



GUIDE TO GOING GLOBAL EMPLOYMENT

Netherlands

INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Employment*.

GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2021 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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NETHERLANDS



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Civil law. Member of the European Union, so required to implement relevant EU directives. The official currency is the Euro (EUR). The official language is Dutch.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

Foreign entities may directly engage employees in the Netherlands, subject to doing-business and tax considerations. Registration with the Dutch tax authorities as an employer – to make mandatory payroll deductions – is required.

PRE-HIRE CHECKS

Required

Immigration compliance. For certain limited provisions (eg, judges, lawyers and advocates), an applicant must provide a recent copy proving that they have no criminal record that should prevent them from performing their duty (*verklaring omtrent gedrag*). All workers must undergo an identity verification on the basis of an original identity document. A copy of these documents must be maintained by the company.

Permissible

Reference checks are common and permissible with the applicant's consent. Other checks are only permissible in limited situations.

IMMIGRATION

Most nationals of the European Economic Area (EEA) and Switzerland are allowed to work in the Netherlands, although they should be registered. Other nationals should have a proper visa that allows them to work in the Netherlands.

HIRING OPTIONS

Employee

Indefinite, fixed-term, full-time or part-time, zero-hours, on-call. Fixed-term employees may gain an indefinite employment status after a certain time and cannot be discriminated against due to their status. With regard to on-call employees and employees with zero-hour contracts, it is mandatory to offer a contract with a fixed number of hours after they have been employed for at least 12 months. This is a recurring obligation.

Independent contractor

With regard to independent contractors, there are no limitations imposed by law and thus no maximum term for hiring an independent contractor. There is, however, the possibility of exposure of deemed employment. The actual circumstances under which the contract is conducted are decisive in regard to the question of whether the work relationship should be considered an employment relation.

Under Dutch law, irrespective of the label given to a contract, an employment agreement will be deemed to exist between 2 parties if:

- The work must be performed in person
- Salary is paid and
- There is a relationship of authority between the individual and the company.

It is important to assess up front if the contract is in fact an employment contract "in disguise." If, based on the facts, this appears to be the case, the independent contractor should be regarded as an employee – so all employee and dismissal protections will apply – and Dutch wage tax and social premiums will be due.

To limit the tax and social security risk, parties may use model agreements, published on the website of the Dutch tax authorities, or submit the contract to the Dutch tax authorities to receive confirmation on the qualification of the contract in a ruling. If Dutch tax authorities confirm the absence of an employment relationship in a ruling, they can, in principle, not recover wage tax and social premiums from the client with respect to that contract.

On January 11, 2021, the Dutch government introduced a new online tool with regard to the legal classification of independent contractors: the Web Module for Assessment of Employment Relationships. The Web Module is an online questionnaire which companies can use to obtain clarity about whether an assignment can be carried out by a contractor instead of an employee. The Web Module will provide 1 of the 3 possible outcomes: contractor, employee or no judgement possible. The Web Module does not yet have legal status, but the outcome of its assessment may be used by companies to review – and reconsider – their working relationship with contractors.

Agency worker

Agency workers are common and cannot be discriminated against due to their status.

Employees who are placed in the organization through a payroll-provider/employer of record (PEO) are entitled to terms of employment that are equal to the terms of employment of “regular” employees of the organization – or terms of employment that are in line with sector common practice, if there are no regular employees within the organization.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

Common best practice, but in any case, the following must form part of the employment contract:

- Parties' names
- Work location
- Job/position
- Start date and end date
- Duration of the employment
- Holiday entitlement and possible entitlement to other forms of paid leave
- Notice periods and dismissal and termination procedures which must be followed (by employee as well as employer) in case of termination
- Salary (including the individual components and the method/frequency of payment)
- Working hours and
- Pension entitlement
- The identity of the hiring company (in case of an agency contract)

Further required content will depend on the requirements of any applicable collective employment agreement.

Probationary periods

Probationary periods are permissible. The maximum statutory probationary period for indefinite-term contracts and fixed-term contracts for 2 years or more is 2 months.

It is not permissible to include a probationary period in a fixed-term employment contract of 6 months or less. It is not possible to deviate from this via a collective labor agreement (CLA).

In case of a fixed-term contract of more than 6 months and less than 2 years, a probationary period of 1 month is allowed. Under a CLA, it is possible to extend the probationary period to a maximum of 2 months.

Policies

The following policies are mandatory:

- Whistleblowing policy (if a company employs 50 or more employees)
- Hazard identification and risk assessment (RI&E)
- Work health and safety policy (which includes policies aimed at preventing, or, if not possible, limiting, pressure at work due to a high workload, discrimination, harassment and bullying).

Third-party approval

No requirement to lodge employment contract or policies with or get approval from any third party.

LANGUAGE REQUIREMENTS

No statutory requirements, although the employer must make sure that the employee understands the relevant provisions.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

All.

Working hours

A full-time working week usually consists of 40 hours. Collective agreements might set different full-time working hours (eg, 36 or 38 hours per week).

Overtime

No statutory obligation to provide pay for overtime worked as long as pay overall does not fall below the statutory minimum. Collective employment agreements might set different obligations.

Wages

Depends on the employee's age. The minimum daily wage for employees of the age of 21 years and older is EUR89.28 per day and EUR1,934.40 per month as of January 1, 2023.

Under the Minimum Wage Act, it is mandatory to pay a holiday allowance of 8 percent of the yearly salary, unless an employee earns more than 3 times the minimum wage and the parties have explicitly agreed in writing to exclude the 8-percent holiday allowance.

Vacation

Based on a full-time week: 20 days per year, excluding public holidays, is the statutory required minimum. It is common practice to give between 24 and 28 days per year.

Sick leave & pay

In case of occupational disability, an employer must pay at least 70 percent of the most recent gross salary plus holiday allowance to the employee for up to 2 years. The salary is capped at 70 percent of the "maximum daily wage" (ie, EUR256.54 per day and EUR5,579.66 per month as of January 1, 2023) and must, during the first 52 weeks of illness, not be below the statutory minimum wage rate. It is common practice (and, as such, is set out in most CLAs) to pay 100 percent of the full salary during the first year of illness and 70 percent of full salary during the second year.

Maternity/parental leave & pay

16 weeks' maternity leave and, after that, a right to return to the employee's own position. During maternity leave, the employee is entitled to a maternity allowance. The employer continues to pay the full salary of the employee. However, the Employee Insurance Agency reimburses a part of the regular salary to the employer, capped at the maximum daily wage. Statutory possibility of unpaid parental leave during a part of the working week over a certain amount of time before the youngest child turns 8 years old.

An employee who becomes a father is entitled to 5 days of paid paternity leave. In addition, as from July 1, 2020 and in the first 6 months after birth, there is an additional leave entitlement of 5 weeks in case of a full-time employee (ie, additional paternity leave or partner leave). This is not paid by the employer. An employee who takes additional leave is eligible for state benefits of up to 70 percent of the daily wage.

Since August 2, 2022, parents will receive 9 additional weeks of partially paid parental leave. Payment for this is provided by the government, and, as the program is currently envisaged, the employee will likely receive 70 percent of his/her last earned wage, capped at 70 percent of the "maximum daily wage." The leave may be taken during the first year after welcoming a child.

Other leave/time off work

Employees are also entitled to other forms of statutory leave such as paternity leave, care leave, emergency leave, adoption and foster leave as mentioned in the Work and Care Act. Other forms of leave may be arranged in any applicable collective bargaining agreement. For example, employees may also be entitled to leave for other purposes, such as marriage of family members, bereavement, moving or to carry out a legal or government-enforced rule.

DISCRIMINATION & HARASSMENT

Characteristics protected from unlawful discrimination and harassment include age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation.

WHISTLEBLOWING

On January 24, 2023, the Senate approved the Whistleblowers Protection Act, which aims to better protect the legal position of whistleblowers. Every employer with 50 or more employees will be obliged to establish an internal reporting channel for employees to report suspected breaches. An internal reporting scheme must meet certain requirements (eg, a reasonable timeframe and the manner in which a report must be made). The Whistleblowers Protection Act will enter into force on a date still to be specified. The legislator makes a distinction between small employers, which have 50 to 249 employees, and large employers, which have 250 or more employees. It is expected that large employers will soon be required to establish an internal reporting channel and draft an internal reporting scheme to comply with the Whistleblowers Protection Act. Small employers are subject to transitional law and will, in all likelihood, be given until December 17, 2023 to comply with the Whistleblowers Protection Act.

BENEFITS & PENSIONS

In many industry sectors, a mandatory industrywide pension fund applies. Employees who work in such a sector are required by law to participate in that pension fund, and their employers are required by law to pay pension premiums to the fund. In sectors without such an industrywide pension fund, the employer usually sets up its own pension plan for its employees.

DATA PRIVACY

Employees generally must be notified of personal data processing – and, in certain cases, give consent. Registrations with the Information Commissioner are required. Special rules apply to data transfer outside the EEA. Significant restrictions on monitoring email and internet use.

From May 2018, the country is subject to the General Data Protection Regulation (GDPR), which introduces significant new obligations and onerous sanctions for employers. In general, the GDPR aims at empowering individuals (including temporary employees, job applicants, contractors, trainees and other workers) with regard to controlling the use of their personal data and at harmonizing the data protection legislation across the EU.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

Automatic transfer under the EU Acquired Rights Directive/Dutch civil code in a business sale or service provision change. Significant restrictions on changing terms and conditions following a transfer. Duty to inform and consult with employee representatives. Any dismissal connected to the transfer would be unfair unless for an economic, technical or organizational reason. Works council has the right to advise.

EMPLOYEE REPRESENTATION

Trade unions are prevalent in a number of sectors. Works councils are common and have significant rights. If the company has 50 or more employees, the company is obliged to establish a works council. Beginning on January 2022, temporary agency workers who have been at the company for 15 months will be included in the employee headcount threshold (of 50 or more). If there are more than 10 employees, but fewer than 50 employees, the

company must create the possibility to meet with the employees twice a year. Industry-level collective bargaining agreements are common.

TERMINATION

Grounds

Termination is permissible on misconduct, performance, redundancy or other substantial grounds. Dismissal is only possible on the basis of one of the reasons specified in the new Dutch legislation.

Employees subject to termination laws

All.

Restricted or prohibited terminations

Members of a European Works Council, employees on their first 2 years of sick leave, pregnant employees and employees on military service.

These prohibitions on termination do not apply in the event that:

- An employee consents to the termination in writing
- The termination takes place during the probationary period
- The termination is, by operation of law, due to the expiry of a fixed-term contract
- The termination is a dismissal with immediate effect
- There is a company closure (though the termination of employees who are pregnant or on maternity leave in that event still prohibited/restricted) or
- The termination takes place because the pensionable age has been reached.

Third-party approval for termination/termination documents

Employers do not need any third-party approval for:

- Immediate termination due to an urgent reason
- Termination during a probationary period
- Termination by operation of law due to expiry of a fixed-term contract or
- Mutual consent termination.

In all other situations, employers must either seek approval of the Dutch Employee Insurance Agency (UWV) or request a court to dissolve the employment agreement. Mutual consent terminations are common.

Mass layoff rules

Strict information and consultation rules apply in situations where 20 or more employees in a certain area are to be made redundant within a period of 3 months or less.

Notice

The notice period that must be given by the employee is 1 month. For the employer, notice requirements depend on the duration of the employment:

- Less than 5 years requires 1 months' notice
- Between 5 and 10 years requires 2 months' notice
- Between 10 and 15 years requires 3 months' notice and
- 15 years or more requires 4 months' notice.

It is permissible to agree a longer notice period to be given by the employee in an employment contract, provided that the notice period to be given by the employer is at least double that period (ie, 2 months for the employee and 4 months for the employer). The notice period to be given by the employee cannot be longer than 6 months. With the consent of the employee, employers can, but are not required to, make a payment in lieu of notice.

Statutory right to pay in lieu of notice or garden leave

No.

Severance

Severance pay regulations are arranged by law, under a so-called transition payment. The statutory transition payment is due when the employment agreement has been terminated, and the amount is based on years of service:

- 1/3 of 1 month's salary (including holiday allowance and, if any, fixed end-of-year bonus and/or average bonus of the last 3 years and/or commission of the last 12 months) for each calendar year that the employment agreement has lasted, and a pro rata amount for a period where the employment agreement has lasted less or longer than a calendar year.

The maximum transition payment for 2023 amounts to EUR 89,000 gross or, where an employee earns over EUR 86,000 per annum, a maximum of 1 year's salary.

Waivers

Enforceable, but employees must be given time to consider and to seek legal help.

POST-TERMINATION RESTRAINTS

Non-competes

Post-employment restraints to protect against competition are common in the Netherlands and are included in almost every employment agreement. Typically, such restraints remain in effect for up to 1 year after termination of employment. Non-competition clauses in fixed-term employment contracts are not allowed unless they are necessary to protect a legitimate business interest and the business interests are clearly described in the employment agreement. Published rulings have shown that this is a high threshold; therefore, it is common not to include a non-competition clause in fixed-term employment agreements.

No payment required for enforceability.

As of August 1, 2022, an ancillary activities clause is void, unless there is an objective justification (eg, health and safety, the protection of confidentiality of business information, the integrity of public services, the avoidance of conflicts of interest).

Customer non-solicits

Permissible under the same conditions as described above under non-competes.

Employee non-solicits

Permissible.

WAIVERS

Claims may be waived provided that the employee understands they signed a waiver of claims. Accordingly, it is advisable that employees be given time to consider and to seek legal help with regard to a waiver.

REMEDIES

Discrimination

Compensation depends on damages.

Unfair dismissal

An employee may obtain a court order to be reinstated or can demand an additional "fair compensation" on top of the statutory transition payment.

Failure to inform & consult

Works councils may litigate certain decisions of the company – that is, they may file an appeal with the Enterprise Chamber and request revocation of the company's decision.

CRIMINAL SANCTIONS

Criminal sanctions are not generally a concern.

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