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Employment law - Legislative News 2005/2006

Act on Working hours

The Dutch Ministry of Social Affairs and Employment proposes to substantially simplify the Act on Working Hours (“*Arbeidstijdenwet*” (**ATW**)).

The proposals by the Ministry relate to (among others) minimum hours of rest, work on Sundays, maximum working hours, night shifts, breaks and availability. The proposals are intended to simplify rules and regulations, thereby keeping in mind the objectives of the ATW ((i) health, safety and well- being of employees in respect of working hours, (ii) stimulating the combining of work, care duties and responsibilities outside the workplace). It should thereby be made possible to deviate from statutory regulations on a collective basis, thus creating more responsibility for a decentralized regulation of working hours.

This will have possible consequences for the system of working hours and overtime currently in use by companies in the Netherlands.

The Social Economic Council (**SER**) has at the Government’s request provided advice on the outline of the Government’s proposed changes to the ATW. The advice was provided in February 2005. The Government intends to submit a new Bill to Parliament shortly.

Non- competition clause

In 2001 the Government introduced a new Bill of Parliament which – if accepted – will profoundly change the current statutory rules and regulations regarding non-competition clauses.

As is the case now competition clauses in order to be valid need to be concluded in writing. The main difference with the current statutory regulations is that the new Bill will maximize the length of a non-competition clause to one year. In addition an employer who wishes to hold the employee to the obligations contained in a non-competition clause will be forced to pay a reasonable compensation to the employee, as the latter will thus be restricted in his/her freedom toundertake certain activities.

The Bill further prescribes that – apart from the amount of compensation payable by the employer – the geographic area to which the non-competition clause applies as well as the activities it intends to cover should be clearly defined.

The Bill, which due to the compensation element is rather controversial, was introduced in Parliament in 2001 and has been accepted by the 2nd Chamber of Parliament. It is currently in its final stages of deliberations in the 1st Chamber.

As soon as the Bill becomes law all non-competition clauses currently used by companies in employment contracts with its employees must be brought into line with the new regulations within one year of the Billbecoming law.Failure to do so is likely to result in the non-competition clause becoming null and void.

Act on Work and Income to Employment Capacity

Per 1 January 2006 the rules and regulations regarding disability benefit have changed. The former Disability Act (“*Wet op de Arbeidsongeschiktheid*” (**WAO**)) has been replaced by the Act on Work and Income to Employment Capacity (“*Wet Werk en Inkomen naar Arbeidsvermogen*” (**WIA**)).

An employee who is ill is entitled to continued payment of between 70% - 100% of his/her salary during the initial two years of illness, provided that the overall payment during the initial two year period does not exceed 170% of the salary. Under the WAO, an employee who continued to be ill after the initial 2 years underwent an appropriate medical examination. If found ill, the employee was entitled to disability benefit. Depending of the employee's service record and age such disability benefit was either salary related or minimum wage related.

Under the WIA the system has changed. Employees who have become ill since 1 January 2004 fall under the scope of the WIA. The WIA consists of two types of benefit: IVA-benefit and WGA-benefit. IVA-benefit is intended for employees who are considered to be completely and permanently ill, which is the case if and when the employee's earning capacity does not exceed 20% of his last earned salary and this is not likely to change. IVA-benefit amounts to 70% of the employee's salary (up to a statutory maximum) up to the age of 65. Provided that (among others) the number of employees claiming IVA-benefit in 2006 does not exceed 25,000 this will be increased to 75% of the employee's salary. Similarly the so-called 'Pemba' Act (under which the social security premiums payable by the employer are increased in the event of an increase of its staff claiming disability benefit) may be abolished.

Employees who are considered to be partially ill (provided that their incapacity for work amounts to at least 35%) or completely but not permanently ill qualify for WGA-benefit. WGA-benefit initially amounts to 70% of the employee's last earned salary (up to a statutory maximum). The length of this wage-related WGA-benefit depends on the employee's age and service record. Subsequently the employee will qualify for minimum wage related benefit, the amount of which depends on the extent to which he/she actually works. Unlike IVA-benefit WGA-benefit is intended to stimulate the employee's full return to work.

Unemployment benefit Act

The Government intends to change regulations regarding an entitlement to unemployment benefit. Under the new regulations in order to qualify for unemployment benefit a former employee needs to have worked during 26 out of the last 36 weeks. Currently this is 26 weeks out of the last 39 weeks. The other condition for entitlement to unemployment benefit (the employee needs to have earned salary during 52 days or more in at least 4 out of the last 5 years) remains unaltered. The 26-out-of-36-weeks rule is intended to effective from 1 April 2006.

Unemployment benefit will amount to 75% of the employee's last earned salary (up to a statutory maximum) during the initial two months and 70% during the subsequent period. This is currently 70% over the whole period. The duration of unemployment benefit depends on the employee's age and service record. The maximum entitlement to unemployment benefit will be shortened from 5 years to 3 years and 2 months. These changes are intended to be effective from 1 October 2006

An entitlement to unemployment benefit is dependent on whether or not the employee can be held liable for termination. This is verified by the unemployment agency (UWV) upon application for unemployment benefit. In order to safeguard as much as possible an employee's entitlement to unemployment benefit, employer and employee usually agree to request the court to terminate the employment contract on neutral grounds, regardless of the fact that (i) both parties have reached agreement in respect of (the conditions for) termination and (ii) termination could therefore easily be effected by mutual consent. Such proceedings before the court, also referred to as pro-forma termination proceedings, prevent as much as possible the UWV from holding the employee liable for termination. Under the new regulations intended to be effective from 1 October 2006 the UWV will limit this liability check. As a result the practice of pro-forma termination proceedings before the court will no ! longer be necessary in safeguarding an employee's entitlement to unemployment benefit. However, until is has become apparent how the liability check will work in practice, we advise clients to continue using pro forma termination proceedings for the time being to avoid any risks.

In the event that an employee has worked during 26 out of the last 36 weeks but not during at least 4 out of the last 5 years, he/she does not qualify for wage related unemployment benefit. However, the employee does qualify for so-called short-term unemployment benefit. Short-term unemployment benefit currently amounts to 70% of minimum wage over a period of 6 months. Under the new regulations, intended to be effective from 1 October 2006, this will amount to 75% of the employee's last earned salary (up to a statutory maximum) during the initial 2 months, followed by 70% of the employee's last earned salary (up to a statutory maximum) during the subsequent 4 months.

Collective dismissal and the 'last in - first out' principle

Another change concerns the so-called 'last in - first out' principle. Under the current regulations, in the event of termination of employment contracts on economic grounds (collective dismissal) selection of the

employees eligible for termination must take place on the basis of the principle that the employee with the shortest service record is eligible for termination first (presuming that the employees involved have a similar job/position). This principle has been criticised as it forces the employer to retain senior (and therefore more expensive) staff, whereas the underlying reason for termination will as a rule be an economic one.

The Government has now agreed that in the event of dismissal of employees on economic grounds (collective dismissal) the 'last in - first out' principle will no longer be the sole determining factor in deciding which employee shall be eligible for termination. In determining which employees (with a similar job/position) are eligible for dismissal employees will now be categorised according to age groups and employees within the same age group will be selected for dismissal in accordance with the 'last in – first out' principle. These changes will be effective from 1 March 2006.

Collective Labour Agreements applicable to foreign employees

A Bill has been introduced into Parliament which will also make collective labour agreements (**CLA**) which have been declared generally binding ("*algemeen verbindend verklaard*") applicable to employees working in the Netherlands but employed by foreign employers. Consequently, foreign companies who second their employees to the Netherlands on a temporary basis may be subject to CLA regulations.

Dismissal of a managing director ("*bestuurder*") of a company ("*NV/BV*").

Recently the Dutch Supreme Court has ruled on the implications of dismissal of a managing director. The relationship between a managing director and a company traditionally has a dual character, i.e. is governed by both employment law and a corporate law. A managing director is (usually) contracted under an employment contract, but is appointed and dismissed as managing director under the rules of corporate law. The question of old was whether such a dismissal (by means of a resolution of the General Meeting of Shareholders) also implied the termination of the employment contract.

The Supreme Court has recently ruled that this is the case. This means that the dismissal of a managing director through the adoption of a resolution of the General Meeting of Shareholders also implies termination of his/her employment contract.

The Supreme Court has further ruled that this is only different in the event that (i) a statutory prohibition to dismiss exists or (ii) parties have agreed otherwise

Dismissal of a managing director of a Dutch company ("NV/BV") can be effected by means of a valid resolution of the General Meeting of Shareholders. Bear in mind that the applicable notice period needs to be observed as well as (customary) rules regarding possible severance payments.