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The Netherlands

EMPLOYMENT AND LABOUR LAW

Contributor

ACG International

Edith Nordmann

Managing Partner | Attorney at Law | enordmann@acginter.com

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

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THE NETHERLANDS
EMPLOYMENT AND LABOUR LAW

1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

An employer who wants to terminate his employees' contract must take notice of termination into account. The notice of termination must be given in writing and starts once the notification has reached the recipient. Collective bargaining agreements contain provisions on the notice of termination. When no period has been laid down, the legal term is applicable. The longer an employee has been in service, the longer the notice of termination. This varies from a notice period of one to four months.

The notice period can be extended by agreement between employee and employer, and concluded in writing.

Shorter notice periods are only permitted when this is laid down in a collective bargaining agreement.

Sending a termination notice that meets the required notice period does not automatically end an employment contract. Detailed procedural requirements must be followed carefully. Additionally, when an employment contract sets a notice period different from the standard one, often extending it, the maximum allowed is six months. For such cases, the notice period for the employer has to be twice as long as that for the employee.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

In the event of a mass redundancy, the employer has to act in compliance with the Collective Redundancy Notification Act. The obligations prescribed by this act are triggered when the employer aims to dismiss at least 20 employees functioning in the same working area within a period of three months, based on prudential grounds.

The Employee Insurance Agency (UWV) and the trade unions with members working under the employer must be notified on the intention of dismissing the employees.

Furthermore, the trade unions as well as the works councils have to be consulted on the plans. The employment agreement cannot be terminated within a month after having notified the relevant parties.

When the employer does not act in accordance with the rules prescribed for mass redundancy, the termination agreement will be void.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

In the event of a business transfer, the rights and obligations of an employee arising from the employment contract will transfer from the transferor to the buyer. Employers are not allowed to dismiss any employees because of a business sale. Consequently, not only do employees keep their position, but also the wage, overtime compensation, travel allowance, bonuses and secondary labour conditions as agreed upon in the contract are safeguarded.

With regards to collective agreements, the existing one stays applicable. Depending on the collective agreement that was applicable at the business of a buyer, this could result in different collective agreements that are applied within a business.

Economical, technical or organisational interests can form a ground to allow unilateral amendments to collective agreements.

4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The legal notice period an employer must observe is at least 1 month. However, the exact length of the notice period depends on the length of employment.

Please note: a notice clause in the employment contract or collective agreement may also play a role in this.

Any employee could potentially have a longer notice period if it is explicitly agreed upon in their individual employment contract. However, for employees, the notice period can be extended contractually up to a maximum of six months. These agreements are subject to negotiation between the employer and the employee and must comply with Dutch labour law limits, including the stipulation that the employer's notice period must be at least twice as long as that of the employee if the agreed period exceeds the statutory minimum.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Under Dutch dismissal law, the parties can mutually conclude a termination agreement. In fact, in many cases employers prefer to settle because of the limited amount of reasonable dismissal grounds. Employer and employee are free to choose whether payment is involved in the termination agreement.

Furthermore, the so called 'transition compensation' is a common clause in termination agreements which is applicable to both permanent and temporary employees as both types of employees can be entitled to be compensated in the event of a dismissal. Upon termination by the Employer the Employee is entitled to the transition payment by law. Employees are entitled to transition compensation starting from the first day of their employment.

The amount of compensation is based on the monthly salary and the number of working years.

Parties can, however, legally agree that no transition compensation is paid (or more than the minimum compensation) if these agreements are made and concluded in accordance with all legal requirements of a settlement agreement.

Please note: Employees have a mandatory right to 14 days of reflection to rescind the agreement in writing.

6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

Employers cannot unilaterally require employees to serve a period of garden leave. The employee needs to explicitly agree upon the leave, including additional arrangements concerning costs and compensations.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

Individual dismissals in the Netherlands require a procedure either at the cantonal court or the Employee Insurance Agency (UWV), an autonomous administrative authority that is commissioned by the Ministry of Social Affairs and Employment. The question of where the case gets brought before depends on the ground for dismissal.

An employer must apply for a dismissal permit at the UWV when the cause for dismissal was either formed by business-related reasons or long-term incapability. When the application is completed, the UWV will notify the employee and provide a copy of the request for a dismissal permit. The defence of an employee needs to be known in writing within 14 days. Typically, the UWV handles the application in no more than four weeks.

In the event of dismissal due to reasons relating to the individual employee, the application for a dismissal permit can be submitted at a cantonal court. The application must be in writing and supported by a reasoned opinion. After the cantonal judge has informed the employee of the application, he/she can file a statement of opposition. Subsequently, both parties are invited by the court for an oral hearing.

Whether or not the contract will be terminated, depends on the 'seriousness of the reasons'.

Besides the legal notice of termination, certain categories of employees can be entitled to protection against dismissal and termination benefits.

Furthermore, Dutch law knows a general prohibition on

termination of the employment contract. This prohibition forces an employer to obtain the written consent by an employee or the Employee Insurance Agency (UWV). With the UWV's consent, the employer has received a permit for dismissal which enables the employment contract to be terminated.

The UWV or the cantonal court will adopt a 'preventive test' to assess whether there is a reasonable cause for the dismissal or a possibility for reinstatement. Grounds for dismissal could constitute structural incapacity to work, prudential reasons, labour conflicts or inadequate performance.

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

The decision to terminate the employment contract shall become null and void when it is manifestly unreasonable. This includes situations where: a statement of reasons is missing; the dismissal is based on 'sham recovery' or false declarations; the consequences of dismissal are too severe for the employee or the employer has not sufficiently taken the disproportionality between his interests and the negative consequences for the employee into consideration.

The remedy for a successful claim must constitute a financial compensation that is in accordance with the nature and severity of the employers' shortcoming.

The UWV also expects employers to aim towards reinstatement within the business before dismissing the employee. In principle, the reinstatement is limited to the business establishment where the employee is working.

9. How, if at all, are collective agreements relevant to the termination of employment?

First and foremost, the Dutch Constitution guarantees the right to freedom of association and assembly. Trade unions in the Netherlands are expected to protect and safeguard the interest of their members with regards to wage development, social security, employment protection, safe working conditions, etc. One of the most efficient tools that trade unions have, are collective bargaining agreements and their say in the establishing of such.

Furthermore, termination cases concerning more than 20 employees within the same company (collective termination) includes the obligation to notify the UWV (Employee Insurance Agency) and the relevant trade unions in advance of the intended layoffs. The employer is also required to consult with the trade unions about the layoff plans. Additionally, in most cases, the works council (OR) must also be consulted regarding the intended layoffs.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

In Dutch employment law, before an employer can validly terminate an employment relationship, he must often obtain permission from or inform a third party, such as the Employee Insurance Agency (UWV) or a court. This requirement varies depending on the reason for dismissal:

Mutual Consent: If the termination is by mutual consent, no prior permission is required. However, a written settlement agreement is necessary, and the employee has a reflection period of 14 days to rescind the agreement.

Economic Grounds or Long-term Illness: If the dismissal is for economic reasons or due to the employee's long-term illness (more than two years), the employer must obtain permission from the UWV. Without this permission, the dismissal is null and void.

Other Grounds: For dismissals based on other grounds, such as performance issues or a disturbed working relationship, the employer must seek dissolution of the employment contract through the cantonal court.

Sanctions for breach of these requirements can be significant. If an employer dismisses an employee without the necessary permission or fails to follow the correct procedure, the dismissal may be deemed invalid. In such cases, the employee can request the court to reverse the dismissal, meaning the employment contract would continue, and the employer would have to pay wages for the period in question. Moreover, in cases of collective redundancies (dismissing more than 20 employees within three months for economic reasons), failing to consult with trade unions and the UWV beforehand can lead to the annulment of the dismissals, with further financial consequences for the employer

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

A discriminatory termination of an employment contract is voidable (Section 7:681(1)(c) of the Dutch Civil Code). An employee who invokes discrimination must submit an application to the subdistrict court within two months.

Labour law jurisprudence over the past few years shows that employers are increasingly being judged for unequal treatment of employees or discrimination when hiring and firing employees. This is partly due to the direct effect of European regulations in our Dutch employment law. Article 39(2) of the EC Treaty, for instance, prohibits discrimination on grounds of nationality.

Instead of annulment, the employee can also request an award of fair compensation (Section 7:681(1) of the Dutch Civil Code). This must be done within three months from the end date of the contract. Under Article 149 et seq. of the Dutch Code of Civil Procedure (RV) ((too) briefly summarised: he who asserts, he who proves), it is generally not easy for an employee to prove that his dismissal has discriminatory grounds. After all, employers will not readily acknowledge this and generally give a different (more neutral) reason for termination of the employment contract than the actual reason. That is why special rules on the burden of proof apply in equal treatment law. These rules imply that if an employee alleges facts in court that may give rise to a presumption of discrimination, the employer has to prove that no breach of the relevant equal treatment law has occurred. As an employer crosses this threshold quite easily, it is their burden to prove that there is no discrimination as the employer often has more information than the employee. On the basis of provided information it can be made clear whether or not there has been discrimination.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

The employee can request fair compensation. Fair compensation can be awarded if, after the end by operation of law, the non-continuation of the employment contract is the result of seriously culpable acts or omissions on the part of the employer (Art. 7:673(9) of the Dutch Civil Code).

The legislative history shows that discriminatory non-renewal of a temporary employment contract is by definition seriously culpable. As for the amount of the fair compensation, in addition to the lost income as a result of the non-renewal of the employment contract, there is room for awarding compensation due to discrimination against the employee. However, it is up to the court to determine the amount of such compensation.

Although, in the Netherlands, one cannot expect compensation that runs into the millions.

Finally, the employee can ask for compensation on grounds of tort. After all, acting in violation of equal treatment legislation is unlawful. Both material and immaterial damages can be claimed. Generally, dismissed employees still choose to apply for annulment or an award of fair compensation.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

All employees – even with a fixed-term contract – are generally provided with the same protection and enjoy equal rights. However, employees such as those who are pregnant, a member of a works council or an individual on sick leave enjoy additional protection with regard to termination of contracts.

Furthermore, when giving notice, the employer must take into account the following notice prohibitions and can therefore not give notice:

- during the employee's first 2 years of illness (moreover, if, during the employee's illness, the employer has not done enough to reintegrate the employee the employer is therefore obliged to continue paying wages for a longer period);
- during pregnancy and maternity leave and during the first 6 weeks after the employee has started working again;
- if the employee is still sick after the maternity leave due to pregnancy or childbirth;
- if the employee is on a candidate list or is a member of a works council or employee representation or health and safety committee (up to 2 years after membership);
- if the employee is an occupational health and safety expert;
- if the employee is performing (foreign) military service or substitute service;
- if there is a notice prohibition similar to one of

the above-mentioned notice prohibitions.

Employer may also not dismiss the employee:

- because of a transfer of undertaking;
- because the employee is a member of a trade union or participates in trade union activities;
- because the employee wants to take parental leave or care leave;
- if the employee is a data protection officer and the performance of his duties is the reason for dismissal.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

With the introduction of the Whistleblowers Protection Act on 8 February 2023 the protection of whistleblowers has been improved:

- The Whistleblower Protection Act requires employers with 50 employees or more to draw up a procedure for reporting (a suspicion of) an abuse to his employer. The employer investigates the abuse and, if necessary, takes measures.
- The law stipulates that at least the following must be included in the whistle-blower procedure: (i) how the internal report is handled, (ii) when there is an abuse (based on the legal definition), (iii) to which officer an internal report must be made, (iv) that the report is handled confidentially if the reporter indicates that he or she wants it to be treated confidential, (v) that the employee can trust a consultant to seek advice.
- The employer is also obliged to inform all employees in writing or digitally about the points mentioned above, about the circumstances under which they can make a report externally, and about the legal protection in the event of a report.

Also note that the works council has the right of consent to the internal reporting scheme. It is advisable to involve the works council as early as possible in the realization of the scheme.

15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

The Dutch Civil Code prescribes that employers can dismiss employees in the event of financial difficulties, however as stated in Q7 a permit of the UWV is needed. In order to obtain the permit, even in case of financial difficulties, employer has to show that it is impossible to reinstate the employee through schooling or otherwise in another suitable position. Re-engagement on new, less favourable terms is not allowed.

16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

The use of artificial intelligence (AI) in recruitment and selection regarding dismissals/termination is a relatively new trend. The Dutch Social-Economic Council (SER) has however, warned about the risk of discrimination by applying algorithms as AI is still far from 'neutral'. According to SER there is currently no evidence that using AI in recruitment and selection is an effective tool against discrimination. More scientific research is needed for that. By now, however, it is clear that this effect cannot be taken for granted. Moreover, the Human Rights Board also warns of risks of discriminatory effects from the use of algorithms in the recruitment and selection process due to built-in biases (bias) against certain groups.

The EU has reached a preliminary political agreement in Brussels on the AI Act. These are European requirements and frameworks for artificial intelligence. With this, the proper development of AI – focusing on economic opportunities as well as safeguarding public values – in the EU and the Netherlands gets a major boost.

The political agreement also includes agreements on what constitutes 'high-risk AI systems' and what requirements are imposed on them. Also, certain types of undesirable AI will soon be prohibited, such as social scoring or manipulative AI techniques. Providers of chatbots in web shops, deepfake techniques or generative AI systems such as the popular ChatGPT must ensure that it is clear to people that they are talking to an AI or that content has been created by AI. AI systems with no or little risk to humans do not need to

meet additional requirements. These include AI systems for customer services, for inventory management or for low-risk data, for example.

The agreement still needs to be approved by all EU member states and the entire European Parliament. The law will enter into force after two years.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

If the employment is terminated by the judge, then the compensation due is based on the monthly salary and the amount of working years. Employer and employee are free to choose whether payment is involved in an out of court settlement – the termination agreement. Furthermore, the aforementioned 'transition compensation' is a common clause in termination agreements. Both permanent and temporary employees are entitled to be compensated in the event of a dismissal, also known as the 'transition compensation'. Employees are entitled to the transition compensation starting from the first day of their employment. The amount of compensation is based on the monthly salary and the amount of working years. There can also be a situation where a "fair compensation" is awarded upon the termination of an employment contract. This compensation is in addition to any statutory severance (transition payment) and is awarded under specific circumstances, particularly in cases where the dismissal is considered to be unfair or when the employer's conduct has been particularly egregious. The amount of this fair compensation is determined by the court and is based on the circumstances of each case, without a preset maximum limit.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Yes, in Dutch law, an employer can agree with an employee on the termination of employment where the employee waives their rights in return for a payment. This agreement should be documented in the form of a settlement agreement or termination agreement. It must be in writing and clearly outline the terms of dismissal, including any compensation. The employee has a 14-day reconsideration period to revoke their consent. Limitations on non-disclosure or confidentiality clauses can be included but must comply with strict Dutch employment law standards, ensuring they are not unreasonable or excessively restrictive.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

To give employees some protection against the restrictive effects of a non-competition clause, the law states that the clause must meet a number of requirements: the clause must be in writing; the employee must have had the opportunity to read the content of the clause before signing the employment contract; it may only be concluded with persons aged 18 or older; and it may not be unreasonably onerous. Moreover, it is not possible to include a competition clause in a temporary contract. There is, however, 1 exception to this rule: if the employer can demonstrate that there are important business or service interests. Only then a non-competition clause may be included in the temporary contract. A motivation in the contract must make clear why there is an important business or service interest. Without this motivation, the clause is not valid. A non-competition clause for an indefinite period of time must limited in time (usually up to 12 months) and geographically.

Moreover, the Dutch government wants more clarity on when competition clauses can or cannot be included in an employment contract. To do so, however, the law needs to be changed. An amendment proposal for this is expected to be submitted for internet consultation before 2024.

The bill will include the following changes:

- limitation of non-competition clause in duration;
- geographical demarcation of non-competition clause as well as specific and motivated mention in the contract;
- justification of serious business interest in non-competition clauses in permanent contracts (this already applies to temporary contracts);
- compensation to departing employee if employer holds him to the non-competition clause (a legally determined percentage of last-earned salary). This will prevent

employers from simply including and invoking the non-competition clause.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Based on an Confidentiality Agreement in the individual employment agreement an employer can require a worker to keep information relating to the employer confidential after the termination of employment. To make this obligation even more efficient a penalty clause can be added to the Confidentiality Agreement within the employment agreement.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

Upon request of the employee, employers are obliged by law to provide a written work certificate at the end of the employment. A work certificate is a written statement and contains: (i) the kind of work conducted, (ii) the working time per day or week, (iii) the commencement and termination date of the employment; only upon specific request of the employee the reference also contains how the employee performed his duties, the reason of termination and upon whose initiative the employment was terminated. If employer refuses to give reference or adds untrue statements or adds the reason why/the way of performance etc. without specific request/consent of the employee, employer is liable towards the employee and third parties for the damages incurred. Contrary to the legal provisions on the written work certificate, there is no legal obligation to provide a reference. An employer is not obliged to give a reference, even if the employee has given permission to do so or asked the employer to do so. An employer must comply with the General Data Protection Regulation (GDPR) also with respect to certificates and references. On the grounds of GDPR, an employer may not simply provide privacy-sensitive data about employees to third parties. Special prudence and care are required.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The most common difficulties are that employers don't keep a meticulous file on their employees. As a result, if the parties do not reach an amicable settlement on termination, the judge will refuse a request for termination by the employer if there is not a complete file proving a sufficient ground for termination.

23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

In 2024, Dutch employment law will undergo several changes, including the implementation of the Minimum Hourly Wage and Salary Increase Law, adjustments in the Work-related Cost Scheme (WKR), an increase in the maximum severance payment, and the rise of the AOW Retirement Age to 67 years. There will also be changes affecting model agreements for self-employed individuals, restrictions on the 30% ruling, and the end of the STAP budget. Employers with 100 or more employees will need to report on employee mobility to monitor CO_2 emissions. Also, the first tier of the tax-free space in the work-related expenses scheme is reduced from 3% to 1.92%. If an employer provides more net reimbursements than allowed, employer will be subject to an 80% final levy (tax). This makes the net reimbursement significantly more expensive.

These developments require employers to review and adjust their policies and agreements accordingly.

Due to different judgements on gig-economy workers, European legislation is being prepared which will ensure that gig-economy workers are considered to be employees and not freelancers. This has far-reaching consequences for working with freelancers. Employers should prepare themselves by identifying the permanent core of employees they need and the flexible workers who perform other tasks. The European Union (EU) has discussed proposed rules for platform work, and on June 12, 2023, the Council determined its position. The proposal aims to clarify the employment status of platform workers and establishes criteria for determining this status. Digital labour platforms must be more transparent about the use of algorithms and are required to report labour performances to national authorities. The directive also aims to improve enforcement, transparency, and traceability. Negotiations with the European Parliament are still pending before the proposed rules become EU legislation. Only after this insight, it will be possible to prepare as an employer for these changes.

Contributors

Edith Nordmann
Managing Partner | Attorney at Law

enordmann@acginter.com