19 November 2014

Upcoming Changes in Dutch Employment Law

On 10 June 2014 the Upper Chamber of the Dutch Parliament approved the *Wet werk en zekerheid* (Work and Security Act – the 'WWZ'). The WWZ will introduce important changes to Netherlands employment law. We will resume the most important changes and the dates on which they will take effect below.

Date of effect: 1 January 2015

Non-competition clause

Current rule

An employment contract for either a fixed or indefinite term may contain a non-competition clause without the need for justification.

Under the WWZ

In fixed-term contracts a non-competition clause is only permissible if it is justified by the compelling commercial interests of the employer and if these reasons are set out in writing in the employment contract. Employment contracts for an indefinite term may contain non-competition clauses without the requirement that these be justified.

Transitional rule

The new legislation applies to all employment contracts entered into on or after 1 January 2015. Terms set out in employment contracts entered into before 1 January 2015 remain enforceable, even in the absence of any compelling commercial interest.

Advice

Justify in the right way the importance of agreeing a non-competition clause. The justification will depend on the individual circumstances of the case. The same applies to the non-solicitation clause, which is regarded in the same way by the courts as a non-competition clause.

Risks

In the absence of a good explanation of compelling commercial interests, no reliance may be placed on the non-competition clause in any fixed-term employment contract. You should note here that it is also necessary to establish compelling commercial interests in respect of the renewal of a fixed-term contract entered into before 1 January 2015 that is renewed on or after 1 January 2015.

Trial period clause

Current rule

A trial period clause is permissible in a fixed-term contract of any duration.

Under the WWZ

It is no longer possible to include a trial period in fixed-term contracts of six months or less.

Transitional rule

The new legislation governing trial periods applies to all employment contracts entered into on or after 1 January 2015.

Advice

If a trial period is desirable, consider a fixed-term contract of more than six months. Seven months is sufficient. Alternatively, enter into a contract for a fixed term of just two or three months: the disadvantage of this is that a second contract will be entered into at a sooner stage in the chain, meaning that a contract for an indefinite term could be created at a sooner stage.

Risk

No reliance can be placed on a trial period in respect of a fixed-term contract of six months or less.

Prior notice in case of termination

Current rule

A fixed-term contract ends by operation of law without requiring the employer to give notice of termination.

Under the WWZ

At the end of fixed-term contracts of six months or longer, an employer must notify the employee in writing at least one month before the end of his/her employment contract as to whether the contract term will be extended and, if so, under what conditions. If this obligation is not satisfied, the employer must pay the employee a penalty.

Transitional rule

The obligation to notify applies in respect of all employment contracts that end on or after 1 January 2015.

Advice

Ensure that the HR records are organized in such a way that the employee is notified in writing in good time (at least one month before the expiry of the contract term) as to whether his/her contract

will be extended and under what conditions. Consider including a notice clause in the employment contract.

Risk

If the obligation to give this written notification is not complied with, the employer must pay the employee a penalty of one month's salary. If an employer complies too late with the obligation, it is liable to pay the employee a penalty calculated pro rata the full penalty.

Date of effect: 1 July 2015

Contract chain rule

Current rule

3-3-3 contract chain

No more than three fixed-term contracts are permitted, up to a combined maximum contract term of 36 months. If the successive fixed-term contracts are interrupted by gaps of more than three months, the contract 'chain' is broken and the counting of the combined duration of fixed-term employment contracts starts from the beginning.

Under the WWZ

3-2-6 contract chain

No more than three fixed-term contracts are permitted, up to a combined maximum contract term of 24 months. If the successive fixed-term contracts are interrupted by gaps of more than six months, the contract 'chain' is broken and the counting of the combined duration of fixed-term employment contracts starts from the beginning.

Transitional rule

The new contract chain rule applies to all employment contracts commencing on or after 1 July 2015. Contracts entered into before 1 July 2015 count only in the calculation for the new contract chain rule if after 1 July 2015 a new employment contract signed.

Advice

Take the new contract chain rule into account when deciding on the duration of the contract. Consider, for example, a contract term of seven months for the first contract, and eight months for the second and third contracts. The total length of the 'chain' is 23 months (thus less than the maximum duration of 24 months), which therefore avoids an indemnity in connection with termination (see below), and also allows time for a trial-period clause to be agreed. Careful note should be made of the transitional rule. These should be tactically applied by, for example, offering an employee a new third (one-year) contract just prior to 1 July 2015.

Risk

Failure to correctly apply the new contract chain rule and the transitional rule carries the risk of converting a fixed-term employment contract into a contract for an indefinite term.

Termination process

Current rule

Dual system: Employers may – irrespective of the reason (basis) for termination – decide for themselves whether to seek approval to terminate the contracts of employees via the courts or the Social Security Agency (the 'UWV'). It is not possible to appeal the termination process.

Under the WWZ

Employers may no longer choose for themselves whether to seek approval for the termination of employees' contracts via the courts or the UWV. Termination based on business economic reasons or following a period of two years' sick leave must be approved via the UWV, whereas termination for personal reasons, such as poor job performance, needs to be assessed by the court. In either case, a decision can be appealed.

Transitional rule

The new rules on termination govern all applications for termination of an employment contract filed with the UWV or the court on or after 1 July 2015.

Advice

Ensure that the termination file is in accordance with the procedural rules for termination and choose the correct route for termination.

Risk

If the application for termination is filed with the wrong body and/or does not comply with the correct procedural requirements, the application will be rejected.

Reflection period

Current rule

There is no period for reflection and withdrawal in connection with the signing of a termination agreement.

Under the WWZ

The employee may revoke an unconditionally given consent in writing within 14 days. If it is not included in the termination agreement, the thinking period is extended to a period of three weeks. This applies also if the employee agrees to termination and the employer has not notified the employee of the reflection period in writing within two working days.

Transitional rule

The new rule governing the thinking period governs all employment contracts that end by mutual consent on or after 1 July 2015.

Advice

Whether or not to include a thinking period in the termination agreement is a strategic issue. Keep in mind during negotiations that the employee can make use of the thinking time. Consider, for example, compensating the employee for waiving the use of the reflection period.

Risk

If the employee seeks to use the reflection period, the employment contract is not terminated on the basis of the termination agreement.

Termination payment

Current rule

The sub-district court formula is used by judges in termination proceedings to calculate the amount of compensation payable for termination. In termination proceedings that are clearly unreasonable (according to the UWV procedure) compensation can be payable based on a calculation of actual financial loss. These are two different procedures producing two different financial results.

Under the WWZ

A new type of compensation for termination of employment has been introduced: the 'transition payment'. It will apply to both court and UWV proceedings. All employees, whether permanent or temporary, have the right to this payment following termination of employment after a period of employment of at least two years. The amount of this transition payment depends on the duration of the employment. The rule is: one-third of the employee's monthly salary per year of employment until and including ten years of employment, and one-half of the employee's monthly salary for all years of employment that the employee was employed by the employer for a period in excess of ten years. The maximum payment is EUR 75,000 gross, or one year's salary, whichever is higher. Costs incurred by the employer for the purposes of aiding the employee in his/her market position, such as training and outplacement, may be deducted from the termination payment under certain conditions. Only in exceptional cases, such as serious cause or poor financial situation, may the court deviate from the calculation of the termination payment.

Transitional rule

The new termination payment governs all contracts that end on or after 1 July 2015. There is a different rule for older employees and small employers.

Small employers, older employees

Employers with fewer than 25 employees may, in the case of termination of employment for business economic reasons, calculate the amount of the termination payment on the basis of an assumed commencement date of employment of 1 May 2013, even if the employee was employed longer. In the case of small employers that terminate employment for business economic reasons no compensation for termination is payable because they will usually choose to bring proceedings via the UWV. The measure is intended to give them time to build up a fund to pay for the termination payment. This transitional period will end on 1 January 2020.

There is also a transitional rule for older employees. Up to 2020 an employee aged 50 or older whose employment is terminated and who has worked for the employer for more than ten years is entitled to receive one month's salary for each year of employment after the age of 50. This transitional rule will also continue until 2020.

Advice

Be aware that a termination payment is owed at the end of a fixed-term contract after 24 months. Check to see what transitional rule applies to your organization/employees. Update your training scheme, so that these costs can be deducted from the termination payment. Prepare good termination files, so that the court is able to agree to the termination of employment.

Risk

The introduction of the termination payment gives the court less room for manoeuvre in the termination proceedings (e.g. in the case of poor job performance). To date, the court has the authority to terminate the employment contract and to compensate the employee with a higher payment in the absence of a dismissal file. In principle, the court no longer has such authority, and it is therefore anticipated that more applications for termination of employment will be rejected, resulting in the employee keeping his/her job. This means that the compiling of a proper termination file is even more important.

Obligation of employer to provide training

Current rule

There is no statutory obligation to provide training.

Under the WWZ

The new Act introduces an obligation upon employers to provide training. The Act states that the employer must enable the employee to follow such training as is necessary for the employee to perform his/her job.

Transitional rule

Employers have an obligation to provide training as from 1 July 2015.

Advice

Draw up a training plan for each employee, setting out the costs involved, and agree repayment / settlement provisions.

Risk

An employee's contract cannot be terminated for poor job performance if his/her unsuitability is the result of insufficient attention paid by the employer to the employee's training.

Date of effect: 1 January 2016

WW (unemployment benefit)

Current rule

The maximum period for which WW is paid is 38 months.

Under the WWZ

The maximum period for which WW is paid is reduced from 38 months to 24 months.

Transitional rule

The period for which WW is paid will be reduced by one month for each quarter commencing 1 January 2016. As from 2019 the maximum period for which WW is paid is two years.

Advice

This means it is more important than ever for an employee to keep his/her job, since unemployment benefits are payable for a more limited duration. This means that more defended termination applications are to be expected. Accordingly, a properly compiled termination file is essential.

Risk

The employee will focus more on retaining his/her job and defend any dismissal in every way possible as a result of the duration of the WW payment being of a more limited duration.

Finally

These are the most significant aspects of the Work and Security Act. During its passage through the Dutch Upper Chamber, Minister Asscher further announced that he would bring forward remedial legislation in response to the criticism of the draft legislation from, inter alia, employment-law attorneys. However, this remedial legislation will not introduce major changes. The minister wishes to avoid the Act losing its 'balance'.

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Cao (collective labour agreement)

With the implementation of the Work and Security Act the opportunities for diverging agreements concerning, for example, contract chain provisions or on-call contracts, to be included within the cao are limited. However, there are a number of subjects (termination payment, training, dismissal proceedings, third year of WW payment) in respect of which agreements may be included in the cao.

There is, however, a transitional rule for pre-existing cao's: agreements in the cao that affect the provisions of the Work and Security Act remain in force either up to the date on which the relevant cao ceases to be in force, or up to a date not exceeding one year following the commencement of the new statutory provision.

The employer should check carefully what changes are to be introduced into the cao, and harmonize policy and internal regulations with this. Policy that is based on an old cao will cease to have effect. Make use of the opportunities to influence the agreements through a new cao (via the sector/employers' association that sits at the table during negotiations) or consider the options for a new own-company cao. A company cao enables an optimum company-oriented use of the opportunities to depart from the general principles that the law allows in respect of cao's.

Please note that the above is only a resume of the most important changes in Dutch employment law taking effect as of 1 January 2014, and does not constitute legal advice in any individual case. We recommend that you obtain advice from a lawyer specialized in Dutch employment law in case you wish to be informed of the possible consequences of the WWZ for any individual employment agreements.