
COVID-19 and Labour Law: The Netherlands

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Abstract

The Netherlands is in an “intelligent” lock down, which means that social and economic activities are limited, but not to the extent that people are locked in their houses. The main labour law related measure, NOW, aims to protect jobs by compensating the costs of wages when the employer suffers a loss of turnover of more than 20%. Self-employed can apply for a relaxed regime on income support (TOZO). The regular labour law measures have not been altered, with the exception of the driving time for truckdrivers delivering essential goods. Via the Labour Foundation social partners work closely together with the government.

Keywords: COVID-19; Labour law; NOW; TOZO; Preservation of jobs; Income protection

The first confirmed COVID-19 infected person was reported on 27 February 2020 and the first patient who died due to COVID-19 was reported on 6 March 2020. From that moment things changed very fast in the Netherlands. First people were told to take good care of their personal hygiene with extra cleaning in workplaces. Per 12 March 2020 this changed radically and economic and social life were sort of put on hold. There is no total lock down, but what is called an “intelligent” lock down. This means that we have to stay at home as much as possible, including working from home, social distancing (1,5 meter apart at least), no big gatherings or events of more than 100 persons, etc. Schools and universities are closed and education is done remotely. Restaurants, cafes, gyms, concert halls, etc. are also closed. And professions that involve direct contact between persons have also been stopped, this includes hairdressers, physiotherapy, etc. Initially these measures would last till 6 April 2020, but as per 31 March 2020 they have been extended to 28 April 2020, schools stay closed till 4 May 2020, and gatherings of 100 persons or more are forbidden till 1 June 2020¹. The aim of these measures is “to flatten the curve” of the rise of the number of infected persons in order to prevent that the healthcare system cannot

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¹ See for a full overview of all the measures at: <https://www.government.nl/topics/coronavirus-covid-19/tackling-new-coronavirus-in-the-netherlands>

deal with it anymore. Given that there are first signs the “curve is flattening”² the measures seem to have effect.

On 19 May 2020 the government published a chart indicating step-by-step exit-strategy to slowly getting out of the intelligent lock down³. The first step is opening of primary schools, libraries, outdoor sports, and swimming pools. The second step, per 1 June 2020, includes opening of businesses in so called “contact jobs” like hairdressers and physiotherapists; restaurants, bars and cafés (outdoors unlimited; indoors maximum of 30 persons); cinemas (max. 30 persons); cultural institutions (max. 30 persons); museums; and secondary schools. The third step will be start at the 1st of July 2020 and mainly extends the number of people from maximum 30 to maximum 100 in cinemas, restaurants, bars and cafés, and cultural institutions. Also organised gatherings of max. 100 persons will be allowed from then⁴. Further openings are indicated for September (indoor sports, saunas, sex houses and cannabis cafés, casinos and community houses) and undetermined yet (big, organized events and night clubs). All with the disclaimer that the virus remains under control.

On 17 March 2020 the Dutch Government announced an ‘Emergency Package Jobs and Economy’. The Package holds three types of measures: 1) safeguarding income and salaries; 2) postponement of taxpaying; and 3) relaxation of credit provisions⁵.

With regard to labour law the most relevant measure falls within the first category of measures and is called “NOW”, which is the abbreviation of the Dutch title “Noodfonds Overbrugging Werkgelegenheid”, in English translated as “Temporary Emergency Bridging Measure for Sustained Employment”⁶. The NOW provides financial support for businesses when it suffers a loss in the turnover of at least 20% due to the government’s measures on COVID19. The higher the loss in turnover, the higher the financial support - with a 100% loss of turnover 90% of the wage costs will be compensated. The wage compensated is the wage for social insurance purposes as it is known by the UWV⁷, up to a maximum of €9538,- per employee per month. To this wage sum 30%, and 40% under the NOW 2.0, is added for pension premiums, holiday allowances and other costs/benefits⁸.

An advance of 80% will be paid upon the application for the scheme and will be followed by a calculation of the actual loss of turnover afterwards, which may lead to a

² A specialized agency of the Government is registering the number of positive tested persons, how many have been hospitalized and how many people have died due to COVID19. No statistics are available about how many patients have recovered. The information is available at: <https://www.rivm.nl/en/novel-coronavirus-covid-19/current-information-about-novel-coronavirus-covid-19>

³ <https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/documenten/publicaties/2020/05/20/poster---coronavirus-basisregels-voor-iedereen-engels>

⁴ It should be noted here that as part of the BlackLiveMatters movement also in the Netherlands gatherings have taken place with more than 100 persons. In the cities Amsterdam and Rotterdam the crowd was so big that it was impossible to comply with the general 1,5 meters distance rule.

⁵ A full overview of these measures can be found at www.business.gov.nl.

⁶ See for more details about NOW: <https://business.gov.nl/subsidy/corona-crisis-temporary-emergency-measure-now/>

⁷ The Employee Insurance Agency, an administrative body responsible for, among others, social security payments, such as unemployment benefits, sick pay, etc..

⁸ The relevant reference months are November 2019 and January 2020. For seasonal businesses other reference months apply: Letter to the Second Chamber of Parliament, *Derde Wijziging NOW*, dated 20 May 2020, ref. nr. 2020-0000069947, p. 2.

correction⁹. The compensation can be requested for a period of three months within the period March-July 2020 and, under certain conditions, can be extended once for another three months. The measure applies to a wide range of workers, including all kinds of flexible workers, such as part-timers (including zero-hour contracts), fixed term employees and other workers employed by other forms of temporary contracts¹⁰. The measure also applies to temporary works agencies¹¹ and staffing agencies¹².

An interesting condition of the NOW is that when the employer applies for it he commits to not terminate employment contracts for economic reasons. If the employer does nonetheless the wage compensation will be claimed back plus fifty percent of the amount of the wage¹³. Since employers have to get permission by the UWV for such dismissals a control mechanism seems to be automatically in place.

As per Ministerial [Decree of 1 May 2020](#) the NOW has been amended effective per 5 May 2020. The main amendment concerns the calculation of the loss of turnover in group company, which will not be done at an aggregated level, but at group level. The extended personal scope comes with a number of additional conditions: 1. there are demands regarding the dividend and bonus policy of the group; 2. there has to be an agreement with the trade unions or if the group company has less than 20 employees with the employee representation; and 3. there are additional conditions with respect to control and prevention of fraud. The amendment was requested by Parliament and social partners¹⁴.

Per 1 June 2020 most of the measures of the NOW have been prolonged for another three months by the NOW 2.0. The NOW 2.0 includes some amendments and some additional requirements. The most interesting amendment is the lifting of the prohibition to terminate employment relationships when the employer applied for the NOW subsidy. Instead of having to pay back 150% of the subsidised wage sum, the employer only has to pay back the full wage sum, thus without the 50% fine. In case of a collective dismissal a fine of 5% may apply, unless trade unions or employee representatives have agreed with the collective dismissal¹⁵. The justification for this amendment is that since the economic conjuncture has changed, companies need to have the possibility to restructure in order to avoid complete bankruptcy. Additionally, the government argued they prefer companies to

⁹ See for an overview with example calculations: Overview of changes as provided by Joop van Zijl distributed by AR Updates nr. 23, 2020.

¹⁰ Although not included in the legislation, the accompanying letter to the NOW measure calls upon employers to keep their flexible workers employed as much as possible.

<https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/documenten/kamerstukken/2020/03/31/tijdelijke-noodmaatregel-overbrugging-voor-behoud-van-werkegelegenheid>. Nonetheless, the trade unions report that the employment contracts of many flexible workers have been terminated: <https://www.fnv.nl/corona/verregaande-maatregelen-om-jou-door-de-coronacrisis>

¹¹ In the Netherlands TWA's can enter into a permanent employment contract with the persons they allocate to the user undertaking.

¹² In Dutch called "pay-roll companies".

¹³ Article 11, sub b NOW.

¹⁴ <https://zoek.officielebekendmakingen.nl/stcrt-2020-25372.html> - amendment regarding group company.

¹⁵ Letter to the Parliament, *Noodpakket 2.0* d.d. 29 May 2020, ref. nr. 2020-0000075592, p. 2-4.

apply for the wage-subsidy rather than not because they are afraid of the fine and then being driven to bankruptcy that could have been (partially) prevented¹⁶.

Following the example of Denmark, the NOW 2.0 includes a prohibition to pay dividend and bonuses over 2020 or to buy shares of their own company¹⁷. The underlying idea is that the money saved by not paying dividend and bonuses or buying own shares, the cashflow position of the company can be strengthened which is considered to be needed for future economic hard times¹⁸. A second interesting new measure in NOW 2.0 is that employers have to make an effort to stimulate the employability of their employees by (re)training them. A special package, called *NL Leert door*, has been established to support these (re)training activities¹⁹. The package aims to ease the transition from work to work and therefore includes career guidance and online training focussing on skills and knowledge for jobs in demand. In total €50 million in support has been made available in addition to regular, already existing funds²⁰.

A last change that should be mentioned in this report deals with transparency. Since the NOW and NOW 2.0 provide in subsidies, the Public Access Act requires publication of the companies that are recipients of the subsidies. The to be published information includes: name and address of the company; amount of the advance payment; and the final fixed payment²¹.

It is too early to tell how effective the NOW and NOW 2.0 are. What is clear though is that the unemployment rate has increased in the period March – April from 2,9% to 3,4%. It is also predicted that the unemployment rate will increase to 4–6,3% over the summer²². Although this is the highest increase since 2003 for the Netherlands, it is considered relatively low compared to the numbers for the Eurozone for which an average unemployment rate of 9,6% is predicted²³. However, since approximately 20% of the workforce is supported by one or more measures of the government it seems clear that without these measures the increase of the unemployment rate would have been much higher.²⁴ It is estimated that in the upcoming months the unemployment rate will increase more.

Another interesting income preserving measure is a relaxed regime that enables self-employed to apply for financial support, the Tozo. As per June the relaxed regime will be less relaxed. The underlying idea for this is twofold. First because of the exit-strategy it is presumed that many self-employed will gain (more) income. Second, whereas under the

¹⁶ Letter to the Second Chamber of Parliament, *Noodpakket 2.0*. dated 20 May 2020, nr. CE-AEP / 20148518 (Kamerstukken II, 2019/20, 35 420, nr. 2), p. 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 9.

¹⁹ *Ibid.*, p. 10.

²⁰ *Ibid.*, p. 10-11.

²¹ Letter to the Parliament, *Derde wijziging NOW*, d.d. 20 May 2020, ref. nr. 2020-0000069947, p. 6.

²² Letter to the Parliament, *Monitoring Arbeidsmarkt en Beroep Noodpakket* d.d. 5 June 2020, ref. nr. 2020-0000075701, p. 2.

²³ *Ibid.*, p. 2; and Letter to the Second Chamber of Parliament, *Noodpakket 2.0*. dated 20 May 2020, nr. CE-AEP / 20148518 (Kamerstukken II, 2019/20, 35 420, nr. 2), p. 3.

²⁴ Letter to the Second Chamber of Parliament, *Noodpakket 2.0*. dated 20 May 2020, nr. CE-AEP / 20148518 (Kamerstukken II, 2019/20, 35 420, nr. 2), p. 10-11.

initial Tozo the aim was to support entrepreneurs and self-employed professionals who have a viable business to get through a rough patch, the aim of Tozo 2 is to support those who need it to get through the transition period during the exit-strategy, i.e. June, July and August. By applying a stricter regime entrepreneurs and self-employed can slowly get used to make (again) a living without government support²⁵. Therefore ‘Tozo 2’ will (re)introduce a partner-test, meaning that households with a total income above the social minimum will not be eligible for the Tozo 2²⁶. Self-employed professionals can also apply for support in the shape of additional livelihood support and/or a business capital loan.²⁷ This too has been prolonged for another three months²⁸.

In practice the relaxation of credit provisions has proven to be important as well. Many companies as well as consumers have been granted a deferment of payment²⁹. The total amount of referrals is appr. 7 billion EURO, with which about 111.000 companies are supported. They have to make the full payments within a year. Interestingly this measure has been extended with a Small Credit Corona (Klein Krediet Corona – KKC-regeling)³⁰.

Since schools and childcare facilities are closed and parents have to work from home as much as possible, there is a serious challenge to combine work and care responsibilities. Employers have been requested to be flexible with working schemes (starting later, stopping earlier, working in the evening hours etc.). However, the employer may not unilaterally change the working time schedule. Such requires either the consent of the works council or from the employee³¹. In addition, a more relaxed regime of various forms of (already existing) special leaves apply, which should make it easier for the employee to combine work and care responsibilities³². With respect to annual leave rights, in general, the NOW should prevent the need for employers to force their workers to use their annual leave days³³. Nothing specific applies with respect to annual leave days that have already been booked and seem to have lost their value due to the general situation created by the COVID19 pandemic. Based on existing rules the employer can only refuse the withdrawal of the leave for serious business reasons. Whether not having enough work due to the COVID19 pandemic qualifies as a serious business reason is unclear³⁴.

Special school and childcare support is arranged for employees who work in so called crucial professions or vital processes (as it is called in Dutch) which cannot be done from

²⁵ *Ibid.*, p. 14.

²⁶ *Ibid.*

²⁷ <https://business.gov.nl/the-coronavirus-faq-for-entrepreneurs/> - Tozo

²⁸ Letter to the Second Chamber of Parliament, *Noodpakket 2.0*. dated 20 May 2020, nr. CE-AEP / 20148518 (Kamerstukken II, 2019/20, 35 420, nr. 2), p. 15-17.

²⁹ <https://www.businessinsider.nl/banken-lenen-financiering-mkb-bedrijven-coronacrisis/>

³⁰ Letter to the Second Chamber of Parliament, *Noodpakket 2.0*. dated 20 May 2020, nr. CE-AEP / 20148518 (Kamerstukken II, 2019/20, 35 420, nr. 2), p. 16.

³¹ Article 27 Act on the Work Council.

³² <https://www.fnv.nl/corona/werk-en-corona#thuiswerken>

³³ Nonetheless there are complaints filed with trade unions that employers force employees to take their leave days: <https://eenvandaag.avrotros.nl/item/dwingt-jouw-baas-je-nu-om-je-vakantiedagen-op-te-nemen-dit-zijn-jouw-rechten/>

³⁴ Something which is not only the case in The Netherlands:

<https://uklabourlawblog.com/2020/04/06/furloughing-and-fundamental-rights-the-case-of-paid-annual-leave-by-alan-bogg-and-michael-ford/>

home. What qualifies as crucial profession or vital processes is defined widely. The first includes professions in healthcare, education, public transport, the food chain, transport of energy sources, trash collection, media. In this group the working time for truck drivers in the supply of essential goods, such as food and medication, has been relaxed. This means for example that the daily maximum driving time is extended from 9 to 11 hours³⁵. The second, vital processes, includes processes that are essential in a democracy, public health and safety, and security³⁶. The childcare support is free of charge.

Social Partners are involved in the design of the measures through the Labour Foundation which is a national consultative body comprised by the three main trade unions and three main employer organisations of the Netherlands³⁷. Part of their activities is to advise the government on labour-related issues. With regard to the COVID-19 situation the Labour Foundation meets weekly with the government to discuss the Emergency Package. In their support letter to the Emergency Package they call upon the employers and workers' representatives to report problems not (yet) covered by the Package, but do need action by the central government. The same applies for sector specific issues on occupational health and safety which cannot be solved due to conflicts with OSH-legislation³⁸. Issues that have been addressed in this context include the position of flex workers, including those working on a fixed-term contract, on call contracts and via temporary work agencies. Other issues that have been addressed are sick leave, costs for (special) leave, and annual holiday payments³⁹. Another interesting activity undertaken by the Labour Foundation is the draft of a Corona Safety Protocol for Migrant Workers in order to ensure the safety of migrant workers⁴⁰. This seems to go parallel with government action, albeit started later with the establishment of the "*Aanjaagteam Bescherming Arbeidsmigranten*"⁴¹.

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³⁵ This is done in accordance with Article 14 of Regulation 561/2006.

³⁶ <https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/veelgestelde-vragen-per-onderwerp/kinderopvang/cruciale-beroepen>

³⁷ <https://www.stvda.nl/en/labour-foundation>

³⁸ <https://www.stvda.nl/-/media/stvda/downloads/publicaties/2020/coronacrisis-noodpakket.pdf?la=nl&hash=290B8F57F6BA09AD9DB26B91FC27F9DE> (p.4).

³⁹ See

https://www.stvda.nl/nl/thema/arbeidsvoorwaarden/~/_link.aspx?_id=99C48911502041E19955BDE56BAD544F&_z=z.

⁴⁰ <https://www.stvda.nl/-/media/stvda/downloads/publicaties/2020/huisvesting-arbeidsmigranten.pdf>

⁴¹ Letter to the Second Chamber of Parliament, *EU-arbeidsmigranten en het coronavirus* d.d. 4 May 2020 (Tweede Kamer, vergaderjaar 2019–2020, 29 861, nr. 49).