Stibbe

NOW

Temporary Emergency Bridging Measure Work Retention

22 April 2020

Table of contents

I. Temporary Emergency Bridging Measure for the purpose of Work Retention (Tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid "NOW")

The NOW – introduction 3
Compensation under the NOW 4
Decline in turnover 5
Wage sum 7
Additional obligations under the NOW 8
Scope of the NOW 10
Application procedure 11
Accounting in retrospect 12
Legal protection 14
Collective obligations and the NOW 15
Alternative austerity measures for the NOW 15

II. Support measures for the self-employed

The Dutch Temporary Bridging Measure for Self-Employed Persons (Tijdelijke Overbruggingsregeling Zelfstandige Ondernemers "Tozo") 16
Tax measures 17

III. General Employment Law and COVID-19

Working from home 19
Working from home and holidays 20
Illness 20
Privacy 21

IV. Variable remuneration, pensions and COVID-19

Variable remuneration 24
Pensions 26

Contact 28

Stibbe

I. The Dutch Temporary emergency bridging measure for the purpose of work retention (Tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid “NOW”)

The NOW – introduction

On 1 April 2020, **the Dutch Temporary Emergency Bridging Measure for the purpose of Work Retention (“NOW”)** was **published**. Pursuant to the NOW, employers may be eligible to receive a subsidy that serves as a compensation for the wage costs. The subsidy may be as high as 90%, proportionate to the decline in turnover.

The subsidy for the wage costs applies for employers that are confronted with a decline in turnover of at least 20%. The NOW is intended to address the consequences of the measures against the spreading of COVID-19. However, employers do not need toprove that the decline in turnover is caused by those measures.

The option of extending the NOW has been expressly kept open. Clarity about this will be provided no later than on 1 June 2020.

The Dutch Special Regulations for Reduction in Working Hours (regeling werktijdverkorting “wtv”) become the NOW: what changes?

	Wtv	NOW
Measure	Temporary exemption from the injunction on reducing the working hours of (groups) of employees to be designated in the exemption	No reduction of hours but compensation for the payment of wage costs, in the form of a subsidy
Conditions	1. At least 20% of the work capacity cannot be used, or this is expected to be the case, for a period of at least two and a maximum of 24 weeks; 2. because of a reduction in activities caused by extraordinary circumstances that cannot reasonably be considered to belong to the normal entrepreneurial risk	1. A decline in turnover of at least 20% over an uninterrupted period of three months; 2. because of a reduction in activities caused by extraordinary circumstances that cannot reasonably be considered to belong to the normal entrepreneurial risk
Exceptions	No exemption is granted: • with retroactive effect • if the headcount is not in line with the reasonably to be expected demand • if the work reduction is related to a strike	A subsidy is refused inter alia if: • it is not or insufficiently likely that the decline in turnover will be at least 20% • the application fails to satisfy other require ments set in the NOW
Duration	Six weeks, with three possible extensions of 6 weeks each	Three months, with a single extension of three months
Advance	Employers receive compensation in retrospect, in the amount of the employees’ unemployment benefits	Employers will receive an advance payment of an amount equal to 80% of the subsidy to which they are expected to be entitled
Unemployment benefit	During the period of reduced working hours, employees use their accrued unemployment benefit entitlement	Employees do not have to use their accrued unemployment benefit
Application procedure	Apply for exemption with the ministry of Social Affairs and Employment (SZW); register and apply for unemployment benefits with the Dutch Employee Insurance Agency (UWV)	Apply for subsidy at the UWV desk; advance payment and final settlement by the UWV

Compensation under the NOW

Of what does the compensation under the NOW consist?
Pursuant to the NOW, employers may be eligible for state support to bridge a period of a substantial decline in turnover. The support consists of a subsidy for wage costs. These are the wage costs of employees employed by the employer who are compulsorily covered by employee insurance schemes. In this respect, a maximum of € 9,538 per employee applies. The subsidy explicitly also applies for the wage costs of employees with flexible contracts and employees in whose regard there is no obligation to continue to pay wages.

How is the amount of the subsidy calculated?
The amount of the subsidy is a percentage of the employer's total wage sum over the three-month period from March through May 2020. The subsidy is related to the percentage of the decline in turnover. The percentage of 90% of the total wage sum is a maximum percentage that will be paid if the decline in turnover is 100%. If the decline in turnover is lower, the subsidy will be proportionally lower:

- with a decline in turnover of 100%, the subsidy is 90% of the wage sum;
- with a decline in turnover of 50% the subsidy is 45% (= 50% of 90%) of the wage sum;
- with a decline in turnover of 20% the subsidy is 18% (= 20% of 90%), etc.

The subsidy is calculated with the following formula:
A x B x 3 x 1.3 x 0.9,
in which:

- *A = the decline in turnover; and*
- *B = the wage sum*

How is the advance payment calculated?
If the employer is eligible for the subsidy, the UWV initially determines the amount of the subsidy based on the decline in turnover expected and reported by the employer and based on the wage sum for January 2020. Subsequently, the employer receives an advance payment of 80% of the provisional subsidy amount as established by the UWV. The UWV pays the advance payment in no more than three instalments and strives to pay the first instalment within four weeks from receiving the employer's complete application.

How is the subsidy definitively determined?
The employer must apply for the definitive determination of the subsidy within 24 weeks from the end of the period in which the advance payment has been received. The UWV determines the definitive subsidy based on the actual decline in turnover experienced and based on the actual wage sum over the three-month period of March through May 2020.

The employer must apply for the definitive determination of the subsidy within 24 weeks from the end of the period in which the advance has been received

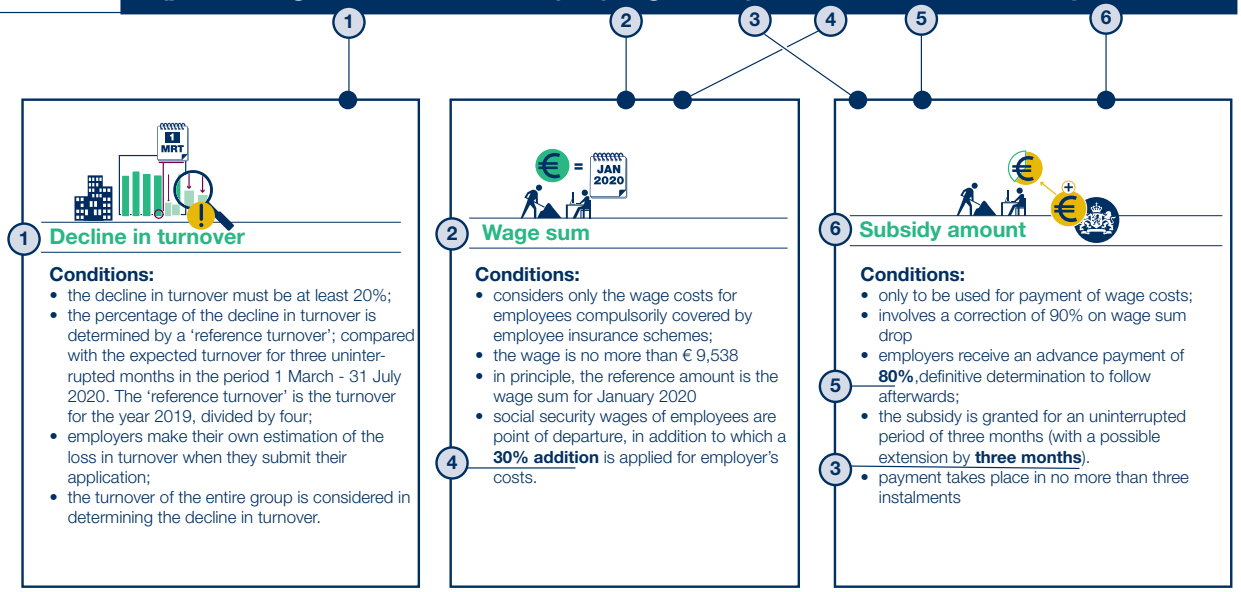
The settlement at the end may have the consequence that the amount is established to be lower than the advance payment received, for example because the decline in turnover or the wage sum turns out to be lower than was expected. In that case, the employer runs the risk of having to pay back part of the advance payment received.

The NOW includes two variable components that are decisive for the amount in subsidy that employers may claim: the decline in turnover, and the wage costs. Both components will be discussed below.

When is no subsidy granted under the NOW?
The subsidy is refused if:

- it is not or insufficiently plausible that the decline in turnover of the employer in question will be at least 20%;
- the account number submitted with the application fails to correspond with the withholding tax number stated in the application and with the account details connected thereto;
- no wage data are available in the UWV's benefit entitlement database; or
- the application otherwise fails to meet the requirements set out in this measure.

NOW Formula (percentage turnover decline) x (wage sum) x 3 x 1.3 x 0.9 = subsidy amount



Decline in turnover

What is turnover considered to mean?
The NOW is linkedwith the definition of turnover in accounting law. The net turnover is taken as a point of departure. Relevant is the revenue from the supply of goods and services through the legal entity's business, after deduction of turnover tax credits and the like.

Any income ensuing from an organisation's normal activities is also considered turnover under the NOW, even where this may normally be designated by a different term than turnover. The explanation to the NOW mentions such examples as benefits, subsidies received and other contributions from a government institution, but also other income such as gifts or health care insurance claims.

When is there an acute decline in turnover as a consequence of COVID-19?
The purpose of the NOW is to compensate employers who are confronted with an acute decline in turnover resulting from extraordinary circumstances not belonging to the normal entrepreneurial risk. These include the far-reaching measures taken by the government in response to the outbreak of the COVID-19 virus. Employers confronted with a decline in turnover of at least 20%, occurring in an uninterrupted period of three months between 1 March 2020 through 31 July 2020, are eligible for a subsidy under the NOW.

To be able to offer employers clarity and security quickly, the point of departure is that a decline in turnover of over 20% in the period of 1 March 2020 through 31 July 2020 is a consequence of extraordinary circumstances. Therefore, employers need not show to what degree the extraordinary circumstances contribute to the decline in turnover of (over) 20%.

Does the NOW apply also if the decline in turnover of at least 20% is not a consequence of COVID-19?
Yes, employers suffering a decline in turnover as a consequence of other extraordinary circumstances than the outbreak of the COVID-19 virus may also be eligible for a subsidy under the NOW. Although the outbreak of COVID-19 was the reason for the NOW, it is not required that the decline in turnover was caused by COVID-19 and the measures taken in response thereto. The NOW serves to compensate employers suffering an acute and serious decline in turnover as a consequence of the measures taken in response to the outbreak of COVID-19. To that end, a compensation in the wage costs is offered, the government explicitly calls on employers to use the NOW and other support measures with integrity.

To what period is the decline in turnover being related?
In principle, the decline in turnover is related to the turnover in the period of January through December 2019 divided by four. This is called the reference turnover.

Will correction take place if the reference turnover is not representative?
No, under the NOW no correction of the reference turnover will be made if the results in question are not representative for an employer's business. To keep the measure simple, company-specific circumstances are not taken into account. This may turn out to be disadvantageous for some employers.

How should the decline in turnover be calculated?
The decline in turnover is calculated by comparing the reference turnover to the turnover over an uninterrupted period of three months between 1 March 2020 through 31 July 2020. For the exact calculation of the percentage of the decline in turnover, the difference between the reference turnover and the turnover over the uninterrupted period of three months should be divided by the reference turnover.

How is the decline in turnover calculated for a group of companies?
If an employer is part of a group of companies, the entire group must be considered to determine the decline in turnover. In that case, the decline in turnover of the group that existed on 1 March 2020 will be considered. Also foreign legal entities are included in the calculation if they pay wages to employees compulsorily covered by employee insurance schemes in the Netherlands. Employers who are part of the same group and who make separate applications under the NOW must therefore record the same decline in turnover.

Employers suffering a decline in turnover as a consequence of extraordinary circumstances other than the outbreak of the COVID-19 virus may also be eligible for a subsidy under the NOW

Can employers whose decline in turnover does not become visible until at a later stage claim compensation under the NOW?
The NOW recognises that the decline in turnover as a consequence of COVID-19 may only become visible at a later stage, for example because a drop in the demand for production may not express itself at once. Because of this, the NOW offers some flexibility to employers in determining the uninterrupted period of three months in which the decline in turnover occurs. This means that employers may choose whether that period starts on 1 March, 1 April of 1 May 2020. For the wage sum, however, the period March, April and May 2020 is always taken into account. This period cannot be shifted.

What if an employer fails to satisfy the requirement of a decline in turnover of at least 20%?
Employers who fail satisfy the requirement of a decline in turnover of at least 20% have no right to compensation under the NOW. The NOW is a temporary measure, the underlying idea being that, to the greatest possible extent, employment should be retained in the period in which the subsidy is granted. Employers who suffer a less than 20% decline in turnover at this time will be deemed to absorb this loss themselves.

Employers may not suffer a decline in turnover of 20% or more until later in the year (or even next year). Also in that case, the employeris not eligible to receive a subsidy under the NOW. However, the option of an extension of the NOW is still open. This will be decided no later than by 1 June 2020.

Wage sum

What are the concepts “wage” and “wage sum” taken to mean?
The total wage sum consists of all the wages of the individual employees on which employee insurance contributions are paid (the wage for the purposes of wage tax/national insurance contributions). The data from the payroll tax form submitted to the Dutch Tax and Customs Administration are used for these wages. In a group of companies, the wage sum and therefore also the subsidy are calculated separately for each employer in the group that has its own withholding tax number.

Are the employer’s contributions compensated under the NOW?
The employer’s contributions are compensated in a lump sum, for which all employees’ wages taken together are multiplied by 30%. This additional allowance serves to compensate for extra costs, for example for pension contributions or additional insurance or to build up holiday allowance. All this is deemed to be included in the 30% mark-up.

Over what period are wages subsidised?
Initially, the NOW provides a subsidy for the wage costs of March through May 2020. Employers may choose the starting moment for the calculation of the decline in turnover. The period for the wage cost subsidy is fixed in the NOW., Relevant are the wage costs incurred in March through May 2020. Employers have no freedom of choice in this respect.

The employer’s contributions are compensated in a lump sum. All employees’ wages taken together are multiplied by 30%

In what way is the subsidy linked to the wage sum?
The subsidy amount is based on the wage sum. The support offered is a subsidy for the wage costs of the employees employed by the employer and compulsorily covered by employee insurance schemes. For the NOW, the subsidy is linked to the wage sum at two different stages: (1) upon determining the expected subsidy and the advance payment; and (2) upon determining the definitive subsidy.

The expected subsidy and the advance payment
In calculating the advance payment, the wage sum over a reference period of one month, in principle the month of January of 2020, is taken. The wage sum of January 2020 was chosen as the basis for the amount of the subsidy because it is the most recent month for which sufficient wage data are available in the UWV’s benefit entitlement database.

Definitive subsidy
For the definitive determination of the subsidy, the wage sum as used for the advance payment is compared to the wage sum for the subsidy period of March 2020 through May 2020.

Wage sum decrease
The wage sum in the subsidy period may turn out to be lower than in the reference period (in principle, January 2020), because employees may no longer be with the company or may not have been called up again, as a result of which they may not have received wages. If the wage sum has decreased, the subsidy will be set lower. The settlement is intended as an incentive to retain employees if and where possible. If the wage sum over the months March-April-May is lower, the subsidy amount will be lowered by 90% of the decrease of the wage sum.

Consequences of the calculation method
The incentive may have major consequences for employers suffering less than 100% loss in turnover. The expected subsidy is calculated based on the expected decline in turnover. At a 50% loss in turnover, the subsidy is 45% instead of 90%. The final settlement resulting from the wage sum decrease is calculated based on 90%. For every euro the wage sum has decreased, the employer receives 90 eurocents less in subsidy. Hence, in the settlement, no correction takes place for the loss in turnover. In that case, the employer pays back more than is proportionate. However, a higher wage sum in the months of March-April-May 2020 does not result in a higher subsidy being determined.

The final settlement is intended as an incentive to retain employees if and where possible

Do the wages of all employees fall under the definition of "wage sum"? Also those of directors?
The employee is defined as the employee in the meaning of the Dutch Social Insurance (Funding) Act (Wet financiering sociale verzekeringen). Both regular and state employees are mentioned therein. Those who do not fall under that definition, such as uninsured directors and major shareholders and the voluntarily insured, are excluded. Hence, their wages are taken into account for the subsidy.

In addition, the subsidy is capped at twice the daily wage per month per individual employee (calculated for the uninterrupted period of three months), which boils down to € 9,538 a month. Wages over € 9,538 a month are therefore not covered by the subsidy.

Additional obligations under the NOW

What obligations does the NOW impose on employers who are granted a subsidy?
Employers receiving a subsidy for the wage costs under the NOW must meet a number of additional obligations:

- the obligation to keep the wage sum the same as much as possible;
- the obligation to file no applications for a permit to dismiss employees on business economic grounds;
- 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 1964.

What are the consequences if an employer fails to satisfy the additional obligations?
The NOW provideThe NOW provides an option for the UWV to suspend payment of the advance payment, should there be a serious presumption that an employer fails to meet the obligations. The option to suspend does not apply if it is suspected that an employer does not comply with the obligation to not file applications for a permit to dismiss employees on business economic grounds. This has consequences for the amount of the definitive subsidy.

What are the consequences if the wage sum has not remained the same?
The obligation to keep the wage sum the same where possible in the period in which the subsidy is received, is meant as an incentive for employers to retain as much employment as possible, by continuing to employ employees and the payment of their wages. Failure to satisfy this obligation may lead to the UWV suspending payment of the advance payment.

If the wage sum has not remained the same, this has consequences for the amount of the definitive subsidy. If the wage sum has decreased over the months March, April and May 2020, the provisional subsidy amount will be decreased; this may lead to a reclaim of advance payments received. An increase of the wage sum does not result in a higher definitive subsidy.

What concept of dismissal is used in the NOW?
The NOW obliges employers not to request a permit to dismiss employees on business economic grounds. A penalty will be applied in such a case; this penalty is applied only if an employer requests a permit from the UWV to terminate the employment contract on business economic grounds. Employers may therefore decide not to renew an employment contract for a fixed-term or to terminate an employment contract during the trial period. Termination by mutual consent or file an application with the subdistrict court to terminate the employment contract for other reasons than business economic grounds will not result in a penalty.

The NOW provides an option for the UWV to suspend the advance payment, should there be a serious presumption that an employer is failing to meet the obligations

Employers must however be aware that this will result in a decrease of the wage sum, the consequence of which will be that the amount of the definitive subsidy will be lower.

What are the consequences if an employer files an application for a permit to dismiss an employee, or fails to (timely) withdraw such application?
If an employer nevertheless files an application for a dismissal permit or fails to withdraw it (in time), the UWV will deal with the application and render a decision. In the event of an application for a dismissal on business economic grounds, the employer will have to make plausible that the dismissal cannot be prevented by invoking the NOW and why not. Failure to satisfy this obligation does however haveconsequences for the amount of the definitive subsidy. The wages of the employees whose dismissal has been sought are multiplied by 1.5; the sum is subsequently deducted from the total wage sum on which the definitive subsidy is based. This is done irrespective of whether the UWV renders a positive decision on the application for a dismissal permit and the employment contract can actually be terminated.

What are the consequences for applications for dismissal already filed?
If the application for a dismissal was filed in the period of 18 March 2020 up to and including the moment the NOW has entered into force, the employer is given the opportunity to withdraw that application within five working days from the moment the NOW has entered into force. If the application was filed after this moment, the employer should withdraw it within five days from its filing. Applications for dismissal filed in the period of 1 March through 17 March 2020 need not be retracted and will simply be assessed.

What conditions apply for the possible extension of the NOW?
The Dutch minister of Social Affairs and Employment has left open the option of extending the NOW by three months. This issue will be decided no later than on 1 June 2020. Upon extension, further conditions may be added, pertaining for example to the amount of the subsidy or the threshold of 20%; additional conditions such as the obligation to follow training may be imposed.

The scope of the NOW

Which flexible workers fall under the NOW?
The support regards a subsidy for the wage costs of employees employed by an employer and compulsorily covered by employee insurance schemes. As such, the measure also applies for employers with employees working under a flexible contract. The subsidy for flexible workers is equal to that of regular employees. Also employees in whose regard the employer has no obligation to continue to pay wages explicitly fall under the scope of the NOW if their wages nevertheless continue to be paid. They for example may include employees with a zero-hours contract or on-call workers.

What is the employer's obligation towards flexible workers?
Employers are obliged to keep the wage sum the same as much as possible. The Dutch government has explicitly called on employers to take responsibility for their flexible workers and to continue to pay their wages. It follows from the explanations to the NOW that during the legislative consultations, adding the option of retaining employees with a flexible contract as a condition to the measure was discussed. However, adding that option turned out to be too complex; therefore, only the obligation to keep the wage sum the same as much as possible was included.

If there is a serious presumption that this obligation is not being met, the minister will suspend the subsidy. It is unclear at this time in what cases a serious presumption will be considered to have arisen. An added incentive to comply with this obligation is that in the end, the amount of the definitive subsidy is decreased by 90% of the amount by which the wage sum has dropped in the months March- April-May 2020. See above in the answer to the question how the subsidy is linked to the wage sum.

The Dutch government has explicitly called on employers to take responsibility for their flexible workers and to continue to pay their wages

To prevent a decrease in the wage sum, employers should pay on-call workers or employees on a zero-hours contract the same wages as those that were paid in the reference period (in principle, January 2020).

Do employers have an obligation to extend the employment contracts of employees on fixed-term contracts?
That obligation does not explicitly exist based on the NOW. If however suspicions are that the obligation to keep the wage sum the same as much as possible is being severely violated, the subsidy is suspended. For that reason, it is important to take into account a possible wage sum decrease and repayment with fixed-term employment contracts that may expire in the course of the subsidy term. If notice of non-renewal of the employment contract has already been given, this may be reversed where possible. If a (large) number of fixed-term employment contracts have been terminated, this will have consequences for the wage sum.

What are the consequences of terminating an employment relationship with flexible workers prior to applying for the NOW?
Employers who ended the employment relationship with a flexible worker after 1 March 2020 will face consequences for the amount of the subsidy. The measure offers no scope to disregard employment relationships terminated between 1 March 2020 and 17 March 2020 (the date the measure was announced). This is a consequence of the fact that the wage sum in the months March, April and May 2020 is decisive for the eventual determination of the subsidy. In the discussion of the manner in which the subsidy is linked to the wage sum, it was discussed that this may have unfavourable consequences for the employer. A possible solution for those unfavourable consequences might be to continue to pay the flexible workers with retroactive effect. Flexible workers whose employment contract has already ended may be offered an extension.

What about payroll employers and employment agencies?
For payroll employers and temporary employers, the same conditions apply as for regular employers. They may apply for compensation under the NOW and will be compensated for the wage costs of employees employed by them. Temporary employment agency contracts with or without a temporary agency clause are included. Such temporary agency clause is a provision in the temporary employment agency contract that ensures that the agreement between the temporary agency worker and the temporary employment agency ends when the hirer terminates the placement. The requirement of a decrease in turnover of at least 20% also applies to payroll employers and employment agencies.

Does the NOW also apply for expats temporarily working in the Netherlands or temporarily assigned abroad?
According to the literal text of the NOW, the subsidy amount is calculated over the number of 'employees' within the meaning of the Wfsv. These are mainly employees working in the Netherlands, regardless of how long they reside in the Netherlands. Also expats briefly sent to the Netherlands may qualify as 'employees' under the Wfsv. As a rule, Dutch expats temporarily assigned abroad are not employees in the meaning of the Wfsv. That is the outcome if the text is interpreted literally. However, that interpretation is not in line with the intention of the minister of Social Affairs and Employment, which follows from the explanations to the NOW.

**According to the literal text of the NOW, the subsidy amount is calculated over the number of 'employees' within the meaning of the Dutch Social Insurance (Funding) Act.
These are mainly employees working in the Netherlands, regardless of how long they reside in the Netherlands**

These provide that the subsidy is calculated over all the employees socially insured in the Netherlands, which is a different concept than the concept of an 'employee' in the Wfsv, and may have a different effect in practice. According to Regulation 883/2004, expats sent from the Netherlands to another EU member state for less than 2 years and expats who are sent to the Netherlands from another EU member state for more than 2 years enjoy social insurance in the Netherlands. In addition, for some non-EU states there are treaties that provide which social security rights apply. Those treaties and the regulation take priority over the Wfsv. Since what is provided in the explanations to the NOW provide the apparent intentions of the minister of Social Affairs and Employment, there is something to be said for the NOW applying to 'employees with social security in the Netherlands' rather than to 'employees' in the Wfsv, where those concepts might result in different outcomes.

Application procedure

Where can an application be submitted?
NOW applications can be submitted to the UWV desk. As per 6 April 2020, employers may file their NOW applications at the UWV desk, via a form made available on **www.uwv.nl** .

Duration of the NOW application procedure
The decision period is 13 weeks from receipt of the complete application. The UWV strives to pay the first advance instalment within 2 to 4 weeks from receipt. The UWV may ask the employer for additional information. In that case, the start of the decision term of 13 weeks is postponed. In other words, the UWV will not decide on an application before it has received the additional information, which must be provided within four weeks.

What information should be provided with the application?
Employers must provide the following data with their application:

- the expected decline in turnover in full percentage points;
- the uninterrupted period of three months in which the decline in turnover is expected;
- the withholding tax number;
- the bank account number on which the employer receives payments from the Dutch Tax and Customs Administration regarding withholding taxes; and
- the dossier number of a possible earlier application under the wtv.

Timing and entry into effect
As per 6 April 2020, employers may file their applications under the NOW at the UWV desk. From that moment, applications may be filed for a subsidy for the wage costs over March, April and May 2020. This means that for the application, 1 March 2020 is the starting date; the reason to look back to that date is that employers may have been confronted with a decline in turnover resulting from COVID-19 already from March 2020.

Applications for exemptions under the wtv submitted before 18.45 hrs on 17 March, but on which no decision has been received will be designated NOW applications

Convergence with the wtv measure
Applications for exemptions under the wtv submitted before 18.45 hrs on 17 March, but on which no decision has been received will be designated NOW applications. Employers will be requested to supply additional information so that their applications may be assessed along the criteria of the NOW. Employers with an exemption based on the wtv who have been applying the working hours reduction cannot apply for an extension of such exemption. They can make an application based on the NOW. The NOW provides a measure to prevent employers applying the working hours reduction benefit doubly from state support measures. The sum in unemployment benefits received during their application of the working hours reduction will be deducted from the wage sum considered for the NOW.

Accounting in retrospect

When is the definitive subsidy determined?
Within 24 weeks from the conclusion of the period of three months in which the advance payment on the subsidy was received, employers must apply for a definitive determination of the subsidy. A number of documents should be submitted in that application, including in any case documentation of and information on the decline in turnover, an audit opinion and a statement that the obligations for the subsidy have been met. The UWV sets the definitive subsidy based on the actual decline in turnover and the wage sum over March through May 2020. It is expected that within four weeks, clarity will be given about the question whether the audit opinion is required for all employers or also for those with a specific turnover or application.

At what time will the UWV test whether an employer has complied with the conditions for a subsidy under the NOW?
Upon determining the definitive subsidy amount, the UWV will test whether the employer has complied with the conditions for a subsidy under the NOW.

NOW timeline, dates and instalments

As per **15 March 2020**, several emergency decrees are effective in the Netherlands as a consequence of the corona crisis, in any case until **28 April 2020**, with a possible extension.

Jan

Feb

Mar

Announcement NOW on **17 March 2020**

Apr

Publication NOW on **1 April 2020**

NOW applications can be made from **6 April 2020**

The NOW may be applied for an expected decline in turnover in the period **1 March - 31 July 2020**. The application can be made for a decline in turnover in three uninterrupted months. Upon receipt of a complete application, the UWV decides whether the conditions are met; if so, the UWV provides an advance of 80% of the subsidy.

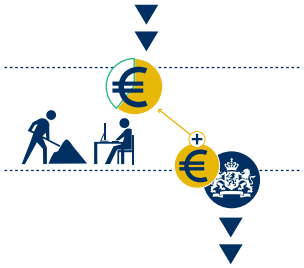
May

Jun

The NOW is in force through **31 May 2020**. Before 1 June 2020, a possible extension of three months will be decided on.

Jul

The decision term for whether a company is eligible for an advance payment is **13 weeks** and starts the moment a complete application is received



Aug

Within **24 weeks** from the end of the uninterrupted period of three months, the employer will request the definitive determination of the subsidy. The following documents should be attached:

- documentation and information about the decline in turnover;
- an audit opinion;
- a statement that the obligations for the subsidy have been met.

Sep

Oct

Nov

Dec

Within **52 weeks** from the application for this, the definitive determination will take place. This may result in:

- an additional payment, because the advance payment is only 80% of the subsidy;
- an additional payment, because a correction takes place: ultimately, a greater loss in turnover than expected was suffered;
- repayment, because less turnover was lost than expected;
- repayment, because the wage sum has dropped and/or the employer has filed an application for leave to dismiss with the UWV.

Legal protection

What are the sanctions on failure to comply with the obligations in the NOW?
The NOW imposes several obligations on employers who make an application. Some of the obligations pertain to the provision of information to the UWV. Others serve the retention of employment, such as the requirement that employees should not be dismissed in the course of the subsidy term on business economic grounds.

There may be various consequences for not complying with these obligations. Erroneously paid or excessive advance payments may be partly reclaimed.
If it turns out that some obligations have not been met after the subsidy has been determined, the UWV may re-establish the subsidy at a lower amount. In addition, the UWV may suspend payment of an advance payment if it suspects that an employer is failing to meet the conditions for a subsidy.

In his covering **letter to the House of Representatives ("Kamerbrief")**, the minister of SZW writes that in cases of abuse of the measure, criminal prosecution might follow. The minister considers that the UWV might report such abuse. The text of the NOW provides no injunctions or penal provisions. As such, the comment in the Kamerbrief is not directly related to the content of the NOW.

Wat can employers do who disagree with a decision made by the UWV?
Several scenarios are imaginable in which employers fail to agree with the UWV, for example if an advance of the definitive subsidy is too low, is the subsidy application is rejected in its entirety or if the UWV withdraws or lowers the subsidy after having established it.
All those acts may be appealed, in the following manner.

Several consequences may be attached to failure to comply with these obligations. Erroneously paid or excessive advance payments may be partly reclaimed

Firstly, employer may object to such decisions to the UWV. The UWV will make a new decision in response to the objection, either amending or upholding its earlier decision.

The UWV's decision on the objection may be appealed before the district court, which will decide whether the UWV made the right decision and, depending on the dispute, may order the UWV to make a new decision, or make a decision of its own in its judgment.

The decision of the district court may be appealed. Because the NOW is based on two different laws, it is not entirely certain whether the Central Appeals Tribunal or the Administrative Jurisdiction Division of the Council of State has jurisdiction to hear such an appeal. In the explanations to the NOW, it is assumed that the Central Appeals Tribunal is competent.

What is the difference between the subsidy granted and the definitive subsidy determination?
Provision of a subsidy under the NOW is in two steps. The first is the granting; the second the definitive determination. Employers must file an application for each step, after which the UWV decides on the application.

In the granting of the subsidy, inter alia the amount of the advance payment and the period over which the subsidy is given are determined. Together with the granting of the subsidy, an advance payment is supplied. According to the text of the law, the UWV decides on the granting of the subsidy within 13 weeks from the application, but the UWV strives to decide on the complete application within two to four weeks.

The subsidy determination provides the definitive subsidy amount. In the application for the determination, the employer provides inter alia the information required to be able to determine the decline in turnover and an audit opinion. The UWV will decide on this definitive sum within 52 weeks from receipt of the application.

Can employers request leave to reduce work hours now?
No, this is not allowed, and no exemptions on this injunction are granted. Before, exemptions could be granted applying the Policy Rules in regarding exemptions on the injunction on reducing working hours (Beleidsregels ontheffing verbod op werktijdverkorting 2004). Those policy rules have been replaced by new ones, which prescribe that no more exemptions of this injunction will be granted.

Collective obligations and the NOW

Does the works council have the right to advise or consent on the intention to request compensation under the NOW?
Based on the measure, employers are obliged to inform the works council or the employee representative body or, for lack thereof, the employees about the subsidy granted. If there is a serious presumption of non-compliance with this obligation, the subsidy is suspended. This will likely result in the subsidy not being paid until the works council has been informed.
No procedural requirement is attached to informing the works council. The information requirement at least offers the option to consider in consultation with employees what other measures are needed to bridge this difficult period.

Employers are obliged to inform the works council or the employee representative body or, for lack thereof, about the subsidy granted. If there is a serious presumption of non-compliance, the subsidy is suspended

This obligation does not concern a formal right (to advise) of the works council, as included in the Dutch Works Council Act (WOR) . At this time, there are also no leads to assume that the works council has the right to advise or consent pursuant to the WOR. In addition, the NOW does not mention the involvement of the trade unions. Now that the measure explicitly provides in what way the employer must inform the employees about the NOW, the trade unions do not seem to have been given a role to fulfil.

Alternative austerity measures for the NOW

What temporary austerity may employers take?
For employers who do not meet the 20% decline in turnover requirement at this point, or those who expect such a drop in the wage sum in March, April and May that it will not pay to apply for a subsidy, it may be important to take other temporary austerity measures, such as:

- asking the employees to take their holidays;
- (in consultation with the employees) postponing the payment of holiday allowances;
- (in consultation with the employees) postponing the payment of variable remuneration;
- (in consultation with the employees and the pension provider) not paying the pension contributions;
- temporarily stopping payment of expense allowances.

II. Support measures for the self-employed

The Dutch Temporary Bridging Measure for Self-Employed Persons (Tijdelijke Overbruggingsregeling Zelfstandige Ondernemers "Tozo")

The Tozo is a temporary measure based on the Dutch Social Assistance Self-Employed Persons Decree 2004 (besluit bijstandsverlening zelfstandigen (Bbz)). Based on said decree, self-employed persons but also independent workers with employees may apply for income support in the form of supplementary maintenance benefits or for a working capital loan.

The conditions for support based on the Tozo

The exact criteria are not entirely clear at this stage. According to the **Dutch central government (Rijksoverheid)**, the self-employed person must at least meet the following conditions to be able to use the measure:

- the self-employed person is at least 18 years of age and has not reached the state pension age;
- the self-employed person lives in the Netherlands, with a business established in the Netherlands and the main activities taking place in the Netherlands;
- the self-employed person satisfies the legal criteria for the running of the business or independent profession;
- the self-employed person was commercially active as a self-employed person already prior to 17 March 2020 and registered with the Chamber of Commerce;
- during the calendar year, at least 1225 hours are spent on activities in the business or for the independent profession; this boils down to approximately 24 hours a week.

In what respects is the Tozo different from the Bbz?

In a number of areas, the Tozo derogates from the Bbz. The following Bbz criteria do not apply for the Tozo:

- The viability test is not applied to promote the quick processing of applications: self-employed persons therefore do not need to prove that their business is viable.
- There is no means test or partner income test: the partner's income is not considered and a house, savings or expensive business assets such as a car, are also not taken into account.
- The income support is provided 'gratuitously': the self-employed person is not obliged to repay this later. Social assistance pursuant to the Bbz is granted in the form of an interest-free monetary loan that may be converted into (the form of) a gratuitous sum.
- The cost sharer standard is not applied: based on this standard, normally the number of adult household members is taken into account in determining the amount of social assistance benefits.

The maintenance benefit supplements the income up to the social minimum. This social minimum is no more than circa € 1,500 (for cohabitants) or € 1,050 (for singles) net a month

Of what does the additional benefit consist and what additional conditions apply for this?

The maintenance benefit supplements the income up to the social minimum. This social minimum is no more than circa € 1,500 (for cohabitants) or € 1,050 (for singles) net a month, depending on the income and the composition of the household. If a self-employed person earns (more than) the social minimum, no additional benefit can be obtained. The self-employed person must state that as a consequence of the corona crisis, the income is expected to be less than the social minimum. The benefit amount is set in line with that expected income. It will be checked in retrospect what income was actually earned and as such, what additional benefit could actually be claimed.

What is the duration of the additional benefit?
The Tozo is a temporary measure. Benefits may be received for the months of March, April and May 2020, i.e. for three months. The maintenance benefit is granted in one go for the three months' period and paid out per month.

Of what does the working capital loan consist and what additional conditions apply in this respect?
Self-employed persons can take out a loan of no more than € 10,157 at a 2% interest rate. The maximum term of the loan is three years. Up to 1 January 2021, no redemptions need to be made. The self-employed person must state and make plausible that there are liquidity problems resulting from the corona crisis.

Up to which date can applications for support be filed?
The application for the support may be submitted until 31 May 2020. Benefits may be claimed with retroactive effect as from 1 March 2020.

Where can an application for support be submitted?
The temporary measure is carried out by the municipalities and applications for the additional support are made via (the website of) the municipality in which the self-employed person lives, also if the business is registered in a different municipality.

What are the terms for the support?
The maintenance benefit is provided within four weeks for a maximum period of three months. Under the Bbz, this instalment is 13 weeks.

What is the sanction if it turns out that the support was claimed erroneously or has been too high?
The central government obliges municipalities to reclaim the support granted and impose a fine if fraud is discovered. In addition, Municipalities have a power of recovery.
Exactly when fraud applies and a fine has to be imposed accordingly is not yet clear.

Tax measures

Do different terms apply for tax payments to be made by entrepreneurs?
The Dutch Tax and Customs Administration grants a special payment deferment to any entrepreneur who has incurred or will incur liquidity problems because of the corona crisis. The deferment may be obtained for payment of income tax, corporation tax, sales tax (VAT) and wage tax.

For now, upon request entrepreneurs are granted a payment deferment of three months

When can a payment deferment be requested?
The option of requesting a deferment of tax payments has been available as per 12 March 2020. However, entrepreneurs who wish to make such a request must have already made their tax returns and received a tax assessment.

How long a deferment may be obtained?
For now, upon request, entrepreneurs are given a payment deferment of three months. For longer deferments, the Dutch Tax and Customs Administration will ask for additional information. After the deferment request is received, collection measures are halted and the payment deferment applies immediately. Individual assessments are made later.

What are the requirements to obtain a payment deferment?
The usual requirements for a deferment continue to apply. Within four weeks from requesting a deferment, entrepreneurs should submit the requisite independent expert opinion. The conditions for that statement are still under discussion.

What happens to fines imposed for non-(timely) payment of taxes?
If an entrepreneur requests a payment deferment in relation to the consequences of the corona crisis, the Dutch Tax and Customs Administration will cancel any so-called 'default fines' imposed for non-(timely) payment of taxes.

What happens to the collection interest rate for tax debts?
Collection interest is charged if a tax assessment is not paid on time and must be paid from the moment of expiry of the payment term. As from 23 March 2020, the collection interest for all tax debts will be lowered from 4% to 0.01%.

What happens to the tax interest rate?
As per 1 June 2020 (with regard to the sales tax as from 1 July 2020), the tax interest rate is lowered to 0.01%. Tax interest is charged when a tax assessment could not be determined on time.

Entrepreneurs who expect to make no profits at all will be given back any tax already paid for this year

What happens to provisional assessments imposed on entrepreneurs who now expect lower profits?
Entrepreneurs who expect lower profits as a consequence of the corona crisis can submit a request for reduction of the provisional income tax assessment, which will be granted by the Dutch Tax and Customs Administration. If the sum of the new provisional assessment is lower than the sum in taxes already paid this year, the difference will be paid out. Entrepreneurs who expect to make no profits at all will be given back any tax already paid for this year.

How and where can a request for a payment deferment be submitted?
Entrepreneurs should send their payment deferment request to the Dutch Tax and Customs Administration (Postbus 100, 6400 AC Heerlen). The request must include explanations as to how the corona virus has resulted in payment problems. The government is still investigating how the process of requesting a special payment deferment may be given the most convenient form.

III. General Employment Law and COVID-19

Working from home

Can employees be obliged to work from home?
On 12 March 2020, the Dutch government declared that, depending on the specific circumstances of a particular case, employers may refuse to give their employees access to the workplace. The Dutch government advises employers to have their employees work from home as much as possible. On 31 March 2020, these measures were extended to 28 April 2020. In view of this advice, working from home is a justified request from the employer.

Can employees be obliged to use their own laptop to work from home?
Employers can demand that their employees work from home, in view of the risks resulting from the outbreak of the corona virus (COVID-19). The employer can also force employees to use their own equipment if the employer cannot make equipment available. If an employee is able to work from home, but refuses to do so without good reason, the risk of not working is generally at the expense of the employee. In that case, the employer can stop wage payments to the employee.

Do employees have the right not to work, for fear of infection?
Since employees are now being asked to work from home as much as possible, reasonably there can be no fear of contracting COVID-19 in the workplace. Therefore, employees in principle do not have the right not to work.

Employers must make an effort to make the work place safe; this follows from Article 7:658 DCC and is an obligation that also applies under normal circumstances. If the employer fails in its duty of care, the employer is liable to the employee for any damage the latter incurs in carrying out his/her activities. Employees carrying out a "vital profession" as published on the central government's list of such professions, will reasonably have to continue to do their jobs. If an employee belongs to a vulnerable group, for example in terms of their age or health, it may still be justified to not request the employee to work, taken into account good employment practices. Depending on the circumstances of a particular case, a suitable solution should be found.

If the employer fails in its duty of care, the employer is liable to the employee for any damage the latter incurs in carrying out his/her activities

Should the employer continue to pay the wages of employees who do not have the opportunity to work from home?
In view of the highly exceptional measures taken by the Dutch government at this point, and in view of the exceptional nature of COVID-19, we deem it likely that employers will have to continue to pay employees who are forced to stay at home, even if they cannot work from home, in any case until 28 April 2020. For now, the government measures, including the advice to employers to have employees work from home wherever possible, will remain in effect until that date. Under specific circumstances, employers can apply for state support under the NOW.

Can employees be asked to take up leave if they are not fully employable because they have to take care of and/or teach their children?
If unforeseen circumstances occur that make an immediate interruption of the work necessary, employees are in principle entitled to (short-term) contingency leave without loss of pay. However, this is not intended for long-term caring for and/or teaching children.

If an employee's child is ill when the schools are closed, the employee is entitled to a short-term carer's leave. The employee is entitled to 70% of his/her wage in that case. In each period of 12 consecutive months, the maximum leave is twice the number of working hours per week.

If neither of these two situations pertains, employees in principle will have to take up holidays, parental leave (only for young children) or unpaid leave if they are not (fully) employable because of having to care for and/or teach their children.

In practice, employers and employees often make suitable arrangements for this, which seems to be working well at this time. The question is how this will be solved, now that the period of working from home and the school closures have been extended until 28 April 2020.

Working from home and holidays

Can employers oblige their employees to work from home?
On 12 March 2020 the Dutch government declared that, depending on the specific circumstances of a particular case, employers may refuse to give their employees access to the workplace. The Dutch government advises employers to have their employees work from home as much as possible. On 31 March 2020, these measures were extended to 28 April 2020. In view of this advice, working from home is a justified request from the employer.

Can employers oblige their employees to take a holiday?
Employers can ask employees to take up holidays. However, employees can refuse to do so. In principle, it is not possible to oblige an employee to take a holiday. It is imaginable, however, that employees take a holiday in consultation with their employer.

To prevent everyone going on holiday at the same time while business operations are just about to start again, employers will have to deal critically with any holiday requests

What if employees submit a request for a holiday after this period of restrictions?
In principle, employers must plan holidays in conformity with the employees' requests. This means that generally, such requests should be approved. To prevent everyone going on holiday at the same time , while business operations are just about to start again, employers will have to deal critically with any holiday requests. In view of the current exceptional situation, there may be a compelling reason not to allow holidays in a specific period. This should be assessed on a case by case basis and depends on the specific circumstances.

What if employees have already requested a holiday, but after the corona crisis this leads to undesirable consequences?
After consultation with an employee, the employer may change a holiday already granted for compelling reasons. For example, sudden bustle in the company resulting from a rush order or indispensability of the employee in question, related to the sudden illness of his/her replacement.

Illness

Can employers ask their employees to report ill?
It is not up to an employer to assess whether an employee is ill. Only the company doctor can examine an employee and determine whether he/she is ill. When an employee is ill of COVID-19 or a cold, he/she is ill and as such entitled to continued payment of wages. If the employee is not judged ill, the employer in any event cannot oblige him/her to take up sick days.

Privacy

When employees report ill, can employers ask them whether, and register that, they have COVID-19 (symptoms)?
If an employer asks whether, and registers that, employees have corona symptoms, that employer is processing sensitive personal data: health information. The General Data Protection Regulation ("GDPR") offers some scope to process health information, for example in the context of public health, or to serve a serious public interest or a data subject's vital interest. The European privacy regulator ("EDPB") considers public health and the vital interests of a data subject as suitable exception grounds to allow employers to process employee health data in the context of the COVID-19 virus. In the recital to the GDPR, as a specific example of such a ground 'monitoring epidemics' is mentioned.

However, such processing must be necessary and further defined in law. In this respect, there is a problem with the Dutch application of this law. In the context of alcohol and drug testing, for example, the Dutch Data Protection Authority ("DPA") has provided that the employer's general duty to safeguard a safe workplace (Article 5 of the Dutch Working Conditions Act) is not sufficiently specific. In addition, the Dutch GDPR Implementation Act (the "UAVG") makes the processing of employee health data difficult. Some of the GDPR principles do not work directly, or have been adopted in more restricted form. As such, the GDPR offers some scope for data processing, but the details outlined by the Dutch DPA at this point and the limited interpretation of the GDPR in the UAVG give employers no space to process corona symptoms.

According to the Dutch DPA, employers cannot ask about the nature and cause of an employee's illness. Only the occupational health and safety service or the company doctor can process such medical information

The Dutch DPA realises that in these special circumstances, saving lives is the top priority, but also explicitly states that in the event of (a suspicion of) COVID-19, employers cannot process health data. According to the Dutch

DPA, employers cannot ask about the nature and cause of an employee's illness. Only the occupational health and safety service or the company doctor can process such medical information. However, in these special circumstances employers may send employees home when they exhibit symptoms of a cold or the flu, or if the employer has doubts about an employee's health.

Employees also play a part in this: being a good employee means that they are expected to assess their own health and to refrain from putting the safety in the work place in jeopardy by appearing in the work place with symptoms. As such, employers may request employees to not come to work with symptoms.

In addition, as was always the case, illness absence may be registered and ill employees can be asked when they expect to be back at work. The employer cannot record an employee's health symptoms, however – that task is reserved for the general practitioner and/or the company doctor.

May an employer tell other employees that a sick colleague has COVID-19 (symptoms)?
Employers' options in this respect are very limited. The GDPR offers some options, but they have been largely cancelled by the Dutch DPA and the limited implementation of the GDPR in the Dutch GDPR Implementation Act.

However, an employer's duty of care may entail that – should an employee be infected with COVID-19 and this infection constitutes a danger for other employees – other employees must be informed, with the greatest possible caution, with a view to their health and that of the people in their environment.

In any case, no more information can be supplied than strictly necessary: i.e., that in the immediate work circle, a corona infection has been established (indirectly or otherwise); exactly who is involved, or further circumstances, should not be revealed.

In addition, good employment practices as laid down in Article 7:611 DCC mean that the employer cannot share a sick colleague's private information with other employees.

Strictly speaking, the GDPR does not apply when a sick colleague is discussed only verbally, without using electronic means of communication.

What if an employee tells the employer or colleagues that he/she has COVID-19 (symptoms)?
The Dutch DPA provides that – also in the event that the employee volunteers the information that he/she has been tested positive for COVID-19 or has symptoms that indicate this – this information cannot be recorded, shared or otherwise used by the employer. The sick employee's permission does not change this. Because of the relationship of authority between an employer and an employee, it is assumed that there can almost never be a legitimate, freely given consent.

Can employers check their employees for COVID-19, for example by taking their temperature?
The Dutch DPA has explicitly spoken out against employers measuring body temperature. The Dutch DPA provides that employers may ask employees to take their own temperature, however. Checking whether an employee has corona is the prerogative of the relevant (company) doctor. Whether an employee gives the employer permission is irrelevant. This was decided by the Dutch DPA because body temperature gives an insight into the employee's health, which is sensitive personal information that, based on the law, can only be processed in restricted cases.

Hoewel de AVG enige ruimte biedt voor het verwerken van gezondheidsgegevens van de werknemer in het kader van COVID-19 bestrijding, wordt deze ruimte zeer beperkt ingevuld door de AP

The GDPR offers some scope to process employee health information; however, this scope has been largely cancelled by the Dutch DPA and as a result of the restricted implementation of the GDPR in the Dutch GDPR Implementation Act.

It is not fully ruled out that temperature can be checked without GDPR implications. Depending on how this is carried out, it is imaginable that there will be no processing that falls within the scope of the GDPR . However, the Dutch DPA seems to assume that by definition, some data will be processed which falls inside the scope of this law.

Can employers ask employees to supply a medical certificate?
In a medical certificate, an (independent) physician gives an opinion about the patient's state of health. As such, the medical certificate necessarily provides information about the employee's health. Although in the GDPR, some scope is offered to process employee health information in the context of combating COVID-19, the Dutch DPA has given very little substance to that scope.

Can employers measure the productivity of employees working from home?
No, this is not allowed under the GDPR.
In earlier investigations, the Dutch DPA's specific policy about monitoring employees was developed. The DPA has formulated that monitoring is allowed, but only if an employer can show that i) monitoring is necessary; ii) it has a legitimate interest in monitoring; iii) its interest in measuring productivity is greater than the employees' interest in protecting their privacy.

Improving employees' productivity may be a legitimate interest for the employer. Constantly monitoring the use of (computer) systems by employees working from home, instead of for example doing random checks, is explicitly considered non-legitimate.

The impact on the employee's privacy of using monitoring tools to track his/her activities, is too great to justify this. In this respect, it is irrelevant whether the equipment used belongs to the employer or to the employee.
Where the results of the monitoring would be used in the decision-making process to dismiss employees, the privacy of the employees in question in any event (heavily) outweighs the employer's interests.

If an employer nevertheless decides to apply some form of monitoring, prior consent of the works council must be obtained. Moreover, employees must be sufficiently clearly informed about the monitoring in advance, for example by way of a privacy policy.

Constantly monitoring the use of (computer) systems of employees working from home, instead of doing random checks, for example, is explicitly considered non-legitimate. The impact on the employee's privacy, of using monitoring tools to track his/her activities, is too great to justify this

IV. Variable remuneration, pensions and COVID-19

Variable remuneration

Can employers who are in financial trouble as a consequence of the COVID-19 outbreak, postpone the payment of variable remuneration (bonuses, profit distributions etc.)?
The question whether postponement of payment of variable remuneration is allowed should be answered based on the relevant employment conditions as regulated in the collective bargaining agreement, the staff manual or the bonus scheme, to see what was agreed about the moment of payment. If the various arrangements offer no option for postponement, the employer in principle will have to pay the variable remuneration at the usual time.

Employers who are more than three working days late with a variable remuneration payment will owe the statutory increase (Article 7:625 DCC), which is five percent per day for the fourth through the eighth working day and one percent for each following working day, on the understanding that the maximum increase is 50%. The court has the power to limit the statutory increase if it finds this reasonable with a view to the circumstances.

Can employers who are in financial trouble as a consequence of the COVID-19 outbreak postpone the payment of the holiday allowance?
The obligation to pay holiday allowance is based on the Dutch Minimum Wage and Minimum Holiday Allowance Act (Wet minimumloon and minimumvakantiebijslag WML). This Act provides that the holiday allowance should be paid in the month of June. By written agreement, that moment may be derogated from as long as a payment is made at least once per calendar year.

This option to derogate is used a lot. It is common for employment contracts to provide the moment at which the holiday allowance is paid. This may also be set out in a collective bargaining agreement or staff manual. In principle, unilateral derogation from those arrangements, by late or non-payment, is not possible. This constitutes a violation of the written agreement and the WML. Employees may demand compliance, which puts the employer at risk: if it fails to pay (on time), a statutory increase is owed (Article 7:625 DCC). In addition, the Inspectorate of the Ministry of Social Affairs and Employment (ISZW) can impose fines and penalties.

At present, employer and employee representatives in numerous sectors are consulting to prevent (mass) dismissals. They are also discussing a delay in or even complete cancellation of the payment of profit distributions and/or the holiday allowance

At present, employer and employee representatives in numerous sectors are consulting to prevent (mass) dismissals. They are also discussing a delay in or even complete cancellation of the payment of profit distributions and/or the holiday allowance.
The trade unions do not seem unwilling to agree to this where employers are in dire financial straits.

Such ‘Corona agreements’ should be designed with great care to make sure that employers are not confronted with claims afterwards. The same applies where this type of agreement is made with individual employees and/or the works council.

Can employers who are in financial trouble as a consequence of the COVID-19 outbreak reduce or even cancel variable remuneration schemes?
Arrangements for variable remuneration, such as bonuses and profit distributions, often contain a discretionary power, which means that to a certain extent, employers can decide for themselves not to award or pay variable remuneration in any given year. The question is whether such a power can only be used for awarding future, new variable remuneration components or also for payment of variable remuneration earlier awarded – and as such, already 'earned'. This depends on the specific formulation of the discretionary power in the variable remuneration scheme in question.

If the employer did not reserve its discretionary rights in the variable remuneration scheme, it will be harder to cancel or change that scheme. Employers might invoke a unilateral amendment clause in the employment contract (Article 7:613 DCC). For lack of such a clause, they can only rely on general doctrines, such as that of being a good employer/employee (Article 7:611 DCC) or that of unforeseen circumstances (Article 6:258 DCC).

In reducing or cancelling a variable remuneration scheme, the works council's right of consent should also be considered (Article 27 Dutch Works Councils Act, "WOR"). On a case by case basis, it should be assessed whether a remuneration scheme is being established, amended or cancelled. If the criteria for awarding variable remuneration and/or the underlying system of the scheme is/are being changed, the works council has the right of consent; the works council usually does not have that right if the employer invokes a discretionary power once, or if only the amount of the variable remuneration is amended.

How about employers in the financial sector?
Specific remuneration rules apply for employers in the financial sector. Financial businesses must have a controlled remuneration policy, wherein they usually retain the right not to award variable remuneration in specific circumstances, or to amend the variable remuneration. As such, the question whether employers in the financial sector may reduce variable remuneration partly depends on their remuneration policy and the specific (legal) remuneration rules applicable to them.

From the nature of shares as a form of remuneration, it follows that employees benefit from an increase in the share price and therefore also bear the risk of a decrease

Amendments of variable remuneration schemes over 2019 will usually be impossible in any case (this was already 'earned' and usually also awarded and in principle will have to be paid out).
For variable remuneration over this ongoing year 2020, this may be different and depends on what was agreed. Given COVID-19, performance criteria may be changed in the meantime, because of the current business expectations.

Are employers held to compensate the depreciation of employee shares?
Some employers give their employees variable remuneration in the form of stock-listed shares, often linked to a so-called lock-up period in which the employees cannot sell their shares. COVID-19 results in a worldwide share price fall. This may also have consequences for the employee shares. In many cases, they will be greatly depreciated. The question is whether the employer is held to compensate employees for this loss in value. In our view, that is usually not the case. From the nature of shares as a form of remuneration, it follows that employees benefit from an increase in the share price and therefore also bear the risk of a decrease.

What are the consequences of COVID-19 for the remuneration policy for directors of stock-listed companies?
Pursuant to the new Article 2:135a DCC, the remuneration policy for directors of stock-listed companies must be adopted by the AGM every four years.
For many stock-listed companies, this will take place for the first time in 2020.

Among other things, the remuneration policy must include an explanation of the way in which the support within our society has been considered. We believe that COVID-19 and its economic consequences may affect that support for the remuneration policy of companies. If common employees have to accept pay cuts, public support for directors' salary increases is likely to be limited. This is something for stock-listed companies to consider.

Pensions

Can employers get a payment deferment for pension contributions?
On 21 March 2020, the Dutch Labour Foundation agreed with the Federation of Dutch Pension Funds and the Dutch Association of Insurers that employers with financial problems resulting from the COVID-19 outbreak will be helped. Because the issues differ per sector or employer, tailor-made solutions will be offered based on the following problem-solving approaches:

- the pension providers will agree on a payment scheme with individual employers in acute financial trouble;
- within the legal options available, the payment terms within which employers have to pay pension contributions are extended for the sectors and employers affected;
- the pension providers conduct a less strict policy in collecting pension contributions (for example by postponing their engagement of collection agencies and/or their imposition of administrative fines.

To date, the scope for bespoke solutions has been limited by the legal rules on inter alia payment terms. These are still under discussion by the Federation of Dutch Pension Funds, the Dutch Association of Insurers, the Dutch Central Bank (DNB) and the ministry of SZW. Employers with acute problems paying pension contributions, who wish to be eligible for a payment scheme, should contact their pension provider. If their employees are members of a compulsory sectoral pension fund, in the event of inability to pay, the pension fund should be notified (Article 23 Dutch Sectoral Pension Fund (obligatory membership) Act, "Wet Bpf 2000"). Violation of this obligation to notify may result in the directors of the employer being jointly and severally liable towards the pension fund.

The Dutch Pensions Act offers employers the option to reserve the right to reduce or to stop paying the employer's part of the pension contribution in the event of a far-reaching change in circumstances

Can employers rely on a contribution payment reservation in the pension agreement?
Employers who are in financial trouble as a consequence of the COVID-19 outbreak may be able to rely on a contribution payment reservation. The Dutch Pensions Act ("Pw") offers employers the option to reserve the right to reduce or to stop paying the employer's part of the pension contribution in the event of a far-reaching change of circumstances (Article 12 Pw). To use that option, it should first become established whether such a reservation was made in the pension agreement. If so, the question is whether financial problems resulting from COVID-19 qualify as a 'far-reaching change in circumstances'. The legislative history shows that this may be the case (***Kamerstukken II* 2005/06, 30413, 3, p. 184**). The legislator has explicitly mentioned an employer's incapacity to pay as an example of a situation that may justify reliance on the payment reservation.

The option of including a payment reservation in a pension agreement does not apply for employers that take part in a compulsory sectoral pension fund.

Does the works council have the right of consent if an employer invokes the contribution payment reservation?
The works council has the right of consent regarding an intention to determine, amend or cancel arrangements based on a pension agreement (Article 27 WOR). In our view, an employer's invocation of a payment reservation already included in the pension agreement does not constitute a change to that agreement. It is therefore unlikely that the works council has the right of consent in this regard. This may be different if it is immediately clear that rather than a temporary change, it concerns a structural change of the amount of the pension accrual.

Can pension providers stop the pension accrual if employers are unable to pay the contributions (and no payment deferment has been granted)?
In the event of contribution payment arrears, insurers are entitled to discontinue the accrual of pension claims. The rules of Article 29 Pw must be considered in this respect, which basically means that the insurer must have made a demonstrable effort to collect the contributions in arrears. Subsequently, the insurer should inform the participants and the employer about the termination of the pension accrual. The insurer can then stop the accrual, three months from this notification at the earliest. This arrangement also applies for premium pension institutions.

Pension funds cannot stop accruing pension claims in the event of contribution payment arrears. However, payment arrears result in lower coverage, which may eventually harm the participants. Lower coverage may result in failure to index-link the pensions or even in reduction measures.

Possible other emergency measures employers may take in the area of pensions
Employers in financial trouble as a consequence of the COVID-19 outbreak might explore the following emergency measures:

- in cases where the pension agreement does not contain a contribution payment reservation, employers might introduce such a reservation by invoking a unilateral amendment clause. The works council's right of consent should also be considered in this case;
- employers may have additional contribution obligations pursuant to an implementation agreement. They might investigate whether COVID-19 is a valid reason to escape such additional obligation. First of all, the implementation agreement must be assessed: does it contain relevant provisions which can be invoked by an employer in financial difficulties? If it does not, the employer can 'only' fall back on general doctrines of civil law, such as force majeure (Article 6:75 DCC), unforeseen circumstances (Article 6:258 DCC) and/or reasonableness and fairness (Article 6:248 DCC).

Pension funds cannot stop accruing pension claims in the event of contribution payment arrears. However, payment arrears result in lower coverage

What consequences does the COVID-19 outbreak have for the (further planning of the) elaboration of the new pension agreement?
From the media, it turns out that to date, any consultations about the further detailing of the pension agreement have continued, be it by telephone. For now, it seems that the COVID-19 outbreak is not affecting the planning. For any developments regarding the new pensions system, please consult our website: **www.stibbenieuwpensioenstelsel.nl**.

Contact

Jaap van Slooten
Partner
jaap.vanslooten@stibbe.com
+31 20 546 06 51
+31 6 533 956 05

Paul Vestering
Partner
paul.vestering@stibbe.com
+31 20 546 01 01
+31 6 109 355 80

Astrid Helstone
Partner
astrid.helstone@stibbe.com
+31 20 546 06 54
+31 6 202 450 74

Ea Visser
Senior medewerker
ea.visser@stibbe.com
+31 20 546 04 64
+31 6 153 708 12