COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

The Netherlands

EMPLOYMENT & LABOUR LAW

Contributor

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

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THE NETHERLANDS
EMPLOYMENT & LABOUR LAW

1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

As a result of the continuing impact of the covid-19 pandemic the Dutch government has prolonged the Temporary emergency bridging measure (*Tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid – NOW*) until March 31st, 2022. This temporary measure to maintain employment is a ministerial regulation as one of the support measures during the corona crisis in the Netherlands to support companies to keep their employees in service.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

Working from home is not an employee's right, but an option on the basis of the law that the employer may decide on. On the other hand, an employer may not refuse a request to work from home without a reason. In principle, the employer has the right to instruction: the right to determine how work is performed and where. An employee can invoke the Flexible Working Act (*Wet flexibel werken)*. On the basis of that law, an employee may request changes in employment and the workplace.

Moreover, in 2022, the cabinet has made a specific exemption in the work-related costs scheme for the reimbursement of certain work-from-home costs. This concerns a fixed amount of a maximum of €2 per day or part of a day worked from home. This makes it possible for the employer to grant this allowance free of payroll taxes.

However for the same working day, the exemption for a home work allowance and the exemption for a travel allowance for commuting to the fixed workplace cannot apply at the same time. The exemption for a home work allowance of a maximum of €2 per working day at home can therefore be applied if an employee only works from home for part of the day. But if an employee works part of the day from home and the other part works at the fixed workplace, only one of the exemptions can be applied.

If an employer chooses to allow employees to work (partially) from home, it is wise to draw up a work from home policy. This is an agreement in which agreements about working from home are laid down. This includes things such as the number of hours someone works at home and in the office, which resources the employer facilitates, and other important matters.

3. Does an employer need a reason in order 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.

Be aware that a termination notice, even if containing the correct notice period, does not terminate the employment! Very strict procedural rules have to be observed.

4. 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 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.

5. 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. 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.

Employers are not allowed to dismiss any employees because of a business sale.

6. 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?

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Please note: if a unilateral term of notice other than the statutory term of notice is agreed upon in the employment contract (often an extended term of notice), this may be a maximum of 6 months, but the term of notice for the employer must be double.

This even applies if only a different notice period for the employee is included and nothing is said about the notice period for the employer.

7. 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 aforementioned 'transition compensation' is a common clause in termination agreements. The criteria dictating whether an employee is obliged to provide a transition compensation are mentioned in question 6.5. Employees have a right to 14 days of reflection to rescind the agreement in writing.

8. 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.

9. 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.

10. If the employer does not follow any prescribed procedure as described in response to question 8, 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.

In the event of dismissal by mutual termination agreement, the employee has a two-week reflection period to reverse the decision. Furthermore, when the dismissal by mutual agreement was not concluded in writing, it is invalidated by operation of law.

Lastly, when the dismissal is based on the grounds as mentioned in question 6.4, the employer will not obtain a permit to dismiss the employee by either the UWV or the court.

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

First and foremost, 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) will only be approved by the court when a social plan is formulated in cooperation with a trade union.

Dutch trade unions have yearly negotiations with cabinet members and employers' organisations concerning the development of wages and social security.

Lastly, members of Dutch trade unions have a seat on the Economic and Social Council.

12. 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?

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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.

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

The Act on Equal Treatment is one of the main sources for the enforcement of discrimination prohibitions and equal treatment in the Netherlands. This Act prohibits discrimination on grounds such as race, religion and belief, political affiliations, gender, pregnancy, sexual orientation, nationality and civil/marital status.

The Dutch civil act obligates employers to ensure a working environment free of discrimination. In principal, distinctions based on the aforementioned grounds is prohibited and would only be allowed when underlined by an objective justification.

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

A complaint regarding discrimination can be filed at the Netherlands Institute for Human Rights. The complaints procedure is partially in writing and verbal. The complaint must be filed in writing. Once the Institute has collected enough information and heard the (candidate) employer, the formal inquiry (hearing) will take place. Within eight weeks after the hearing, the Institute for Human Rights will render a verdict. While the verdict is not legally binding, employers must follow the judgment in a vast majority of the cases.

For a legally binding judgment, the civil court needs to be involved. The civil judge is obligated to consider the ruling of the Institute for Human Rights. The claim usually consists of compensation for material and immaterial damage.

The court will often attempt to move both parties towards a settlement. When this fails, the court will give their verdict in writing after approximately four weeks. Both parties have the right to appeal against the decision of the court.

15. 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 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 sick enjoy additional protection with regards to termination of contracts. Furthermore, employees with an open-ended contract can count on added protection when exchanging their contract for a fixed-term contract.

As of 1st January 2020, employment law has been amended to give fixed-term workers the same rights as the other employees to make it unattractive for employers to give fixed-term contracts instead of indefinite contracts.

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

The 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.

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 can be 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.

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, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

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 aforementioned 'transition compensation' is a common clause in termination agreements. Both permanent and temporary employees can be 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.

Employees have a right to 14 days of reflection to rescind the agreement in writing.

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.

Employers can restrict employees to work for competitors after the termination of employment (i) if they have worked longer than 6 months (ii) the restriction is reduced in time and geographically (usually not longer than 12 months) (iii) it must be a written agreement between employer and employee, the employee must be of age, there must be a contract for an indefinite period and the non-competition clause must be specific enough and the employee must know what he can expect.

Must be specific enough whereby the employee must know what he can expect and it must be possible for him to still find a job in all reasonableness after the period of employment.

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, the (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 on 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?

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. Only after this insight, it will be possible to prepare as an employer for these changes.

Contributors

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