European (& the GCC) Employment Law Update

Jurisdiction: The Netherlands
Date: October 2018

Impact date	Development	Impact
1 January 2019 (expected date)	Extension of the powers of the works council with regard to the remuneration of directors	In June 2018 the Senate passed a bill on the extension of the powers that works councils have in relation to the remuneration of directors. This will introduce an obligation on large companies (those which employ 100 or more staff) to discuss employment conditions, agreements and developments in pay ratios, including those for the board, in an annual meeting with the works council. Under the current Works Councils Act, works councils already have the right to receive information about the level and nature of employment conditions and agreements on an annual basis. By including the obligation to discuss employment conditions in the consultation meeting, works councils no longer need to raise this sensitive subject for discussion themselves. The Government believes that this will encourage directors to actively render an account of the pay ratios.
1 January 2019 (expected date)	Extension of parental leave after childbirth	The Government has introduced a bill which regulates the extension of the parental leave entitlement (following the birth of a child) for the spouse, the registered partner, the person with whom he/she cohabits without being married or the person who has acknowledged the child ('the partner'). Paid parental leave will be extended from two to five days (paid by the Government). The partner will also receive five weeks of unpaid leave, during which they receives a benefit of 70% of salary, capped at 70% of the maximum daily wage (for social security purposes). This amounts to 6 weeks of parental leave. The Government also intends to give adoption and foster parents six weeks of unpaid leave. This bill concerns an amendment of the Work and Care Act (*Wet arbeid en zorg – "Wazo"*) and other related laws. It was passed by the Dutch House of Representatives on 2 October and is currently pending before the Senate.

1 January 2020 (expected date)	Act on the balanced Labour Market	The Government published a draft which works out the details of several measures already mentioned in the coalition agreement '*Vertrouwen in de toekomst'* ("towards the future with confidence"). The measures mentioned in the bill regard the following seven subjects: **1. Provisions on succession of fixed-term contracts** The maximum term for successive fixed-term employment contracts will be extended from two to three years. In addition, the bill will introduce the ability, in a collective bargaining agreement to reduce the interval from six to three months, if recurrent temporary work is concerned that can be performed for a period not exceeding nine months. This exception is broader than the existing exception for seasonal labour. Finally, an exception will be introduced for substitute teachers in primary education in the event of replacement due to illness. **2. On-call contracts** For employees with employment contracts with a deferred duty of performance, and without fixed working hours (zero-hours and 'min-max' contracts), a new rule will be introduced. The employer must notify the employee at least four days in advance of the times at which the work is to be performed. In the event of shorter notice, the employee will not be under the obligation to comply with the call. A term of less than four days may be agreed in the Collective Labour Agreement ("CLA"). Furthermore, it is proposed that, if the call is withdrawn within four days of commencement of the work, the employee will be entitled to payment of wages for the period for which he was called. Finally, employees with zero-hours contracts will be able to terminate their employment contracts subject to a notice period of four days (or such shorter term as agreed in the CLA), without any liability to pay a compensation, rather than the current one-month notice period.

		3. Pay rolling A separate equal treatment requirement will be included in the Dutch Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs, Waadi*), comprising the primary and secondary terms of employment that are also being used by the client, with the exception of pension. Furthermore, the Government proposes to declare an exemption for the special provisions of the Dutch Civil Code (DCC) relating to agency work agreements. In line with the exemption of Article 7:691 DCC for an agency work agreement in the context of pay rolling, the possibility, in the CLA, to agree that six agency work agreements can be entered into during a maximum period of four years (before being converted into a temporary employment contract for an indefinite period of time) will be restricted to agency work agreements not concluded in the context of pay rolling. **4. Reasonable grounds for dismissal** A new ground for dismissal will be added to the reasonable grounds for dismissal of Article 7:669 (3) DCC: the i-ground. This ground means that there must be a combination of circumstances consisting of two or more grounds for dismissal (c-h) to such an extent that the employer cannot reasonably be required to continue the employment contract. This may be offset by a higher maximised compensation in addition to the transitional compensation for the employee. Such compensation cannot exceed fifty per cent of the transitional compensation to which the employee is entitled in the event of termination of the employment contract. **5. The probationary period** A probationary period of five months will be possible for employment contracts for an indefinite period of time – rather than the current maximum of two months – if the employment contract is the first one as between the parties.

		In addition, it will be possible, in the event of an employment contract for a limited period of two years or more, to agree a probationary period of three months. Here, too, the employment contract must be the first one as between the parties. **6. The transitional compensation** Finally, an entitlement to compensation will be introduced in the situations where a small-sized employer dismisses employees in view of discontinuation of his business to retire or on account of sickness. Furthermore, in the present legislative proposal, the Government wishes to arrange, in view of the Bill already before the Lower House regarding measures in respect of the transitional compensation in the event of dismissal for commercial reasons or on account of long-term disability, that the transitional compensation can be offset only if the employee has been sick for two years. With respect to the entitlement to, and the accrual of, the transitional compensation, two measures are proposed. Firstly, it is proposed to provide for entitlement to transitional compensation from the start of the employment contract, rather than only after two years. This will be offset by the second measure: abandonment of the increase of the transitional compensation after the employment contract has continued for ten years. In the current situation, employees receive a higher transitional compensation for the years of service after ten years (1/4 monthly salary per 6 months rather than 1/6 monthly salary per 6 months). **7. Contributions differentiation** The Government proposes to replace the sectoral differentiation in the Unemployment Benefits (WW) contributions by differentiation according to the nature of the agreement. This means that the sector classification will no longer be relevant to the WW contributions, and that, for the future, two WW contributions will be introduced that will apply to all employers: the low contribution for permanent contracts and the high contribution for flexible contracts.

		The Government intends to submit a legislative proposal to the Lower House in the third quarter of 2018, so that the publication of this draft bill is on schedule. The relevant act should take effect on 1 January 2020.
1 April 2020 (partly)	Changes to the transition payment	On 5 July 2018 the Bill was passed by the House of Representatives. The Bill concerns two topic. It introduces the right for employers to ask for compensation for transition payments upon dismissal due to long-term incapacity for work (more than two years) from 1 April 2020 onwards. In addition, the legislative proposal provides that in the case of dismissal on economic, technical or organisational grounds a provision contained in the collective labour agreement (CLA) no longer needs to be equivalent to the transition payment (the compensation can therefore be lower than the transition payment). It is yet unclear when this rule is going to be enforced. **1. Dismissal in the case of long-term incapacity for work** Employers often feel that the obligation to pay the transition payment in the case of dismissal due to long-term incapacity for work is unjustified, because the employer has usually already paid its sick employee two years' wages up to that point and has often incurred reintegration costs. The legislative proposal provides in this regard that where an employee is dismissed due to long-term incapacity for work the transition payment paid and any transition and employability costs deducted from this will be compensated by the Employee Insurance Agency (UWV). This compensation will be charged to the General Unemployment Fund (Algemeen werkloosheidsfonds - Awf), which will mean that the Awf premium will rise. <u>Not important how the employment contract is ended</u> Although the transition payment is as a rule only due if the employment contract is terminated by giving notice, dissolved by the court or not renewed, the compensation scheme will also apply if it is terminated by mutual consent.

		Maximum amount of the compensation The amount of compensation is limited as follows: The compensation will not be higher than the transition payment to which an employee would be entitled at the moment the obligation to continue to pay wages in the event of illness ends. This is generally after a period of two years. The recently published draft bill 'The balanced labour market' furthermore regulates that employers will only receive compensation for employees who have been sick for two years or longer. The period in which a wage sanction is imposed (where the period of continued payment of wages during illness is extended because the employer has not met its reintegration obligations) will not be compensated. The compensation will not be higher than an amount equal to the gross wage paid during the period of the employee's illness (therefore excluding employer's contributions). Filing for compensation From 1 April 2020 employers can apply for compensation. From this date, compensation can be applied for, for both new and old cases. Old cases are those where transition payments have been paid by employers between 1 April 2015 and 1 April 2020. An application period of six months applies for both new and old cases. Applications for the old cases must therefore be submitted no later than 30 September 2020. The moment of payment (the moment at which the payment is made by the employer to the employee) is the moment when the payment is debited from the employer's account. If the transition payment is paid in instalments, the last payment will be regarded as the moment of payment. **2. Dismissal on economic, technical or organisational grounds** At present, an employer does not have to pay a transition payment if compensation is included in a CLA that is 'equivalent' to the transition payment.

		The requirement that there must be an equivalent provision can be a hindrance to arriving at collective agreements in the case of dismissal on economic, technical or organisational grounds that reflect the situation of the business or sector. For this reason, the proposal provides that in the case of dismissals on economic, technical or organisational grounds a provision included in the CLA (such as a 'from work to work' arrangement or financial compensation) no longer needs to be equivalent to the transition payment. The CLA parties can decide for themselves whether this compensation will be paid by the employer or, for example, by a fund into which employers pay an annual contribution.
Unknown	Changes with regard two pay rolling	In November 2017, a legislative proposal was submitted to the Dutch Parliament to amend the Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs, hereinafter: Waadi*), regarding pay rolling. The proposal intended to make sure that payroll employees work under the same employment conditions as employees who were directly employed by the undertaking and performing the same or equivalent positions. The purpose of the legislative proposal is to prevent improper competition between payroll employees and "normal" employees, regarding employment conditions. The legislative proposal is still pending at the moment. Meanwhile, another legislative proposal has been submitted for an internet consultation, regarding a number of changes in the Dutch Civil Code. It also includes a definition of pay rolling and declares a specific regime applicable on payroll agreements. The proposal intends to make a differentiation between pay rolling and agency work. Pay rolling will, in the new definition, differ from agency work in the sense that agency employers have an active role on the labour market, bringing supply and demand of work together (the so-called allocative function). Payroll employers do not have such allocative function since the hiring undertaking itself searches the employee which it will hire.

		For agency work, a so-called “light” regime applies when it comes to dismissals and the conclusion of temporary contracts. This “light” regime will only apply on pay rolling in a very limited way. The new definition of pay rolling will also apply on intra-concern posting of employees. Whether the proposed change of the Waadi-Act, as well as the proposed change of the Dutch Civil Code, will actually be realised, remains to be seen. Both proposals have received quite some criticism from employment law specialists in both the academic world as well as in law firms.