Stibbe

NOW-2

Second Temporary Emergency Bridging Measure Work Retention

09.07.2020

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Introduction

On 17 March 2020, the Dutch cabinet announced the first emergency package of support measures to alleviate the economic consequences of the corona crisis. This emergency package inter alia comprised the First Temporary Emergency Bridging Measure for the purpose of Work Retention ("**NOW-1**") and the Temporary Bridging Measure for Self-Employed Persons ("**Tozo-1**"). In the **first Stibbe e-book** of 22 April 2020, we discussed these support measures and the general questions raised by the corona crisis in terms of employment law and privacy. In the **second Stibbe e-book** of 7 May 2020, we discussed significant developments regarding the NOW-1 and the Tozo-1 and looked ahead at the Second Temporary Emergency Bridging Measure for the purpose of Work Retention ("**NOW-2**").

In the meantime, sweeping government measures to combat spreading of the COVID-19 virus have been eased, with the Netherlands retreating from the intelligent lockdown step by step. The economic consequences of the corona crisis are still noticeable, however; expectations are that a recession is imminent that will take rather longer than initially expected. Accordingly, the Dutch cabinet announced a second emergency package on 20 May 2020. This emergency package consists of an extension of inter alia the NOW-1 and the Tozo and the introduction of new support measures.

In the first chapter of this third e-book, the NOW-2 is discussed. The Tozo and the other (tax) support measures are discussed in the second chapter. Finally, some practical guidelines are offered for employment law issues that may come up in this new phase of the corona crisis.

I. Second Temporary Emergency Bridging Measure for the purpose of Work Retention ("NOW-2")

The NOW-2 – introduction

After the first emergency package had been announced, the NOW-1 was ultimately **published** on 1 April 2020. In the period from 6 April through 5 June 2020, employers could apply to the Dutch Unemployment Insurance Agency (**UWV**) desk for a wage cost subsidy under the NOW-1. The NOW-1 was changed several times in the course of the application period. For more information about this, please consult the Stibbe e-books of 22 April 2020 and 7 May 2020.

In this chapter, the NOW-2 is discussed that was published in the **Government Gazette** (*Staatscourant*) on 25 June 2020. Attention is paid *inter alia* to the additional conditions the NOW-2 sets for employers wishing to claim the wage cost subsidy.

The NOW-2: what changes have been introduced, compared to the NOW-1?
The key requirements for eligibility for a subsidy based on the NOW have remained the same. This means that employers confronted with an acute decline in turnover of at least 20% may claim a subsidy for the wage costs. In this way, the NOW is to enable employers to retain as many of their employees as possible.

The NOW-2 has also introduced a number of changes from the NOW-1. The table below provides an overview of the main changes, which are discussed in the next sections.

	NOW-1	NOW-2
Subsidy period	Three months, from 1 March 2020 through 31 May 2020.	Four months, from 1 June 2020 through 30 September 2020.
Period of decline in turnover	An uninterrupted period of three months; the employer can choose whether this period starts on 1 March, 1 April or 1 May 2020.	An uninterrupted period of four months; new applicants can choose whether this period starts on 1 June, 1 July or 1 August 2020. Employers that received a subsidy based on the NOW-1 cannot choose the starting moment of the turnover period; this must follow on the period of three months chosen earlier under the NOW-1.
Reference turnover	Turnover for the calendar year 2019, divided by four.	Turnover for the calendar year 2019, divided by three
Wage sum reference month	January 2020. The wage sum is increased with a fixed surcharge of 30%.	March 2020. The wage sum is increased with a fixed surcharge of 40%.
Obligations for the employer	Important obligations include: to keep the wage sum the same as much as possible, and not to seek to dismiss people for commercial reasons.	The NOW-1 obligations have remained unchanged in the NOW-2; a new obligation has been added: to encourage employees to take part in career development advice or training.
Dismissal for commercial reasons	Employers are obliged not to seek to dismiss employees for commercial reasons. It they do this anyway, the wage sum of the employees whose dismissal has been sought will be increased by 50% and deducted from the total wage sum based whereon the subsidy is established.	Employers are still obliged not to seek to dismiss employees for commercial reasons, but the 50% penalty mark-up has been abolished. Instead, 100% of the wage sum of the employees whose dismissal has been sought will be deducted from the total wage sum. New conditions have been added for mass redundancies to be implemented.
Injunction on bonus payments, dividend distributions and share buybacks	The injunction on paying bonuses, distributing dividends and engaging in share buybacks is only effective when the group exception is applied.	The injunction on paying bonuses, distributing dividends and engaging in share buybacks applies for employers claiming an advance of € 100,000 or over, or a subsidy amount of € 125,000 or over. The injunction on paying bonuses, distributing dividends and engaging in share buybacks when using the group exception continues to apply in full.

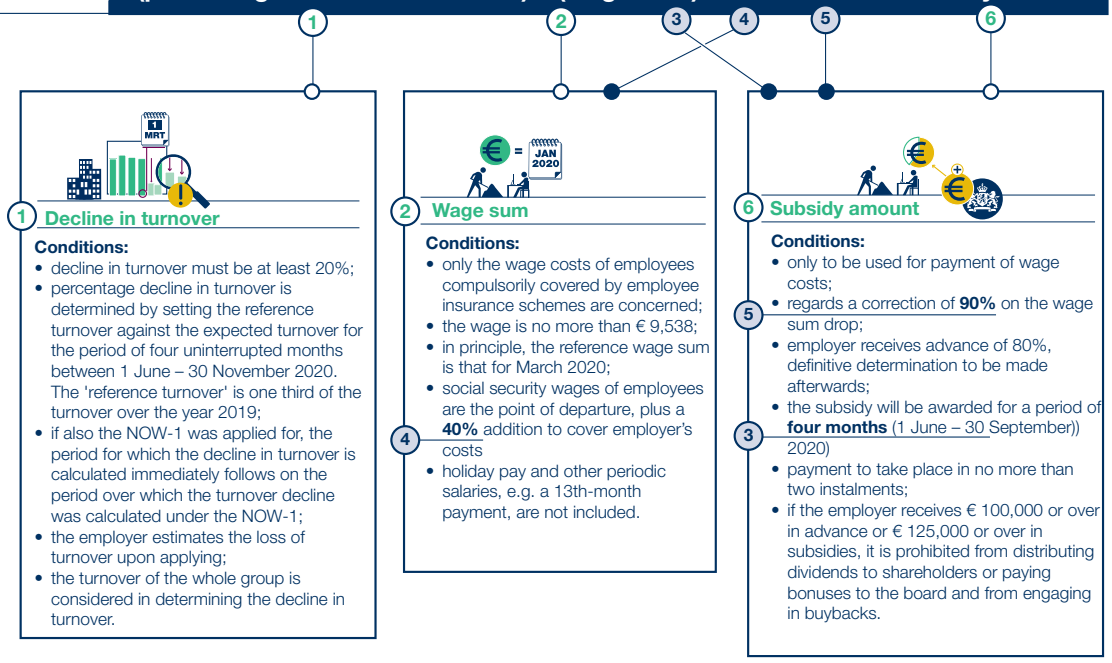
Decline in turnover and the wage sum under the NOW-2

Calculating the subsidy under the NOW: a refresher

The subsidy amount is a percentage of the employer's total wage sum over the period of 1 June 2020 through 30 September 2020. Also under the NOW-2, the amount of this subsidy depends on the percentage of the decline in turnover: in the event of a decline in turnover of 100%, the employer is eligible for a subsidy of 90% of the total wage sum. If the decline in turnover is lower, the subsidy will be established at a proportionally lower amount.

The subsidy employers can claim under the NOW-2 is calculated using the following formula:
A x B x 4 x 1.4 x 0.9, in which:
A = the decline in turnover;
B = the wage sum.

NOW-2 formula (percentage decline in turnover) x (wage sum) x 4 x 1.4 x 0.9 = subsidy amount



Over what period is the decline in turnover established?

The decline in turnover of at least 20% must occur in an uninterrupted period of four months between 1 June 2020 and 30 November 2020. Employers that did not use the NOW-1 can choose whether that uninterrupted period of four months starts on 1 June, 1 July or 1 August 2020. For employers that have already received a wage cost subsidy, this period follows immediately on the uninterrupted period of three months chosen earlier under the NOW-1.

To what period will the decline in turnover be related?

As under the NOW-1, the turnover is related to the turnover realised in the period of January through December 2019. This turnover is subsequently divided by three to establish the reference turnover.

What is the reference turnover when there has been a take-over or divestiture of a business unit?

In some cases, the reference turnover may not be representative, because an employer may have taken over a company, or divested a business unit, in 2019. After all, a take-over or divestiture can directly affect the turnover results and distort the picture in that way. To offset this problem, the NOW-2 provides the option of determining the reference turnover differently in these situations. In case of a take-over, a transfer of an undertaking in the meaning of Article 7:662 DCC must be concerned. The main rule continues to be that, if the employer is part of a group of companies, the entire group must be taken into account to establish the decline in turnover

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In these situations, the reference turnover is the turnover for the period from the first month after the take-over or divestiture of a business unit through 29 February 2020, divided by the number of months whose turnover is considered, divided by four. This determination of the turnover in derogation from the main rule applies for divestitures and sales from 1 January 2019 and before 2 February 2020. Upon applying for the subsidy, employers must request application of this exception.

How should the decline in turnover be calculated?

The decline in turnover is calculated by offsetting the reference turnover against the turnover for the uninterrupted period of four months in the period of 1 June 2020 through 30 November 2020. For the exact calculation of the decline in turnover, the difference between the reference turnover and the turnover in this period of four months is divided by the reference turnover. The outcome of this calculation is expressed in whole percentage points, rounded up.

How is the decline in turnover calculated in a group of companies?

The main rule continues to be that, if the employer is part of a group of companies, the entire group must be taken into account when the decline in turnover is determined. Under the NOW- 2, the group composition on 1 June 2020 is decisive for the determination of the decline in turnover of the group.

The exception to this main rule, also termed the group exception, has been taken over from the NOW-1. It means that an individual operating company that is part of a group of companies experiencing less than 20% decline in turnover, may apply for a wage cost subsidy based on its own decline in turnover. However, there are additional conditions for using this group exception; also these have been included unchanged in the NOW-2.

For more information about the calculation of the decline in turnover, the concept of turnover under the NOW and the group exception, please consult the Stibbe e-books of 22 April 2020 and 7 May 2020.

What is the reference period for the wage sum?

To calculate the advance, the subsidy amount is established based on the wage sum for the reference period March 2020. 15 May 2020 is the reference date for the information from the payroll tax form. If no wage data for March 2020 are available, the wage sum for November 2019 is taken as the point of departure.

If the employer has paid the annual holiday pay during this period, this will not be included in the wage sum. Any other periodic salaries, such as the thirteenth month of pay paid out in March on top of the wages and holiday pay, are also deducted from the wage sum. This is to prevent that the determination of the subsidy is based on too high a wage sum, which could mean that employers would have to pay back (part of) the advance received.

What is the effect of a decrease of the wage sum, compared to that in the reference period?

Ultimately, the UWV determines the subsidy based on the wage sum over the subsidy period of 1 June 2020 through 30 September 2020. This period applies for all employers, irrespective of the turnover period chosen. Also under the NOW-2, upon the definitive determination of the subsidy, the wage sum as used for the advance payment is compared with the wage sum over the subsidy period. This means that a decrease of the wage sum in the subsidy period, as compared to the reference period, will result in a lower determination for the definitive subsidy. If the wage sum over the months June through September 2020 is lower, the subsidy amount will be lowered by 90% of the sum by which the wage sum has decreased.

Will employers' contributions be compensated also under the NOW-2?

Yes, also under the NOW-2, the additional employers' contributions, such as pension contributions and contributions to holiday pay, will be compensated in a lump sum; this lump sum has been increased from 30 to 40% under the NOW-2. This means that the total wage sum is multiplied by 40%. The reason for the increase is that, beside wage costs, employers also incur other costs. The increase of this lump sum will give employers more scope to use the financial means available to continue to pay wages and the other expenses they must incur to preserve the company and as such, employment.

Obligations under the NOW-2

What obligations does the NOW-2 impose on employers that receive a wage cost subsidy?

The NOW-1 imposed a number of obligations on employers receiving a subsidy. Those obligations were focused on ensuring the efficient and targeted spending of the subsidy, and have been included unchanged in the NOW-2:een verplichting om de loonsom zo veel mogelijk gelijk te houden;

- the obligation to keep the wage sum the same as much as possible;
- the obligation to use the subsidy only for the payment of the wage costs;
- the obligation to inform the works council or the employee representative body, or for lack thereof, the employees, about the subsidy granted under the NOW; and
- additional obligations, such as keeping auditable books and accounts and filing payroll tax returns pursuant to the Dutch Wages and Salaries Tax Act (*Wet op de Loonbelasting*) of 1964.

The NOW-2 offers employers the opportunity to withdraw the dismissal application within five days from submission, to ensure that employers are aware of the consequences of seeking dismissal under the NOW-2

What obligations in the NOW-2 are new, compared to the NOW-1?

The NOW-2 contains a new obligation, based whereon employers must make an effort to stimulate employees to take part in career development advice or training. This best-efforts obligation is focused on preventing unemployment. Because many employees will have to prepare for a different way of working or even, different work, it is desirable that they be given the opportunity to prepare for this by seeking career development advice or by attending further training for the purpose of staying employed. Employers may satisfy this best-efforts obligation by paying attention to this in their current training policy or by discussing this with the works council or employee representation. Employers may also use the resources offers in the 'the Dutch go on learning' ('*Nederland leert door*') crisis package, whereby the government renders support to training activities.

In addition to this training obligation, the NOW-2 provides new obligations, to be satisfied if employers wish to implement a (mass) dismissal for commercial reasons, as well as restrictions on making bonus payments or dividend distributions, and on share buybacks.

The NOW-2 and dismissals for commercial reasons

Can employers implement dismissals for commercial reasons under the NOW-2?
No, employers receiving a wage cost subsidy under the NOW-2 are still obliged not to apply for leave to implement dismissals for commercial reasons. The NOW is intended to prevent loss of employment so that, also under the NOW-2, employers must commit to refrain from filing dismissal applications. This obligation pertains to applications filed in the period of 1 June 2020 through 30 September 2020, for leave from the UWV to terminate employment contracts for commercial reasons.

The NOW-2 offers employers the opportunity to withdraw dismissal applications within five working days from their submission, to ensure that employers are aware of the consequences of seeking dismissals under the NOW-2.

What are the consequences, should employers nevertheless submit a dismissal application, or fail to withdraw it or to withdraw it on time?
The consequences of non-compliance with this obligation have been changed in the NOW-2. Where under the NOW-1, a penalty mark-up of 50% would be applied as soon as an employer nevertheless sought dismissal from the UWV, this mark-up has been cancelled in the NOW-2. Under the NOW-1, the penalty mark-up meant that to determine the subsidy, the wage sum of the employees whose dismissal had been sought by the employer was increased by 50%. That sum was subsequently deducted from the total wage sum based whereon the subsidy would be determined, the consequence being that ultimately, the subsidy amount would be lower.

Under the NOW-1, the penalty mark-up meant that upon determining the subsidy, the wage sum of the employees whose dismissal had been sought by the employer was increased by 50%

The reason that this penalty mark-up has not been included also in the NOW-2, is that the Dutch cabinet has acknowledged that there is a new economic reality. Dismissals and bankruptcies cannot be prevented in every case, and companies will have to start adjusting to changed circumstances. Despite the fact that the penalty mark-up has been cancelled, submitting an application for leave to dismiss employees still affects the subsidy amount. In determining the subsidy under the NOW-2, the amount is no longer corrected for 150% but for 100%, with the wage sum of the employees whose dismissal is sought in the period from 30 May 2020 through 30 September 2020. This correction is made for the wage sum of these employees over three months, instead of over the entire subsidy period of four months. After all, an employee whose dismissal has been sought may well leave his/her employment already during the subsidy period. In that case, the subsidy amount will be lower as a result of a decrease in the total wage sum, but also as a result of the 100% correction with the employee's wage. According to the explanations on the NOW-2, considering only three months' wages in this latter correction prevents a double subsidy decrease, through application of both the wage sum correction and the reduction upon dismissal for commercial reasons.

Also under the NOW-2, therefore, submitting an application for leave to dismiss for commercial reasons results in a lower subsidy sum being determined. Since the penalty mark-up

has been abolished, the effect of this is more limited. It makes a difference that the wage of all employees whose dismissal has been sought is taken into account: both the applications rejected and the applications granted are concerned, therefore.

Mass redundancy and the NOW-2

In cancelling the 50% penalty mark-up, the Dutch cabinet considered that thorough consultations between employers and trade unions about the envisioned dismissals are of great importance. In view of those consultations, the choice was made to include an addition obligation in the NOW-2, pertaining to collective redundancy. The obligation entails that employers:

- must consult about the envisioned collective dismissals with the trade unions in question, or for lack thereof, with some other employees' representation, such consultation being focused on reaching consensus about the number of redundancies; and
- no earlier than four weeks after a notification based on the Dutch Collective Redundancy (Notification) Act (Wet melding collectief ontslag "**WMCO**"), submit applications to the UWV for leave to make dismissals in the context of collective redundancy.

If there are no relevant trade unions, employers may consult with some other representation of employees: the works council or the employee representation or, for lack thereof, the staff meeting as defined in the Dutch Works Councils Act (*Wet op de ondernemingsraden*).

If there are no relevant trade unions, employers may consult with some other representation of the employees

What are the consequences if employers make a WMCO notification, but fail to satisfy this obligation?

For employers that fail to satisfy this obligation, making one or several WMCO notifications in the period of 30 May 2020 through 30 September 2020, as well as filing an application for the dismissal of 20 or more employees during the subsidy period in the same UWV operational area, the total subsidy amount will be cut by 5%. For the application of this cut, it is not required that the redundancy applications ensue from the WMCO notification.

The subsidy is not cut if the employer and the trade unions in question, or for lack thereof, some other employee's representation, reach consensus about the number of redundancies proposed by the employer for each WMCO notification. This means that a statement of the relevant trade unions as defined in Article 2 of the Dutch redundancy scheme (*Ontslagregeling*) does not suffice. However, the arrangement made with the trade unions can serve as the written statement referenced in that Article 2, on condition that this has been clearly designated as such.

What if the employer has consulted with the unions, but no consensus has been reached?

If the employer and the trade unions cannot reach consensus, the 5% cut will nevertheless not be applied if these parties jointly request the Dutch Labour Foundation (*Stichting van de Arbeid* "**StvdA**") to assess whether the proposed number of redundancies is necessary, and the employer has not withdrawn its application. The StvdA has set up a dispute resolution committee (*Commissie voor geschilbeslechting*) for this purpose, to which employers and relevant trade unions may jointly turn by submitting an **application form**. Upon submitting this form, they commit to accepting and complying with the dispute resolution committee's decision.

If the employer and the trade unions cannot reach consensus, and make no joint request of the StvdA, the subsidy amount is cut by 5%.

The obligation to make no bonus payments and dividend distributions and to not engage in share buybacks

What does this obligation entail?

During the **Parliamentary Debate** on 22 April 2020, the Dutch Lower House was critical about the fact that employers claiming state support still continue to pay bonuses and distribute dividends.

During that same debate, the Dutch Lower House adopted **Jetten et al.'s motion**, in which the government is requested *"where possible, upon a possible extension of the NOW, to include as a condition that, this and the coming year, companies using the NOW refrain from distributing dividends, paying bonuses and engaging in share buybacks (…)"*.

The government has adopted this motion by including as a condition in Article 17(1) NOW-2 that employers applying for a wage cost subsidy should not distribute dividends to shareholders and pay bonuses to the Board of Management, the board and the management. In addition, they should not engage in share buybacks. The injunction applies only for employers claiming an advance of € 100,000 or over, or a subsidy amount of € 125,000 or over. That threshold is in line with the obligation provided in Article 16 NOW-2, to submit an audit opinion with the subsidy application.

For whom does this obligation apply?

The injunction in Article 17(1) NOW-2 addresses "the employer or legal entity". This means that any employer applying for a wage cost subsidy cannot pay bonuses, distribute dividends and buy back shares. The injunction applies only for employers claiming an advance of € 100,000 or over, or a subsidy amount of € 125,000 or over (Article 17(2) NOW-2).

The question is whether this injunction also applies for other legal entities, where a group of companies is concerned. According to the explanations to the NOW-2, the injunction pertains only to "the legal entity", suggesting that the other legal entities in a group of companies can still do these things, on condition that they do not file a wage cost subsidy application of their own (in which case Article 17(1) NOW-2 applies for each legal entity filing its own application) and that no use is made of the group exception (in which case Article 17(3) NOW-2 effective, applying Article 7 NOW-2).

Article 17(1) NOW-2 provides that employers should not pay bonuses to "the Board of Management, the board and the management of the group and the legal entity or company"

Incidentally, Article 17(1) NOW-2 provides that employers should not pay bonuses to "*the Board of Management, the board and the management of the group and the legal entity or company*". The reference to "the group" implies that the injunction pertains to bonus payment to the board of the employer applying for the subsidy as well as to bonus payments to the group's board. In view of this formulation in Article 17(1) NOW-2, this raises the question whether the injunction extends to include also bonus payments to the group's board. However, it only pertains to the employer filing the application, as is also clear from the **explanations to the NOW-2**, in which it is explicitly stated that this injunction on distributing dividends, or making bonus payments to the board or management of the group of companies, pertains only to the legal entity in question, and that the other legal entities of the group, unless they make applications of their own, and no application is filed on the level of the operating company, can still do these things. As such, the provision is still unclear, and open to two different interpretations.

Which persons should not be receiving bonuses?

The obligation to refrain from paying bonuses applies for "*the Board of Management, the board and the management*". Under the NOW-1, the interpretation was defensible that, in view of the object of this obligation, the scope was limited to the statutory directors. However, the **explanations to the NOW-2** clarify that the concept "Board of Management, board or management" should be broadly interpreted as: members of the Board of Management, the board or the management who determine policy are concerned. These are not just the statutory directors, therefore, but also employees belonging to the tier of management in which (part of the) policy is determined.

It is still unclear whether this also includes the managers engaged in determining the 'day-to-day' policy of the company (for example an *Executive Committee*), or only the directors determining the 'bigger' strategic management (for example a *Board of Directors*).

The in-house job title or a Chamber of Commerce registration is not decisive in any case, nor the fact whether the employee in question may or may not have the authority to sign. Also those who are part of the Board of Management, the board or the management are included.

How does the general obligation to make no bonus payments and dividend distributions, and to not engage in share buybacks, relate to the obligation upon application of the group exception?

The NOW-1 already provided a similar obligation in the event that an individual operating company, which was part of a group that had incurred less than 20% loss in turnover, wanted to use the group exception. The government deems undesirable for a group of companies to distribute dividends or pay bonuses or buy back shares because as a group, it is still achieving relatively good results. In such a case, the group would have to cover the losses of the individual operating company in question and take responsibility for the continued payment of employee wages.

Once employers use the group exception, a more extensive obligation applies, therefore.

The obligation, in using the group exception, not to make bonus payments and dividend distributions over 2020, and to refrain from share buybacks, has been copied in Article 17(3) NOW-2. This obligation has a wider scope than the new, general obligation provided in Article 17(1), to pay no bonuses, distribute no dividends or buy back shares: if an individual operating company uses the group exception, this has further-reaching consequences for the group or the parent company. Employers wanting to use the group exception must declare that also the head of the group or the parent company will satisfy those obligations, and they must make sure that the group effectively commits to this prior to making their application.

More specifically, this means that:

- the obligation to (i) distribute no **dividend** for 2020 and to (ii) not buy back any **shares**, applies for **all legal entities in the group and the parent company**;
- in a group of companies, the obligation to **pay no bonuses** for 2020 pertains only to the Board of Management, the board and the management (i) **of the group head or the parent company** and (ii) the employer applying for a wage cost subsidy;
- it is irrelevant whether a Dutch company or group of companies, or an international company or group of companies is concerned.

Once employers use the group exception, a more extensive obligation applies, therefore. This difference is also made explicit in the explanations to the NOW-2.

What are the consequences for the subsidy if an employer fails to comply with the obligation under the NOW-2 to make no bonus payments and dividend distributions and to not engage in share buybacks?

The obligation to make no bonus payments and dividend distributions and to refrain from buying back shares is set out in Article 17 NOW-2. If employers fail to meet this obligation, this may have legal consequences for the subsidy in several ways:

1. Based on Article 19 NOW-2, the advance may be completely or partially claimed back if Article 17 NOW-2 is violated.
2. Based on Article 18(6)(d) NOW-2, the subsidy may be reduced to nil. This does not entail setting off the bonuses paid and the dividends distributed, therefore: the UWV reduces the subsidy amount to nil, as a result of which the employer will have to pay back the entire sum. It is relevant in this context that the subsidy application must be filed within 24 or 38 weeks from 15 November 2020 and that subsequently, the subsidy must be determined within 52 weeks from receipt of that application.

3. In relation to its control obligations, the minister of Social Affairs and Employment (*Sociale Zaken en Werkgelegenheid* "**SZW**") may also withdraw the subsidy decision at a later stage, pursuant to Article 20 NOW-2, or change it to the employer's detriment, should the employer be found to have acted in contravention of the NOW's object. That object is stated in Article 3 NOW-2: to contribute to employers' payment of the wage costs, "insofar as no profit or bonuses are paid out or shares bought back". It is easy to imagine that if it becomes known, for example after the publication of remuneration reports, that an employer has acted in contravention of the obligations in Article 17 NOW-2, the minister of SZW withdraw the subsidy decision or change it to the employer's detriment. In addition, employers must cooperate in investigations by the minister of SZW until five years from the date of the subsidy determination (Article 15(k) NOW-2 in conjunction with Article 25(4) NOW-2).

Application procedure and accounting afterwards

From what date can applications be filed?

Expectations are that employers will be able to file NOW-2 applications with the UWV desk in the period from 6 July through 31 August 2020. From that moment on, employers can use the UWV website to file applications for the wage costs over June, July, August and September 2020; for the purpose of the application, the period as from 1 June past is included, therefore.

Are advances part of the NOW- 2 system?

Yes, as soon as an application results in a positive decision, the UWV will grant the subsidy and provide an advance. The advance is paid in two instalments and amounts to 80% of the expected subsidy amount. Also under the NOW-2, the decision term is 13 weeks from receipt of the complete application, though in practice, the UWV strives to pay the first advance within two to four weeks from receipt of the complete application.

If employers have to submit an audit opinion, they are given more time to file their application for the determination of the subsidy, namely 38 weeks.

When is the subsidy determined?

In principle, employers file their application for determination of the subsidy within 24 weeks from the end of the uninterrupted period of four months within 1 June through 30 November 2020. If they must submit an audit opinion – more about which below ¬– they are given more time to file their application, namely 28 weeks. The application can be filed using the form provided on the **website of the UWV**. Employers may request a determination starting 15 November 2020, this being the date that all wage data become available. Accordingly, the 24- or 38-week term will not start before mid-November 2002.

Audit opinion

Upon filing their application for the subsidy determination, employers that have received an advance of € 100,000 or over or a subsidy decision for € 125.000 or over are obliged to submit an audit opinion in regard to their compliance with the subsidy conditions. In the **explanations to the NOW-2**, it is provided that this should be an unqualified audit opinion. In that case, employers have more time to file an application for a subsidy decision, namely 38 weeks. If employers fail to satisfy the obligation to submit an unqualified audit opinion, the subsidy will be reduced to nil (Article 18(3) NOW-2).

An audit opinion in the meaning of Article 1 of the Dutch Accountancy Profession Act (*Wet op het accountantsberoep*) is concerned in this regard; in addition, the opinion must meet the standards set by the Royal Dutch Association of Civil-Law Notaries (*Koninklijke Beroepsorganisatie van Accountants*), with due observance of the Dutch Audit Protocol (*Accountantsprotocol*) established by the minister of SZW. This protocol is expected to be published before 1 August 2020.

Employers that need not submit an audit opinion must submit a form drawn up by the minister of SZW with a statement of a third-party expert, in which the percentage of effectively incurred turnover loss is confirmed; this may be a statement of a trust office, financial services provider or sector organisation. The obligation to submit a third-party statement does not apply for employers that have received an advance of less than € 20,000 or a subsidy decision for less than € 25,000.

Timeline of dates and terms of the NOW-1 and NOW-2

From **15 March 2020**, several measures apply as a result of the corona-crisis. They are focused on maximum virus control, on not overloading the health care system, and on protecting vulnerable people in our society. Emergency decrees have been made to monitor compliance with these measures. This has had major consequences for the Dutch economy.

17 March 2020: Announcement NOW-1

1 April 2020: Publication of the NOW-1

6 April 2020: Applying for the NOW-1 possible

5 June 2020: Final opportunity to apply for the NOW-1

25 June 2020: Publication of the NOW-2

6 July 2020: Possible to apply for the NOW-2

31 August 2020: Final opportunity to apply for the NOW-2

Feb
Mrt
Apr
Mei
Jun
Jul
Aug
Sep
Okt
Nov
Dec

NOW-1 - period for which an application can be filed: for an expected decline in turnover in three uninterrupted months from 1 March through 31 July 2020

NOW-1 - period in which an application can be filed: from 6 April through 5 June 2020.

NOW-2 - period for which an application can be filed: for an expected decline in turnover in four uninterrupted months from 1 June through 30 November 2020.

NOW-2 - period in which an application can be filed: from 6 July through 31 August.

NOW-1 / NOW-2
Terms in weeks, relevant for the advance to and the definitive determination of the subsidy

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

The maximum term for the decision whether a company is eligible for a subsidy (the advance) is **13 weeks**. The term starts the moment the complete application has been received.

In principle, employers must apply within **24 weeks**:
- from 6 October 2020 [NOW-1],
- from 15 November 2020 [NOW-2]; or
- upon conclusion of the turnover period, should this end after 15 November 2020 [NOW-2].

Applications are filed by filling out a designated form.

Within **52 weeks** from receipt of the application, the definitive subsidy is established. At final settlement, money may be reclaimed or an additional payment may be made. In practice, the subsidy will be determined earlier, in most cases within one month.

II. TOFA, Tozo and other (tax) support measures

Introduction

Apart from the extension of the NOW, several other support measures have been taken. The **Temporary Bridging Measure for Flex Workers** (*Tijdelijke Overbruggingsregeling voor Flexibele Arbeidskrachten* "**TOFA**") has been introduced, for example, and the Tozo has been extended. In this chapter, (changes in) these and other support measures are discussed.

TOFA

From 22 June 2020, it has been possible to apply for compensation based on the TOFA, a measure intended to compensate employees with a flexible contract, who have suffered a loss of income as a consequence of the corona crisis, for the cost of living.

For whom does the TOFA apply?

The TOFA targets employees who cannot claim social security benefit because of the corona crisis. The definition of employee for the TOFA is in line with that provided in the Dutch Social Insurance (Funding) Act (*Wet financiering sociale verzekeringen* **Wfsv**). It includes all employees who, based on a notional employment relationship, are insured under the Dutch Unemployment Insurance Act (**WW**), the Dutch Sickness Benefits Act (**ZW**) and/or the Dutch Work and Income (Capacity for Work) Act (**WIA**). Also trainees, who are not insured for the WW or WIA but are covered by the ZW are included in the definition. Those who receive benefits based on employee insurance schemes also fall in this definition; since benefits are usually not qualified as wages from current employment, however, they are not eligible for the TOFA. After all, for the TOFA as for the NOW, wages for the purposes of wage tax/national insurance contributions (the **SV-wage**) are considered, i.e. the wages from current employments on which the contributions to employee insurance schemes are paid.

What is the compensation and in regard to what period can it be received?

The TOFA compensation is a one-off gross amount of € 1,650 , awarded over the period of 1 March 2020 through 31 May 2020; effectively, a gross sum of € 550 per calendar month.

What conditions apply for the TOFA compensation?

To be eligible for the TOFA compensation, an applicant must meet the following conditions:

- the applicant was at least 18 years old on 1 April 2020 and has not reached retirement age;
- at least € 400 in wages were received in February 2020;
- at least € 1 in wages was received in March 2020;
- at least 50% less wages were received in April 2020, compared with the wages received in February 2020, and no more than € 550 were received in any case;
- no benefits or other compensation for income were/was received for April 2020; and
- the applicant must state in writing that he/she needs the compensation as a result of having suffered a loss of income, by way of a contribution in the costs of living.

How is the TOFA compensation treated in terms of tax?

The compensation serves as a taxable wage in terms of income tax and qualifies as wages from previous employment. As such, the UWV will withhold wage tax and the national insurance contribution. The compensation is taken into account for the amounts of benefits, such as the healthcare benefit, childcare allowance and housing subsidy.

About the procedure

The compensation may be requested from the UWV between 22 June through 12 July 2020. The UWV strives to decide on applications within four weeks. After an application has been awarded, the compensation will be paid within 10 calendar days

Tozo

The Tozo ("**Tozo-1**") has been effective since 22 April 2020. The measure introduced a support package for the self-employed. Subsequently, some changes were made to the measure, which was published on 1 May 2020. For more information on the Tozo (and the other support measures), please see the first two e-books of 22 April 2020 and 7 May 2020. Below, only the Tozo extension and the relevant changes are discussed.

For what period has the Tozo been extended?

Based on the Tozo-1, compensation could be received for a maximum of three uninterrupted calendar months in the period between March and August 2020. Applications could be made until 1 June 2020. The Tozo has been extended by four months from 1 June 2020 ("Tozo-2"). This has caused the application period to be extended by four months, through 30 September 2020. In addition, the duration of the period for which additional payment may be received has been extended to a maximum of seven uninterrupted calendar months, through September 2020. Self-employed persons who have not claimed under the Tozo may still do this for the period June through September 2020. Applications filed will be deemed to have been submitted on 1 June 2020.

It is significant in this respect that the period for which this support may be awarded has not changed, and is still limited to the period of March to September 2020. If a self-employed person was already awarded support for April through June 2020, the benefit period can only be extended by three months, to September 2020. On the other hand, self-employed persons who were granted Tozo support for the months of March through May may still receive benefits for four additional months. However, on 30 June 2020 the Dutch Lower House adopted a **motion**, entailing that the Dutch cabinet will consult with municipalities to safeguard that self-employed persons who applied for the Tozo as from April or May 2020 will be given the opportunity to have their application apply from March 2020.

Based on the Tozo-1, compensation could be received for a maximum of three uninterrupted calendar months in the period between March and August 2020.
A significant change is that for Tozo-2, a partner income test applies

What additional or diverging conditions have been introduced for the additional benefit?

Largely the same conditions apply for eligibility for additional Tozo-2 funding as under the Tozo-1. There is no income test, for example, the viability of the company is not considered, and the cost sharer standard not applied. A significant change, however, is the partner income test applied under the Tozo-2, to determine whether applicants can claim the additional benefit for the cost of living. This means that an applicant's partner's income is taken into account in deciding whether the additional support may be claimed; if the shared income for the months of possible benefit exceeds the social minimum, no additional benefit may be claimed for those months.

What changes have been introduced with regard to the loan for working capital?

For eligibility for the working capital loan, also largely the same conditions apply under the Tozo-1. However, the loan that may be obtained for the entire Tozo period (March through September) has been capped at € 10,157. Furthermore, an additional condition has been introduced.

Getting a loan under the Tozo-2 now requires that no application has been filed for a moratorium on payments or the bankruptcy of the self-employed person, or of any of the partners or members with which the business or independent profession is carried out in collaboration, or of the legal entity in question. This also includes moratoria on payments already awarded and bankruptcies already declared, now that applications were already filed for these. Upon filing the application, the self-employed person will have to declare that no such situation is concerned.

Other support measures

In addition to the NOW and Tozo extensions and the TOFA introduction, several other support measures have been introduced of extended. The most important of these are discussed herein below, particularly the Dutch **SMB COVID19 Fixed Charges Subsidy Measure** (*Regeling subsidie financiering vaste lasten MKB COVID-19* "**TVL**") and the extension of the tax measures.

What does the TVL entail and what are the conditions?

In addition to receiving compensation under the NOW, SMB companies in specific sectors may be eligible for compensation to help pay their fixed charges, of at least € 1,000, with a maximum of € 50,000, for the period of 1 June through 30 September 2020. The sum in compensation depends on the size of the company, the amount in fixed charges and the degree of turnover loss. Companies meeting the following conditions are eligible to claim compensation under the TLV measure:

- the company has a maximum of 250 employees;
- the company has lost more than 30% turnover (as a result of the corona crisis);
- the company's standard industrial classification number (SBI code) is on the TOGS list of SBI codes. Companies' SBI codes are on that list if they qualify as (belonging to) an 'affected sector';
- the company was incorporated and registered in the commercial register before 15 March, and has a business location in the Netherlands;
- at least one of the company's business locations has a different address than the owner's/owners' private address/addresses;
- the company is not bankrupt and has not applied for a moratorium on payments; and
- the company is not a state company.

The sum in compensation depends on the size of the company, the amount in fixed charges and the degree of turnover loss

What tax measures have been extended?

In the Stibbe e-book of 22 April 2020 the tax measures taken by the Dutch cabinet are set out; for a description of those measures, please consult that e-book. A number of the measures has been extended to 1 October 2020, inter alia the option to get a special payment deferment for tax payments, the temporary reduction of the rate of interest on tax and overdue tax, and the relaxation of the hours criterion for the self-employed. As far as is known at this point, all these measures can be used until 1 October 2020.

III. General Employment Laws and COVID-19

Finally, a number of general employment law subjects are discussed in this chapter, in the light of the corona crisis and specifically focused on the new phase that has started.

Working from home

Do employees have the right to work from home?

Employers have a specific authority to issue instructions, based whereon they can instruct employees as to the place in which the work should be carried out, for example, at the office (Article 7:660 DCC). There is no legal right for employees to work from home. In principle, therefore, employees cannot force their employer to allow them to work from home. However, based on Article 2 of the Dutch Flexible Working Act (*Wet flexibel werken*) they can ask their employer to change their workplace. This request may serve to allow an employee to work from home one or several days a week. Before they can submit such a request, employees must have worked for the employer in question for at least 26 weeks. The request must be submitted at least two months before the effective date required. Subsequently, the employer has the obligation to 'seriously consider' the request and upon rejection, to consult with the employee about this. Accordingly, employers have a great deal of discretion to grant or rejects such requests. Finally, these rules do not apply for employers employing fewer than ten employees.

There is no legal right for employees to work from home

Has the corona crisis changed this?

In principle, the corona crisis has not changed the legal framework for working from home. However, it is significant that employers have the obligation to ensure a safe working environment. Employers must also behave as good employers. That role is likely to be affected by the fact that (i) since mid-March, many employees have worked from home and (ii) the government still calls on people to work from home as much as possible. Furthermore, if employers cannot guarantee a safe working environment in the workplace, to standards of reasonableness and fairness it may be unacceptable and/or a violation of good employment practices for the employee to be held to come to the workplace. In that way, an employee might indirectly compel the employer to let him/her work from home. If employers fail to guarantee a sufficiently safe working environment in the context of COVID-19, employees might refuse to come to the workplace and justifiably demand to be allowed to work from home. There are no examples in case law of situations in which such a position was successfully defended by an employee, but this is a unique situation in regard to which case law has yet to develop.

What is the influence of the fact that the government calls on employers to allow their employees to work from home as much as possible?

Although as such, there is no right for employees to work from home, it is significant that the government calls on employers to have their employees work from home as much as possible. The question is whether this has an effect. Can employees derive rights from this call by the Dutch government?

In a recent judgment about a small employer (fewer than employees), the Subdistrict Court of Nijmegen **held** that this very generally formulated government advice about working from home as much as possible does not have such a far-reaching effect on the specific legal relationship between an employer and an employee that a 'right to work from home' may be derived from this. The subdistrict court also has not held that this government advice restricts the employer's authority to give instructions, or that based on reasonableness and fairness, that government advice should simply be followed by any good employer.

Wat is the working from home initiative?

On 16 May 2020, a Dutch green (*Groenlinks*) and a Dutch democratic (D66) party **announced** that they were preparing a private member's bill that will serve to make the option to work from home a legal right. The two parties have put forward the following specific proposals to this purport:

- Turn working from home into a legal right. In due course, this will help to make it more normal to work from home for part of the time, and it will ensure that this right becomes a standard part of the discussion on the work floor.
- Make sure that home offices meet the labour conditions requirements. Everyone should be able also to work from home without trouble. Give the same tax benefits for furnishings and fittings in the home workplace as for those at the office, for example by giving employers a tax incentive to help provide good workplaces at home.
- Call on employers and employees to pay attention to the option to work from home also at the collective bargaining table and during performance reviews. What facilities does this require? What do employees want and how can this be facilitated? On the work floor, arrangements must be made to facilitate working from home.
- Take stock of the current impediments to working at home as set out in the rules and in legislation. Any tax-related laws, but also for example labour laws, are based on the old ways of working. By clearly mapping the possible hurdles to working from home, these are more readily surmounted.

For now, no private member's bill has been submitted; should developments occur in this area, attention will be paid to them in subsequent versions of this e-book.

Wage concessions

Can employers withhold employees' wages if employees cannot work or can only work less?

In principle, employers are obliged to pay the time-based wages established if an employee has partly or wholly failed to do the work agreed, unless this partial or entire failure reasonably should be at the employee's expense (Article 7:628 DCC). This may occur in exceptional emergencies. Generally, therefore, employers will 'simply' have to continue to pay their employees. In a recent **judgment**, the Subdistrict Court of 's-Hertogenbosch decided on the question at whose expense an employee's inability, (also) caused by the corona crisis, to continue to do his/her work, should come. The subdistrict court considered that, in view of the main rule aforementioned, that no work had been done could not be held against the employee in question. As such, the employee was deemed entitled to continued payment of wages for the months he/she had not worked.

In principle, the employer is obliged to continue to pay wages if the employee has not carried out the work agreed

Can an employer withhold an employee's wages if the employee has to be quarantined?

An even more recent **judgment** has been rendered in the context of a different situation. The question was whether an employer should continue to pay the wages of an employee who, in conformity with the advice of the government, was self-isolating because one of his household members had corona symptoms, whereas that employee could not work from home. The Subdistrict Court of Maastricht held that in a quarantine situation, there is not a sick employee involved but rather, an employee who must heed a precautionary measure imposed by the government. If a housemate has a fever, the other members of the household must self-isolate, unless they work in a crucial profession or vital process. In that case, they only stay at home if they have symptoms of their own. If an employee has been in contact with a person possibly infected with the corona virus or has a sick housemate, and cannot work from home because that is impossible in his/her profession, this is a circumstance beyond that employee's responsibility. In such a case, the employer is obliged to continue to pay wages. Since the employee in question is not ill, the employer cannot withhold waiting days from the wages, and must continue to pay them in full. It follows from this that employees who

must self-isolate, yet cannot do their work from home, retain their entitlement to wages – or so this subdistrict court has decided.
Whether an employee is also actually entitled to wages depends on the circumstances. Employees who lie about having to be in quarantine will not be entitled. However, the point of departure is that employers must continue to pay wages, even if the work cannot continue to be carried out.

Can employers unilaterally cut employees' wages?

In principle, employers cannot unilaterally change employment conditions. Employment conditions, including salaries, can be unilaterally changed under specific circumstances, however. These pertain where (i) the employer has agreed a unilateral changes clause with the employee and (ii) there are serious commercial or organisational reasons that justify a unilateral change of the employment conditions (Article 7:613 DCC).

If no changes clause was agreed, the duty to be a good employee may be invoked (Article 7:611 DCC). After all, perhaps an employee may reasonably be required to accept a reasonable proposal of the employer to change the employment conditions. Whether this is the case depends on the circumstances of the case. These regard in particular (i) the nature of the changed circumstances that have inspired the proposal, (ii) the nature and drastic aspect of the proposal made, as well as – in addition to the interest of the employer and the business run by it – (iii) the position of the employee in question, to whom the proposal is put, and (iv) the latter's interest in the employment conditions remaining unchanged. This standard follows from the case law of the Netherlands Supreme Court, specifically the judgments in **Stoof/Mammoet** and Van der Lely/Taxi Hofman. All in all, it may be possible, therefore, for an employer to unilaterally change employment conditions and as such, also the wage.

Under specific circumstances, employers may be able to unilaterally change the employment conditions and as such, also the wage

Might the corona crisis justify a wage concession?

In view of the above, it depends on the circumstances of the case whether an employment condition can reasonably be changed by the employer. Invoking a unilateral changes clause, an employer will have to furnish facts and evidence of serious interests that justify the change. The Subdistrict Court of Rotterdam has recently **held** in this regard that merely referring to the corona crisis will not suffice. Accordingly, employers will have to present sound arguments as to wherein their serious interest lies. The matter referred to, incidentally, regarded the obligation to take holidays rather than a direct reduction of an employee's (base) salary.

It is worth mentioning that in said case, the employer had indicated that the change proposed served as a point of departure, and that matters would take place in consultation with the manager. Although an invocation of Article 7:613 DCC does not require consultation with the employee before the change is introduced, in this matter the subdistrict court considered that, against the background that it had been indicated that such consultation would take place, the employer could not implement a unilateral change without this. A role may have been played by the fact that the change pertained to the obligation to take holidays, whereas in principle, employers should schedule holidays in consultation with their employees (Article 7:638 DCC).

That a deteriorated commercial situation, resulting from the corona crisis, may result in a serious reason to propose a wage concession follows from a recent judgment of the Subdistrict Court of Amsterdam. An employer that had lost a large part of its income as a result of the corona crisis, and as a consequence of this had acute payment problems, found itself compelled to withhold 50% of its employees' wages. The subdistrict court considered that it was sufficiently plausible that the extraordinary circumstances in which the employer found itself had led to an unforeseen commercial emergency.

This had given the employer the serious interest that in principle entails that employees can be asked – in consultation – to suspend or even completely relinquish specific claims under employment law.

Under specific circumstances, therefore, a change of employment conditions and as such, even a cut in salary, may be justified. In the judgment in question, however, this unilateral decision to pay only half his salary, taken without consulting with him, resulted in an excessive reduction of his income for the employee in question, which brought him in financial trouble. In this case, after balancing the mutual interests, to standards of reasonableness and fairness the employee could not be required to accept several months of a 50% cut in pay, also because it could not be established when the employer might have sufficient funds to make up the arrears. It can also be deduced from this judgment that also the extent of the salary reduction (logically) plays a part in the assessment. If as a result of a pay cut, an employee gets into financial problems and can no longer make a living, the reasonableness test will readily find in the employee's favour.

In principle, employers need not request the works council's consent to implement a (collective) wage reduction

Does the type of salary concerned play a part in the weighing of the interests?

It is obvious that it matters for the balancing of the interest to what kind of salary the change pertains. A reduction of a bonus or benefits scheme is more likely to be deemed justified than a change in the base wage. This ensues *inter alia* from the consideration in the Stoof/Mammoet judgment referenced herein above, that the "nature and drastic aspect of the proposal made" play a part in the assessment of whether the change is justified.

What is the part of the works council in the implementation of a wage concession?

In principle, employers need not request the works council's consent to implement a (collective) wage reduction. As it happens, this concerns a change of a principal labour condition, which falls outside the scope of Article 27 of the Dutch Works Councils Act (**WOR**). However, there may be a right of consent if a change is made in the remuneration system; see chapter IV of the Stibbe e-book of 22 April 2020 in this regard.

What other circumstances play a part in assessing whether a wage concession reasonably can be required?

Although in view of the above, the works council has no right of consent in regard to a decision to decrease the wages in a company, the works council's consent to such a measure may affect the reasonableness test.

In addition, it may be relevant how much support for the salary reduction is felt in the company. If a relatively great number of employees is willing to agree to the salary reduction, this will more readily be deemed reasonable.

Privacy

In the Stibbe e-book of 22 April 2020, a number of privacy issues were discussed that are relevant to employers in this corona era. In relation to a number of recent developments, several of those issues are discussed again here.

Is checking employees for COVID-19, for example by taking their temperature, a contravention of the Dutch GDPR?

As described in the **Stibbe e-book** of 22 April 2020, the Dutch Data Protection Authority has explicitly spoken out against employers measuring body temperature. The Dutch DPA holds that the employer can ask an employee to take his or her own temperature, however. In addition, checking whether an employee has corona is the prerogative of the relevant (company) doctor. Whether an employee gives his/her permission is irrelevant.

This was decided by the Dutch DPA because a person's body temperature gives an insight into an employee's health, which is sensitive personal information that, based on the law, can only be processed in restricted cases.

On 24 April 2020, the president of the Dutch DPA again **spoke out** against using temperature measuring equipment, indicating that the Dutch DPA will enforce the law if it concludes that such a contravention has taken place. However, on 8 May 2020 the Dutch DPA seemed to be giving more colour to this position, when it posted on its website that the Dutch GDPR does not apply if a temperature is being taken without being processed further, i.e., if the temperature is not registered and also does not end up in an automated system. The DPA added that usually, the GDPR will apply after all; mostly, not only the temperature is taken, but is also likely to be used in some way. After all, the employer takes that temperature for a reason, and the employer's objective will usually be to give or refuse employees access to the workplace. For that purpose, the temperature will usually be reported or registered elsewhere, in the Dutch DPA's view.

All in all, the conclusion seems to be that, although the Dutch DPA has made some provisos, employers can take their employees' temperatures as long as the information is not registered. As such, measuring and reading the temperature on a thermometer, without storing the results, is not in contravention of the Dutch GDPR. This is also in line with the text of the Dutch GDPR. In such a case, the Dutch DPA cannot act, therefore.

Measuring and reading the temperature on a thermometer, without storing the results, is not in contravention of the Dutch GDPR

Is the option to measure employees' temperatures without processing them restricted in any other way?

Significant also here is the fact that employers have the right to give instructions, based on which employees may be instructed to comply with specific regulations drawn up by the employer. The employer has a duty of care in this respect, to safeguard a safe working environment for its employees.

In the context of the corona crisis, this duty of care serves to prevent infection among the staff, i.e. to prevent that employees are exposed to the risk of infection. In view of this, it seems plausible that usually, the measuring of the employees' temperature, without storing the information, can be deemed a reasonable rule.

Finally, it should be pointed out that in such a case, in which the temperature is taken without the information being processed, there may still be a violation of an employee's right to privacy. The right to respect for one's private life may be at risk, for example, where an employee is publicly refused access to the workplace in relation to his or her 'fail' for the temperature measurement (Article 10 Constitution/ Article 8 ECHR).

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