertaking or a part of an undertaking has been transferred, the decisive criteria are whether the identity of the undertaking has remained intact and whether the economic entity of the undertaking is being transferred. All the circumstances of the transfer must be taken into consideration, including the type of undertaking, the degree to which assets, employees and customers are being transferred, and whether or not the same activities are being performed after the transfer.

17.2 Automatic transfer of employees

Where there is a relevant transfer, the employment contracts of those employees employed by the transferor and "assigned" to the organized grouping of resources, or employees that are subject to the relevant transfer, automatically transfer to the transferee on their existing terms and conditions of employment (with the exception of old age, invalidity and survivors' benefits under occupational pension schemes). Subject as follows, the transferee effectively steps into the transferor's shoes with regard to the transferring employees, such that all of the transferor's rights, powers, duties and liabilities under or in connection with the transferring employees' contracts pass to the transferee, and any acts or omissions of the transferor before the transfer are treated as having been done by the transferee. The transferor (seller) and transferee (buyer) are jointly liable for debts and obligations accrued but unpaid before the transfer date for a period of one year after the transfer date.

Employees of the seller's business have the right to refuse to transfer to the purchaser, but they are treated as having resigned without entitlement to severance compensation if they exercise this right. Consequently, they will have no remedy against either the seller or the purchaser. There are two exceptions to this rule:

- where employees resign in response to a repudiatory breach of contract by the employer
- where the transfer involves or would involve a substantial change in working conditions to the material detriment of the transferring employees



In these circumstances, employees will be regarded as dismissed and may have claims for wrongful dismissal. Assuming that employees do not exercise their right to object to the transfer, the purchaser stands in the place of the seller as regards the employees' contracts of employment.

17.3 Changes to terms and conditions of employment

The rights and obligations under an employment contract are transferred to the transferee, while the transferor remains — next to the transferee — liable for a period of 12 months from the date of the transfer in respect of obligations arising under employment contracts prior to the transfer date. Obligations that arise after the transfer date are for the account of the transferee. The terms and conditions contained in a CLA are binding on the transferor and are automatically transferred to the transferee for the remainder of the term of that agreement. If the duration of this CLA ends, the terms and conditions of employment can be renegotiated. The introduction of a new CLA (applicable to the transferee and concluded after the date of the business transfer) supersedes the previous agreement. However, if an employee would have (for instance, based on the conditions contained in a CLA that transferred to the transferee) better terms in the previous agreement, such as a higher salary, he/she remains entitled to this salary. Even if a new CLA (containing a lower salary) is applicable, this would not prevent this employee from receiving a higher salary as most Dutch CLAs contain “minimum” conditions, from which deviation in favor of the employee is possible.

17.4 Information and consultation requirements

If an employer with 50 or more employees considers transferring all or part of an undertaking, it must, prior to its decision on the matter, request the advice of the works council (see further at **16.2** above).

17.5 Protections against dismissal

Employees dedicated to the transferred business transfer (by operation of law) to the acquiring entity. Therefore they are protected from being dismissed following the transfer.

Furthermore, a dismissal in connection with organizational changes in the enterprise, for example as discontinuation of business activities (*ETO-redenen*) requires the employer to observe genuine objectivity in selecting employees for redundancy. It is not possible to select employees for subjective reasons. The employer will have to apply the so-called reflection principle (*Afspiegelingsbeginnel*). However, it is generally very difficult to reorganize directly following the transfer of an undertaking. Employees are still protected from dismissal for reasons related to the transfer and the Dutch Labor Authority will, in general, reject the request for dismissal.

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