Three key takeaways

Changes in Employment Law

Dutch employment law is a highly dynamic legal domain. In a recent Employment Essentials webinar, Homme ten Have and Peter Vogels discussed the outlines on recent developments and provided practical insights. They also answered questions from the more than 90 webinar participants about changes in employment law. We have summarised the three main takeaways.

1 Work where you want bill rejected: employers and employees can agree on workplace adjustments themselves

On 27 January 2021, the initiative bill 'Work where you want' (Wet werken waar je wilt) was submitted to the Dutch Senate. The aim of the bill was to make it easier for employees to make arrangements to work in a hybrid structure or at least to make a request to work from home. The reason for proposing the bill was the changed attitude towards working from home after the COVID crisis. The main change envisaged was the statutory criterion: the employer would only be allowed to refuse the employee's request to adapt the workplace on grounds of reasonableness and fairness, with the employer expected to make a proper balancing of interests, taking into account all the circumstances of the case.

On 26 September 2023, the Senate voted against the initiative bill by a narrow majority. Most political parties seemed to find it sympathetic, but unnecessary. Employers and employees have proved that they can 'work it out together' and the current practice has not led to any significant legal procedures. As a result, the employer can still refuse a request to work from home without having to justify it on grounds of reasonableness and fairness. Even without this statutory test, it remains important that the discussion on the work floor always balances the employee's wishes on the one hand and the employer's interests on the other. This balancing of interests also gives employers leeway where there are reasons why employees need to be at work. For example, for new employees to familiarise themselves with the organisation, to foster team building or to accommodate customers.

2 Assessment of Employment Relationships and Legal Presumption (Clarification) Act may have far-reaching consequences for both workers and employers

The internet consultation on the proposed 'Clarification of the Assessment of Employment Relationships and Legal Presumption (Clarification) Act (*Wet verduidelijking beoordeling arbeidsrelaties en rechtsvermoeden*) ended on 10 November 2023. The purpose of the act is to combat false self-employment and to further specify the qualification rules by clarifying the open norm 'working in the service of', which is the distinctive criterion for the qualification of an employment agreement (and the demarcation of a services agreement). It also introduces a so-called 'legal presumption' that employees with an hourly rate below EUR 32.24 are deemed to perform their work on the basis of an employment contract.

The open norm 'working in the service of' (the authority relationship criterion) is to be determined on the basis of four elements:
A: Subordination of the worker (indicating an employment agreement)
B: Organisational embeddedness (indicating an employment agreement)
C: Working for own account and at own risk (indicating self-employment)
C+: Behavior of the worker in the economic activity (if necessary, if elements A and B are the same as C)

To determine whether there is an employment agreement, there must be subordination of the worker (element A) and/or embedding in the employer's organisation (element B). Otherwise, there is no 'working in the service of' (i.e. a relationship of authority) and therefore no employment agreement. If element A or B is present, it should be determined whether the employee works for own account and at own risk (element C). In this case, a weighing exercise is carried out: if working at one's own expense and risk (element C) outweighs the working for the employer (element A) and embedding in the organisation (element B), there is no employment agreement. This of course also works the other way around.

If they carry equal weight (i.e. elements A and B have the same weight as C), then an assessment should be made of the worker's behavior in the economic activity (element C+). Here, the worker may still be regarded as an entrepreneur rather than an employee, for example, if the worker has a large number of customers, an own web site and makes business investments of some size. Each of these elements is explained in detail and with example cases.

The bill in its current form may have far-reaching consequences. A widely shared criticism entails that the element 'organisational embedding' plays a very large role in this legislation compared to current case law. This could lead to a high number of (re-)qualifications of legal relationships to an employment agreement. In view of this, and considering other extensive feedback, it remains to be seen whether the bill will be passed in its current form. It is therefore not inconceivable that it will have to be amended, also when assessing the points of view of the winning parties in the recent elections. Responses to the internet consultation will be reviewed and may result in adaptations to the bill. It will then be discussed at the first consultation with the spokespersons for Social Affairs and Employment of the political parties on 25 January 2024. If there is support for the proposal in the new Lower House, the legislative process can continue.

3 Is the non-compete clause really necessary? The Dutch government considers modernisation.

Research by Panteia shows that one in three employers in the Netherlands includes a non-compete clause in employment agreements, but often in an improper way. Rather than protecting the company's market position, they mostly use it as a deterrent. Employees, in turn, often misunderstand the clause and do not realise that it applies to more than just 'direct competitors'. They also underestimate its legal enforceability. Employers often see no good alternative to the non-compete clause and consider it necessary to protect their customer base and business-sensitive information. In most European Union member states, an employer can only invoke the non-compete clause if the employer compensates the employee, which requires consideration as to whether a non-compete clause is really necessary.

In a letter to the House of Representatives of 6 June 2023, Minister Van Gennip indicated that the government is working on modernising the non-compete clause, limiting the use of the clause by employers. The government refers, ***inter alia,*** to the considerations as set out in the Panteia report and considers to make the following statutory changes: (i) legally limiting the non-compete clause in duration; (ii) when including the non-compete clause, the geographical scope must be included, specified and justified; (iii) when including the non-compete clause, employers will also have to justify the 'compelling business interests' in the case of employment agreements for indefinite term (which is now only required in the case of fixed-term employment agreements); and (vi) when invoking the non-compete clause, an employer will in principle have to pay compensation, set at a percentage of the employee's last-earned salary determined by law. These changes could have a significant impact on the handling of non-competition clauses in the Netherlands. It should be noted however, that the discussion on the modernisation of non-compete clauses has been going on for some time. It remains to be seen when such changes will be effectuated.

Questions

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