Employment Law

NEWS

Post-Brexit Immigration Challenges in the Netherlands

and further information from the Employment Law environment

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Editorial

Dear reader,

Who would have thought a year ago that we would still be dealing with the consequences of the corona epidemic today? Sadly, the reality is different. To this date, the effects have been felt all over the globe. The lockdown not only has a huge economic impact, but it also affects society in a social way.

From an employment law perspective, the epidemic leads to new judicial questions. Should employers continue to pay wages during a lock-down and can employees be forced to be vaccinated before resuming their work? May employers record whether employees have been vaccinated or does this violate the right to privacy? And how does this relate to the statutory obligation of employers to ensure a safe working environment? Several of these questions will be addressed in this newsletter.

In addition, this newsletter also addresses other topical issues, such as Brexit, immigration, and new laws and regulations on dismissal and remote working. No fewer than 12 contributions from eight different jurisdictions make this newsletter a very readable and bright publication, which I warmly recommend. I kindly thank all the contributing authors for the great work they have done to make this newsletter possible.

Let's hope that somewhere behind the horizon a post-corona time will shine. With spring on its way, I am reminded of one of the most quoted opening lines in Dutch poetry, written by Herman Gorter in 1889:

"The Spring is new and new
the sound it brings."

I wish you all a beautiful spring in good health!

Kind regards,

Jeffrey L. R. Kenens
Global Chairperson of the GGI Employment Law Practice Group

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Post-Brexit Immigration Challenges in the Netherlands

By Wytske Wijnnobel

Nothing new under the sun: the UK left the EU on 31 January 2020. Up to 31 December 2020, there was a transition period, making it possible for UK nationals to continue living and working in the Netherlands. As of 01 January 2021, living and working in and travelling to the Netherlands is not to be taken for granted. Due to Brexit, individuals and companies need to pay serious attention to the immigration requirements.

We will first distinguish between three timeframes to maintain an overview: immigration requirements *prior* to Brexit, *during* the transition period, and *after* Brexit. Under each time frame, we will focus on the following immigration categories: long-term assignments, short-term assignments, frontier workers, and business travellers.

Before Brexit

Before Brexit, UK nationals could travel to the Netherlands based on their UK passport. The length of their stay was not restricted. Additionally, they could work in the Netherlands without a work permit. As a result, UK nationals in one of the four aforementioned categories, were able to travel, live, and work in the Netherlands without facing any immigration restrictions.

GGI member firm
LIMES International B.V.
Tax, Advisory, Fiduciary and Estate Planning
Valkenburg ZH, The Netherlands
T: +31 88 0899 000
W: limes-int.com
Wytske Wijnnobel
E: wytske@limes-int.com

LIMES International B.V. is an independent international tax consultancy firm specialising in cross-border issues. They focus exclusively on companies and expats that cross borders, providing them with a broad range of integrated solutions in tax and global mobility, legal, payroll, immigration, social security, HR, and VAT services.

Wytske Wijnnobel

Wytske Wijnnobel is an immigration specialist of LIMES International with more than 10 years of experience in individual and corporate immigration issues.

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During the Transition Period

As a result of the Withdrawal Agreement, UK nationals could still travel to the Netherlands based on their nationality prior to 01 January 2021. They could also start living and working in the Netherlands. However, UK nationals on a long- or short-term assignment and frontier workers who continue after 31 December 2020 should apply for a Withdrawal Agreement residence document prior to 01 July 2021. Frontier workers must apply for a frontier worker's document to continue their activities in the Netherlands after 31 December 2020. During the transition period, business travellers could still travel to the Netherlands and attend business meetings. They could also work in the Netherlands during the business trip based on their UK passport.

After Brexit

The transition period ended on 31 December 2020. After this date, UK nationals are no longer covered by the Withdrawal Agreement. UK nationals may travel to and stay in the Netherlands, if their stay does not exceed 90 days within 180 days. Please note that the duration of stay in other Schengen countries should be considered when calculating the 90-day period. However, living and working is, in most cases, no longer possible without a residence and work permit.

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Generally, the following applies: if the assignment lasts less than 90 days, a work permit is required. If the assignment exceeds 90 days, a residence permit is required as well.

UK nationals on a short-term assignment who stay in the Netherlands for less than 90 days need a work permit. UK nationals who stay in the Netherlands for more than 90 days need to apply for a residence and work permit with a specific purpose, such as the highly skilled migrant permit or the intra corporate transferee (ICT) permit.

Depending on the duration and activities, frontier workers may also need to apply for a work permit.

Business travellers need to verify the required travel and work documents upfront. If the 90 days within 180 days is not exceeded, the business traveller can travel to the Netherlands and can, for example, participate in commercial transactions or negotiating contracts. However, he is not allowed to do regular work. The business activities permitted without a work permit are more comprehensive for UK nationals than for other third country nationals.

It is recommended that, prior to each trip, the business traveller/employer verifies which travel and work documents are required based on duration of the trip and type of work.

Conclusion

Free movement of UK nationals used to be a fundamental right within the European Union. Brexit has a significant impact on UK nationals when it comes to immigration and relocation. Our immigration team would be happy to assist.

New Legal Challenges Face Those Hiring, Retaining Remote Workforce

By Kelly Holden

In today's largely remote work environment, companies face additional legal challenges in hiring and retaining top talent. Many hiring managers and supervisors have adjusted their application processes, with many conducting interviews and extending offers remotely.

There are numerous HR and employee morale policies and issues that also affect retention and having an effective workforce, according to Kelly Holden, chair of DBL Law's Employment Law

GGI member firm
DBL Law
Law Firm Services
Cincinnati (OH), Crestview Hills (KY), Louisville (KY), USA
T: +1 859 341 1881
W: dbllaw.com
Kelly Holden
E: kholden@dbllaw.com

Kelly Holden

DBL Law is a full-service law firm providing premier legal services and business advice in a collaborative manner, with integrity, professionalism, and respect, as a strategic partner with its clients. The firm has 50 attorneys and offices in Cincinnati (OH), Crestview Hills (KY), and Louisville (KY). **Kelly Holden** leads DBL Law's Employment & Labour practice group, representing private and public employers in all facets of employment law. She advises clients on employment law compliance, drafts non-compete agreements, employee policies, and handbooks, and provides training on such issues.

practice. “The I-9 process is entirely different if there are no in-person meetings. United States Citizenship and Immigration Services (USCIS) has issued guidelines addressing remote workers and how to check documents. There are also issues with how to train and orient workers remotely to ensure they receive the same type of orientation they would in person, including receiving a copy of the employee handbook.”

Wage and hour laws still apply for keeping track of hours for hourly workers and paying overtime. “If an employer is hiring a salaried worker and they fall into the executive (managerial) exemption, they must supervise the equivalent of two or more full-time workers and this is more challenging in a remote work environment,” Kelly remarked, adding, “There can still be worker’s compensation issues that apply to remote workers as well as Title VII, ADA, ADEA and all anti-discrimination laws.” This new environment adds a layer of complexity to already complex and ever-changing employment laws.

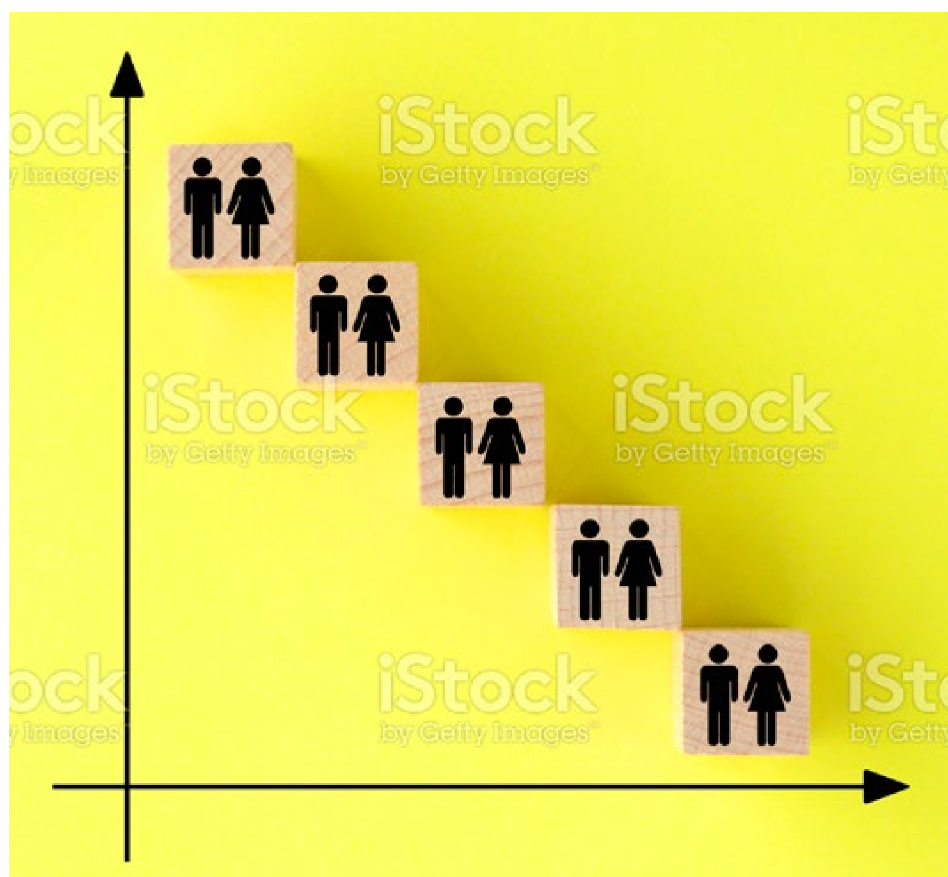
Another Side to Collective Redundancies

By Jeremiasz Kuśmierz

The legal framework for collective redundancies was unified across the EU 23 years ago. However, there remain substantial differences between states and as a result, collective redundancies are still rife with challenges and costs.

Outplacement is one such challenge. It includes all potential services and measures facilitating the redeployment of employees made redundant. Outplacement packages can be particularly pricey and oppressive, especially for employers burdened with a drop in revenue caused by COVID.

The directive implemented 23 years ago is frugal with respect to mandatory outplacement services. Collective consultation must at least cover the ways and means of mitigating the consequences of redundancies by recourse to accompanying social measures aimed at aid for redeploying or retraining workers.



Regulations in Poland, for example, do not extend beyond the minimum level of protection, so the employer is not responsible for providing any outplacement programme to employees made redundant, even if this is raised by unions.

Polish law provides for a special regime for redundancies where the employer intends to dismiss more than 50 employees within three consecutive months. Such a redundancy must be flagged to the local Labour Office. The employer must

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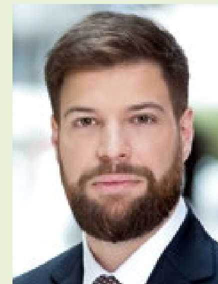
then consult with the Office, which is partially responsible for retraining.

This often comes as a surprise to companies from other jurisdictions, where it is typical for all such costs to be borne by the employer.

Although outplacement obligations are not expensive in Poland, due to liberal laws, and amount to only a small proportion of the total costs of collective redundancies, there is much to be said for employers putting more effort into planning outplacement programmes that, in the long run, may provide substantial benefits to the overall collective dismissal by cooling emotions and keeping employees on board during the entire process.

GGI member firm
Penteris
Law Firm Services
Warsaw, Poland
T: +48 22 257 83 00
W: penteris.com
Jeremiasz Kuśmierz
E: jeremiasz.kusmierz@penteris.com



Jeremiasz Kuśmierz

Penteris is a European law firm combining in-depth expertise, robust advice, and a pan-regional reach. We are committed to keeping clients ahead of the market with hard skills, legal acumen, and service-minded know-how. **Jeremiasz Kuśmierz** is focused on new tech and believes it to be the foundation of future business. His global outlook is highlighted by his participation in multinational deals involving China and Europe. He spreads his work across dispute resolution, employment, compliance, and risk management matters.

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The Implications of the New Labour Code for Foreign Companies in Vietnam

By David Lang and Nga Dinh

Vietnam has approved an amended Labour Code, which came into effect in January 2021. Most of the code remains the same; however, changes have been introduced in respect of hiring and firing employees. This is a big step towards aligning with international labour standards, as the government integrates into the larger global economy.

1. Hiring the employees

Regarding working hours, the new code states that normal working hours cannot exceed eight hours a day or 48 hours per week. However, the working hour limit remains the same at 48 hours per week. As seasonal labour contracts have been removed, employers have only two forms of labour contract: indefinite-term labour contracts and definite-term labour contracts of a maximum of 36 months. Moreover, electronic labour contracts in data message form are now formally accepted.

From a recruitment perspective, probationary periods can last up to 180 days for managerial positions, which greatly favour an employer. Employers and foreign employees may enter into multiple definite-term labour contracts. For example, the maximum duration of a work permit is two (2) years, instead of four (4), and can be renewed on an unlimited basis. This regulation aims to guarantee that the term of the expat employee's labour contract shall be consistent with his/her obtained work permit.

2. Unilateral termination by an employee

From an employee perspective, an employee now has the right to unilaterally terminate a labour contract

without any reason, under the Labour Code 2019. However, employees need to give their employers' proper notice in advance: at least 45 days in the case of an indefinite-term labour contract, at least 30 days in the case of a definite-term labour contract of 12 to 36 months, and at least three working days in the case of a definite-term labour contract of fewer than 12 months.

GGI member firm
Viettonkin Consulting
Advisory, Auditing and Accounting, Corporate Finance, Tax
Hanoi, Vietnam
T: +84 94 5086038
W: viettonkinconsulting.com
David Lang
E: truong.lang@viettonkin.com.vn
Nga Dinh
E: nga.dinh@viettonkin.com.vn

Founded in 2009, **Viettonkin** is a multi-disciplinary group of consulting firms specialised in accounting, legal, and a one-stop solution to FDI enterprises worldwide. The FDI consulting company aims to facilitate and connect investors in Southeast Asia with the rest of the world.

David Lang

David Lang is the Founder and CEO of Viettonkin. He has over 10 years of experience, focused on FDI investment and supporting worldwide enterprises.

Nga Dinh

Nga Dinh is an HR Manager at Viettonkin with considerable expertise in employee relations and legislation.

Statutory Period of Notice for Service Contracts with Managing Directors:

New Decision of the German Federal Labour Court of 11 June 2020

By Dr Angelika Baumhof and Cathrin Kirchbach

The Federal Labour Court (BAG) has ruled that in the absence of a contractual provision on the period of notice in service contracts with managing directors, the statutory provision of § 621 of the German Civil Code (BGB) applies. The decision is surprising, as the Federal Court of Justice (BGH) has so far assumed an analogous application of § 622 BGB (only applicable to employment contracts) in order to protect minor shareholding and third-party managing directors.

The BAG, on the other hand, does not consider the requirements for analogy to be given, as this would conflict with the case law of the BAG on employee-like persons, who are generally more economically dependent and therefore need more social protection than managing directors.

§ 621 BGB determines the notice period based on the periods for which the remuneration is calculated. If the remuneration is calculated on a monthly basis, the employment

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relationship can be terminated at the latest on the 15th of a month to the end of the month. If the remuneration is calculated based on longer periods, the employment relationship may be terminated with six weeks' notice to the end of a calendar quarter. § 622 BGB, on the other hand, provides for a notice period of four weeks to the middle or end of a month, which applies to both parties. For the employer, this notice period is extended, with increasing length of service to up to seven months to the end of the month. § 622 BGB is therefore in the interest of managing directors.

Thus, in view of the divergent provisions of § 621 and § 622 BGB, it is now necessary to determine a notice period in employment contracts for managing directors. For existing contracts that only refer to the statutory notice periods, contractual clarifications or new provisions are now required.

GGI member firm
Jakoby Dr Baumhof
Auditors Tax Consultants Lawyers
Auditing & Accounting, Tax, Law Firm Services, Advisory, Corporate Finance
Rothenburg o.d.T., Ebersberg, Germany
T: +49 9861 9405 0
W: jakoby-baumhof.de
Dr Angelika Baumhof
E: angelika.baumhof@jakoby-baumhof.de
Cathrin Kirchbach
E: cathrin.kirchbach@jakoby-baumhof.de

Jakoby Dr Baumhof – Auditors Tax Consultants Lawyers is a medium-size interdisciplinary company located in the south of Germany, with offices in Rothenburg ob der Tauber, located in Northern Bavaria, and Ebersberg, near Munich.

Dr Angelika Baumhof

Cathrin Kirchbach

Dr Angelika Baumhof specialises in Corporate and Commercial Law and Contractual Civil Law. She started her career as a judge at the District Court of Munich and as a prosecutor in Munich. Since 1996, she has been Partner at Jakoby Dr Baumhof. Her main field of expertise is consulting, but she also practices litigation in all fields of commercial and private law. **Cathrin Kirchbach** is an attorney at law who specialises in Individual and Collective Labour Law. She also advises on social law. She speaks German and English.

JAKOBY
DR. BAUMHOF
Wirtschaftsprüfer
Steuerberater
Rechtsanwälte

Big Immigration Win for Employers: California Judge Strikes Down H-1B Visa Restrictions

By Mohammad Ali Syed

On 01 December 2020, a California federal judge struck down the Trump administration's policies tightening eligibility and raising minimum salaries for foreign employees on high-skilled work visas, finding that the administration had not justified its choice to skip key procedural steps.

US District Judge Jeffrey White, a George W. Bush appointee, found that the unemployment crisis caused by the coronavirus pandemic was not "good cause" for the US Department of Homeland Security and US Department of Labour to flout the proper regulatory procedure when issuing the two policies, which aimed to crack down on H-1B specialty occupation visas.

The Labour Department's salary requirements took effect immediately upon publication in October, while DHS' new criteria rules were set to take effect in December.

"The Court cannot countenance – reluctantly or otherwise – Defendants' reliance on the COVID-19 pandemic to invoke the good cause exception", Judge White said. "The pandemic's impact on the economy is the only reason DHS proffered as good cause, and Defendants do not dispute that the failure to provide notice and comment was prejudicial."

The case is *Chamber of Commerce of the United States of America et al. v United States Department of Homeland Security et al.*, case number 4:20-cv-07331, in the US District Court for the Northern District of California.

GGI member firm
Offit Kurman, Attorneys at Law
Advisory, Corporate Finance, Fiduciary and Estate Planning, Law Firm Services, Employment and Immigration
More than 10 offices throughout the US
T: +1 240 507 1784
W: offitkurman.com
Mohammad Ali Syed
E: mo.syed@offitkurman.com

Mohammad Ali Syed

Offit Kurman is a full-service law firm with over 225 attorneys focused on representing privately held businesses. With deep experience and knowledge dealing with the issues that business owners are regularly faced with, they bring value to every relationship. **Mohammad Ali Syed (Mo)** is a Principal with Offit Kurman in the Washington, DC, metro area, where he is head of the firm's Immigration Practice. He has broad experience in business, employment, and investment-based visas and immigration. Mo is former co-chair for the Immigration and Nationality Committee of the ABA International Law Section.

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The Implications of "Long COVID" on the Workplace: A New Type of Disability?

By Liam A. Entwistle

We are all coming to terms with the impact of the COVID-19 pandemic in relation to the economic impact on employers, the arrangement of their workplaces in the future, and whether the sudden imposition of remote working has changed the make-up of their workplaces for good. It also applies to those many thousands of people who were unfortunate enough to contract COVID-19.

A difficult implication of COVID-19, known as Post-COVID Syndrome or "Long COVID" has now arisen. The National Institute for Health and Care Excellence has, in its guideline scope, defined Long COVID as "signs and symptoms that develop during or following an infection consistent with COVID-19 which continue for more than twelve weeks and are not explained by an alternative diagnosis".

The definition refers to clusters of symptoms, including "generalised" pain, fatigue, persisting high temperature, and psychiatric problems. There are similarities to the early definitions of chronic fatigue syndrome ("ME").

COVID-19 does not have to be diagnosed. The current evidence suggests that Long COVID symptoms are persistent and debilitating. It may be difficult to differentiate Long COVID psychiatric issues from those caused by the effects of national lockdowns.

The definition of disability in the Equality Act 2010 (S. 6(1)) is a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities

"Long-term" means over twelve months. Those who have presented with the earliest examples of Long COVID show that it easily lasts this length of time. The UK Courts say "substantial" means "not insubstantial", not a high hurdle. Certainly, extreme tiredness could easily have such an effect.
As workforces return to the workplace, given the loose definition of Long COVID, the low bar for establishing disability, and the impact of lockdowns, we can expect significant numbers of Long COVID diagnoses to cause lengthy absences from the workplace. If Long COVID is diagnosed or suspected, the condition should be treated as a probable disability. That should speed rehabilitation and avoid claims.

GGI member firm
Wright, Johnston & Mackenzie LLP
Law Firm Services
Glasgow, Scotland
T: +44 141 248 3434
W: wjm.co.uk
Liam A. Entwistle
E: lae@wjm.co.uk

Liam A. Entwistle

Wright, Johnston & Mackenzie LLP is an independent Scottish law firm offering the full range of corporate, dispute resolution, and private client services. They are GGI's sole Scottish member. **Liam A. Entwistle** is a Fellow of the Chartered Institute of Arbitrators and represents clients in arbitrations under many of the regulatory regimes, as well as acting as Arbitrator.

Preserve Employees by Avoiding Redundancies: The Partial Activity Scheme in France

By Santiago Guzmán

Due to the COVID-19 pandemic and to prevent redundancies, numerous measures have been implemented by the French Government.

One of the most known measures is the partial activity scheme, that allows all companies whose activity is or has been reduced due to the COVID-19 and, in particular, those that are subject to an obligation to close down (restaurants, coffee shops, malls, shops, etc.), to benefit from a lump-sum allowance co-financed by the State and the UNEDIC (unemployment agency).

Employees that have been placed in partial activity receive a compensatory indemnity from their employer. Through this scheme, the State and the UNEDIC will refund, in most cases fully, the sums paid by the employer to its employees.

How does it work?

- Partial activity scheme can be requested by businesses in exceptional circumstances (such as the COVID-19 pandemic);
- While the employment contract is suspended, the employee receives a compensatory indemnity from his employer. This indemnity must be at least equal to 70% of the prior gross remuneration. It can be increased by the employer;
- A partial activity request must be submitted by the employer online via a dedicated website;

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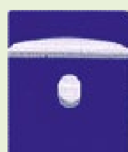
GGI member firm
FIDAG SARL
Audit and Accounting, Tax, Advisory and Corporate Finance
Paris, France
T: +33 1 42 80 20 81
W: fidag.com
Santiago Guzmán
E: santiago.guzman@fidag.com

Santiago Guzmán

FIDAG SARL was created in 1985 and specialises in accounting, auditing, and advice to SMEs where they are engaged in international operations, particularly tax issues, social and labour law, legal problems, accounting, and

Santiago Guzmán is an Employment law counsel at Fidag and a former Attorney at Law (Paris and Madrid Bars). He advises international companies in all French labour law-related issues.



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- The employees' representatives must be consulted about this measure. In the absence of employee representatives, the employer will directly inform his employees about the implementation of the partial activity scheme;
- Once the employer's request is authorised by the DIRECCTE (labour administration), the employer can claim for the partial activity allowance, paid by the Services and Payment Agency (ASP). From 01 March 2020 to 31 May 2020, the partial activity allowance received by the employer was equal to 70% of the employee's gross hourly pay. From 01 June 2020, the amount of the allowance has decreased: companies are thus reimbursed 60% of the gross salary, instead of the previous 70%. Sectors subject to particular legislative or regulatory restrictions (tourism, hotels and restaurants, cultural sector) are not concerned by this decrease. This percentage will probably be once again modified in the following months.

This scheme is part of the "whatever-it-costs" French government policy to face the COVID-19 crisis. In 2020, the estimated partial activity cost was EUR 27 billion.

Dutch Compensation Scheme for Paid Severance in Case of Company Closure Effective as Per 01 January 2021

By Jeffrey L. R. Kenens

In case of company closure due to retirement or death of the employer, small employers may apply for compensation of the paid statutory severance at the Employee Insurance Agency (UWV) as of 01 January 2021. The Dutch government has decided to do this because the payment of statutory severance in the event of the cessation of business operations may have undesirable financial consequences, particularly for small employers. Employers must pay statutory severance to employees whose employment contract was terminated at the employer's initiative or was

GGI member firm
TeekensKarstens advocaten notarissen
Law Firm Services
Alphen aan den Rijn, Amsterdam,
Leiden, The Netherlands
T: +31 71 535 80 00
W: tk.nl
Jeffrey L. R. Kenens
E: kenens@tk.nl

TeekensKarstens advocaten notarissen (TK) is a top 50 full-service Dutch law firm with extensive experience in the field of international law. TK established specific international teams to provide international clients tailor-made services and information.

Jeffrey L. R. Kenens

Jeffrey L. R. Kenens is a Partner at TK and part of the international corporate employment law team. He is also Global Chairperson of the GGI Employment Law Practice Group.

not continued, among other things, when the company is closed down. The compensation scheme for paid severance in case of company closure will enter into force on 01 January 2021.

As of this date, compensation can be requested for a paid severance allowance by the employer or the inheritors if the company is terminated due to retirement or death of the employer and if the other conditions are met. For example, it must concern a small employer (less than 25 employees) and at least one of the employees must have been granted a permit for dismissal by the UWV due to the termination of the business. Compensation due to retirement of the employer is only possible if the employer has reached the statutory retirement age. Only severance allowance paid as of 01 January 2021 can be compensated.

The possibility for compensation in the event of company closure due to employer sickness has not yet entered into force. Discussions are still underway between the Ministry of Social Affairs and Employment, the UWV, and professional associations in the field of occupational health and insurance regarding the way in which the assessment of sickness can be carried out.

Massachusetts Lawsuit Over Black Lives Matter Masks:

When it Comes to Employees' Self-Expression, Consistency is Key

By Jennifer Huelskamp

GGI member firm
Freeborn & Peters LLP
Law Firm Services
Chicago & Springfield (IL), USA
T: +1 312 360 60 00
W: freeborn.com
Jennifer Huelskamp
E: jhuelskamp@freeborn.com

Jennifer Huelskamp

Freeborn & Peters LLP is a full-service law firm in the US with international capabilities and offices in Illinois, New York, Virginia, Illinois and Florida. The firm serves clients across a broad range of sectors and targeted industries through its pioneer interdisciplinary approach. **Jennifer Huelskamp** is a Partner in Freeborn's Employment and Litigation Practice Groups, with a practice focused on employment litigation and counselling. She has significant experience representing clients in state and federal courts and in proceedings before government agencies.

In a recent federal case, Whole Foods employees alleged the grocer violated Title VII by discriminating against employees for wearing Black Lives Matter (BLM) masks. Plaintiffs alleged that disciplining employees for wearing BLM masks constituted unlawful racial discrimination and that discipline of employees for opposing the policy constituted unlawful retaliation.

The lawsuit alleged Whole Foods had a dress code policy prohibiting employees from "wearing clothing with visible slogans, messages, logos, and/or advertising that were not Whole Foods-related". Plaintiffs said the policy was rarely enforced until plaintiffs began wearing BLM masks. "For instance, employees wore items with LGBTQ+ messaging ... and other non-Whole Foods messaging."

Plaintiffs alleged that even the mask policy was not strictly enforced. Whole Foods denied the allegations and moved for dismissal, arguing plaintiffs failed to state

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a discrimination claim because they did not allege Whole Foods "disciplined or discharged any employees because of their race or applied the policy differently based on any employee's race".

Ultimately, the court dismissed all discrimination claims, reasoning, "[I]nconsistent enforcement of a dress code does not constitute a Title VII violation because it is not race-based discrimination". The court continued, "Title VII does not protect free speech in a private workplace". The court noted "because no plaintiff alleges that he or she was discriminated against on account of his or her race or that he or she was discriminated against for advocating on behalf of a co-worker who had been subject to discrimination, Plaintiffs have failed to state a claim for discrimination under Title VII".

This decision cautions employers that consistently applied policies are key in any workplace setting. This is the best practice for all employment policies, but especially in the enforcement of policies that implicate self-expression and free speech.

Ruling of Remote Working

By Roman Makarov

The COVID era demanded that the Russian Government settle the issue of remote work in more detail, which was not the focus of attention of federal legislators before.

As a result, Parliament answered several questions that life poses to employees and employers because of the massive transfer of staff to working from home. The law came into force on 01 January 2021.

The document introduces the concept of combined employment: when a person can work part of the time from home and spend the other part in the office. How many days per week, per month or how many working hours to devote to the office, and how many to work outside the office, must be decided by the employer in his policies and fixed by the parties in the employment contract.

The conclusion of such an employment contract is possible using an electronic signature and does not require paperwork, traditionally used earlier.

Earlier, the law required an employee to indicate their place of remote work; the new law abandoned this relic. Now the workplace can be wherever there is the Internet.

The legislation now protects employees from unjustified dismissals per maximum. To prevent remote workers from being forced to work 24/7, it establishes that employees have every right to go offline without any consequences. If they agree to be in touch around the clock, then the employer must pay them extra for overtime work.

Additional grounds for terminating an employment contract with a teleworker are as follows:

- An employee does not interact with the employer for more than two working days in a row without a valid reason from the moment

GGI member firm
Nektorov, Saveliev & Partners
Law Firm Services
Moscow, Russia
T: +7 495 646 81 76
W: nsplaw.com
Roman Makarov
E: roman.makarov@nsplaw.com

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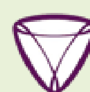
Roman Makarov is a Partner of Nektorov, Saveliev & Partners, specialising in dispute settlement and complex bankruptcy cases. Roman develops strategies and tactics of legal defence in court.

Roman Makarov



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the employer's request is received (unless a longer period is set);

- The employee changed the place of work, and this led to the impossibility of fulfilling duties on the same terms (for permanent distance employment contracts).

The beginning of a remote working day can be the time of entering the work mail, and the time of a call to the company's reception.

Does the employer have to pay the costs of electricity, telephone, internet, or depreciation of personal equipment? The law says that compensation for employees' personal expenses is at the goodwill of the employer. This issue can be resolved in policies or labour agreements.

Employers will be prohibited from tracking where employees work remotely.

At any rate, the remote performance of a labour function by any employee cannot be the basis for reducing their wages.

Leave on a Silver Platter

By Monika Birnbaum

Forfeiture of leave at the end of the year or at the end of the statutory forfeiture periods only if the employer reminds the employee

Everyone looks forward to their leave and often schedules it a long time in advance. Leave is taken when requested unless there are illness or business reasons for not taking it. And of course, there are also employees who consider themselves indispensable and postpone and save up their leave.

But what happens to leave that is not taken? Following the decision of the European Court of Justice (ECJ) of 06 November 2018 (C-684/16 on Art. 7 RL 2003/88/EC [Working Time Directive] as well as on Art. 31 para. 2 of the Charter of Fundamental Rights of the European Union), the German Federal Labour Court (BAG) has ruled that entitlement to the statutory minimum leave in principle only expires according to Sec. 7 para. 3 BUrlG at the end of the calendar year, or a permissible extension period, if the employer has previously specifically requested the employee to take his leave in good time in the leave year, and has informed him that it can otherwise expire, and the employee has nevertheless not taken the leave of his own free will (BAG, 19.02.2019 - 9 AZR 541/15). An exception to this principle is made by the BAG (BAG, 07.07.2020 - 9 AZR 401/19) if the employee was continuously incapacitated for work due to illness until the end of the extension period.

Two questions remained unanswered, which have now also been submitted to the ECJ by the BAG - 9 AZR 266/20(A) and 9 AZR 401/19(A):

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What if the employee is sick, but could have taken partial leave until the incapacity of work occurred? And what about the statutory limitation periods? Can leave that is only stipulated in the employment contract, but which the employee was not explicitly requested to take, if it does not expire within the short expiration periods (15 months after the end of the calendar year), then at least expire according to the statutory periods (three years after the end of the calendar year)?

Until this has been clarified, employers are well advised to always and without any exception give all employees, regardless of whether healthy or sick, the clear notice right at the beginning of the year or, in the case of employees joining during the year, immediately upon joining, and to offer leave on a silver platter: "Statutory annual leave is a leave that must be taken in the calendar year. Therefore, if you do not request it in the current year, it can expire."

GGI member firm
FPS
Law Firm Services
Dusseldorf, Frankfurt, Berlin, Germany
T: +49 30 885 927-390
W: fps-law.de
Monika Birnbaum
E: birnbaum@fps-law.de

Monika Birnbaum

FPS is one of the largest fully independent German law firms with four offices in Germany. FPS currently employs over 120 lawyers and notaries. One of the firm's core areas of expertise is national and international litigation, as well as dispute resolution.
Monika Birnbaum's emphasis is on advising national and international clients regarding all aspects of German collective and individual Labour and Employment law. She is also active as a business mediator and has broad experience as a lecturer.

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Contacts

GGI Global Alliance
Sihlbruggstrasse 140
6340 Baar | Switzerland
T: +41 41 725 25 00
F: +41 41 725 25 01
E: info@ggi.com
W: ggi.com
W: ggiforum.com

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Responsible Editor in charge of Employment Law content:
Jeffrey L. R. Kenens
Global Chairperson of the GGI Employment Law Practice Group
E: kenens@tk.nl

GGI member firm
TeekensKarstens advocaten notarissen
Law Firm Services
Vondellaan 51
2332 AA Leiden
The Netherlands
T: +31 71 535 80 00
F: +31 71 535 80 01
W: tk.nl