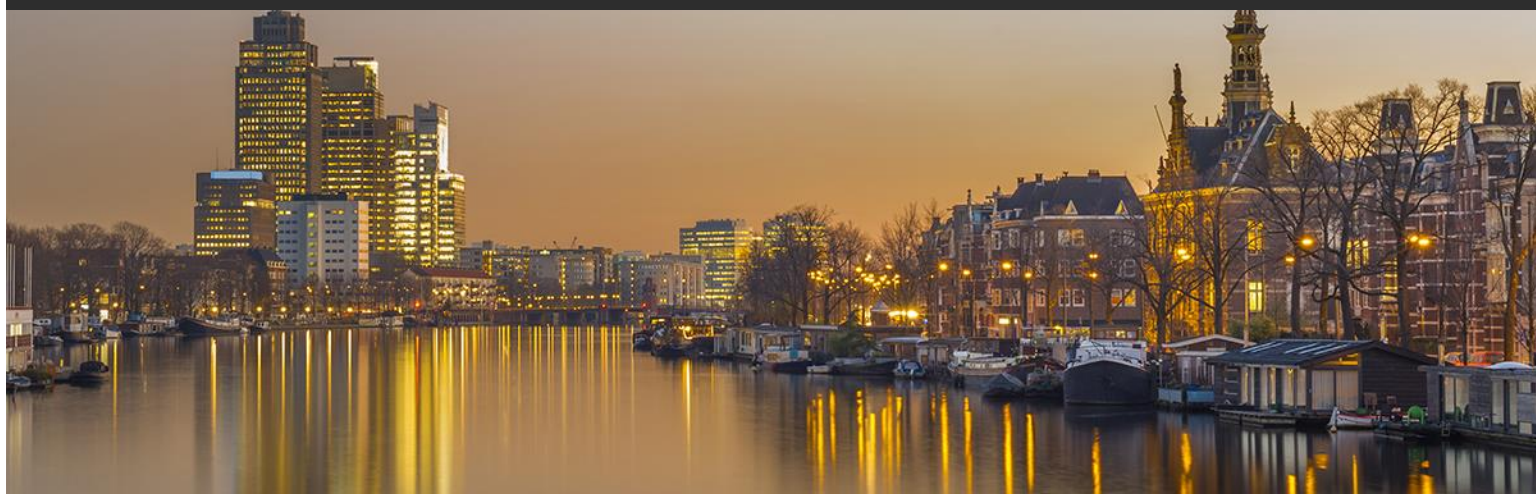


Alert | Labor & Employment



January 2021

Dutch Labor, Employment, and Pensions Update

Stricter Conditions of the NOW 3 Set Aside

On 9 December 2020, the Dutch government announced that the Third Emergency Bridge Measure for Conservation of Work (*Derde Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud*) (the **NOW 3**), which consists of three phases between October 2020 and June 2021, will not be augmented for the second phase. NOW 3 is a scheme that provides for compensation to employers of wage costs in the event of significant (20/30%) turnover loss compared to the year 2019 due to Coronavirus Disease 2019 (COVID-19). The phases of the NOW 3 are as follows:

- 1 October 2020 – 31 December 2020 (**NOW 3.1**)
- 1 January 2021 – 31 March 2021 (**NOW 3.2**)
- 1 April 2021 – 30 June 2021 (**NOW 3.3**)

The government announced that NOW 3.2 will be consistent with NOW 3.1. NOW 3.2 was initially planned to be stricter than NOW 3.1, with the turnover loss threshold during NOW 3.2 to be raised from 20% to 30% and the compensation of the wage costs to be a maximum of 70% instead of 80% of the total wage sum (capped per employee at EUR 9,538 gross per month). The possibility of decreasing the wage sum remains 10% compared to the wage bill of June 2020, without any adverse effects on the subsidy amount (i.e., the subsidy amount will not be adjusted downwards within the indicated percentage in case

of dismissals, natural outflow of staff or pay cuts). Companies can request wage compensation under NOW 3.2 from 15 February 2021 through 14 March 2021.

Supreme Court: How the Work is Performed Qualifies the Legal Relationship; Intention of Parties Less Relevant

On 6 November 2020, the Dutch Supreme Court ruled that parties' intent when entering into an agreement is no longer a relevant element when assessing if such agreement can be regarded as an employment agreement or independent service contract (*opdrachtovereenkomst*). Before this ruling, the prevailing doctrine was that the parties' intent had to be considered first, and it was important to assess the manner in which the agreement had been implemented. The Supreme Court has now ruled that if the agreed upon rights and obligations comply with the legal definition of an employment agreement, an employment agreement is in place.

The parties' intent may still play a role when determining what the agreed upon rights and obligations are. This because in the Netherlands the interpretation of contract provisions must not only be assessed in the literal sense but also based on the meaning the parties could have reasonably attached to the contract provisions in the particular circumstances and what they could have reasonably expected.

It is important to take this ruling into consideration when entering into an independent service contract and to pay more attention to the specific provisions underlying the work. If, for example, employer authority (*gezagsverhouding*) over work exists, the risk of reclassification – which can lead to taxes, employer levies, and fines being due retroactively, and issues in case of sickness and proposed terminations – is significant

Introduction of Pilot Web Module for Assessment of Independent Workers

On 11 January 2021, the Dutch government introduced a pilot web module that should provide parties more certainty upfront on the question of whether services can be provided without entering into an employment agreement. The pilot aims to enable companies to obtain a declaration that services can be performed outside of an employment relationship if such declaration follows from the answers to the questionnaire. This declaration will provide certainty upfront that no withholding obligation for wage tax and social security contributions exist, provided that the questionnaire has been completed truthfully and that the work is implemented in accordance with the provided answers.

During the pilot, which will last at least six months, it is not possible to derive any rights from the outcome of the web module questionnaire. However, the module can help inform whether an underlying relationship should be carried out under an employment agreement. Due to the introduction of the pilot, the government has announced that the enforcement moratorium of the tax authorities that is currently applicable will be extended to Autumn 2021. During the (extended) moratorium the tax authorities will only take action against bogus self-employment in case of malicious intent (*kwaadwillendheid*) or if the underlying relationship is not adjusted within a reasonable period following an instruction from the tax authorities. [View the web module \(in Dutch\) here](#); [view the English version here](#).

Temporary Easing of the Early Retirement Scheme Levy (RVU)

If an employee receives compensation for the sole purpose of bridging the period up until the retirement date (i.e., pensionable age) or the state's pension age (which is currently 66 and four months (*AOW-gerechtigde leeftijd*)), a punitive tax levy of 52% over such bridge compensation (e.g., severance payment) applies. On 17 November 2020, the Dutch House of Representatives (*Tweede Kamer*) unanimously

approved a temporary exemption to the Early Retirement Scheme Levy (**RVU**). With the temporary easing of the RVU, this punitive levy will not be applicable to bridge compensation up to a maximum of the grossed-up amount of the net AOW-benefit (*AOW-uitkering*) (i.e., EUR 1,767 per month). This exemption is only applicable to compensation related to the period in which employees will reach the retirement date / state's pension age within three years.

The temporary exemption to the punitive levy will be introduced as a concession for employees who have been confronted with the accelerated increase of the state's pension age and may not be able to work through the retirement date. Further specification of the exemption to the RVU will be possible on a sectoral level. The RVU exemption is currently pending before the Senate (*Eerste Kamer*), but may come into force with retroactive effect from 1 January 2021, and will apply for at least five years.

Adequate Pension for Payroll Employees as of 2021

Since 1 January 2020, payroll employees are entitled to at least the same employment conditions as employees working in equal or similar positions employed by the company that hires them. This arrangement is further expanded as part of the Balanced Labor Market Act (*Wet arbeidsmarkt in balans*), with the obligation for the hirer to offer an adequate pension scheme as of 1 January 2021. This obligation applies if:

- employees in equal or similar positions employed with the hirer are offered participation in a (collective) pension scheme; or
- employees in the sector in which the hirer operates are entitled to participation in a (mandatory industry wide) pension scheme.

** This GT Alert is limited to non-U.S. matters and law.*

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