

# DUTCH LABOUR LAW

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## Introduction

As a foreign employer in the Netherlands, it is important to know that there are many legal provisions that protect the interests of the employee. These are, among others, provisions regarding holidays, minimum wages, working hours and employment of disabled employees. As a consequence, you are not entirely free in concluding employment agreements. Before you agree to an employment agreement, you will need to know the answers to the following questions: When is a contract an employment agreement? What are compulsory articles in an agreement? How can you terminate an agreement? What are your obligations when an employee becomes ill? Are you free to choose between job applicants?

This article will discuss the definition, contents and termination of an employment agreement, as well as illness of the employee and discrimination, it will also give practical information on working conditions, pregnant employees and parental leave.

## The employment agreement

### *Definition*

The employment agreement is an agreement between an employer and an employee, according to which the employee has to work under the supervision of the employer during a certain period of time and for a certain amount of wages. For minors below the age of 16 the permission of their parent or guardian is required to conclude an employment contract. An employment agreement may be agreed upon orally, but there are certain provisions, such as a non-competition clause, that are only enforceable if agreed upon in writing.

The employment agreement must be distinguished from *overeenkomsten van opdracht* (commission contracts) and *aanneming van werk* (contracting for work). The rules and provisions of Dutch labour law *only* apply to employment agreements. An agreement to carry out physical labour, like building a house, against a pre-fixed price and within a specific period of time is not an employment agreement because there is no relation of authority between parties.

### *Elements*

The most important elements of an employment agreement are wage, holiday allowance, salary slip and additional compensation.

## Wage

Minimum Wage and Minimum Holiday Allowance Act provides for a statutory minimum wage for all employees – male and female – between the ages of 23 and 65 and a statutory minimum youth wage for employees between the ages of 15 and 23. These statutory minimum wages are reviewed each year.

## Holiday allowance

All employees, regardless their age, are entitled to a statutory minimum holiday allowance of 8% of their gross annual wage. The holiday allowance is usually calculated over the period June 1 to May 31 and paid in May of each year.

## Salary slip

The employer is obliged to provide the employee with a salary slip that indicates how much wage was paid and how the wage was calculated.

## Additional compensation

Additional compensation is often paid in the form of a so-called ‘thirteenth month's salary’, premiums for productivity, sales commissions in addition to contract wages, profit sharing (*tantième*) and/or participation in a share option plan and/or bonus plan.

## *Fixed term*

An employment agreement can be entered into for a definite period (fixed term) or for indefinite duration. The fixed term does not necessarily have to be defined by reference to a specific date. The term may also expire upon completion of certain well-defined tasks or projects. However, provisions that call for expiration of the employment period by reason of illness, marriage, or pregnancy of the employee are null and void.

If no fixed term is agreed upon, the agreement is considered to be for an indefinite period. In addition, there are two situations in which the employment agreement for a definite period of time is legally regarded as an agreement for an indefinite period of time. This is – in short – the case if:

- a fourth consecutive employment agreement for a definite period of time is concluded with no intervals of more than three months between them; or,
- two or more consecutive employment agreements are concluded and (together) exceed a period of 36 months, the intervals taken into account.

## **Contents of the employment agreement**

Labour conditions governing individual employment agreements are often agreed upon by others than the parties to the individual agreement. Both the law and applicable *Collectieve Arbeidsovereenkomsten* (CAO's; collective labour agreements) provide mandatory rules. The parties to an employment agreement are therefore limited in negotiating their own terms.

### *General information*

Within one month after the employment started, the employer must send a written specification of the following details to the employee. The employer has to confirm:

- the names of the parties;
- the date of employment;
- the job title or position of the employee; and,
- in case of a fixed term, the duration of the contract.

In most cases this information is included in the written employment agreement and/or the salary slip.

### *Probationary period*

Parties to an employment agreement for an indefinite duration or a fixed term of more than two years can agree on a probationary period with a maximum of two months. The duration of a probationary period for an employment agreement for less than two years cannot exceed one month. A stipulation concerning a probationary period will only have legal effect if it is agreed upon in writing. During the probationary period both parties can terminate the agreement without prior notice. The termination takes effect immediately, irrespective of prohibitions of termination such as illness, or pregnancy.

### *Notice period*

The employment agreement can be terminated upon notice by both parties. The employment agreement for a fixed term however, cannot be terminated early, unless parties have agreed otherwise in writing.

In the employment agreement parties often refer to the statutory notice period, which is one month for the employee. The statutory notice period for the employer is related to the length of the employment and ranges from one month (employment shorter than five years) to four months (employment over 15 years). Parties can also agree upon a different notice period, with a maximum of six months for the employee, but in that case the notice period of the employer must be twice the notice period of the employee.

## *Non-competition clause*

The employee may be restricted, after termination of the employment agreement, in accepting comparable jobs or employment in enterprises in a certain geographical area. This is the so-called 'non-competition clause'. The clause can only be agreed upon in writing and with a person of 18 years or older. A non-competition clause is usually effective for a period of one year after the termination of the employment agreement. Parties may agree that a penalty must be paid in case of non-compliance.

A non-competition clause must be carefully phrased. If the employee should request so, the District Court may limit the scope of the clause or set the clause aside if it is of the opinion that the employee is disproportionately restricted in his re-employment. The Court may also mitigate (possible) penalties for non-compliance by the employee. In addition, the Court may fix a compensation payable to the employee if the former employer wishes to enforce the clause.

## *Vacation days*

According to Dutch law the employee is entitled to vacation days with a statutory minimum of four times the weekly working days. That is 20 days for an employee working five days a week. Parties often agree on more days than the statutory minimum. The employer continues to pay wages during the employee's vacation.

## **Termination of the employment agreement**

There are several ways to end an employment agreement. A distinction is made between the termination of an employment agreement for a fixed term and the termination of an employment agreement for indefinite duration.

### *Fixed term*

The employment agreement for a fixed term or a fixed project ends on the final date as mentioned in the employment agreement or upon completion of the project. Termination upon notice before the end of the definite period is not possible unless parties have agreed otherwise.

### *Indefinite period*

There are several possibilities to terminate an employment agreement for an indefinite period: upon notice, for urgent cause, by court decision or by mutual consent.

### Termination upon notice

Both the employer and the employee can terminate the employment agreement by giving notice. To give notice the employer requires a permit from the *UWV Werkbedrijf* (the public employment

service). Until this *UWV* permit has been obtained, any notice is subject to annulment within six months.

In the application for a *UWV* permit the employer must specify the reasons for termination. The *UWV* will send this application to the employee and will invite him to respond. Thereupon, the employer has the opportunity to comment on the employee's response. Any statement must be substantiated. Sometimes the *UWV* decides to give parties the opportunity to be heard. The decision of the *UWV* is irrevocable and not subject to appeal.

An exception to this rule is made for embassies and consular missions because they are foreign public bodies. Please note that this exception does not apply to the Ambassador, if he or she is the formal employer. As an employer, he or she must apply for a permit.

Except for "urgent cause" or during the probationary period, notice of termination may not be given during the first two years of an employee's illness, during pregnancy or to a member of the works council. An employee who is dismissed because of the circumstances mentioned above may invoke the nullity of the notice within two months after the notice has been given.

Even if the employment agreement was terminated and notice was given with due observance of the requirements, it is possible that the dismissal is manifestly unreasonable. If the employee is of the opinion that the effects of termination are unreasonable, or that the reasons for the termination are incorrect, he may seek redress in court and claim a severance payment or even re-instatement of the employment.

### Termination for urgent cause

An employment contract can be terminated immediately by both parties due to an urgent cause, such as theft, fraud, or crimes involving a breach of trust. This party is entitled to terminate the agreement with immediate effect. No *UWV* permit is required and there are no prohibitions to give notice.

To justify an immediate and irrevocable termination of the employment agreement, there needs to be an urgent cause. In addition, the employer has the obligation to act with due care and take the employee's interests into consideration. Therefore, the employer must communicate the urgent cause to the employee at the shortest possible notice, preferably in writing.

If the employee contests the termination for urgent cause in court, the employer has to prove his allegations. The court might decide that the cause was not serious and urgent enough to justify an

immediate termination and consequently declare the termination void. If the employee kept himself available to report to work, he is entitled to his salary as from the date of improper termination.

### Termination by court decision

The employment agreement can also be dissolved by the District Court. The employer or employee can request the court to terminate the employment agreement for serious cause. A request for a dissolution based on serious cause is often made when the urgency of the cause does not outweigh or overcome the risks connected to an immediate termination for urgent cause. Serious cause can consist of an urgent cause that has not previously been invoked to terminate the employment agreement. A serious cause might also be a change in circumstances of such a nature that the employment should be terminated instantly or on short notice. In its decision to dissolve the employment contract, the court will fix a date of termination. The dissolution does not have retroactive effect. A *UWV* permit is not required and the notice period does not have to be taken into account. If the court grants termination due to a change in circumstances, it may award the employee compensation, which is to be paid by the employer.

Compensation will be awarded if the court decides that it is "fair under the given circumstances". An employee who feels that the employment should be terminated due to a change of circumstances caused by the employer can also claim compensation.

### Termination by mutual consent

Finally an employment agreement can be terminated by mutual consent, preferably in writing. Usually the employee only agrees to the termination in exchange for a severance payment. It is important to note however, that the employee who consents to his dismissal might be deemed voluntarily unemployed and therefore will not be entitled to unemployment benefits.

## **Illness**

### *Payment of wages*

When an employee becomes unfit to work due to illness, the employer is obliged to continue to pay 70% of the salary for a maximum period of two years. The employer does not have to continue paying the employee's wage in case the illness is caused intentionally or in case the employee refuses to cooperate in his recovery. After the two years of payment the employee may be awarded invalidity benefits by the *Uitvoeringsinstituut Werknemers Verzekeringen* (*UWV*; Employee Insurance Agency).

### *Instructions during illness*

The employer may set rules and give instructions during absence due to illness. These rules and instructions must be supervised by the *Arbodienst* (working conditions service) or an internal,

certified expert. If the employee refuses to comply with the rules or instructions regarding the obligation to inform the employer, the employer can suspend the obligation to continue to pay wages. If it concerns other rules or instructions, the employer can (temporarily) end the payment of the employee's wage. It is recommended to lay down these rules and instructions in a set of regulations.

### *Suitable work*

The ill employee must accept suitable (alternative) work offered by the employer. Often parties disagree on whether work is suitable or not. In that case they can ask the *UWV* for a second opinion. If the employee (still) refuses to accept suitable work, the employer may (again) suspend payment of the employee's wage.

### **Discrimination**

According to the *Algemene wet gelijke behandeling* (Equal Treatment Act) it is prohibited to discriminate on grounds of religion, race, political beliefs, sexual orientation, gender, nationality or civil status.

### *Men and women*

Unless there is a statutory exception, it is prohibited to discriminate between men and women. This prohibition is laid down in the *Wet gelijke behandeling mannen en vrouwen* (Equal Treatment (Men and Women) Act) and the Dutch Civil Code. The Act also applies to the advertising for and the hiring of employees and termination of an employment agreement.

### *Discrimination based on working time*

The Dutch Civil Code prohibits discrimination between employees based on working time and working hours. The employer cannot discriminate between employees with a temporary and those with a permanent contract or between employees working part-time and those working full-time.

### *Age discrimination*

According to the *Wet gelijke behandeling op grond van leeftijd bij de arbeid* (Equal Treatment in Employment (Age Discrimination) Act) it is prohibited to discriminate between employees based on their age, unless there is a so-called 'objective justification'.

### **Practical information**

#### *Working conditions and working hours*

According to the *Arbeidsomstandighedenwet 1998* (Working Conditions Act 1998) and the *Arbeidstijdenwet* (Working Hours Act), the employer must pursue best practices to obtain the right working conditions. The employer is obliged to take all possible measures to protect his employees

and he must also observe the rules of Dutch labour law. If the employer does not comply with this obligation he is liable to a fine, imposed by the *Arbeidsinspectie* (Health and Safety Inspectorate).

Furthermore, the employer has to take the necessary measures in order to create a safe work environment for his employees. More specifically, the employer must protect his employees against injuries or illnesses due to or in the course of work. The employer is liable for any damage due to the illness or injury unless he can prove that he took all necessary measures to prevent such damage.

### *Work and Care Act*

According to the *Wet Arbeid en Zorg* (Work and Care Act), the employee is entitled to (paid) leave in case of childbirth (pregnancy), emergencies (urgent leave) or taking care of parents during their illness (care leave).

### *Pregnancy*

Female employees are entitled to pregnancy leave and maternity leave. A pregnant employee has the right to leave during a consecutive period of 16 weeks. In addition, she has the right to receive payment of 100% of her salary for a period of 16 weeks.

### *Parental leave*

Employees who have been employed for more than one year are entitled to unpaid parental leave if they take care of their child younger than eight years.

### *Employee handbook*

In general, the employer is allowed to give instructions regarding for example the use of e-mail and internet, company cars or safety. If the employee does not comply with these rules or instructions, the employer may take disciplinary measures. It is important that the employer makes sure that employees are aware of the rules of conduct and that disciplinary measures are laid down. It is therefore recommended to adopt a code of conduct or an employee handbook, which can be part of the individual employment agreement or can be accepted in writing separately.

### **Conclusion**

If you set up a business or an organization in the Netherlands you will have to deal with Dutch employees. There are many legal provisions that protect the interests of employees. Some of these legal provisions, such as equal treatment of men and women, are based on European law, but there are several important specific Dutch provisions. Minimum wages are fixed by law, as well as the number of days holiday. Furthermore, employers have a legal obligation to grant employees a holiday allowance every year.

## RUSSELL ADVOCATEN

Termination of an employment agreement is also bound by a number of specific legal provisions. The Netherlands is unique due to the preventive dismissal assessment. Apart from interference by a judge or specific cases, like a dismissal on the spot or during the probationary period, an employer can only end the employment agreement upon notice if he has a UWV permit. However, this rule does not apply to embassies.