



RECENT DEVELOPMENTS IN DUTCH EMPLOYMENT LAW

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With this newsletter we would like to inform you with regard to a number of new developments in the everchanging field of Dutch employment law. We will touch on COVID-19 vaccination policy at work, legal aspects of working from home, the recent social agreement and new case law regarding the qualification of (employment) contracts.

First Dutch employer states that unvaccinated employees are not welcome at the office

Dutch-founded multinational LeasePlan has recently called on all employees who have been vaccinated against COVID-19 to return to the office.

Unvaccinated employees are not welcome, although the company has indicated that it will not perform checks to confirm vaccination status. This policy touches on a complicated legal issue: the (im) possibility of obliging individuals to be vaccinated.

Fundamental rights

Under Dutch law, vaccination is voluntary. The right to bodily integrity and the right to privacy are guaranteed by the Dutch constitution. 'Actual' compulsory vaccination (defined as the possibility of forcing an individual – by court order- to be vaccinated) is generally assumed to be a violation of these rights. Whether the same applies for the pressure to vaccinate, is subject to discussion.

It is also the topic of much debate whether or not fundamental rights directly apply to the relationship between employer and employee or if they merely apply indirectly through the principles of *good employership* and *good employeeship* as laid down in article 7:611 of the Dutch Civil Code (**DCC**). Regardless, it appears that the justifiability of measures which restrict fundamental rights varies based on the severity of those measures and the specific circumstances of each particular case.

Duty of care

Another important factor to consider is the employer's duty of care to provide a safe and healthy work environment (article 7:658 of the DCC). This duty of care extends not only to employees, but also includes third parties and clients. Moreover, the Dutch Working Conditions Decree was updated to include a new article to oblige employers to take timely and necessary measures to reduce the (risk of) COVID-19 infections. The duty of care may be used to argue in favour of policy which exerts pressure to vaccinate.

Privacy

Finally, privacy legislation, in particular the General Data Protection Regulation (GDPR), should be considered. Article 9.1 of the GDPR forbids the processing of health-related data, which is generally assumed to include vaccination status. Article 9.2 provides exceptions to this general rule, e.g. consent from the data subject and necessity for reasons of substantial public interest. The Dutch Data Protection Authority however has taken the position that given the power imbalance between employer and employee, barring highly specific exceptions, employee consent cannot be used to justify the processing of vaccination status. Necessity also cannot apply here, as national law does not provide for the required legal exception.

In the absence of specific legislation, case law or government guidance on the topic, vaccination policy remains something of legal grey area. It remains to be seen how this situation will develop in the (near) future.

Work from home regulations

Although effective 25 September 2021 the government's advice to work from home will be relaxed, the advice will remain to work from home if possible and only work on site if necessary. Many Dutch employers have indicated that they expect that their employees will continue to partially work from home, even after the situation surrounding COVID-19 has been normalized. In order to facilitate working from home it is recommendable for employers to draw up work from home regulations. Legislation regarding health and safety in the workplace, including the Working Conditions Act, also applies when employees are working from home, as does the aforementioned duty of care.

The Flexible Working Act enables employees to, under certain terms and conditions, request their employer to (*inter alia*) change the location where they perform their work. Employers are currently only obliged to consider such a request and consult with



the employee if they decide to deny it. However, a bill containing an amendment to the Flexible Working Act is currently pending, proposing that employers should be obliged to grant a request to change working location unless they are able to demonstrate a so-called ‘compelling business interest’ in denying it.

Given the subject matter of work from home regulations, the works council (if any) may have a part to play. Every company in the Netherlands with over 50 employees is required to have a works council. A works council is a body representing the employees of a company. Through them, employees are informed and consulted by management on the progress of the business and any anticipated significant decision that could affect their employment or working conditions. Based on article 27 of the Dutch Works Councils Act, the approval of the works council must be sought for any intended decision to set up, change or withdraw a regulation, regarding inter alia, working hours, working conditions and monitoring of employees. The right to render advice as included in article 25 of this act may also come into play, for example if a significant investment is made in order to facilitate working from home.

Facilitating working from home may also have tax consequences. New measures in this respect are expected to be announced on Budget Day (21 September 2021) as part of the 2022 Tax Package.

Employers and employees present social agreement

The Social and Economic Council (SER), which advises the Dutch Government and Parliament on social and economic policy, recently presented an advisory report with recommendations for labour market reform. The main recommendation is that flexible work must be strictly regulated and permanent jobs must become the norm, in order to combat uncertainty and inequality. The features of the advisory report include:

- The possibility of entering into three consecutive fixed-term employment agreements for a maximum of 3 years before the employment agreement is automatically converted into a permanent contract will remain. The current interruption period of 6 months, after which the chain of consecutive contracts ‘resets’, will be eliminated.
- On-call contracts will be replaced by basic contracts with at least a quarterly hour standard to make employees’ wages predictable.

- The statutory minimum wage will be further increased.
- In the event of severe economic distress, employers may partially reduce the working time of employees (with retention of salary) against 75% reimbursement of the wage costs.
- With regard to illness, employers will have fewer reintegration obligations after one year of illness. Currently, an employer and an employee have such obligation for a period of two years.
- Self-employed persons will be obliged to insure themselves against incapacity for work to prevent unfair competition and excessive income risks.
- Temporary agency work will be regulated more strictly, for example by legally limiting the agency clause to 52 weeks and by stipulating that the employment conditions of temporary agency workers must be equivalent to those of employees in direct employment.

What does this mean in practice? Not much at the moment. The advisory report is directed towards the incoming government and may eventually lead to important reforms in Dutch labour law. We will keep you updated.

Employee or independent contractor? Recent developments

A contract for services is an agreement between a business and an individual who is self-employed, wherein the business agrees to pay the individual for (a limited amount of) service without the individual formally becoming an employee. Since such agreement does not qualify as an employment agreement, Dutch employment law rules (tax and civil), including e.g. dismissal rules, payment during sickness, etc., do not apply to this contractual relationship. Like in many other countries, the question of whether a contract qualifies as an employment contract or a contract for services has been subject to much debate for years.

Supreme Court: intent parties plays no role in determining qualification

Contrary to a previous leading judgment, the Dutch Supreme Court has recently ruled that parties' intent should not play a role in determining whether a contract qualifies as an employment contract or a service agreement. The key issue, according to the Supreme Court, is whether the agreed rights and obligations meet the legal definition of employment contract, namely: (i) the (personal) performance of services (ii) under the authority of the company, (iii) in return for remuneration.

Court Amsterdam: Uber drivers are employees

Like the UK's Supreme Court did in February, the Court of Amsterdam ruled on 13 September 2021 that drivers for Uber are employees, not contractors. As a result, Uber drivers fall under the taxi sector's collective labor agreement — meaning Uber faces increased costs to comply with the agreement which sets pay requirements and covers benefits like sick pay. Uber's defense that it is merely a technology company running a platform that connects riders to drivers, was rejected. The court found that the legal relationship between Uber and its drivers meets all the characteristics of an employment contract. It highlighted, among other things, the fact that Uber exerts control over how drivers can work and earn money through its app and algorithms. Uber plans to appeal the decision.

New measures and legislation

New measures and legislation are under construction in order to further clarify the distinction between an employment contract and a contract for services. These rules and regulations have not entered into force yet. For now, the Dutch Tax Authority indicated that it will in principle only pursue (and potentially fine) parties who have acted with malice, i.e. knowingly and intentionally allowed a situation of false self-employment to come into existence/persist.

If you have any questions with regard to any of the topics discussed in this newsletter, please feel free to contact the employment team at BUREN.

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