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Employment update: recent developments

In this update we have set out a number of relevant developments regarding Dutch employment law. It concerns regulations that have entered into force in the last few months or will take effect in the short term.

European Privacy Regulation

After an intensive drafting and negotiating process, the General Data Protection Regulation finally entered into force on 25 May 2016. It will become fully applicable after a two year transition period on 25 May 2018. The regulation will harmonize the level of protection of personal data in the EU member states and will adapt it to the rapid technological developments and increasing globalisation. The regulation provides for, inter alia:

- **strengthened rights for data subjects** (ie the natural person whose personal data is processed). Data subjects will have easier and faster access to their personal data. Also, data subjects must be informed about the processing of said data in language they can understand. They must furthermore consent more explicitly with the processing thereof and will acquire the 'right to be forgotten';
- the **obligation to appoint a data protection officer** for organisations that systematically monitor individuals or process a large scale of sensitive data;
- **strict sanctions** (hefty penalties) against controllers, such as employers, or processors who violate the data protection rules. Data subjects can file a complaint with a supervisory authority and claim compensation.

Businesses have two years to adjust their organisations to the requirements of the regulation. It is important to identify in the short term which changes to the existing policy are necessary and, if need be, to draw up a step-by-step plan for this purpose.

Dutch Data Protection Authority (*Autoriteit Persoonsgegegevens)*

- The possibilities for the Dutch Data Protection Authority, the *Autoriteit Persoonsgegevens* (formerly *College Bescherming Persoonsgegevens*) to impose a penalty on organisations in the event of violation of the Personal Data Protection Act (*Wet Bescherming Persoonsgegegevens*) have been reinforced as of 1 January 2016, partly in anticipation of the implementation of the General Data Protection Regulation. The Dutch Data Protection Authority can immediately impose a penalty in the event of a wilful violation or a violation as a consequence of serious culpable negligence. In other cases, the Dutch Data Protection Authority will first issue a binding instruction with a term within which the instruction must be observed. As of 1 January 2016, the Dutch Data Protection Authority may impose a maximum penalty to the amount of EUR 820,000. The Dutch Data Protection Authority hopes that its reinforced power to impose penalties will have a preventative effect and will cause organisations to start focusing on the protection of personal data in an earlier stage.
- Under the Data Breach Notification Obligation Act (*Wet meldplicht datalekken*) that entered into force as of 1 January 2016, organisations are obliged to notify the Dutch Data Protection Authority of data breaches subject to a penalty. Whether such notification must be made will depend on the severity of the data breach. Under certain circumstances, the person whose personal data has been 'breached' must be notified as well. The General Data Protection Regulation also provides for a data breach notification obligation.

Flexible Work Act (*Wet Flexibel Werken*) / Introduction multiple birth leave

- On 1 January 2016, the Flexible Work Act entered into force. This Act extends the existing right of employees to request adjustment of working time with the right to also request adjustment of the workplace and working hours. The options regarding the already existing right

to request an adjustment of the working time will be extended as well. The employee can make such a request once he/she has been employed for 6 months. This used to be 12 months. The options for rejection by the employer, insofar as it concerns adjustment of working time and working hours, are limited to serious business or service interests. The options for rejection with respect the adjustment of the workplace are broader.

- As of 1 April 2016, the maternity leave for employees expecting multiple births has been increased from 16 weeks to 20 weeks.

House for Whistleblowers Act (*Wet Huis voor klokkenluiders*)

- The House for Whistleblowers Act will enter into force on 1 July 2016. The law provides for:
  - (a) the obligations for employers with over 50 employees to draw up internal whistleblowers' regulations (ie procedural rules for reporting suspicion of misconduct within the organisation);
  - (b) a prohibition against discrimination of employees who, in good faith, duly report a suspicion of misconduct (*benadelingsverbod*);
  - (c) the establishment of a 'House for Whistleblowers' for advice and research in the context of suspected misconduct or related discrimination against the employee;
  - (d) a right of consent for the works council with regard to a proposed decision to adopt, amend or cancel the above-mentioned internal whistleblowers' regulations.

Repeal of the Declaration of Independent Contractor Status (*VAR*) as per 1 May 2016 by the introduction of the Assessment of Employment Relationships (Deregulation) Act

- As of 1 May 2016, the Assessment of Employment Relationships (Deregulation) Act (*Wet Deregulering Beoordeling Arbeidsrelaties*) "Wet DBA") has replaced the Declaration of Independent Contractor Status (*Verklaring Arbeidsrelatie*: "VAR"). The main difference between the VAR and the Wet DBA is that, with the VAR, the contractor had to request a declaration from the Dutch Tax Authorities, on the grounds of which the company would know whether or not it would be removed from paying taxes and social security contributions. Under the Wet DBA, both the company and the contractor are responsible: they can submit their agreement to the Dutch Tax Authorities so that the Dutch Tax Authorities can give its opinion on the withholding tax position as a result of the agreement.
- Another important difference is that, with the VAR, the Dutch Tax Authorities assessed whether the contractor was an entrepreneur or an employee (or earned income from other activities). Under the Wet DBA, the assessment of the relationship between the company and the contractor is now based on whether or not there is an employment relationship, on the basis of civil-law characteristics of an employer-employee relationship. If the Dutch Tax Authorities determines, upon request, that there is no question of a (fictitious) employment relationship, the company has certainty that it does not owe any wage tax and social security contributions. Furthermore, the Dutch Tax Authorities has published a number of assessed (Dutch-language based) model agreements on its website that can be used as well. Note that the use of an assessed (model) agreement or the submission of an 'own' agreement to the Dutch Tax Authorities is optional.
- The State Secretary has promised that the Dutch Tax Authorities will exercise restraint in enforcing this new legislation until 1 May 2017. Nonetheless, this does not alter the fact that the clients and the contractors could be required to change their joint working methods and/or agreement in order to prevent the relationship between the client and the contractor being deemed an employment relationship for tax purposes.

Fictitious employment relationship of supervisory board member

- The contractual relationship between a supervisory board member and the company is a fictitious employment relationship (*fictieve dienstbetrekking*). For the employer, this in principle entails a withholding tax obligation and the obligation to pay the income-related contribution pursuant to the Dutch Healthcare Insurance Act (*Zorgverzekeringswet)*. In anticipation of a legislative amendment to take effect on 1 January 2017, the State Secretary has approved that application of the fictitious employment relationship may now already be removed. Making use of this

approval is optional and is possible only if the company in question and the supervisory board member both opt in the management agreement to do so.

- That the fictitious employment relationship ceases to apply could have consequences for the tax position of both the Dutch supervisory board member (eg no wage withholding tax obligation for the company) and the foreign supervisory board member (eg no possibility of applying the 30% facility). It could also have consequences for the Netherlands in relation to the right to levy taxes under the relevant double tax treaty.
- As of January 2017, it will be possible to continue to qualify for a 30% facility by means of an "opting-in" facility. On this basis, the supervisory board member and the company can request permission from the Dutch Tax Authorities to nevertheless treat the contractual relationship as an employment relationship for tax purposes.

Appointment and dismissal concerning the state pension age

- On 1 January 2016, the Working Beyond State Pension Age Act (*Wet Werken na de AOW-gerechtigde leeftijd*) entered into force. The Act implements a number of changes, making it more attractive for employers to take on employees beyond the state pension age or to have them continue working. For example, an increased number of temporary contracts can be entered into (6 temporary contracts within a period of 4 years before a contract converts into a contract for an indefinite period of time) and the obligation to continue to pay wages in case of illness and the related employment protection has been reduced from 104 weeks to 13 weeks.
- The changes to dismissal law implemented as at 1 July 2015 make it possible for an employer to dismiss an employee on account of him or her having reached the pensionable age, without the employee's consent being required, or without the employer having to request permission from the Employee Insurance Agency (*UWV*) or having to involve the Subdistrict Court Judge. A prerequisite for using this termination option is that the employee must have entered the employment ***prior*** to reaching the pensionable age. Attention must be paid if the standard employment agreement provides that the employment will end by operation of law on the date on which the pensionable age or state pension age is reached. If the employment is continued in that case, the new or continued employment contract will be considered entered into **after** the pensionable age, as a result of which this termination option can no longer be exercised. This means that the employer must have a reasonable ground to terminate the employment.
- No transitional compensation (*transitievergoeding*) is owed in case of dismissal in connection with or after the employee has reached the state pension age or any other age on which the employee is entitled to a pension.
- If, in the event of a reorganisation, there are employees entitled to a state pension within the interchangeable job group in which jobs will become redundant, then these employees must be first designated for dismissal, before the reflection principle (*afspiegelingsprincipe*) is applied.

Work and (Job) Security Act (WWZ) – update

Reassignment (*herplaatsing*)

- It follows from the decisions in which the reassignment effort has been assessed that merely listing job openings in principle is insufficient. The employer must prove that he has concretely looked into reassignment options within the 'reasonable term' which does not commence until after the request for permission or termination has been decided on. This concerns a best efforts obligation on the part of the employer. It was decided in a specific case that looking into reassignment options must also be extended to the organisation with which the employer had a cooperative working arrangement.
- When looking for a suitable position, it is necessary to take into account possible job openings within the group or the concern, as well as jobs of temporary workers, on-call workers or hired-in workers, unless it concerns work of a temporary nature. If suitable work is performed on the basis of an employment agreement for a definite period of time and this agreement ends during the reassignment period, then this job, in principle, is to be also considered in the effort to reassign employees.
- Employees that are faced with dismissal have priority over external applicants. This means that when a job opening (at the employer or within the group) that is considered suitable for an employee faced with

dismissal is filled by an external candidate, this could lead to the Employee Insurance Agency refusing to issue a dismissal permit and the Court refraining from terminating the employment agreement.

- If a suitable position within the group is found and accepted, it is important to consider the manner in which the employment contract with the current employer will end.

Reorganisation and prohibition on termination

- The Employee Insurance Agency does not grant permission to terminate the employment contract if a prohibition of termination applies, such as a prohibition on termination during illness, due to pregnancy or childbirth or during membership of an employee participation body. In principle, this is only different if it can be demonstrated that the prohibition on termination is expected to cease to apply within a period of four weeks after the Employee Insurance Agency decided on the dismissal application. In practice, this means that the Employee Insurance Agency will process the application if, for example, it is expected upon submission of the dismissal application that the employee who reported sick will recover within two months. For example, the employer can submit a statement given by the company doctor to this end.
- In the event that jobs held by employees to whom a prohibition on termination applies will become redundant, the employer must propose a different employee for dismissal. In this case, too, the employer must provide documents that demonstrate that the prohibition on termination will not lapse within two months. In case a prohibition on termination during illness exists, the employer must submit a statement given by the company doctor.

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