

Alert | Labor & Employment



July 2021

Dutch Labor, Employment and Pensions Update

SEC Advice on Labor Market

On 2 June 2021, the Dutch Social Economic Council (**SEC**) presented its ‘Advice on the Labor Market’ (the **Advice**). In the Advice, the SEC addresses the request posed by the Dutch government to offer an updated review on the future of work (i.e., labor market 2021-2025) and recommends changes to current employment laws and regulations. Key elements of the Advice are as follows:

- The use of on-call workers should be abandoned and replaced by standard employment agreements that stipulate a minimum number of working hours (students are excluded).
- Under Dutch law, it is possible for an employer to conclude a maximum of three consecutive fixed-term employment agreements within a three-year period without entering into an indefinite term relationship, i.e., the sequence system (*ketenregeling*). If in such three-year period the sequence is interrupted for longer than six months, it starts over again. The SEC advises that any interruption for longer than six months will no longer ‘restart’ the sequence (except for students (max. six-month interruption) and for seasonal workers (max. three-month interruption)).
- The terms and conditions of employment of temporary agency workers must be equal to those applicable to employees in equivalent positions employed within the hiring company. Agency clauses (i.e., the possibility of the temporary worker agency terminating the employment agreement of an agency worker with immediate effect if the posting is terminated) should be limited to 52 weeks.

- An employer may temporarily reduce the working hours of all employees by a maximum of 20% in the event of business economic circumstances that would otherwise lead to redundancy of employees. The employer may unilaterally decide to do so, provided that salary payment continues. The employer must be insured for 75% of the wage costs for the reduced working hours through a central government compensation scheme, which starts immediately upon application and is subsequently checked for correct use. This scheme is not detrimental to accrued unemployment benefits rights of employees.
- Independent workers are obliged to take out insurance against occupational disability.
- A legal presumption is introduced where it is assumed that an employment agreement is in place between parties (i.e., over an independent services agreement) if the agreed upon fees are below the maximum daily wage (i.e., EUR 30 to 35 per hour).

Proposed Amendments to the House for Whistleblowers Act Due to Implementation Obligation of EU Whistleblower Directive

The Directive of 23 October 2019 on the protection of persons who report breaches of EU law (i.e., the **Whistleblowers Directive**) provides for EU-wide minimum standards by which whistleblowers that report breaches of EU law should be more effectively protected. To implement the Whistleblowers Directive, a draft bill was submitted on 1 June 2021 at the House of Representatives (*Tweede Kamer*) (the **Draft Bill**) which includes amendments to the current House for Whistleblowers Act (*Wet huis voor klokkenluiders*) (the **Act**). In summary, the following amendments of the Act, *inter alia*, are proposed:

- Currently, a suspicion of wrongdoing is defined as an act or omission that puts the public interest at risk relating to threats to public health, the safety of individuals, the environment or the functioning of public service institutions and companies, among other potential circumstances. The Draft Bill proposes that certain suspicions of violations of EU Law (relating to, *inter alia*, the protection of public health, public procurement, money laundering and terrorism financing, consumer protection, etc.) will also be brought under the Act.
- The personal scope of the Act will be extended from employees and persons who perform work outside the course of employment to relevant third parties such as applicants, shareholders, and directors.
- The existing prohibition on employee retaliation in the Act will be further strengthened by the introduction of a shift regarding the burden of proof, meaning that the employee must prove that a wrongdoing has been reported, but it is up to the employer to prove that the measures taken are non-retaliatory as a consequence of the whistleblower's report.
- The internal whistleblowers disclosure procedures (i.e., obligations of companies employing more than 50 employees) should be amended and set up for reports relating to violations of EU law. Stricter requirements have also been introduced regarding the internal whistleblower disclosure procedure, such as concrete deadlines for sending an acknowledgement of receipt and providing information on follow-up steps.
- In relation to external reports of information on violations of EU law, administrative bodies such as the Netherlands Authority for Consumers & Markets, De Nederlandsche Bank (DNB) and Dutch Authority for the Financial Markets will be appointed as external reporting authorities. The House for Whistleblowers will be a last resort in relation to reports of violations of EU law if no other authority has competence.

The Draft Bill is currently pending at the House of Representatives and as the Whistleblowers Directive must be implemented before 17 December 2021, the Draft Bill will likely enter into force before this date.

Extended COVID-19-Related Government Support

The Emergency Bridge Measure for Conservation of Work (*Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud*) (**NOW**) and the Emergency Measure Compensation for Fixed Costs (*de Tegemoedkoming Vaste Lasten*) (the **TVL**) will be updated and extended to Q3 2021.

Changes to the NOW Scheme

The NOW scheme will be extended to Q3 2021 (the **NOW 4**) on the same terms and conditions as the NOW 3 scheme; however, the reference period for the wage sum to be used will change to a more representative month, i.e., from June 2020 to February 2021. In summary and overview the NOW 4 will be as follows:

NOW	NOW 4 Q3 - 2021
Minimum loss of turnover	20%
Maximum wage support	85%
Salary capped at two times the daily wages	2x the daily wages (to be indexed in June 2021 ¹)
Possible payroll reduction²	10%
Fixed surcharge employer costs	40%
Payroll reference month for wage sum	February 2021

The TVL will also no longer qualify as ‘turnover’ for the NOW retroactively as from the NOW 3 (i.e., as of 1 October 2020) and going forward to the NOW 4. Currently, any granted subsidy under the TVL counts as turnover under the NOW and therefore directly impacts the amount of wage compensation under the NOW. In an effort by the government to make the NOW scheme more equitable, it is intended that the TVL subsidy will no longer be considered turnover for the NOW.

Changes to the TVL Scheme

The TVL scheme will increase the maximum subsidy percentage of the fixed costs from 85% to 100% for Q2 and Q3 2021. To further accommodate large enterprises, the maximum TVL subsidy will also increase to EUR 1.2 million for Q2 2021. The ceiling amount of maximum State Aid however remains EUR 1.8 million for the full COVID-19 support. In summary and overview, the TVL scheme will look as follows for Q1, Q2 and Q3 2021:

TVL	Q1 2021	Q2 2021	Q3 2021
Minimum loss of turnover	30%	30%	30%
Subsidy percentage of fixed costs	85%	100%	100%
Maximum TVL subsidy (MKB/smaller companies)	EUR 550.000	EUR 550.000	EUR 550.000
Maximum TVL subsidy ‘large’ enterprises	EUR 600.000	EUR 1.200.000	EUR 600.000

¹ The statutory daily wages are indexed in January and July of each calendar year.

² The subsidy amount will not be adjusted downwards should the wage sum decrease within the indicated percentage in case of dismissals, natural outflow of staff, or pay cuts.

Preventive Dismissal Assessment for Statutory Directors of Foundations No Longer Applies, Additional Grounds for Dismissal Introduced

The Act on the management and supervision of Dutch legal entities (*Wet bestuur toezicht rechtspersonen*) (the **Act**) entered into force on 1 July 2021. The Act will, *inter alia*, lift the preventive dismissal assessment for statutory directors of foundations (*stichtingen*) and introduce new grounds for dismissal and suspension.

Statutory directors of foundations have a dual relationship with the foundation: (i) they are appointed as statutory director; and (ii) they also have a contractual relationship, which is usually on the basis of an employment agreement. Currently, if a supervisory board is established, the supervisory board – if included and arranged in the articles of association of the foundation – can terminate the statutory directorship; however, it cannot terminate the underlying employment agreement without court intervention or intervention by the Employee Agency Body (*UWV*).

Under the Act, the aforementioned preventive dismissal assessment will no longer apply, so statutory directors can be dismissed at all times and can no longer request reinstatement of the employment agreement at the court (only damages in the form of a fair compensation, for example, in case of the absence of a reasonable ground for dismissal).

If no supervisory board is established, the statutory directorship can only be terminated by court intervention requested by any stakeholder or the Public Prosecution Service (*Openbaar Ministerie*) under the following limited dismissal grounds: a violation of the law or the articles of association; mismanagement; or failure to comply with an order to disclose information requested by the Public Prosecution Service. Because the current grounds for dismissal are not always deemed sufficient to effectuate a dismissal in, for example, the situation where a statutory director harms the interest of the foundation, the following additional grounds for dismissal and suspension are added in the Dutch Civil Code: neglect of duties; substantial change in circumstances; and other serious reasons.

* This GT Alert is limited to non-U.S. matters and law.

Authors

This GT Alert was prepared by:

- **Thomas Timmermans** | +31 20 301 7348 | timmermanst@gtlaw.com
- **Iza van Erkel** | +31 20 301 7343 | vanerkeli@gtlaw.com

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