NautaDutilh

Navigating Dutch employment and pension reforms

things you need to know

Intro

The landscape of Dutch employment and pension law is undergoing significant change, with new legislation and court rulings set to affect various aspects of the employer-employee relationship. This update outlines five key areas where reform is expected and provides insights on how to navigate these changes effectively.

#1 Self-employed, employee or a temporary worker? Enforcement on the horizon and case law on platform workers still developing

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#4 Pending legislation could have a significant impact on the handling of non-competition clauses

#5 Organisations with 100 or more employees have to report on the business traffic and commuting of the employees

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With new legislation pending and significant court rulings, changes in working relationship qualification are imminent and are expected to be enforced by the Dutch tax authority from January 2025.

Self-employed, employee or a temporary worker? Enforcement on the horizon and case law on platform workers still developing

The question of whether a working relationship qualifies as an employment agreement or a contract for the provision of services, remains a key issue from a Dutch employment law perspective. The new government has announced that it will continue to work on the pending and much-discussed legislative proposal to clarify the legal status of self-employed entrepreneurs, but the timing is currently unclear. In anticipation of this new legislation, the Dutch tax authority has indicated that it will start enforcing the current legislation as of January 2025. In principle, this will not be retroactive, provided that the parties involved have not acted in bad faith. A company will be deemed to have acted in bad faith if it intentionally creates or maintains a situation of obvious pseudo-self-employment when it knows or should have known that an employment relationship actually exists, or, in the absence of bad faith, if the company has been officially warned and given instructions on how to remedy the situation within a certain period of time and has failed to do so.

In addition to the 'fiscal angle' of the (re)qualification of employment relationships, this issue continues to be a central one in Dutch case law. This is illustrated by the ruling of the Court of Amsterdam in the case between the platform company Temper and the trade unions FNV and CNV. Temper is a gig platform company that enables self-employed freelancers to take on flexible working gigs for professional contractors, for example in the catering and logistics sectors. The trade unions argued that Temper operated as a temporary employment agency and that the collective labour agreement for temporary employees should apply to the freelancers working via Temper. However, the Court of Amsterdam ruled that Temper is an online platform for work, and not an employment agency as the unions claimed. In this context, it was relevant that Temper does not exercise any 'formal' employer authority over the freelancers, as Temper does not pay the freelancers (this is done by the contractors), and there is a very limited obligation for the freelancers to personally perform the gigs. Although the ruling did not answer the question of how to qualify the working relationship between the freelancer and the contractor, it does provide additional insight for similar 'gig' platform companies. It should be noted, however, that the trade unions have already announced that they will appeal against this court decision.

A second relevant case in this context relates to the recent advice of the Advocate General at the Dutch Supreme Court regarding Helpling. Helpling is an online platform that enables private households to contact people who provide cleaning activities. The Dutch trade union FNV and a cleaner initiated legal proceedings and asked the court to rule that there was a 'regular' employment agreement between Helpling and the cleaner and, if not, that there was a temporary agency contract in place between these parties. Helpling, however, took the position that there was only an employment agreement between the cleaner and the private household. While the Amsterdam District Court ruled that there was no (temporary) employment agreement between Helpling and the cleaner, the Amsterdam Court of Appeal ruled that this contractual relationship was to be classified as a temporary agency contract. However, contrary to both courts, the Advocate General has advised the Supreme Court to rule that there an employment agreement between the cleaner and Helpling exists. In this context, it is considered relevant that the employer's authority is exercised differently in the case of work performed through a platform company than in the case of a 'regular' employment relationship. This is particularly the case when low-skilled work is carried out and only limited instructions are required from the platform. The final decision of the Supreme Court is expected on 6 December 2024.

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Employers are required to draw up a transition plan for the new pension system and have to provide employees with adequate information about life events and changes to the pension scheme, as required by case law.

The new pension system necessitates careful employer management and communication

The Dutch Future Pensions Act (*Wet toekomst pensioenen; Wtp*) represents a major change in the Dutch pension system, to be completed by 1 January 2028.The new system provides for the accumulation of a pension as part of an individual pension capital, combined with the benefits of collective risk sharing. At the heart of the changes is the abolition of average premiums, whereby a premium is paid for each individual, regardless of age. Defined benefits are no longer possible; the new pension system will be contribution-based.

The Act introduces three types of defined contribution schemes, all with flat-rate contributions (regardless of age), which are subject to a tax ceiling (currently up to 30%). Any transition to a new scheme must be based on a transition plan covering the type of new pension scheme chosen, the impact on (former) employees, compensation measures and how current pension rights will be converted ('*invaren*'). These plans are drawn up by the employer in consultation with unions or works councils. The pension administrator then has to draw up an implementation plan and decide whether to accept and adopt the administration

of the scheme. The final step is to bind the (former) employees to the new scheme by obtaining (tacit) consent, applying a unilateral right of amendment or via a collective agreement.

Employers have a duty of care regarding pensions. Case law requires them to provide employees with adequate information about life events and changes to the pension scheme. This is particularly important during and after the Wtp transition, when risks shift from the pension provider to the participants.

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In the event of a transfer of an undertaking, acquirers could be faced with the applicability of successive versions of an applicable collective labour agreement due to a dynamic incorporation clause.

Dynamic incorporation clauses in M&A practice require careful consideration of employee rights

Many Dutch employment agreements include a dynamic incorporation clause, which stipulates that not only the current version of a collective labour agreement (CLA) applies, but also successive versions. In its ruling of 12 July 2024, the Dutch Supreme Court held that such a dynamic incorporation clause in an employment agreement is a right of the employee that automatically passes to the new employer/acquirer in the event of a transfer of undertaking and retains its dynamic character. This ruling is significant for the M&A practice, as it means that in the event of a transfer of undertaking, acquirers could be faced with employees invoking rights derived from successive versions of the applicable CLA, without being able to negotiate these collective terms and conditions themselves. The Supreme Court also ruled that the applicability of the dynamic incorporation clause can be waived, but only if such a waiver is made after the transaction and is not related to the transfer of undertaking itself.

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In the future, employers may need to reassess the necessity and scope of non-compete clauses, as well as justify their inclusion based on compelling business interests.

Pending legislation could have a significant impact on the handling of non-competition clauses

In most member states of the European Union, an employer can only invoke a non-compete clause if he compensates the employee, which requires consideration of whether a non-compete clause is really necessary. Earlier this year, a legislative proposal to amend non-compete clauses was submitted for online feedback. This proposal related to (i) the legal limitation of the duration of the non-compete clause; (ii) the inclusion, specification and justification of the geographical scope when including non-compete clauses; (iii) the justification of “compelling business interests” when including the non-compete clause in the case of employment contracts of indefinite duration (which is now only required in the case of fixed-term employment contracts); and (iv) the obligation to pay compensation, set at a percentage

of the employee's last salary as determined by law, when invoking the non-compete clause. These changes could have a significant impact on the handling of non-compete clauses, although it is currently unclear if (and when) the new Dutch government will continue to work on this legislative proposal.

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As of 1 July 2024, employers with more than 100 employees must collect and submit data on the modes of transport used by their employees, the distances travelled, and the frequency of commutes.

Organisations with 100 or more employees have to report on the business traffic and commuting of the employees

Not only the social pillar of ESG is gaining attention from an employment law perspective, but also the environmental aspects of a 'green' employment relationship. Although employers are already trying to make employment terms and conditions more sustainable, for example by offering extra time off to employees who travel to their holiday destination by train and by incentivising the use of public transportation, there are currently no fixed obligations in this regard.

As an important step, with effect from 1 July 2024, employers with more than 100 employees are obliged to report annually on the total business and commuting kilometres travelled by their employees. According to the Reporting obligation on work-related person mobility (*Rapportageverplichting werkgebonden personenmobiliteit*), employers must collect and submit data on the modes of transport used by their employees, the distances travelled, and the frequency of commutes. The information will be used by the Dutch government to monitor and analyse the environmental impact of commuting and to develop strategies for promoting sustainable travel options, such as public transport, cycling, and car-pooling. The initiative is part of the Netherlands' broader efforts to meet its climate goals under the Paris Agreement. By gaining insight into commuter behaviour, the government hopes to identify opportunities to reduce greenhouse gas emissions and encourage greener practices among the workforce.

Reporting takes place through an online portal of the Netherlands Enterprise Agency (Rijksdienst voor Ondernemend Nederland; RVO). Employers are free to choose the method of collecting the relevant data and can either (i) collect data on employees' daily journeys on an ongoing basis or (ii) conduct an annual survey in which employees are asked several questions about their commuting during a 'regular' week, based on which annual amounts are calculated.

About the Employment & Pensions team

The many demographic, societal and economic changes, the renewal of the pension system and the increasing cost and regulatory burdens mean that the pensions sector will face significant challenges in the coming years. Our team has many years' experience of supporting the various players in the pensions market: pension providers such as pension funds and pension insurers, and employers. We understand the dynamics of pensions and the different areas of law involved, and are happy to offer our extensive knowledge and experience in an integrated manner appropriate to each market player.

Contact

Do you have questions about any of the above? We are here to help.

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