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COMMENTARY

The Netherlands Passes Work and Security Act

The legislative proposal for the Work and Security Act passed in the Netherlands, and as a result, Dutch employment and dismissal law is going to be substantially overhauled.

On 10 June 2014, the Dutch Senate (Upper House of the Parliament) adopted the legislative proposal for the Work and Security Act (the "Act", *Wet Werk en Zekerheid*). The Act substantially reforms the laws governing three areas: flexible employment, dismissal and unemployment benefits.

Changes Will Be Implemented at Different Times

The legislature introduces the changes to the three areas at different times:

- Flexible employment changes will take effect as of 1 January 2015. With respect to flexible employment, the adjustments to the provisions on successive fixed-term employment contracts (which stipulate when the last temporary contract in a succession of contracts will be converted into a permanent contract) will take effect from 1 July 2015 instead of 1 January 2015.
- Reforms to the Dutch dismissal law will take effect as of 1 July 2015.
- Amendments to the unemployment benefits will take effect as of 1 January 2016.

Flexible Employment Reforms

With the implementation of the Act, the Dutch government aims to limit the gap between flexible and permanent employment in the Netherlands.

The key changes to be introduced with effect from 1 January 2015 that are most relevant to employment law in a commercial environment are as follows.

Restriction on Probationary Periods. A probationary period clause in employment contracts with a fixed term of six months or less is null and void. This applies to contracts concluded on 1 January 2015 or later, but not to contracts that were already in effect before 1 January 2015.

Restriction on Noncompete Clauses. Temporary (fixed term) employment contracts concluded on or after 1 January 2015 may no longer include a noncompete clause, unless it is necessary on account of compelling business interests. Noncompete clauses in temporary contracts that are already in force on 1 January 2015 will continue to apply.

If an employer wishes to include a noncompete clause in a temporary contract after 1 January 2015, it must state in writing the interests involved and explain why they make a noncompete clause necessary. According to the Explanatory Memorandum to the Act, the interests must relate to temporary and specific duties or specific positions in which the benefits to the employer of including the noncompete clause outweigh the drawbacks for the employee. Unfortunately, the legislator has not given any specific examples of such compelling interests.

Introduction of Notification Obligation. In case of temporary contracts with a term of six months or more, the employer must notify the employee in writing, at least one month before the contract ends, of (i) whether or not the contract will be continued and if so, (ii) on what conditions.

Sanctions for noncompliance are as follows:

- If an employer has failed in any way to inform an employee as to whether it intends to continue the contract, then it must pay the employee one month's gross salary.
- If an employer is late in informing the employee, i.e., less than one month before the contract ends, then for every day that the employer has failed to timely inform the employee, it must pay the employee one day's gross salary.
- If the employment contract is continued but the employer has not fully complied with the obligation to notify (in the cases above), then the contract will in principle be continued under the same terms and duration as the previous one (however, with a maximum duration of one year unless the contract has transferred into an indefinite one by operation of law).

This obligation will apply to temporary employment contracts that terminate one month or later after this part of the new Act takes effect, i.e., from 1 February 2015.

Limit on Exclusion of Obligation to Pay Salary to On-Call Employees. Employees are entitled to payment of salary, even if they have not done their work in full or in part because of circumstances that, in reasonableness, are due to the actions of the employer. The employer and employee can agree in writing to exclude this salary payment obligation for the first six months of the employment contract. This is common practice in case of on-call (and zero-hours) contracts. Often the exclusion of the obligation to continue to pay salary is the basis of such contracts. Under current Dutch law, there is no limit to the departures/deviation that can be made by collective labour agreement from the obligation to pay salary after six months. The exclusion period of six months can therefore be extended by collective labour agreement without any limit.

In order to prevent improper use, deviation by collective labour agreement to the salary payment obligation will now become more limited. Collective labour agreements that take effect after 1 January 2015 may still depart from this obligation but only for specific jobs designated in the collective labour agreement that are nonrecurrent and do not have a fixed scope. Arrangements in collective agreements that are already in force on 1 January 2015 will continue to apply on this aspect for the remaining term, but only up to a maximum of 18 months.

Furthermore, the Minister of Social Affairs and Employment can impose a prohibition to deviate from the obligation to continue to pay salary for specific industrial branches. The Dutch government aims for an abolition of zero-hours contracts in the care sector.

Temporary Employment Relationships. The new Act contains specific rules for temporary employment agencies. The obligation to notify as described above will not apply if a temporary employment clause is in effect between the temporary worker and the agency. Restrictions will come to apply to the periods for which agencies can apply a temporary employment clause, exclude the applicability of provisions on successive fixed-term contracts or depart from the obligation to continue to pay salary. If a collective labour agreement takes effect after 1 January 2015, the statutory term for such deviations can be extended from 26 weeks to a maximum of 78 weeks. Under the new legislation, departing from the obligation to continue to pay salary is not limited to nonrecurrent jobs without a fixed scope. Arrangements in collective labour agreements that are already in force on 1 January 2015 will continue to apply on these aspects for the remaining term, but only up to a maximum of 18 months.

Limitation of Succession of Fixed-Term Contracts. Currently, if more than three fixed-term employment contracts are concluded between the same parties at intervals not exceeding three months, or if the total duration of consecutive employment contracts—at intervals not exceeding three months—is three years or more, the last employment contract will qualify as an employment contract for an indefinite period.

Effective from 1 July 2015, employees with a temporary (fixed-term) contract will be entitled sooner to a permanent employment contract. Employees may be given three fixed-term contracts but only for a maximum period of two years. If six months or more have lapsed between two temporary contracts, the chain of consecutive contracts starts again instead of after the current interval rule of three months.

Drastic Reform of Dutch Dismissal Law and Deteriorated Unemployment Benefits

Effective 1 July 2015, Dutch dismissal law will change drastically; there will be one dismissal route that is dependent on the reason for dismissal and a capped severance pay called "transitional allowance".

The government's aim is to make the laws governing termination of employment more fair, less technical and less costly.

The entitlement under the Dutch Unemployment Insurance Act will be reduced gradually over time (between 1 January 2016 and 2019) to a maximum eligibility to unemployment benefits from 38 to 24 months.

As of 1 July 2015, a person who has received unemployment benefits for a period of six months or more will be obliged to accept any available job as suitable employment (as opposed to one year under the current rules).

Companies should ensure that they are be well-advised with respect to the drastic reform of the Dutch dismissal law that becomes effective 1 July 2015, particularly if they intend to implement a reorganization resulting in staff becoming redundant. In the coming months, Jones Day's Amsterdam Labor & Employment team will provide a detailed overview of the reform of Dutch dismissal law and its consequences effective 1 July 2015.

Concluding Remarks

Dutch employment law relating to flexible employment and dismissals is going to be substantially overhauled in a series of legislative developments that begin on 1 January 2015. The changes will be significant, and it is extremely important that Dutch employers review existing contractual arrangements with staff, particularly with temporary employees.

With respect to the rules relating to flexible employment that enter into force on 1 January 2015, we recommend that companies mark down the dates by which fixed-term employees need to be notified whether their contract will be continued and that they have a standard notice letter in place.

Companies should also evaluate whether new contracts comply with the rules concerning the probationary period and noncompetition. Should contracts be renegotiated? Can noncompete clauses be substantiated? Since Dutch courts consider customer-protection clauses as a form of noncompete clause, it seems advisable to substantiate (if possible) a customer-protection clause in the same way as required for noncompete clauses.

Are the employee handbook and company regulations up to date? Collective labour agreements will have to be checked and (partly) renegotiated. Employers in the care sector and in other sectors where on-call employees form part of the work force, and who are subject to collective labour agreements that have departed from the obligation to continue to pay salary, are well-advised to review the pool of on-call employees. This step will help provide a sound insight into the salary rights of these employees in the event that they would no longer employed or be called in for work less often.

All relevant action points, initially in relation to flexible employment in the Netherlands, should be timely addressed in order to be fully prepared.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Mariëlle Daudt
Amsterdam
+31.20.305.4253
mdaudt@jonesday.com

Franck van Uden
Amsterdam
+31.20.305.4228
fvanuden@jonesday.com

Stéphanie Spoelder
Amsterdam
+31.20.305.4254
sspoelder@jonesday.com

Selma Olthof
Amsterdam
+31.20.305.4255
solthof@jonesday.com

Claire Reynaers
Amsterdam
+31.20.305.4256
creynaers@jonesday.com