Stibbe

The new way of working

Working from home and potential measures during and after the Corona crisis

30 August 2021

TABLE OF CONTENTS

INTRODUCTION

In the Netherlands, a large proportion of employees have been working from home for nearly 18 months, on government advice, in order to prevent the spread of Coronavirus. This has created new challenges for both employers and employees and has also given rise to new questions pertaining to employment law. We have briefly dealt with these questions in our previous e-books.

The Netherlands is currently moving out of lockdown. Due to the 'seasonal effect' and the increase in the number of people who have been vaccinated, the number of infections and hospital admissions has fallen markedly. The government has gradually introduced a number of relaxations and the bulk of the measures ceased to operate with effect from 26 June 2021. The same applied to the advice to work from home as much as possible: for a short while, the advice was to work up to a maximum of 50% in the office unless the 1.5m measure cannot be observed. Although this has been reversed and the advice to work from home will continue to be adjusted to the number of COVID-19 cases, the potential return to the office in the future does raise a number of new questions under employment law. This amongst others includes the question whether employees can be obliged to resume working at the office five days a week.

In this e-book, we will discuss important areas of concern arising from working (partially) from home, and we will concentrate on whether employees can claim a right to work from home. We also discuss some of the privacy law aspects. Finally, we will explore some of the potential measures that employees can take both during and after the Corona crisis.

I. WORKING FROM HOME

Introduction

Many employees have been working from home for over 18 months because of the Corona crisis and government measures. We expect that more employees will be keen to keep working from home.[1] Many employers are anticipating this: working from home has become the new norm in some organisations, while others have a hybrid model with employees being allowed to work from home for a number of days each week. An important question in this situation is whether employees have any right to be allowed to work from home. This chapter deals with this question, and examines specifically the Flexible Working Act (the "**Wfw**") and recent case law on Corona issues. We will also discuss the legislative bill "*Working where you want*" submitted by the GroenLinks and D66 parties, which is designed to introduce a right to work from home. We will conclude this section with some important thoughts on the matter of time recording.

Do employees have a right to work from home?

Wfw

There is currently no (general) right to work from home in the Netherlands. No new legislation or regulations have come into force since the Coronavirus outbreak that govern working from home and the right to do so. This means that the starting point for deciding whether employees are entitled to work from home will be the individual arrangements made by an employer with its employees. The Wfw as it stands contains the appropriate assessment framework if an employee wishes to submit a request to work from home. The Wfw gives employees the right to ask for an adjustment in the agreed *duration of work, place of work or working hours*. In principle, this right applies to all employees in the private and public sectors who are employed by an employer with 10 or more employees.

In the Netherlands, no new legislation or regulations have come into force since the Coronavirus outbreak that govern working from home and the right to do so

Request to work from home under the Wfw

Under the Wfw, an employee can submit a request for adjustment of the place of work. The expression 'place of work' is defined as "*every agreed place used or intended to be used by the employee in connection with the performance of work*". An employee's request to work from home falls within this definition. If an employee wants to work from home in a different time zone from the actual workplace, the request may then also effectively entail a request for adjustment of *working hours*.

What provisions apply to a request for working from home?

The employer should observe the following provisions if it receives a request for adjustment of the *workplace*.

1. The employee must have been employed by the employer for no less than 26 weeks prior to the intended start date of the adjustment. It makes no difference for the calculation of the 26 week period whether the employee has actually performed any work during that year or not. This means, for instance, that a period of maternity leave would also be counted for determining that period.
2. An employee should submit the request to the employer in writing, at least two months before the intended start date of the adjustment, except in unforeseen circumstances. Case law indicates that unless the employer argues that the time limit has been missed, the request will have been made in time.

[1] This is shown by a **survey by TNO** that came out earlier in 2021.

3. While an employee may have a range of reasons for the request, he does not need to provide these with the request. This means that he has no need to disclose to the employer the reasons why he wants to have the workplace adjusted.

Can an employer refuse a request to work from home?
Yes, an employer can refuse the request on a number of grounds. An employer is obliged to consider the request for adjustment of the workplace and discuss the situation with the employee if it refuses the request. This is also referred to as the "*right to ask, duty to consider*". In practice, it can be difficult for the employer to consider the request if the employee does not disclose the reasons behind it. If the employer is faced with multiple requests for adjustment, without being aware of the reasons behind these requests, it becomes impossible to weigh up the relative merits of the requests. In such cases, the employer must deal with the requests in the order they are received.

The employer is not required to substantiate compelling business interests for the rejection of a request to change the workplace. In addition, the employer can review its decision on the basis of interests relating to the workplace that materialise after the decision. Finally, if the situation arises where one particular request encounters no objections but several requests at the same time do so, the employer will have to discuss the situation in order to reach a solution with the employees in question.

All things considered, employees do not have a general right to work from home under the Wfw. The **legislative bill 'Working where you want'** proposes to change this and we discuss these changes further on in this section.

The employer is not required to substantiate compelling business interests for the rejection of a request to change the workplace

Corona case law
There have been a number of court decisions since the outbreak of Coronavirus where the key issue was the right to work from home. These rulings confirm that employees have no general right to work from home, even in a pandemic situation. This is not altered by the fact that many employees have consistently been working from home over the past 18 months. This is confirmed in two recent judgements that are discussed below.

District Court of Gelderland 16 June 2020, ***ECLI:NL:RBGEL:2020:2954***
The employee submitted a request to the District Court to be allowed to work from home. This was based primarily on the Wfw. The District Court dismissed this application because the employer had fewer than 10 employees, because an application for adjustment of the workplace pursuant to the Wfw is not applicable to employers with fewer than 10 employees (section 2.16, Wfw). As an alternative, the employee asked for a change to his workplace. This was because the employer had recalled all of its employees to the office some months after the outbreak of the Coronavirus. The employee was unable to reconcile this with government advice at the time to work from home as much as possible. He argued that there were too many people in the office and the measures were not being complied with sufficiently. The District Court dismissed this claim, finding that the employer had taken several measures in connection with the Corona crisis in order to guarantee a safe workplace. The employer had also argued and explained, without this being challenged, that the employee in question was needed at the office for accepting and processing orders and providing support to another employee.

As we have mentioned, the Wfw contains no general right to work from home. The judgement mentioned above confirms that there is still no right to work from home during the Corona crisis. This is not altered by the fact that employees must work from home as much as possible, on government advice. An employer can still avail itself of its authority to issue instructions. It is, of course, also important here for employers to take measures to guarantee a safe workplace.

District Court of Oost-Brabant 12 February 2021, ***ECLI:NL:RBOBR:2021:840***
In the case leading to this judgement, an employee submitted a request to be allowed to work from home due to the consequences of the Corona virus outbreak. The employee argued that he was perfectly well able to work from home and this was strongly advised by the Dutch government. The employer refused the request. The tension that had already been evident between the parties during a then ongoing integration process was exacerbated. The employer asked the District Court to dissolve the employment contract on the basis of a disrupted employment relationship. The court considered that the request to work from home was quite understandable. The explicit advice from the government was to work from home as much as possible at that point. However, the court also felt that the employer's decision was reasonable. The employee was the only system manager within the business. In addition, it up to the directors of the employer, in principle, to take decisions that they consider to be necessary for a satisfactory commercial operation. It made no difference that the employee saw things differently. While the court questioned the refusal of the request to work from home (a resounding "*no*"), this did not mean that the employer's decision was seriously culpable. Finally, the court considered that the employee's request was primarily practical in nature. The school-aged children were stuck at home and the employee's partner could not do her job as a receptionist from home. There was no evidence that the reason behind the request to work from home was any concern over the employee's health.

The government advice to work from home as much as possible does not go as far as to mean that an employee is entitled work from home in all situations

This judgement also confirms that there is no general right for employees to work from home. An employee's desire to work from home as much as possible, in line with government advice, is understandable as far as it goes but an employer may have good reasons for wanting to deviate from that advice. It is up to the employer to decide what those reasons are. It is, after all, the employer who decides what is required for a satisfactory business operation. This is not altered by the fact that an employee disagrees with the situation and has a different opinion.

To summarise, do employees have a right to work from home under the Wfw?
The Wfw and Corona case law on working from home are clear: employees have no general right to work from home. The Corona crisis has not changed this situation. The government advice to work from home as much as possible does not go as far as to mean that an employee is entitled work from home in all situations. Employers can take decisions that they feel are necessary for the business operation, such as requiring employees to work in the office. The fact that employees have been working from home for the past 18 months does not mean that they have acquired the right to do so. An employee can ask his employer to be allowed to work from home under the Wfw. An employer has to consider the request and discuss the situation with the employee if it is dismissing the request, but there is no requirement for any compelling business interests to dismiss the request. In addition to this, the employer can review its decision on the basis of interests relating to the workplace that materialise after the decision. This assessment framework, which is favourable to employers, is still in force at this point, even after Corona.

The next section discusses the initiative legislative bill "Working where you want". This is designed to amend the assessment framework as set out above. Employers have expressed objections to any embedding of the right to work from home in the law:[2] they feel it is excessive to turn this into a statutory right because arrangements on working from home should be made through proper consultation. This is already happening, for instance in collective labour agreements. In addition, a majority (60%) of employers have expressed that they are keen to continue with hybrid working after the Corona crisis, or apply a mix between working partly from home and partly in the office.

[2] See the recent **report** by the AWVN (Hybrid working becomes the new normal – with different remuneration).

Legislative bill "Working where you want"

Aim of the legislative bill
The bill introduced by D66 and GroenLinks aims to introduce an amendment to the Wfw. According to its proponents, the right to adjustment of the workplace is less firmly entrenched in the law than the right to adjustment of the working hours or duration of work. The bill would put all of these on an equal footing. The current situation, with many employees working fulltime from home, is not the intended norm, but the Corona crisis has certainly prompted endeavours to find a new norm. This will once again involve striking a balance between working in the office and working from home.

The bill makes it harder for an employer to reject a request for working from home

What are the consequences of this bill?
The bill makes it harder for an employer to reject a request for working from home. As matters stand, an employer has a relatively wide freedom to assess a request for adjustment of the workplace. There are no substantive criteria and, as we have mentioned, an employer is only obliged to consider the request and consult with the employee if it is rejected.

The bill alters this starting point: the employer should approve the request unless there are compelling business reasons against doing so. The burden of proof lies with the employer. If the request is denied, the employer has to substantiate the compelling business reasons. That is remarkable: after all, parliamentary debate records show that the legislator explicitly wanted to rule out this more onerous regime when the Wfw was being finalised. The legislator **argued** that the option of changing the workplace introduced considerable responsibilities for the employer that do not arise with working hours. For instance, an employer would have to comply with occupational health & safety rules at the alternative workplace. This is why a more onerous regime was considered undesirable. We feel that this argument is still a valid one, even in these times.

Can an employer still refuse a request to work from home?
The bill does not provide a general right for employees to work from home. An employee's request will be approved, in principle, unless there are compelling business interests opposing it. Just because an employee has been able to work from home during the Corona crisis, however, does not mean that there cannot be compelling business interests. Allowing home working has in fact required special efforts from both parties. A request from an employee should therefore be considered on the basis of facts and circumstances as they apply when the request is made.

Compelling business interests could, for instance, include economic, technical or operational interests that would be seriously harmed if the request to work from home were to be approved. Retaining social cohesion on the workfloor could also be a sufficiently compelling business interest. Also, if an employer is subject to relatively hefty special costs for enabling working from home, this might amount to a compelling business interest. For site-specific work situations – such as factory work – it is relatively easy to imagine compelling business interests.

So, can employees work anywhere?
While the bill is titled "*Working where you want*", it does not allow employees to work anywhere in the world. The choice of workplace is restricted to working from a workplace where work is normally done for the employer (e.g. another branch of the same company) or the employee's residential address. These locations must be within the territory of the European Union. According to the bill's initiators, this should offer sufficient flexibility to let employees choose their workplace, while there is also an accommodation for employers if they are faced with steep costs because their workforce wants to be scattered throughout the world.

How much is the bill actually needed?
The Advisory Department of the Dutch Council of State (the "**Department**") has expressed criticism of the bill. It argues that there is no clear need for the bill. In its **advice of 18 February 2021**, the

Department writes that it is primarily up to employers and employees to make arrangements in matters of Dutch employment law, taking the interests and contribution of the employee into account. It is also commonplace for collective labour agreements to make such arrangements. Legislation should only come into play if any structural stumbling blocks present themselves and cannot be resolved in practice. The Department also states that the employer's options for rejecting an employee's requests are limited. This means that the discussions between the employer and employee are steered in a particular direction. It is therefore unclear whether the bill makes any contribution towards facilitating the dialogue between the employer and employee.

Given the far-reaching consequences for the employer, it remains uncertain whether the bill will be adopted.

Time recording for employees working from home

Employers are obliged to record the number of hours their employees work

Employers are obliged to record the number of hours their employees work. This is a statutory obligation stemming from the Dutch Working Hours Act ("**Atw**") and the Minimum Wages and Holiday Allowance Act ("**WML**"). We will go on to explain exactly the impact of this obligation, the consequences if an employer fails to comply with this obligation and how employers can meet their obligations for employees who are working from home.

The Working Hours Act (Atw)

Article 4:3:1 of the Atw prescribes that an employer must record work and rest times. The aim of this obligation is to ensure that the supervising institution – the Dutch Labour Inspectorate ("**ISZW**") – can check whether the employer complies with the obligations under the Atw relating to matters that include maximum working hours per day and per week and the minimum rest periods. In other words, the employer has to be able to hand over records that will allow the ISZW to confirm that employees have not been working too many hours.

The Atw does not specify how employers should comply with this obligation for recording, nor precisely what data has to be recorded. The explanatory notes to **the Policy rule on imposing fines under the Labour Act and the Working Hours Decree 2013** indicate that an employer should record at least the following information:

1. start time;
2. end time;
3. any intervening breaks; and
4. the employee's identity.

There is no particular format for the records: in theory, the employer could write them down by hand on an A4 sheet. The relevant point is that an employer should be able to submit this information if asked for by the ISZW. Employers must retain these records for at least one year.

It is important to note is that this obligation does not apply to employees who are earning more than three times the statutory minimum wage. For 2021, this amounts to around EUR 5,050 gross per month. This obligation for recording applies in full to employees who are earning a monthly wage below this limit.

WML

On top of the Atw, Article 18b:2:c of the WML specifies that an employer must maintain current records of the number of hours worked by its employees. In terms of this article, the employer is in breach of the WML if it is unable to hand over documents to the ISZW upon request that 'show how many hours the employee has worked'.

This obligation has been in force since 1 January 2018 and is included in the WML in response to a discussion on the statutory minimum wage for employees who are paid on the basis of piecework.

However, the obligation to keep records is explicitly not limited to employees being paid on the basis of piecework but applies to every employee.

In terms of its substance, the obligation to keep records under the WML is compatible with the obligation keep records under the Atw: when Article 18b:2:c of the WML was introduced, the legislator did not consider this as a new obligation because employers were already obliged under the Atw to record working hours and rest periods for their employees. That said, the introduction of the recording obligation in the WML has one very important consequence: the obligation applies to every employee, with no exception being made for higher paid employees. To be more specific, this means that employers are obliged to keep records of working hours for all employees with effect from 1 January 2018.

What consequences are there for not complying with the obligation to keep records?
The consequence of non-compliance with the obligation to keep records can be significant. Separate policy rules have been elaborated for both the Atw and **the WML**, detailing the sanctions that can be imposed if the relevant obligation is ignored.

- The ISZW can impose an administrative fine for non-compliance with the recording obligation under Article 4:3:1 Atw. The amount of the fine depends on several circumstances, including the number of employees for which the breach is confirmed and the size of the employer. The maximum fine that can be imposed is EUR 270,000.
- The ISZW can also impose an administrative fine for non-compliance with the recording obligation in terms of Article 18b:2:c WML. The level of the fine depends once again on a range of factors including the number of employees in respect of which the breach is confirmed. The administrative fine has no upper limit in this case and can therefore increase rapidly.
- On top of the option for imposing an administrative fine, the ISZW can also compel a repeat offender employer to discontinue its operations for a maximum period of three months. While the sanction is only imposed once the employer has been given a warning about this potential sanction after a previous breach, it is quite obvious that non-compliance with the recording obligation can lead to extremely serious sanctions.

The time recording obligations under the Atw and WML apply in full to employees who work from home

Time recording for those working from home
The time recording obligations under the Atw and WML apply in full to employees who work from home. This can, of course, raise practical problems. If an employee is working on the employer's premises, it will generally be easier for those employers to record the time (for instance through the use of an access pass). This is much harder for those working from home. As an employer, how do you record when an employee logs in at home? Also, how do you decide whether an employee is logging in to start work or, say, to do some online shopping?

There are more or less two different ways of recording work and rest periods for employees working from home. Both methods have their advantages and disadvantages.

1. The employer can ask its employees to record their working hours. There are plenty of software programs that allow employees to record their working hours. The disadvantage of this method is that the responsibility is shifted to the employee, so that the employer has to assume that its employees are recording their time correctly. If the employer instructs its employees correctly on the use of time recording software, then generally speaking the employer will be able to assume that the employees will use the software properly. One important advantage of these methods is the relatively minor intrusion into the employee's privacy.
2. The employer may use proactive software. This software maintains its own record of when an employee is working. There are many software programs with this sort of function. However, this software requires precise use: it is important for the software to be able to distinguish between working time and personal time. In other words, the software has to distinguish between when someone is really at work and when someone is only for personel reasons. The first batch of time must be recorded, while the second should not be. This is certainly possible, technically speaking, for instance by linking the software to the use of certain programs.

However, many employees would regard this software as a radical invasion of their privacy.

To summarise, recording working hours for employees working from home is not always straightforward. Another relevant factor is that works councils generally have a right of approval as regards the manner in which the employer will be recording working hours, pursuant to Article 27 of the Dutch Works Councils Act. What all this means is that employers would be well advised to think carefully about how they intend to record working hours for employees working from home.

II. PRIVACY

Introduction

The legislative bill "*Working where you want*" is designed to ensure that employees can work either in the office or at home. There are interesting privacy law issues at play in both situations. In order to work safely at the office, it is important for employees to be healthy and free of symptoms (including Corona). Employers may want to take measures that involve processing health data for employees in that regard, for instance the implementation of Corona tests or the recording of vaccination or Corona symptoms. For working from home, employers might want to exercise some supervision over their employees' productivity, which would involve employees' personal data being processed via digital monitoring technology. This section explores if and what conditions any such processing of employees' personal data might be justified.

Corona, vaccinations and the processing of personal data

May an employer ask employees whether they have Coronavirus or Corona symptoms when they call in sick, and also record this?
If an employer asks whether employees have Corona symptoms and records this, it is then processing sensitive personal data, namely data regarding health. The General Data Protection Regulation ("**GDPR**") offers some room to process health data, for instance in the context of public health, a serious general social interest or a vital interest of someone concerned. The European Data Protection Supervisor ("**EDPS**") views public health and the vital interests of people concerned as suitable grounds of exception for the processing of health data by employers in the context of Coronavirus. The recitals to the GDPR do, after all, mention the 'control of an epidemic' as a specific example of this.

If an employer asks whether employees have Corona symptoms and records this, it is then processing sensitive personal data, namely data regarding health

Any such processing must be necessary and specified in law in more detail. This is a pinch point for its application in the Netherlands. For instance, in the context of alcohol and drug tests, the Dutch Personal Data Authority ("**AP**") has said that the general duty of an employer to ensure a safe workplace (under Article 5 of the Working Conditions Act) is not sufficiently specific. The Dutch implementation act for the GDPR (the "**UAVG**") also makes the processing of employees' personal health data difficult. Some of the bases in the GDPR have not been adopted directly or have been adopted in a more limited form in the UAVG. The GDPR may well offer some room, but its current interpretation by the AP and the limited implementation of the GDPR in the UAVG result in a prohibition of this type of processing in the Netherlands.

The AP appreciates that on the one hand the saving of lives is the top priority in these peculiar circumstances. On the other hand, the AP also says that health data may not be processed by the employer in cases of an actual or suspected Coronavirus case. According to the AP, the employer is not permitted to enquire the nature and cause of an employee's illness. Only the occupational health service or a company doctor is permitted to process this medical data. The employer is permitted to send an employee home if he or she is showing symptoms of cold or flu or if the employer has any doubts about the employee's good health.

The employee also plays a part in this himself. Good employee conduct (Article 7:611 of the Dutch Civil Code ("**DCC**")) entails that employees may be expected to assess their own health and not jeopardise the health of colleagues by turning up in the workplace with symptoms (including Corona symptoms). An

employer may therefore require employees not to turn up for work if they have symptoms that may indicate an infection with Coronavirus.

In addition, it was always permitted to record sick leave and ask the sick employee when he expects to be able to return to work. This does not allow an employer to record the employee's health conditions, which is a task reserved to the employee's general practitioner and/or company doctor.

Is an employer entitled to record whether its employees have been vaccinated against Corona?
The AP indicates that it is unable to comment on whether the employers can *ask* their employees whether they have been vaccinated. The fact is that the AP can only comment on the partly or fully computerised processing of personal data.

However, if an employer makes a digital record of whether its employees have been vaccinated, it will then be processing personal data, according to the AP, and specifically health data. As is the case with an employer recording Corona symptoms, the AP considers that current legislation offers no specific basis for employers recording any data concerning its employees' Corona vaccination status. In addition, in terms of the GDPR, personal data may only be processed for a properly defined, explicitly described and justified objective (Article 5 GDPR) and at this point, according to the AP, employers have no such justified objective. This is because the RIVM considers it to be still uncertain whether vaccinated individuals can be infectious, so that it makes little difference in terms of risk whether an employee has been vaccinated or not.

The AP says that it is aligning itself with the government on this issue, with the government having indicated that vaccination is voluntary. If employees who have been vaccinated gain greater rights than those who have not been vaccinated, the AP considers that this might result in employees feeling obliged to get the vaccination. This does not seem compatible with **the advice from the Dutch Health Council** or **the government position** in relation to vaccination evidence, where the Minister of Public health, Welfare & Sport has indicated that clarity would be provided to private parties about situations in which it would be justified to ask for proof of vaccination. Possibilities here include legislation, self-regulation or other forms of protection.

Is an employer entitled to check its employees for Coronavirus, for instance by taking body temperature?
The AP indicates that taking temperatures as a control for access is generally covered by the GDPR. That being the case, employers are not allowed to take employees' temperatures. Checking whether an employee has Corona is reserved to the relevant general practitioner or company doctor. The AP reaches its conclusion because temperature is an indicator of an employee's health. This is sensitive personal data that may only be processed in limited situations in terms of the law. The AP says that an employer may ask its employees to take their own temperature in a private room, after which employees themselves will have the choice to report sick if they have a high temperature.

Checking whether an employee is infected with the Coronavirus should be done by the (company) doctor

It is not entirely ruled out that checks can be made for a fever without the GDPR being involved. Depending on how this is done, one might imagine that there will be no processing within the scope of the GDPR. Whereas the AP was still assuming in early 2021 that there was a certain degree of data-processing by definition, which was covered by the scope of the Act, it has now revised this view. If (i) temperatures are not recorded in any file, (ii) the measurement is not done automatically (for instance by using a heat camera) and (iii) the processing has no computerised consequence (such as doors opening automatically), then the GDPR does not apply and there can be no enforcement by the AP.

Is the employer entitled to perform a rapid Corona test or demand this as an access check?
Here again, an employer can have Corona tests performed that are not covered by the material scope of the GDPR. The AP has provided the following guidelines on this:

1. the test result may not be recorded in a file;
2. the rapid test cannot be automated, such as through the use of electronic analysis equipment; and
3. the processing must have no computerised consequences, such as for instance digital recording of the test result.

Monitoring employees who are working from home

Is an employer permitted to measure the productivity of its employees who are working from home?
With so much work being done from home during the Corona crisis, the use of data-driven technologies measuring employees' performance has risen. 'Bossware' can track every action by an employee on a laptop. This however is not permissible under the GDPR.

Improving the productivity of its workforce can amount to a justified interest of the employer

In previous investigations, the AP has formulated specific policy relating to the monitoring of employees, in which it confirmed that monitoring is permitted, but only if the employer can demonstrate that (i) the monitoring is necessary, (ii) it has a justified interest in the monitoring, and (iii) its interest in monitoring productivity overrides the interest of employees in having their privacy protected.

Improving the productivity of its workforce can amount to a justified interest of the employer. However, constant monitoring of the use of computer systems used by employees working from home, instead of for example voluntary control, is explicitly deemed to not be legitimate. The impact on an employee's privacy if monitoring tools are used to keep an eye on their activities is too significant to justify the processing involved. It is irrelevant whether the equipment is owned by the employer or employee. The privacy of the individual in question far outweighs the interests of the employer, certainly if the results of monitoring were to be used as part of a decision-making process surrounding the dismissal of employees.

If an employer nevertheless decides to use some sort of monitoring, Article 27 of the Dutch Works Councils Act dictates that it will require prior permission from the works council. Employees must also be adequately informed about the monitoring, for instance by means of a privacy policy.

What is the position with enforcement and supervision as regards the use of monitoring software?
The AP supervises any monitoring of employees. The data collected through the use of modelling software may be linked up to individual employees and is therefore deemed to be personal data within the meaning of the GDPR. Unlawful and disproportionate processing of personal data is a breach of the GDPR. The Dutch Working Conditions Act affords no basis for the ISZW to exercise any supervision over this type of control mechanism, i.e. monitoring software.

The Minister of Social Affairs & Employment explained in his response to questions of members of the Dutch Parliament on the monitoring of people working from home that 14 complaints had been received in the period from 1 January to 1 December 2020. Three of those had been concluded. For one of these complaints, there were talks with the organisation to explain the rules. For another complaint, the AP told the complainer about the steps that he could take himself in the first instance vis-à-vis the organisation in order to address the problem. The AP had still to look at 11 complaints.

III. LIGHT AT THE END OF THE CORONA TUNNEL - MEASURES DURING AND AFTER THE CORONA CRISIS

Introduction

In this section, we discuss specific measures that employers might consider for trying to cope with the adverse consequences of the Corona crisis after the support measures have come to an end. We consider, for instance, the possibility of making new arrangements with employees about unused holidays or catching up on hours not worked.

Measures during and after the Corona crisis

Now that the lockdown is nearing its end, many employers will be fully able to resume their business operations

Now that the lockdown is nearing its end, many employers will be fully able to resume their business operations. However, the damage that many employers have sustained will not readily be rectified. The question then presents itself as to what measures under employment law are available to employers to save costs. A recent interlocutory judgement, for instance, dealt with to what extent Wibra could let employees work hours for free that they were unable to work during the lockdown. Below we will explain the legal framework and feasibility of doing this, as well as similar cost-saving measures under employment law.

Catching up on time not worked

Wibra was one of the many stores that was forced to close its doors during the lockdown. In order to address the consequences of this closure, Wibra scheduled its employees for shorter shifts. Wibra then asked its employees to catch up on these short shift times over the remainder of 2021. Wibra was relying on the Retail non-food CLA, which provides an option of arranging for an average number of basic hours per week and agreeing that the employer can oblige an employee to work more or fewer hours per week, within a bandwidth of +/-35% of the number of basic hours. If the employee has worked for more hours than the number of basic hours when the reference period (12 months) comes to an end, the employer pays the employee for the excess hours worked. If the number of hours worked is less than the number of basic hours after the period comes to an end, deficit of hours will expire and the employee does not need to catch up on these by working for longer in the next period.

The FNV – a trade union that is not a party to the relevant CLA – argued that Wibra's operating method was not permitted and claimed at the Sub-District Court that Wibra should allow this deficit time to expire. The FNV argued that the risk of being unable to work during the mandatory store closure was being foisted upon the employees because they had to work extra hours without pay, while this should have been at Wibra's risk under Article 7:628 DCC. The FNV acknowledged that Clause 4 of the CLA offered an opportunity for rostering employees flexibly, for instance to cope with 'peak times and sick times', but argued that this facility was not applicable to extraordinary situations such as the Corona pandemic. Finally, the FNV stated that Wibra had taken advantage of the NOW wage subsidy scheme. In this light, enforcing deficit time, with the wages for that time having been fully or partially compensated under the NOW scheme, was unacceptable by standards of reasonableness and fairness.

The District Court **held** that the situation contemplated by Article 7:628 DCC did not arise in this case, because Wibra paid the agreed fixed amount of wages in full, even when there was no work available. The Court also held that interpreting the CLA did not yield the result that applying Clause 4 of the CLA was confined to the context of 'sick time and peak times': the bandwidth of the scheme (+/- 35% of the number of basic hours) was undoubtedly intended to cope with substantial peaks and troughs. As for the NOW scheme, the District Court held that the subsidies were applied fully for paying the agreed (basic)

wages of employees. If the employees had actually worked for the average number of hours and if Wibra had suffered a loss in turnover, it would also be able to use the NOW scheme to meet its obligations to pay wages.

This judgement does not mean that employers can *always* allow their workforce to catch up on time. The main rule in Article 7:628 DCC remains applicable, under which the employer is obliged to continue paying wages if the employee has not performed the agreed work fully or partially, unless this should be at risk of the employee. Whether employers can make their workforce catch up on time will depend on what has been agreed in individual employment contracts or CLAs. In this specific situation, wages were consistently paid in full, even when there was no work available. The CLA sets out that Wibra could compel its employees to work more or fewer hours per week within a bandwidth relative to the number of basic hours. In these particular circumstances, this did not lead to unacceptable consequences: only 7% of the total store personnel accrued more than 15% of deficit time compared to their agreed average working hours. The workforce would have to work for an average of 40 minutes of deficit time for the remaining weeks of 2021, above their basic hours.

The duty to continue paying wages

An employer is obliged to pay wages if the employee has not done all or part of the agreed work, unless the employee is reasonably responsible for the fact that work has not been done fully or partly (Article 7:628 DCC). The latter exception can arise in exceptional emergency situations only. Generally speaking, the employer will therefore have to continue paying its employees. Recent case law on the question of who bears the risk for the inability to perform work as a result of the Corona crisis shows that in most situations, this is entirely at the employer's risk (for instance, see the **judgement** by the District Court of Oost-Brabant on 29 May 2020 and the **judgement** by the District Court for Amsterdam on 30 March 2021). This means that, even in exceptional situations such as the Corona crisis, the employee remains entitled to his wage and other terms of employment. The threshold for any alternative apportionment of risk is exceptionally high.

In principle, an employer may only amend the terms and conditions of employment with the employee's consent

Can the Corona crisis justify a cutback on terms of employment?

In principle, an employer may only amend the terms and conditions of employment with the employee's consent. Terms of employment, including salary, may be amended unilaterally if (i) the employer has contracted for a unilateral amendment provision with the employee, and (ii) there are serious economic or organisational circumstances justifying unilateral amendment of the terms of employment (Article 7:613 DCC). If there is no amendment provision in the employment contract, it may still be possible to amend terms in certain circumstances, relying on good employee conduct (Article 7:611 DCC). Case law indicates that merely referring to the Corona crisis is not an adequate ground for amending the terms of employment (see the **judgement** by the District Court of Rotterdam dated 29 May 2020). An employer will therefore have to put forward a good argument for having a serious interest in pushing through the change.

A **judgement** by the District Court of Amsterdam dated 28 May 2020 confirms that a deteriorating commercial situation resulting from the Corona crisis can create a serious interest in effecting a wage cut. An employer who lost a large part of its income because of the Corona crisis and thus ran into acute payment problems felt it was required to hold back 50% of its employees' salaries. The District Court held that it was sufficiently plausible that there was an unforeseen emergency business situation because of the extraordinary circumstances encountered by this employer. The employer therefore had a serious interest that could lead to the ask for its employees, through consultation, to suspend or even completely surrender certain claims they had under employment law. An amendment to the terms of employment and even a reduction in salary may be justified in certain circumstances. In this particular case, however, the unilateral decision that had been taken without any consultation to pay the employee in question only half of his salary caused an excessive depletion of his income, forcing him into financial difficulties. In this case, when the respective interests of the parties were balanced up, the employee could not reasonably and

fairly be required to agree to retention of 50% of his wages over a period of several months.

Can the Corona crisis justify a suspension of terms of employment?
A different question is whether it is possible to suspend a particular payment rather than stop it, so that it is paid out at a later date. Understandably, a temporary suspension of wage payments is more readily permitted than a permanent stoppage or reduction in wages. The District Court of Rotterdam therefore held in its **judgement** of 15 April 2021 that, given the acute financial problems being experienced by the employer, it was justified to defer wage increases. Relevant factors here included that part of a previous wage increase had been awarded a few months earlier than had been agreed, that this was not a permanent change but a one-off, temporary measure, and also that the works council had agreed to the suspension of wages.

In another **judgement**, the District Court of Amsterdam held that the employer Artis had unrightfully terminated extra-statutory Unemployment Benefits Act (WW) rights, end of year bonuses, variable bonuses and work anniversary payments, despite the fact that Artis was facing very heavy weather financially because of the Corona crisis and had been forced into taking measures. This was partly based on the fact that this would be a definitive amendment of terms of employment, while the impact of the Corona crisis was more likely to be temporarily in nature. It would therefore have been more appropriate to make a temporary proposal. The District Court also held it relevant that the situation involved amending multiple primary terms of employment.

This judgement shows that there is some room for the temporary suspension of a specific term of employment. This could therefore be an option of interest for employers, which may include postponing a wage rise or temporarily suspending the settlement of holiday pay, a bonus or a year end payment.

It is imaginable that many employers will be faced with extra pressure when trying to deal with backlogs over the coming period

Can an employer use its employees' accrued holiday entitlements to save costs?
An employer must set the holiday dates for its employees in consultation with the employee (Article 7:638 DCC). A unilateral obligation for employees to take holidays during a certain period is in principle not allowed. This may be different with non-statutory holidays, which may also be paid out under certain circumstances.

In this context, the Sub-District Court of Rotterdam **held** that when setting the holidays for employees, an employer's interest in improving its liquidity does not outweigh the employees' interests in taking time off when needed. One notable point here is that the District Court considered it relevant, when balancing interests, that the employees had continued working during the lockdown, with some of them being under extra pressure due to the termination of (temporary) employment contracts of their colleagues. These circumstances offer some room for the interpretation that if employees are relatively quiet for a lengthy period, perhaps even permanently, so that they do not work their full allocated hours, there may be scope for an employer to set holidays unilaterally. However, in no circumstances does the recuperation aspect of holidays becomes less relevant. It would still be important for employers to consult with their workforce before proceeding with setting holidays unilaterally: the guiding principle remains that holidays should be set in consultation with employees.

Can an employer compel its employees to do work other than the work they are normally required to do?
Another **judgement** by the District Court of Rotterdam shows that an employer may be able to create some flexibility, in the forthcoming post-Corona period, by instructing its employees to do different work if necessary. In this particular case, the employer had requested an employee whose normal work involved front-line service to undertake collection and delivery work. Partly due to the special circumstances surrounding the Corona crisis, the District Court held that the work instructed by the employer was reasonable and that the employee could have anticipated that he would have to do this work. The employee therefore had no entitlement to payment of hours not worked as a result of refusing to do this. It is imaginable that many employers will be faced with extra pressure when trying to deal with backlogs

over the coming period. If the offer is a reasonable one, employees will not readily be able to refuse.

Summary: which cost-saving measures can an employer take in certain circumstances?
Employers who are facing financial difficulties as a result of the Corona crisis may consider cost-saving measures, such as suspending certain terms of employment (wage rises, holiday pay, bonuses or a 13th month payment) or even introducing a temporary salary reduction. Other options would include buying out outstanding holiday entitlement or forcing them to be taken, although this cannot affect the recuperative function of holidays.

Whether an employer can implement measures of this sort (unilaterally) will depend to a large degree on the relevant circumstances. All things considered, Dutch case law highlights the following aspects that may be relevant in the assessment of these situations:

- The severity of the employer's financial or commercial situation and the length of time expected before that situation recovers.
- The extent to which terms of employment are cut back: if reductions mean that an employee ends up with financial problems and can no longer maintain his standard of living, the test of reasonableness is very unlikely to balance out in the employee's favour.
- Whether terms of employment are cut back or merely suspended: if the measures are temporary, they are more likely to pass the reasonableness test for the employer.
- Whether the employer is wrongly failing to continue relying on support measures: if the employer could have been claiming wage subsidy under the NOW scheme but has failed to do so, that will be the employer's fault.
- The nature and intrusiveness of the change: a structural reduction in basic salary is more likely to be held to be unjustified than, for instance, an isolated failure to pay a particular bonus.
- The extent to which the works council or another representative body has been involved in the decision-making process.
- The extent to which other employees within the business have agreed to the change. With more employees having approved of a change, it becomes more reasonable to require other employees to accept the change as well.
- Any measure is more likely to be deemed reasonable if it prevents more radical measures, such as the implementation of (collective) dismissals.

CONTACT

Astrid Helstone
Partner Employment, Pensions & Incentives
astrid.helstone@stibbe.com
T +31 20 546 06 54
M +31 6 202 450 74

Jaap van Slooten
Partner Employment, Pensions & Incentives
jaap.vanslooten@stibbe.com
T +31 20 546 06 51
M +31 6 533 956 05

Paul Vestering
Partner Employment, Pensions & Incentives
paul.vestering@stibbe.com
T +31 20 546 01 01
M +31 6 109 355 80