



The Netherlands and COVID-19 measures in the field of labour law

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1. Introduction

When the first cases of COVID-19 were established in the Netherlands the country went into a so called “intelligent” lock down. After a temporary relaxation of the lock down measures, the Netherlands is in a full lock down since November 2020 and introduced an evening curfew per 21 January 2021. No state of emergency has been announced, rather the situation has been declared a “health crisis”. To mitigate the effects of the lock down measures, the Dutch Government adopted the “Emergency Jobs and Economy Package”. The aim of the Package is to support businesses and safeguard employment as much as possible. Thereto, it holds measures to (i) safeguard income and salaries, (ii) postpone tax payments, and (iii) relax credit provisions. In this contribution we will focus on the first set of measures only. We will complement the description of these measures (the positive law), with data about unemployment and insolvencies. Additionally, we briefly address some issues that affect the position of workers and/or self-employed workers, that have been initiated in addition to the Package or are not or insufficiently covered by the Package. More particularly, these issues are: 1) sick leave and work stress especially in the health care sector; 2) telework; 3) the initiatives “NLWerktDoor” (nlwerktdoor.nl) and “NLLeertDoor” (nlleertdoor.com); and 4) perspectives on the restart after the Package.

2. The Emergency Jobs and Economy Package¹

As indicated in the introduction the Package is comprised by three types of measures, however, the first set of measures, on safeguarding income and salaries, are the most relevant in terms of labour law.² In fact, even of these measures, only few of them concern labour law, whereas most are part of tax law, subsidy law, and social protection law, including social security. Little to no (temporary) adjustments have been made regarding social security measures. This can be explained by the fact that in general Dutch social security was already rather generous. For example, the employer has to pay sick leave benefits for a period of two years at a statutory rate of 70% of the salary, with a maximum of 70% of the maximum day wage. In many collective labour agreements this percentage is topped up to 90 or 100% of the salary or maximum day wage for the first year of sick leave.³

¹ This section draws on our previous publications: J.H. Bennaars and B.P. ter Haar, ‘COVID-19 and Labour Law: The Netherlands’ (2020) 13(1^{Spec}) *Italian Labour Law e-Journal*; and J.H. Bennaars, ‘Covid-19 and labour law in the Netherlands’, (2020) 11(3) *European Labour Law Journal* 324-331.

² See for a complete overview of the financial measures: <https://www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen> - accessed 22 March 2021.

³ Article 7:629 Dutch Civil Code (Burgerlijk Wetboek).

2.1 Measures safeguarding income and salaries

The Package holds four measures to safeguard incomes and salaries of workers and self-employed, namely:

1. Temporary Emergency Bridging Measure to preserve employment (NOW);⁴
2. Temporary support scheme for self-employed professionals (Tozo);⁵
3. Compensation for entrepreneurs in affected sectors (TOGS / TVL);
4. Leniency on premium differentiation for unemployment benefits.

Ad1. Temporary Emergency Bridging Measure to preserve employment (NOW)

Regulation by the Minister of Social Affairs and Employment of 31 March 2020, 2020-0000046630 establishing a temporary subsidy scheme as a contribution towards wage costs in order to maintain jobs in exceptional circumstances (*Tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid*) (1 April 2020), Stcrt. 2020, 19874.

Regulation by the Minister of Social Affairs and Employment of 22 June 2020, 2020-0000085008, establishing the second tranche for a temporary subsidy scheme as a contribution towards wage costs in order to maintain jobs in exceptional circumstances (*Tweede tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid*) (22 June 2020), Stcrt. 2020, 34308.

Regulation by the Minister of Social Affairs and Employment of 5 October 2020, 2020 000119847, establishing the third, fourth and fifth tranche for a temporary subsidy scheme as a contribution towards wage costs in order to maintain jobs in exceptional circumstances and to prepared for the new economic situation (*Derde tijdelijke noodmaatregel overbrugging voor behoud van werkgelegenheid*) (9 October 2020), Stcrt. 2020, 52209.

The NOW has been effective per 6 April 2020 and has been amended and continued several times. It is a subsidy to employers to be compensated for wage costs. A company is eligible for the NOW when it has loss in the turnover of at least 20% due to the government's COVID-19 measures. The higher the loss in turnover, the higher the financial support, with a maximum of 90% wage costs by 100% loss of turnover. The loss of turnover is calculated over a period of three months. The wage compensated is the wage for social insurance purposes as it is known by the UWV,⁶ up to a maximum of €9538,- per employee per month. To this wage sum 30% is added for pension premiums, holiday allowances and other costs/benefits.⁷ The NOW explicitly also covers the wage costs of flexible contracts. In the case of temporary agency workers, the agency, as the formal employer, can apply for the subsidy. During the first tranche, employers were called to continue employment as much as possible and to keep on-call workers on the payroll. Nevertheless, already in March and April, many of such contracts have been terminated.

The NOW was set up in an extremely short period of time as a relative simple subsidy without details to prevent abuse or for tailor-made solutions for sectors or individual employers. This has resulted in a number of amendments. For example, to have more specific eligibility requirements

⁴ See for general information about the NOW at: <https://www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen/now/algemene-informatie-over-now3-vanaf-oktober-2020> - accessed 22 March 2021.

⁵ See for general information about the TOZO: <https://www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen/tozo> - accessed 22 March 2021.

⁶ The Employee Insurance Agency, an administrative body responsible for, among others, social security payments, such as unemployment benefits, sick pay, etc..

⁷ 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.

for seasonal labour. However, this resulted in issues on the execution of the subsidy – the more detailed the rules are, the more time is needed for a proper execution, which is something that lacks in these times, and hence resulted in mistakes. The Minister of Social Affairs and Employment has decided to correct these mistakes only for companies that benefited from it with more than 5% than what they were entitled to or with more than €5000,-.⁸ Under the first tranche about 140.000 companies applied for the NOW for about 2,6 mln employees, amounting to about €8 bln, whereas in the period Jan-March 2021 34.000 companies applied for the NOW for about 0,5 mln employees, amounting to about €500 mln.⁹

Ad2. Temporary support scheme for self-employed professionals (Tozo)

Decree of 17 April 2020 containing temporary rules with respect to social assistance for self-employed that are financially harmed by the consequences of the crisis due to Covid-19 (Temporary benefits for self-employed professionals, *Tijdelijke overbruggingsregeling zelfstandig ondernemers*), Stb. 2020, 118

Regulation of the State Secretary of Social Affairs and Employment of 27 May 2020, nr. 2020-0000065598, to amend the Temporary bridging scheme for self-employed persons in relation to the extension of the Temporary bridging scheme for self-employed persons (*Uitbreiding Tijdelijke overbruggingsregeling zelfstandig ondernemers*) (29 May 2020) Stcrt. 2020, 29395

Regulation of the State Secretary of Social Affairs and Employment of 5 October 2020, nr. 2020-0000132068, to amend the Temporary bridging scheme for self-employed in relation to postponing the limited means test till 1 April 2021. (9 October 2020) Stcrt. 2020, 52396.

Regulation of the Minister of Social Affairs and Employment of 25 January 2021, nr. 2021-0000011056, to amend the Temporary bridging scheme for self-employed in relation to retroactively enable the application and relaxation of the terms and conditions of the loan to meet the needs for a working capital (27 January 2021) Stcrt. 2021, 4392

In essence, the Tozo entails measures to safeguard the income of self-employed workers. Moreover, the regular rules that apply to social assistance for self-employed are relaxed. Especially, the usual means test, partner income test, or the condition that the business must be viable do not apply. The Tozo 2 (which applies for the period July 2020 – September 2020), which was adopted in a period in which the lock down measures were relaxed (between the first and second wave of the virus), re-introduced the partner income test. Tozo 3 (October 2020 – March 2021), and Tozo 4 (April – June 2021) both hold a limited test, meaning that the usual means test is not applied. Initially, it was not possible to retroactively apply for Tozo 3 and 4, however, this has been adjusted and per February 2021, it is possible to retroactively apply for the Tozo till the first of the month before the month in which the application is made. Thus, when applied in February, the Tozo can start per 1 January 2021.

Ad3. Compensation for entrepreneurs in affected sectors (TOGS / TVL)

Policy Regulation of the Minister of Economic Affairs and Climate of 27 March 2020, nr. WJZ/20077977, to compensate damages suffered by enterprises in certain sectors affected by measures to fight further spreading of COVID-19 (Beleidsregel tegemoetkoming ondernemers getroffen sectoren COVID-19) (30 March 2020) Stcrt. 2020, 19159.

⁸ Cf. R Winkel, 'Koolmees: loonsteun foutgevoeliger bij maatwerk', *Financieel Dagblad* 22 March 2021.

⁹ Ibid.

Policy regulation of the Minister of Economic Affairs and Climate and the State Secretary of Economic Affairs and Climate of 15 April 2020, nr. WJZ/20090602, to amend the Policy regulation compensation entrepreneurs in affected sectors COVID-19 in relation to the extension of sectors eligible for a compensation (16 April 2020) Stcrt. 2020, 22337.

Regulation of the Minister of Economic Affairs and Climate of 26 June 2020, nr. WJZ/20146069, to establish a temporary subsidy to enable SMEs that have directly been affected by the measures to fight further spreading of COVID-19 to pay for their permanent regular costs (Regeling subsidie financiering vaste lasten MBK COVID-1) (29 June 2020) Stcrt. 2020, 34295

And by example of the various extensions per annual-quarter:

Regulation of the State Secretary of Economic Affairs and Climate of 9 February 2021, nr. WJZ/21022026, to establish a temporary subsidy to enable SMEs that have directly been affected by the measures to fight further spreading of COVID-19 to pay for their permanent regular costs and to replace the Regulation subsidy financing permanent costs SME COVID-19 (Regeling subsidie vaste lasten financiering COVID-19) (15 February 2021), Stcrt 2021, 6893

TOGS was a one-time payment of €4000,- for entrepreneurs who suffered losses that are directly related to the COVID-19 lock down measures. Eligible sectors include for instance food and beverage; hair, nail and beauty care; travel agents or tour operators; driving schools; swimming pools, fitness centres, sports clubs and sporting events; certain private cultural organisations such as museums, circuses, theatres and music schools; etc. The company should not employ more than 250 employees, and its overhead costs should be at least €4000,- (the compensatory amount). TOGS is continued in the measure TVL MKB.¹⁰ The TVL has changed a number of times and is since the third quarter of 2020 a loss in turnover-related compensation subsidy to enable enterprises to fulfill their permanent financial obligations, e.g. the rent of a location. The TLV runs per quarter and can be applied for retroactively. Steady eligibility requirements include among others, a loss in turnover of at least 30%; a minimum amount of regular cost (TOGS and TLV1) or compensation amount (TLV2 and follow ups); and be recognized as a sector directly affected by the general measures fighting the spreading of COVID-19. Because it is a subsidy which could qualify as an EU competition distorting State-aid, the subsidy, and every change of it, is being approved by the European Commission.¹¹ This kind of aid is considered essential to prevent companies going bankrupt and as such preserves jobs in the most severe affected sectors.

Ad4. Leniency on premium differentiation for unemployment benefits

Decision of 2 September 2020 to amend Decision Wfsv in relation to the extraordinary circumstances as a consequence of covid-19 temporary not to revise the AWf-premium in case of overtime (General Administrative Order), published on 14 September 2020, Stcrt. 2020, 333

As Bennaars reported in the *ELLJ*: ‘As of 1 January 2020, there is a premium differentiation to stimulate the use of fixed-term contracts. The administrative demands for employers to deal with this are postponed until 1 July 2020. Furthermore, a solution is to be found for the expected overtime in certain sectors in this period (e.g., health care) that could lead to an increase of

¹⁰ Tegemoetkoming Vaste Lasten Midden- en Klein Bedrijf – Compensation permanent cost for Small and Medium sized Enterprises.

¹¹ Cf. https://ec.europa.eu/commission/presscorner/detail/nl/IP_20_1221; and more generally: https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html - both accessed 22 March 2021.

premiums based on the new rules.’¹² With regard to the latter situation, the government has decided to suspend adjustments of premiums for the year 2020.

2.2 Effectiveness of the measures: some data on unemployment and insolvency

The measures seem to be effective, because the level of unemployment has not changed much over the course of 2020. In the group 15-75 year the employment participation percentage was 69,3 in February, 67,7 in May, 68,5 in December and was still rising in February 2021 (68,8).¹³ Young people, aged 15-25 have mostly lost their jobs. Many of them work in restaurants, pubs, etc. next to their school or studies. Often also they work on the basis of fixed term contracts which have not been prolonged. Other age groups (25-45; and 45-75) seem to have recovered and found new employment.¹⁴

The number of insolvent companies is historically low. Compared with 2019 (3785 companies declared bankrupt) there are 573 less companies declared bankrupt in 2020 (3212); that is about 15% less insolvent companies.¹⁵

As such it can be argued that the measures are effective in keeping business alive and jobs preserved. Not surprisingly, this has raised discussions about what will happen when the support measures will be stopped. The fear is that the number of liquidations will rise, partly because under normal circumstances some companies would have been insolvent already, partly, because many companies will start with high loans that need to be paid back (not all measures are subsidies; some are loans or concern postponement of payments).

3. Additional issues

3.1 Sick leave and work stress in health care

In the year 2019 Statistics Netherlands (CBS) reported historic low levels of sick leave in the healthcare sector, with an overall level of 5,7% (meaning 57 days out of 1000 days reported as sick). This changed in 2020 where levels as low as in 2003 and 2010 were reported, with 6,6% in the first quarter, 6,1 in the second, 5,9 in the third, 6,9 in the last quarter, and an average of 6,4% over the full year.¹⁶ Traditionally the healthcare sector is notorious for a relatively high percentage of sick leave compared to other sectors, however, in 2020 the difference was bigger than in 2019. Two obvious reasons can be appointed for this. First, during the first quarter, the outbreak of COVID-19, there was a serious shortage of personal protection equipment (ppe) for health care workers which made them extra vulnerable for getting infected with COVID-19. Secondly, due to a chronic shortage of health care workers, the relative higher percentage of sick leave, and an increase in overtime combined with limited options to take annual leave days, have resulted in an increase in work stress, which makes these workers more vulnerable for (psychological) illnesses. This was already an issue of concern in the health care sector but became more pressing during COVID-19. A study on the effects of COVID-19 on carers in nursing homes shows that those who cared for COVID-19 infected persons scored significantly higher on aspects such as sick leave, overtime, and positive test on COVID-19.¹⁷ This remains an issue of concern.

¹² Bennaars, *supra* note 1, 329.

¹³ <https://opendata.cbs.nl/?dl=4C6EE#/CBS/nl/dataset/80590ned/table> - accessed 24 March 2021.

¹⁴ Cf. <https://www.cbs.nl/nl-nl/dossier/cbs-cijfers-coronacrisis/wat-zijn-de-gevolgen-van-corona-voor-arbeid-en-inkomen> - accessed 24 March 2021.

¹⁵ Cf. <https://www.staatvanhetmkb.nl/nieuws/wekelijksefaillissementen> - accessed 24 March 2021.

¹⁶ Ziekteverzuimpercentage; bedrijfstakken (SBI 2008) en bedrijfsgrootte, periode 2019-2020, available on: opendata.cbs.nl

¹⁷ Report of 8 December 2020, published on www.rijksoverheid.nl.

3.2 Telework

Telework was not uncommon to the Netherlands after the introduction in 2011 of the initiative *Het Nieuwe Werken*. In short, the initiative refers to the possibility to work where and whenever you want. However, it never took such a flight as it did during the first lock down in March 2020. While some employers are requiring workers to return to the office (even though the country is in lock down), the general expectation is that teleworking, on larger scale, is here to stay. Hence, trade unions have put the issue on the agenda for negotiations on collective labour agreements.¹⁸ Other issues that need (further) regulation include employers' liability for occupational health and safety (given the limited control by the employer over the telework place, but also new risks such as social isolation); and privacy (digital employee surveillance has grown exponentially).¹⁹

3.3 Initiatives “NLWerktDoor” and “NLLeertDoor”

Regulation of the Minister of Social Affairs and Employment of 31 August 2020, nr. 2020-0000108203, providing subsidies to trainers for providing training (*Tijdelijke subsidieregeling NL leert door met inzet van scholing*) (4 September 2020), Stcrt. 2020, 46170

Regulation of the Minister of Social Affairs and Employment of 23 februari 2021, nr. 2021-0000003750, providing subsidies to collaborations of sectors in order to provide, in follow up and in connection with the previous NL leert door – regulation using training, tailor-made support, guidance and training in order to maintain work and to make transitions from work to work. (*Tijdelijke subsidieregeling NL leert door met inzet van sectoraal maatwerk*) (2 March 2021) Stcrt. 2021, 10313

NLWerktDoor is an initiative of an organisation called *Perspectief op Werk*, in which Social Partners, (organised) local government, the council on vocational training (MBO-raad), the Ministry on Education, Culture and Science, and the Ministry on Social Affairs and Employment, work together to optimize the functioning of the labour market. One of the activities of *Perspectief op Werk* is to match demand and supply on the labour market. Part of these activities is a website by which these two sides are brought together (nlwerktdoor.nl/). Linked to this is also the possibility to get (vocational) training or re-training. While this option was already available, to overcome forced (re)trainings due to the consequences of COVID-19 measures, the government supports since 1 October 2020 many (online) trainings with subsidies. Two types of trainings are covered by the subsidy: online trainings; and (per 15 March 2021) tailor-made sectoral specific trainings provided by the respective sectors for future workers. Both types of trainings are free of cost for the participants in the training.

3.4 Perspectives on the restart after the Package

The Dutch Social Economic Council (SER) has set up a thinktank comprised by besides Social Partners, among others, Netherlands Bureau for Economic Policy Analysis (CPB), Netherlands Bureau for Social Cultural analysis (SCP), Statistics Netherlands (CBS), De Nederlandsche Bank (DNB), Scientific Council for Government policies (WRR), the Council for Public Health and Society (RVS), and Clingendael. These are all key organisations informing and advising the government on various specialised issues. They have formulated five advices offering perspectives

¹⁸ FNV, ‘Nu thuiswerken langer duurt, is regeling noodzakelijk’, *Nieuwsbericht* 28 augustus 2020.

¹⁹ See for more information: B.P. ter Haar, ‘Study on issues of Remote Work in Times of the COVID-19 Pandemic and Beyond’, *Report for the Minister of Social Affairs, Poland*, January 2021.

for after the crisis and on how to restart the economy and society. The three most relevant advises are (in brief):

1. Start developing a recovery policy in dialogue with civil society and local government which aims for long term goals to create an inclusive and sustainable economy;
2. Control the health crisis with intensive testing and swift vaccination programmes;
3. Continue support for directly affected sectors by the COVID-19 lock down measures, matched with an integral approach for the labour market, accompanied with rules on Teleworking with specific attention for psycho-socio risks of teleworking, and attention for vulnerable groups (e.g. flexible workers) and young people.²⁰

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²⁰ <https://www.ser.nl/nl/thema/aanpak-coronacrisis/adviezen-coronacrisis> - accessed 24 March 2021.