The Legal 500 & The In-House Lawyer
Comparative Legal Guide
The Netherlands: Employment & Labour Law

This country-specific Q&A provides an overview to employment and labour law in The Netherlands.

It will cover termination of employment, procedures, protection for workers, compensation as well as insight and opinion on the most common difficulties employers face and any upcoming legal changes planned..

This Q&A is part of the global guide to Employment & Labour. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/employment-labour-law/

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1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful?**

   In 2015 the Work and Security Act came into force, which amended Dutch dismissal and unemployment laws. Now the dismissal of an employee can only be based on one of the statutory grounds. A distinction is made between indefinite and fixed-term contracts.

- The unilateral termination of an indefinite contract must be justified by ‘a reasonable ground’. What constitutes a reasonable ground is stated exhaustively in the Dutch Civil Code. Any termination of a contract not based on any of these grounds is invalid without consent of the employee.

  The grounds for termination stated in the Dutch Civil Code are:

  a. (Business) economic reasons, e.g. a reorganisation, relocation or close down of a company;

  b. Frequent illness absence, where no improvement is expected within 26 weeks and it is not possible for the employer to arrange cover for the employee’s workload during this period;

  c. Being occupationally disabled for a long period of time;

  d. Poor performance and the employee has been given sufficient opportunity to improve his or her performance and has been notified of the consequences of failure to do so;

  e. Culpable behaviour;

  f. Serious conscientious objections to his duties by the employee;

  g. Disturbed working relations, which causes an unrepairable relation between them;

  h. Other circumstances that are of such a severe nature that continuation of the employment contract cannot reasonably be expected.

  Termination for an urgent reason is also a possibility. This is possible only in very exceptional cases, e.g. gross negligence in the performance of duties, theft or fraud.

The employer must substantiate the ground(s) sufficiently. The consequences of the termination will be compensated by the employer through a ‘transition payment’.

- The unilateral termination of a fixed-term contract can be done by including a termination clause in the employment contract. An employer has to pay severance payments if he terminates without a termination clause.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?

Specific information and consultation rules apply in case of collective redundancy according to the Collective Dismissal Notification Act. These rules apply when 20 or more employees are dismissed within a period of three months.

An employer must inform or consult the trade unions, involve the works council if present, notify the UWV (Dutch Employee Insurance Agency), observe a one-month waiting period, apply for dismissal permits or terminate the employment contracts with mutual consent and give notice.

The notification of trade unions must be done timely as to allow for timely consultation. The advice of the works council must be requested in writing and in sufficient time for the council to impact the planned decision significantly.

3. What, if any, additional considerations apply if a worker’s employment is terminated in the context of a business sale?

In the context of a business sale employees transfers to the new company, their new employer, with preservation of all their rights and duties. Pursuant to the Dutch Civil Code and the Council Directive the transfer of business shall not in itself constitute grounds for termination. Termination before the transfer of business with a view to the transfer in question is legally invalid.

Following from the Council Directive dismissals may take place for economic, technical or organisational reasons entailing changes in the workforce, provided that the reason shall not be the transfer in itself.

4. **What, if any, is the minimum notice period to terminate employment?**

In case of an open-ended contract the minimum statutory notice period to be observed by the employer is at least one month, or longer if the duration of the contract is more than five years.

The notice period for termination of employment by the employee is also one month.

Parties can agree on a deviating notice period in the employment contract. In that case the notice period to be observed by the employer must be double the notice period for the employee. Employer has to observe, if present, notice periods determined by the applicable collective bargaining agreement (CBA).

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

It is not possible to convert the obligation to observe the notice period in to one-off payment. However, the party terminating the employment in breach of the notice period will have to pay compensation, which is fixed to the salary that would have been paid when the notice period would have been duly observed.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period**

but require him to say at home and not participate in any work?

Dutch employment law does not have the concept of garden leave. As a main rule an employee is entitled to be allowed to his/her work, as well during the notice period.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

Firstly, the employer must set out the grounds of termination precisely in the notification letter. The ground on which the termination of the employment is based determines the procedure the employer must follow. Termination based on (business) economic reasons or long-term disability, which is the case if an employee has been incapacitated for in excess of 2 years (grounds a and b of question 1) must be assessed by the UWV beforehand. Termination based on the other exhaustive grounds (c through h of question 1) shall be assessed by the labour department of a district court.

The UWV-procedure requires:

- The employer to send an application for a dismissal. The reasons for the application must be substantiated sufficiently to carry the dismissal and the employer must prove that he did enough to prevent the dismissal;
    - There are several specifics in case of (business) economic reasons. Employer must fill in 3 different forms, A, B and C. Employer must make the structural redundancy of jobs due to the close down of business or actions to continue the business plausible. Several other factors must be substantiated to make a successful application;
- The assessment of the application takes approximately 4 weeks;
- The employee can put up a defence if he does not agree with the application. This instigates the hearing of both parties. Parties can request an expert opinion in this stage;
- After this round the UWV will give a decision. Parties can enter an objection to this decision at the district court judge. After this objection the procedure follows the normal

Dutch civil procedure rules.

The district court procedure requires:

- Employers have to submit an application to the district court judge requesting the termination of the employment contract;
- The employee is allowed to send in a state of defence.
- The judge will dissolve the employement, provided that reasonable grounds do occur', meaning one of the grounds of points c through h of question 1.
- When terminating an employment agreement of an employee who has been in the employer's service for 24 months, the transition payment is due by operation of law. The judge may grant fair compensation in excess when the employer is seriously culpable.

It is always possible to terminate the employment by mutual consent. This, of course requires a settlement agreement.

8. **If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?**

Failure to set out and substantiate the termination grounds may result in a rejection of the request by either UWV or district court. The district court may under special circumstances nevertheless terminate the employment, granting an additional compensation on top of the transitional payment.

9. **How, if at all, are collective agreements relevant to the termination of employment?**

Collective agreements can contain deviating notice periods (question 4) and specific rules for collective redundancy. Collective agreements can also contain clauses for instituting Redundancy Committees and clauses regarding the transition payment.

10. **Does the employer have to obtain the permission of or inform a third party (eg local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?**

Yes, see question 7 and 8.

11. **What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?**

The rules and provisions regarding equal treatment stretch to all phases of the employment contract, including the termination. A termination based or relying on discriminatory reasons (e.g. origin, gender, family status, sex, race, age, political orientation) or a termination applied pursuant to acts of harassment will be annulled by the court. The employee can be entitled to reinstatement or high damages due to a ‘serious imputable act’.

12. **What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?**

See question 11.

13. **Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the**

termination of employment?

In Dutch law a distinction is made between two categories of prohibition of termination. One category are the ‘during-prohibitions’ concerning employees under sick leave, unless the disability lasted more than two years or it commenced after the application to the UWV, pregnant employees, employees on compulsory military service or employees who are members of the works’ council. In these circumstances the employee is protected against the termination of the contract except for specific situations, such as a serious imputable act by the employee or the closing down of the company.

The other category is the ‘because of-prohibition’. An employee cannot be dismissed because of a certain capacity of him or her, e.g. being a member of an union, political leave, the transfer of business or not wanting to work on a Sunday. Neglecting these prohibitions entitles the employee to reinstatement or high damages.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

An employee who disclosed properly and in good faith a suspected abuse as meant in the Whistleblowers Authority Act shall not be treated unfairly by the employer during and after the processing of his disclosure by the employer or the competent authority.

15. What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?

If Dutch law is applicable to the employment contract the employer must pay the employee a statutory transition payment on non-renewal of a fixed-term contract of two years or more or a dismissal after two year’s employment, unless the dismissal is the result of seriously culpable conduct.

Transition payments are linked to length of service and age:

- For the first 10 years of employment: the payment is one-sixth of the monthly wages for each completed six months of service;
- For the following 10 years of employment: the payment is one-quarter of the monthly wages for each completed six months of service;
- In the case of an employee aged over 50 and employed for more than 10 years: the payment is one-half of monthly wages for each completed six months of service. However, this is a transitional arrangement lasting until 2020 that does not apply to small employers with fewer than 25 employees.

For calculating the transition payment the monthly wages include holiday pay, overtime, shift allowances and bonus payments. The transition payment is capped at € 79.000 or at one year's salary, whichever is greater.

Parties are free to agree on a higher amount than stemming from the abovementioned calculation.

An employee is entitled to additional compensation if the employer's conduct has been seriously culpable. Collective bargaining agreements may deviate the calculation of the payment as long as the employees receive equivalent compensation.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

If the employer and the employee reach a termination agreement they are free to exclude the termination payment. However, in most termination agreement negotiations the payment will be considered, because the goal is to end the employment contract without following one of the 'formal' routes. Most employees will not sign a termination agreement without any remuneration.

Statutory rights of the employee based on the Dutch labour laws cannot be excluded in return for payment.

17. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Non-compete clauses are a common type covenant in the Netherlands. A distinction is made between non-compete clauses in fixed-term and open-ended employment contracts.

Non-compete clauses in open-ended contracts will in principle be valid, if the formal requirements are met. There are two formal requirements: the employee must be ‘of age’, i.e. 18 years or older, and the clause must be agreed with employee in written form.

However, non-compete clauses in fixed-term contracts will in principle be invalid, unless the employer demonstrates in writing that a non-compete clause is necessary for substantial business reasons. These reasons must be included in the contract and in every following, subsequent, fixed-term contract, to prevent the clause losing its effect.

If the employee is seriously restricted from accepting employment elsewhere due to the non-compete clause, the court may decide to award compensation to the employee.

Non-compete clauses cannot be invoked by the employer in both situations if the termination of the contract is the result of seriously culpable conduct of the employer. The employee has no right to compensation, if the conduct is attributable to him or her.

Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Confidentiality clauses are also common in the Netherlands. The clause prohibits the employee exposing certain information about the company, the organisation and the internal and external contracts of the employer, unless the employer allows him or her to do so. Clauses that stay in force after the ending of the contract are in principle valid, unless it 'weighs more heavily' on the employee to justify the validity.

Confidentiality clauses are not included in Dutch law (yet), so they are not bound to certain statutory requirements.

The non-existence of a confidentiality clause in the employment contract does not mean that an employee is free to share 'secrets' of his (former) employer with third parties.

19. Are employers obliged to provide references to new employers if these are requested?

Employers are not obliged by law to provide references to new employers. Employers are however obliged to issue a certificate when the employment is terminated.

If an employer gives references he must provide this truthfully to avoid being liable to the new employer.

20. What, in your opinion, are the most common difficulties faced by employers when terminating employment and how do you consider employers can mitigate these?

When considering the exhaustive grounds for dismissal, as laid down in the law, the most common problems occur when initiating a dismissal on personal grounds. The court's assessment is strict and requires substantive proof. Since the July 2015, when the new employment law came into force an employer can not combine several grounds for the dismissal. If several dismissal grounds occur each and everyone of

these grounds needs to justify the dismissal. Accumulating all grounds does not strengthen the case anymore.

If a dismissal ground is related to an economical ground the principle applied to select the employees who need to be made redundant requires a classification of the job categories. To a certain extend this classification of jobs can be controlled. However, when it comes down to selecting employees working in a certain job classification the rules are strict, so it is difficult to make a choice for the ‘better woman/man’.

As regards dismissal for economical grounds very often the works council plays a significant role, as do the trade unions. This may result in sensitive manoeuvring and time-consuming delays.

21. **Are any legal changes planned that are likely to impact on the way employers approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?**

The route the employer has to choose to terminate a contract is determined by what ground it is based on. Before the Act the court had a broader competence concerning the h-ground to decide if ‘circumstances that are of such a severe nature that continuation of the employment contract cannot reasonably be expected’ were present. The judge could compensate ‘imperfect grounds’ by awarding a higher allowance.

The h-ground reads as an open norm, but it is not meant to be interpreted that way. It concerns situations which cannot be based on and are separate from one of the other grounds. The h-grounds is not meant to ‘fix’ an imperfect a- to g-ground.

Changes to bring back this competence are planned and allowing the judge to fix ‘imperfect grounds’.