

HIRING AND DISMISSAL AFTER THE WORK AND SECURITY ACT

: DOMMERHOLT

ADVOCATEN

The Work and Security Act [Wet Werk en Zekerheid] (hereinafter: WWZ) became effective in 2015, and drastically changed the employment and dismissal law. We have made a summary to help you understand the new rules about hiring and dismissing employees.

PROBATION PERIOD

It is no longer possible to agree upon a probation period in a fixed-term employment agreement with a duration of less than six months or less. In an employment agreement with a duration between six and 24 months, a probation period of one month can be agreed. If the fixed-term employment agreement lasts longer than 24 months or in an employment agreement for indefinite term, a probation period of two months can be agreed upon. The employer shall have to choose between an employment agreement for six months or less without a probation period, or an employment agreement for more than six months.

NON-COMPETITION CLAUSE

As a rule, a non-competition clause is not allowed in fixed-term employment agreements. In these circumstances a non-competition clause is only allowed, when it specifies why it is necessary to protect severe company interests for the function of the employee. This has to be specified in a written motivation with the non-competition clause. The judge can nullify the clause if he finds the motivation insufficient. In an employment contract for indefinite term, this motivation is not required. The old rules (before 1 July 2015) still apply on non-competition clauses that are agreed upon before 1 January 2015.

NOTIFICATION DUTY

At least a month before a fixed-term employment agreement ends automatically, an employer must notify the employee, in writing, about the extension or termination of their employment agreement. In case of an extension of the employment agreement, the employer must indicate the conditions for the extension. So the so-called notification term also applies if the employment agreement is extended. If the employer fails to comply with this obligation, they have to pay the employee a compensation amounting to one month's salary. If the employer complies with this obligation, but fails to do so on time, they have to pay the employee a proportional compensation. It is important to put these notifications on the agenda on time. The employee must claim the compensation within three months after the end of the employment relationship. After this term, the right of compensation expires.

ROUTES AND GROUNDS FOR DISMISSAL

The employer can only terminate the employment agreement if there are reasonable grounds for it, and reappointment of the employee within a reasonable term, after due training or otherwise, in another fitting position is not possible. The law now states eight 'reasonable' grounds for dismissal; an employee can only be dismissed on the basis of one of these grounds. Reasonable grounds are:

- A. decline in the number of jobs - business economics;
- B. long-term disability (>24 months);
- C. frequent sickness absence with unacceptable consequences;
- D. employee's functioning;
- E. culpable acts or negligence by employee;
- F. refusing to work for serious conscientious reasons;
- G. disturbed employment relationship between employer and employee;
- H. any circumstance other than A to G that makes it unreasonable to demand an extension of the employment agreement.

If the employee does not accept their dismissal, and the dismissal is based on business-economic grounds or after two years of disability (ground A or B), the employer must ask the Employee Insurance Agency [UWV] for permission to terminate the employment agreement. The dissolution procedure before the cantonal judge is meant exclusively for a termination for 'personal reasons' (grounds C to H). The employer is not free to follow the dismissal route of their choice, as was usual until 1 July 2015. If the employer cannot demonstrate that one of the reasonable grounds applies, the UWV shall reject the application for dismissal, or the judge shall reject the request for dissolution of the employment agreement.

TERMINATION AGREEMENT

In addition to the aforementioned dismissal routes, the possibility remains to terminate an employment agreement by mutual agreement. In that case, employer and employee make a settlement agreement. However, as of 1 July 2015, the employee has a statutory reflection period of 14 days from the date on which the agreement is made. During this period, the employee can dissolve the agreement without stating reasons, or revoke their decision to agree to the termination in writing. As a result, the employer remains in uncertainty about the made agreements for at least 14 days. Any clause excluding this right to a reflection period shall be null and void. Moreover, the employer must notify the employee of this right in writing within two days after signing the settlement agreement. If the employer fails to do so, the reflection time is extended to three weeks. It is advisable to include in the standard settlement agreement that the employee is entitled to a 14-day reflection period after signing the agreement.

TRANSITION COMPENSATION

In case of termination of an employment agreement by the employer, or non-extension of a fixed-term employment agreement, an employee with an employment relationship of at least two years is entitled to a transition compensation, regardless of the dismissal route. A compensation is also due if the employee terminates the agreement on grounds of serious culpable behaviour by the employer. The compensation amounts to a sixth part of the monthly salary for every six months during the first ten years of employment, and subsequently, a quarter monthly salary for every six months, to a maximum of € 76,000 gross (2016) or one gross annual salary, whichever is more. Training costs may be deducted from this amount. Until 1 January 2020, there is a bridging arrangement for small-business employers and elderly employees. The transition compensation does not apply in case of serious culpability of the employee. In case of serious culpability of the employer, the employee may be entitled to an additional (fair) compensation. This additional compensation has no maximum and can be granted by a judge. The judge can also grant a fair compensation if the employee is not entitled to a transition compensation.

CHAIN ARRANGEMENT

In case of consecutive fixed-term agreements, an indefinite agreement is automatically made after 24 months or when making the fourth agreement. A new chain is created after a six-month interval. This new chain arrangement applies to all employment agreements with an effective date on or after 1 July 2015. The chain arrangement does not apply to employment agreements with employees following a combined working and learning programme (work-linked training), and to employment agreements with employees under 18 who have worked no more than 12 hours a week on average. Deviation from the chain arrangement is only possible in case of agreements through employment agencies, or if the deviation is the result of a collective agreement. The chain arrangement also applies in case of successive employership. Under the new law, this is the case when different employers are regarded as each others successors with regard to the work to be carried out, regardless of the insight in employee's capacity and suitability.

TERMINATION PURSUANT TO THE OLD AGE PENSIONS ACT AND AFTERWARD

As of 1 July 2015, the employer can terminate the employment agreement by the day on which employee reaches the legal retirement age or a later date, unless other agreements were made in the employment agreement. Neither the employee's approval nor any decision from the Employee Insurance Agency or the cantonal judge is required for termination on or after the legal retirement age. No transition compensation is due either. With employees of legal retirement age, six employment agreements can be made in four years; these employment agreements shall then be terminated automatically. This only applies to employment agreements made after the employee reached the legal retirement age.

ANY QUESTIONS?

Please do not hesitate to call our employment experts to ask them for advice or information. They have the knowledge and practical experience to help you with your preparations for making an employment agreement or a good file, among other things. They will also be pleased to help you when taking (legal) action to terminate an employment agreement.

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