



The Legal 500 Country Comparative Guides

The Netherlands

EMPLOYEE INCENTIVES

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This country-specific Q&A provides an overview of employee incentives laws and regulations applicable in The Netherlands.

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THE NETHERLANDS

EMPLOYEE INCENTIVES



1. What kinds of incentive plan are most commonly offered and to whom?

A distinction should be made between 'all employee' plans and management incentives plans.

'All employee plans' are generally free or discounted share plans, share option plans and share appreciation right plans (SAR plans). Vesting is generally time-based and subject to continued employment.

Management incentive plans commonly put the participant at risk and are more often performance-based. Furthermore, a distinction should be made between publicly and privately held companies. Free shares awarded to management of listed companies are subject to a minimum holding period (in accordance with Dutch corporate governance rules). Co-invest plans are common for management in companies that are privately held. Consequently, the structure of incentive plans widely differs between publicly and privately held companies. The same goes for the legal and tax aspects one has to consider when structuring these plans.

2. What kinds of share option plan can be offered?

Share options offered to employees fall within the scope of 'employee share options regime' of the Dutch Wage Tax Act and are, in general, taxable upon exercise or disposal of the share options.

Deviations are very rare and would, e.g., apply if the employee is awarded options on shares in a company that is holding less than 1/3rd of the shares in the employing company. In such non-qualifying situation, the share option would be taxable upon vesting. Because such situation occurs rarely it will not be discussed below.

From a Dutch tax perspective share option plans are inefficient: the exercise gain is taxable at progressive rates in the hands of the employee without a matching deduction for corporation tax. For this reason Share

Appreciation Rights ('SARs') are often preferred over share options, as SARs are generally tax deductible for corporation tax, subject to one exception: no matching deduction would be available if the employee's taxable remuneration in the calendar year preceding the year of exercise exceeded EUR 598,000 (2022).

3. What kinds of share acquisition/share purchase plan can be offered?

No limitations apply in this respect, so also Restricted Shares, Restricted Share Units ('RSUs') and Performance Share Units can be offered.

4. What other forms of long-term incentives (including cash plans) can be offered?

Management incentive plans of/on companies held by private equity are offered in a wide variety of forms, such as promote shares, profit-sharing loans, ratchet shares, carried interests, etc. Such incentives may qualify as 'lucrative interest' for Dutch tax purposes. Lucrative interests require a lot more of attention from a tax perspective than ordinary equity incentive plans. It is common practice that lucrative interest plans (as well as plans that may qualify as such) be discussed in advance with the tax authorities and the outcome thereof be confirmed in a ruling.

A lucrative interest can generally be described as an interest in a company (such as shares, receivables or any other rights), either directly or indirectly held by an individual, the benefits whereof (yield, capital gains), as may reasonably be considered, are also intended to remunerate the individual (or the spouse or a close family member of the individual) for work. Such work can be under any type of engagement, not necessarily an employment. The remuneration objective may, inter alia, be satisfied if the interest potentially offers a disproportionately high return, i.e. a return that would not be available to other investors without an engagement for work (sometimes referred to as 'sweet equity' or

concisely 'envy'). As a main rule, any benefits from a lucrative interest are taxed progressively with income tax. If a lucrative interest is held by the individual indirectly, through a holding company in which he is holding a substantial interest (i.e. > 5% interest in (any class of shares of) such holding company), AND at least 95% of the benefits from the lucrative interest are distributed in the same calendar year by the holding company, such that they generate income from a substantial interest, progressive income taxation is replaced by taxation under the substantial interest regime, which is at a flat rate of 26,90% (2022). In such kinds of structures, due attention should also be given to other areas of taxation, e.g. to corporation tax on the benefits in the holding company.

5. Are there any limits on who can participate in an incentive plan and the extent to which they can participate?

There are in principle no limits on the employees that can participate in the incentive plan. However, excluding certain groups from the incentive plan could be in conflict with the principle of equal treatment. A direct or indirect distinction on race, gender, part-time/full-time employment, definite/indefinite term contract, etc. is in principle prohibited. An employer cannot treat participants that are in an equal position unequally, unless there is an objective justification.

In order to benefit from certain financial regulatory exemptions, the scope of persons may need to be limited to – in short – employees and/or certain conditions need to be met.

6. Can awards be made subject to performance criteria, vesting schedules and forfeiture?

Awards can be made subject to performance criteria, vesting schedules and forfeiture. These aspects may have an impact on taxation. Awards can also be subject to a lock-up period.

The lock-up period during which the shares are not transferable should permit the reduction of the taxable basis. According to a safe harbour issued by the Dutch State Secretary of Finance a mandatory holding period will have the following effect on the value of listed shares for tax purposes:

Sale restriction in	Tax exempt discount
1 full year	5,5%
2 full years	10%
3 full years	13,5%
4 full years	16%
5 full years	18,5%

Hence, to the extent an award is paid in shares, subject to a holding period of one year, the taxable benefit is set at the number of shares times the share price, minus a tax-exempt rebate of 5.5%.

In case (i) the shares to which the incentive plan relates, are listed on a regulated market in the Netherlands or (ii) the MAR (as further described under number 15) applies to the relevant company, specific disclosure obligations have to be observed when the granted awards become unconditional (i.e. upon vesting).

In certain (very limited) circumstances the forfeiture of awards may be contrary to the principle of reasonableness and fairness (redelijkheid & billijkheid) and therefore not valid. Furthermore, in case of – in short – unfair dismissal, an employee can claim a fair compensation and the (potential) value and/or vesting of awards may be taken into account to determine the amount of fair compensation.

7. Can awards be made subject to post-vesting and/or post-employment holding periods. If so, how prevalent are these provisions both generally and by reference to specific sectors?

Awards can be made subject to post-vesting and/or post-employment holding periods.

Post-vesting holding period provisions are often agreed in management incentive plans when the exercise of the awards is linked to an exit event. Post-employment holding period provisions are not very common.

8. How prevalent malus and clawback provisions are and both generally and by reference to specific sectors?

Some management incentive plans contain malus and clawback provisions. We note that some mandatory provisions of the Dutch Civil Code can be used in order to claw back bonuses/grants in certain situations. Furthermore, specific remuneration rules apply with respect to employees of financial institutions and top management of public and semi-public institutions.

Payments made against these regulations are null and void and need to be returned.

9. What are the tax and social security consequences for participants in an incentive plan?

When determining the tax and social security consequences it is important to make a distinction between the various incentive plan awards. We have therefore made an overview of the various tax and social security consequences for: i) free / discounted shares, ii) share options and iii) SARs.

Free / discounted shares

(i) on grant (subject to condition precedent):

No tax and/or social security consequences arise at the date of grant.

(ii) on vesting:

Upon the date of vesting, tax and social security consequences will arise for the participant. The taxable amount is the fair market value (share price on the exchange) at the date of vesting, minus any acquisition price paid, multiplied by the number of shares under the award.

The benefit (free shares / provided discount) is taxed as employment income at progressive income tax rate, generally with a mandatory wage tax withholding at source by the employing entity.

The taxable benefit is in principle also subject to social security charges, though this is relevant only to the extent the employee's remuneration is below the annual maximum chargeable income. Social security contributions are capped at an employment income in the amount of € 35,472 (employee contribution) and € 59,706 (employer contribution) respectively (2022 amounts).

(iii) on exercise:

N/A.

(iv) on the acquisition, holding and/or disposal of any underlying shares of securities:

Acquisition (apart from vesting) does not constitute a taxable moment.

As to holding and/or disposal we have to distinguish between box 1, box 2 and box 3 taxation.

Box 1. If the shares qualify as a lucrative interest (see also Q&A 4), any dividends received, and any capital gains realised upon disposal are taxed at progressive rates in box 1. The standard progressive rates amount to a maximum percentage of 49.5% in 2022, although this percentage can effectively increase to 55.5% when we also consider the income-dependent decrease of the tax rebates (heffingskortingen) up to a certain amount of income.

Under certain circumstances (e.g. if the shares are held through a holding company) box 1 taxation on a lucrative interest is replaced by box 2 taxation for substantial interests (see below or Q&A 4).

Box 2. If the participant holds an interest of 5% or more in (any class of) the share capital of the company, the shares constitute a so-called 'substantial interest', which is subject to box 2 taxation. Under this regime, any dividends received and any capital gains realised upon disposal are taxed at a flat rate of 26,90% (2022);

Box 3. Any shares not falling within the scope of box 1 or box 2 taxation, are taxed in box 3. During the holding period, a progressively determined notional yield of the taxable value of the shares on 1 January, in each given year, is subject to Dutch income tax at a fixed rate of 31%. Any actual investment income received (e.g. interest, dividends) is not taxable.

There is a general exemption for net worth assets up to (in 2022)

€ 50,650 (for singles) and € 101,300 (for couples), which applies to all assets including (market value of) shares on 1 January, prior to the calculation of the notional yield.

Upon disposal of the shares, any capital gains realized shall be exempt, whereas a loss will not be tax deductible for the participating employee. (v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan:

A loan that is offered to participants as part of an incentive plan in principle does not constitute a taxable benefit, provided the interest on the loan is set at arm's length. In general, if the interest is below market rates under similar conditions, the benefit for the participant may constitute taxable employment income. Furthermore, it should be noted that under certain circumstances loans with specific conditions, like limitations on the recourse, may constitute a lucrative interest or the benefit could be considered employment income.

Share option rights

(i) on grant:

No tax and/or social security consequences arise at the date of grant.

(ii) on vesting:

(iii) No tax and/or social security consequences arise at the date of vesting on exercise:

Taxation for Dutch wage tax purpose arises upon exercise of the share option.

The exercise gain (i.e. the share price at fair market value minus exercise price) constitutes employment income, which is taxable at progressive income tax rates, with a mandatory wage tax withholding. The taxable benefit may also be subject to social security charges (similar to the free / discounted share plans).

(iv) Since 2019 an exemption is available in respect of options on shares in innovative start-up companies: 25% of exercise gains / taxable benefit up to € 50,000 (i.e. € 12,500) per employee per calendar year. The exemption is subject to a number of conditions. on the acquisition, holding and/or disposal of any underlying shares of securities:

Please refer to the paragraph on free / discounted shares.

(v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan:

Please refer to the paragraph on free / discounted shares.

SARs

(i) on grant (subject to condition precedent):

No tax and/or social security consequences arise at the date of grant.

(ii) on vesting:

No tax and/or social security consequences arise at the date of vesting.

(iii) on exercise:

In principle the same tax treatment applies at the date of exercise for the SARs, as that apply for the share options. The difference between the SARs and the share

options are that the SARs are exercisable in cash and not in shares. For social security aspects, please refer to the paragraph on free / discounted shares.

10. What are the tax and social security consequences for companies operating an incentive plan?

(i) on grant (subject to condition precedent):

No tax and/or social security consequences arise at the date of grant.

(ii) on vesting:

Upon the date of vesting, tax and social security consequences will arise in respect of free / discounted shares, generally resulting in a withholding obligation for the employer.

There is in principle no matching deduction available for corporate income tax ('CIT') purposes.

(iii) on exercise:

Upon the date of exercise tax and social security consequences will arise in respect of share options and SARs, generally resulting in a withholding obligation for the employer.

There is no matching deduction available for CIT purposes when exercising share options under an option plan. If a SAR is exercised for cash in accordance with plan rules, the exercise gain paid to the employee is in principle deductible for CIT purposes, unless the employee's taxable employment income in the preceding year exceeded € 598,000 (2022).

(iv) on the acquisition, holding and/or disposal of any underlying shares of securities:

In principle no tax and/or social security consequences arise for the company on the acquisition, holding and/or disposal of any of the underlying shares.

For sake of completeness, we note that if a participant's employment ceases (irrespective of the reason), all taxable employment income derived from that employment as from 1 January of the calendar year immediately preceding the termination year, is considered for determining whether a special employer tax on excessive termination payments applies. Benefits may (partially) be considered a termination payment for purposes of this tax, if the participant is leaving in the same or the next calendar year of the vesting date of the free / discounted share plan, or the exercise date of the

option right and/or SAR. Under certain circumstances, the value of share options may have to be taken into account even if the share options have not yet been exercised. The applicability of this special tax is dependent on a number of conditions. In practice the most important condition is that the special employer tax only applies if the participant's remuneration in the second calendar year preceding the year in which his employment is terminated, exceeded € 576,000 (2022).

(v) in connection with any loans offered to participants (either by the company operating the incentive plan, the employer of the participant (if different) or a third party) as part of the incentive plan:

If the employer (or a group company) has extended a loan to the participant at beneficial conditions, e.g. at an interest rate that is below market rates under similar conditions, the employer will have a withholding obligation regarding the taxable benefit.

11. What are the reporting/notification/filing requirements applicable to an incentive plan?

- The employer is generally required to deduct wage tax and (the employee part of) social security contributions on taxable benefits from an incentive plan that constitute employment income. In addition, the employer is generally required to pay part of social security contributions up to the maximum chargeable remuneration. These benefits must be included in the payroll.
- The participant must disclose any taxable benefits of the shares in the annual income tax return and pay the income tax due (any wage tax deducted at source may be offset).
- In case (i) the shares to which the incentive plan relates, are listed on a regulated market in the Netherlands or (ii) the MAR (as further described under number 15) applies to the relevant company, specific disclosure obligations have to be observed.
- Share incentive plans with a cross-border dimension that have the effect of converting income into capital or other categories of revenue which are taxed at a lower level or are exempt from tax, may have to be reported to the tax authorities under the legislation based on the EU Mandatory Disclosure Directive (DAC6).

12. Do participants in incentive plans have

a right to compensation for loss of their awards when their employment terminates? Does the reason for the termination matter?

In principle, participants do not have a right to compensation for loss of their awards when their employment agreement terminates. As set out above, this is only different (i) in certain (limited) circumstances when the forfeiture of awards is contrary to the principle of reasonableness and fairness (*redelijkheid & billijkheid*), or (ii) in case of - in short - unfair dismissal as in such case an employee can claim a fair compensation and the (potential) value and/or vesting of awards may be taken into account by a court when determining the amount of fair compensation.

The calculation of the fair compensation could for example be as follows. If the employment agreement is terminated without a reasonable ground (e.g. there is not sufficient file for underperformance) a court may grant a fair compensation. The court will in such case calculate the fair compensation by determining the missed income of the employee until the date the employer could have terminated the employment agreement with a reasonable ground. Building up an underperformance case could - depending on the specific situation - take for example 3 to 6 months. If awards would vest during this period, the court will add the value of the awards to the fair compensation amount.

13. Do any data protection requirements apply to the operation of an incentive plan?

Yes. The processing of the employee data for an incentive plan is considered a processing activity which is governed by both the General Data Protection Regulation (GDPR) and the Dutch GDPR Implementation Act (UAVG). Further thereto, the processing must comply with all requirements of GDPR, and must *inter alia* be based on a legal ground, be done for specific purposes and the personal data may not be retained longer than necessary. Additional requirements apply for the processing of sensitive data. Furthermore, a company is under the obligation to inform the employees regarding the processing of their personal data in the context of the incentive plan in accordance with the information obligation. In case that personal data is collected or processed by companies located outside of the European Economic Area, additional measures must be implemented and complied with to ensure an adequate level protection.

14. Are there any corporate governance guidelines that apply to the operation of incentive plans?

The Dutch Corporate Governance Code contains general principles that apply to the remuneration of the management board of listed companies. These principles need to be applied or it needs to be explained in the annual accounts of the company why they are not applied. These principles inter alia stipulate that the remuneration policy should include:

- i. an appropriate ratio between the variable and fixed remuneration components. The variable remuneration component should be linked to measurable performance criteria determined in advance, which are predominantly long-term in character;
- ii. if shares are being awarded, the terms and conditions governing this. The Shares need to be held for at least five years after they are awarded; and
- iii. if share options are being awarded, the terms and conditions governing this and the terms and conditions subject to which the share options can be exercised. Share options cannot be exercised during the first three years after they have been awarded.

If there is a financial undertaking (*financiële onderneming*) with its seat in the Netherlands within the group, it should be checked whether additional remuneration rules apply, which may restrict the possibility to offer awards to employees.

15. Are there any prospectus or securities law requirements that apply to the operation of incentive plans?

Prospectus requirement

Whether an approved prospectus will be required when offering awards under an incentive plan to employees in the Netherlands will depend on whether the awards qualify as 'securities' under Dutch law. If the awards do not qualify as security, no prospectus is required for the offer of the awards to employees in the Netherlands.

In case the awards will be transferable, the awards may qualify as securities under Dutch law and, if so, a prospectus approved by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, **AFM**), or any other competent authority, is required, unless one of the available exemptions to the prospectus requirement applies. With respect to incentive plans, the

exemptions which are most often relied on are the exemption available when awards are offered to fewer than 150 persons in the Netherlands or the exemption available for certain targeted employee award plans. This is all based on the European Prospectus Regulation (EU) 2017/1129 which applies since 21 July 2019.

Market abuse regulation

In case of a (request for) listing and trading of shares or any other financial instruments of the company, to which the incentive plan relates, on a regulated market (RM), multilateral trading facility (MTF) or organized trading facility (OTF) in any of the member states of the European Union, the provisions of the Market Abuse Regulation (EU) (596/2014, the **MAR**) (including the insider trading prohibition) become applicable to the granting, exercise, and subsequent sale of shares.

In respect of employee share / option plans an exemption from the insider trading prohibition may be available under the MAR.

Disclosure obligations

In case (i) the shares to which the incentive plan relates, are listed on a regulated market in the Netherlands or (ii) the MAR applies to the relevant company, specific disclosure obligations have to be observed by qualifying persons.

PRIIPS

Where participants genuinely invest and the amount repayable may fluctuate, a company offering an incentive plan may need to consider whether a key information documents under PRIIPS Regulation (1286/2014) needs to be prepared and published on its website.

16. Do any specialist regulatory regimes apply to incentive plans?

Other than the securities laws described under question 15 above, there is no specific national regulatory regime regarding incentive plans in the Netherlands.

If there is a financial undertaking (*financiële onderneming*) with its registered seat in the Netherlands within the group, it should be checked whether additional remuneration rules apply, which may restrict the possibility to offer awards to employees and conditions thereof, including possible clawbacks.

17. Are there any exchange control restrictions that affect the operation of incentive plans?

Under Dutch law, no exchange controls are currently applicable to the operation of incentive plans involving Dutch employees.

18. What is the formal process for granting awards under an incentive plan?

In case of an equity incentive plan, the shareholders meeting needs to adopt a resolution (i) approving the incentive plan and the number of shares that will be issued in connection with this plan, and (ii) generally authorising the board of directors or a committee to administer the plan and elect the employees that may participate in the plan.

In case of a cash-based plan (such as a Share Appreciation Right) in general it's the company's board of directors that can grant the awards without shareholder approval.

The grant of an award must also follow any requirement set forth in the corporation's articles of association, remuneration policies and if applicable corporate governance code.

19. Can an overseas corporation operate an incentive plan?

Yes, taking into account the applicable securities laws when offering awards to employees in the Netherlands.

20. Can an overseas employee participate in an incentive plan?

Yes, taking into account the securities laws applicable in the country where such overseas employees are residing.

21. How are share options or awards held by an internationally mobile employee taxed?

Share options and other share awards held by an internationally mobile employee will be taxed considering both national legislation and double taxation agreements. Resident taxpayers in principle owe income tax on their worldwide personal income irrespective of where it is earned or paid, while non-resident taxpayers are only liable to pay income tax in the Netherlands on

their income from certain Dutch sources (such as employment), resulting in limited tax liability.

Any taxable benefits from free/discounted shares or the exercise of share options are allocated for taxation under the double taxation agreements similar to regular pay of the internationally mobile employee. In accordance with the OECD commentary, such benefits are considered being accrued over the vesting period (unless facts and circumstances indicate differently). E.g., if the participant is a tax resident of the Netherlands, the exercise gain on share options must be disclosed in full in the personal income tax return, as a first step. If the participant exercised his employment in another jurisdiction during 50% of the vesting period, with his employment income being allocated for taxation to that other jurisdiction in accordance with the DTA, the same goes for 50% of the exercise gain, as a second step. In order to avoid double taxation, generally an exemption with progression is allowed (for board members sometimes only a tax credit is allowed).

30%-ruling

A special wage tax facility applies for employees who have been recruited from abroad to work in the Netherlands and who meet certain conditions. For these employees, the so-called 30%-ruling may apply. This regime intends to cover the extra expenses that such person has because he works outside of his home country. If the application of the regime is granted (maximum period: five years), the employer may pay the employee a (fixed) tax-free allowance of up to 30% of the taxable employment income, i.e. inclusive of taxable benefits for share incentive plans generating employment income. The ruling may also have other benefits, such as the possibility for the employee to opt for being taxed as a non-resident taxpayer for box 2 and box 3 income tax purposes. Under those circumstances box 2 is only applicable with respect to substantial share interests in a Netherlands-based company and box 3 only with respect to real estate located in the Netherlands (i.e. any other net wealth would not be subject to income tax).

22. How are cash-based incentives held by an internationally mobile employee taxed?

Please refer to Q&A 21.

23. What trends in incentive plan design have you observed over the last 12 months?

Tax authorities have become increasingly keen on

proper valuation of shares.

24. What are the current developments and proposals for reform that will affect the operation of incentive plans over the next 12 months?

A legislative proposal has been proposed for 2022 that shifts the taxable moment of share option rights. The (draft) legislative proposal has currently however been put on hold. At this stage it is uncertain if and when the

proposal will be 'revived' and in which form. Under the (draft) legislative proposal the taxable moment of share option rights that regard shares that are not tradeable (for example due to a lock-up), is deferred to the moment the (underlying) shares become tradable (but no later than 5 years after the date of exercise). Whether the employee sells the shares at the time they become tradable is irrelevant. Upon implementation, it is also possible for employees to opt for taxation at the moment of exercising the share option rights, which is in accordance with the current tax regime for share option rights.

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