NautaDutilh

Employment & Pensions

things you need to know in 2023

Intro

In the year ahead, challenges around legal restrictions and rules involving employment in the Netherlands will be impacted by several factors. For example, labour market shortages mean that employees will become more vocal when it comes to diversity and inclusion, but also that employers need to think carefully about ways to attract and retain staff.
We also expect the year ahead to see the changing pension law, protection of whistleblowers and rules relating to dismissal (collective or otherwise) high on the HR department's agenda.
Here are some key issues for HR officers in 2023:

#1 ESG; Diversity, Equity and Inclusion (DE&I) has become a hot topic in the workplace

#2 Negative incentive of restrictive covenants as retention tools is not top of mind

#3 Employers are responsible for the protection of whistleblowers

#4 Dutch pension system changes fundamentally

#5 Strict rules apply to redundancies and collective dismissal

#1

ESG; Diversity, Equity and Inclusion (DE&I) has become a hot topic in the workplace

The ‘S’ in ESG stands for social, referring to a company’s relationships with its stakeholders. Examples include fair wages, employee engagement, a company’s impact on the community and on supply chain partners, and DE&I.

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We recommend that employers take a critical look at their policies and conditions of employment

DE&I has become an increasingly relevant topic in the workplace. Apart from the legal obligation for employers to ensure a safe working environment, the likelihood of outperformance (financial or otherwise) of diverse executive or other teams is greater. Furthermore, investors expect a DE&I strategy and so do the current workforce and new talent. We expect an uplift in whistleblowing claims in this respect.

With due observance of the shortage in the labour market as well as the fact that employees tend to be increasingly critical of employers with regard to the extent to which they respond to social developments, we recommend that employers take a critical look at their policies and conditions of employment. In addition, it is important to review how the workforce is educated to demonstrate the right behaviour. When monitoring whether policies are successful, be aware of data privacy restrictions.

#2

Negative incentive of restrictive covenants as retention tools is not top of mind

In these turbulent times, we see a shortage of employment capacity in many industries. When looking for well-trained and readily available human capital, employers aim to maximise their recruitment efforts. The flip side of such a trend is the focus on mechanisms of retention. We are all aware of the positive effects of bonus schemes but the negative incentive of restrictive covenants as retention tools is usually not top of mind.

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Dutch employment agreements often include a non-competition and/or non-solicitation clause

Dutch employment agreements often include a non-competition and/or non-solicitation clause. The regular term for such clauses is usually one year after termination of the employment agreement. If employees were not to perform work during the notice period by way of garden leave, this period may be deducted from this term, but such is not a given. Often a penalty clause is included in case of non-compliance.

How these contractual obligations play out in practice differs. The most well played solution is that the former employer agrees to a full or partial waiver of the non-restrictive covenants. If such is not possible and the employee joins a competitor, the parties operate in an uncomfortable zone in which the former employer may bring an action against both the employee and the new employer. This may lead to a court injunction that would prevent the employee from

working for the new employer, an award of damages and potentially the forfeiture of contractual penalties. As an alternative to such detrimental dynamics, an employee who is unable to obtain a waiver from the former employer may turn to a court to be partly or wholly released from the restrictive covenants by the court.

#3

Employers are responsible for the protection of whistleblowers

Throughout Europe, the EU Whistleblower Protection Directive should have been implemented on 17 December 2021. The required changes to current Dutch law are laid down in a legislative proposal: the Whistleblower Protection Act (*Wet bescherming klokkenluiders*) bill. This bill needs to be implemented as a matter of urgency and will come into force in 2023. Before then, employers should review their existing whistleblowing policies and procedures and check whether these are in line with the new Whistleblower Protection Act.

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The whistleblowing procedure – that requires the consent of the works council or relevant employee representation – needs to comply with statutory requirements (new or otherwise), such as ensuring acknowledgement of receipt and follow-up on the complaint by an impartial person or department. To strengthen the position of whistleblowers, employers must also ensure confidential and secure reporting channels and effective protection for whistleblowers.

With due observance of the new Whistleblower Protection Act, we recommend that employers take a critical look at their whistleblower policies and procedures. To adhere to the law, but also because using a well-conceived whistleblowing procedure and a confidential and secure reporting channel contributes to damage control. Shortcomings may result in illness of employees, liabilities and reputational damages. Furthermore, it is essential that the whistleblowing policy and procedure are communicated and promoted broadly and thoroughly within the organisation. Please read more in the article '*Het wetsvoorstel Wet bescherming klokkenluiders: op de goede weg, maar nog niet op de eindbestemming*' (in Dutch only).

#4

Dutch pension system changes fundamentally

Since September 2022, the Dutch Future Pensions Act (*Wet toekomst pensioenen – Wtp*) bill is being debated in parliament. This bill on the reform of the Dutch pension system was submitted after many years of preparation. It proposes fundamental changes to the Dutch pension system that will affect every existing pension arrangement and pension administration agreement.

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Employers will have to choose between three variants of a defined contribution scheme

Defined benefit schemes will disappear. Employers will have to choose between three variants of a defined contribution scheme (flexible contribution, solidarity-based contribution or contribution-benefit). Furthermore, contrary to current market practice, age-dependent premium accrual is no longer permitted.

Adaptation of current arrangements to the new standards can, depending on the age structure of the employee population, be disadvantageous for some groups, constituting a ground for compensation. Such is possible by means of applying transitory law, by specific provisions within the new pension arrangement or emoluments separate from pensions. During a transition period of four years, employers will have to detail and negotiate these new arrangements, if possible with labour unions or the works council. Both legal counsels and pension brokers should be involved to explore implementation requirements and possibilities.

The Future Pensions Act was expected to come into effect on 1 January 2023. However, due to the number of objections from parliament, this date has been pushed back to 1 July 2023. It is currently unclear if the recent delays will affect other deadlines in the transition process.

#5

Strict rules apply to redundancies and collective dismissal

Mainly due to the energy crisis, we expect an increase in collective dismissals. It is important to note that strict rules apply in respect of the selection of employees to be made redundant. Cherry picking is not permitted. If a restructuring qualifies as a collective dismissal, complicated Dutch dismissal law becomes even more complicated as regulators, the works council and unions will need to be involved.

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If an employer intends to dismiss 20 or more employees within a period of three months, the Dutch Collective Redundancy (Notification) Act (*Wet melding collectief ontslag*) will apply. According to this Act, the employer has to notify the Dutch Employee Insurance Agency (UWV), the works council and the labour unions concerned of the intended dismissals. The employer is required to consult about its decision and its social consequences with the works council and the unions. It should be noted that pursuant to the Dutch Works Councils Act (Wet op de ondernemingsraden), collective dismissals will also lead to a right for the works council to provide advice on any decision the employer proposes to make.

After the information has been provided to the UWV, a one-month waiting period applies. During this period, dismissal permits obtained from the UWV may not be used, new dismissal permits cannot be requested and no valid termination agreements can be agreed. Should the works council advise against the intended collective

dismissal, another one month waiting period will apply. During this period the works council can appeal the employer's decision in court.

Only once the obligations under the Act are complied with and the works council consultation process is finalised, can the employer request the dismissal permits from the UWV. Therefore, it is important to ensure that the correct process is followed.

About the team

NautaDutilh's Employment & Pensions Team offers national and international clients adaptive and creative solutions to future challenges in the complex and rapidly developing field of employment and pensions law. We advise in particular on employment and taxation, equal treatment and anti-discrimination, mass redundancy and individual dismissal, outsourcing, payroll processing and pensions as well as on restrictive covenants.

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