Santiago-2017

FOURTH STUDY COMMISSION

"Flexible employment and other emerging types of labor relations"

The Netherlands

Preamble

Flexibility (quantitative or qualitative) has become a major issue in the competitiveness of companies, which have to adapt and even react as quickly as possible to unforeseeable events, conjunctures or economic constraints that are less and less predictable.

In order to do so, employers choose to have either external flexibility, by using interim, fixed-term contracts, subcontracting or even the outsourcing of certain skills (computing, accounting, logistics, calling centers, catering, etc.), or internal flexibility 1) by being flexible on "time", adjusting working hours or allowing part-time work, 2) by giving "geographical" flexibility to the employees in the workplace (telework, working remotely, even a change of assignment from one workstation to another for the same employer), 3) by expanding the employee's tasks to modify his or her job in the workplace (specialization by training in order to increase the skills of the worker), or even 4) by training the worker to give her or him the possibility to get a new job in the same company.

From the workers' point of view, this flexibility may be perceived by some as a source of precariousness likely to degrade their living conditions, but for others this flexibility can both be associated with a freer management of their working hours when, for example, more flexible hours have been negotiated or chosen and not imposed, which would constitute a way of making work less monotonous or more diversified.

This year, the theme chosen by the 4th Commission at the 59th International Congress of IAJ tend, on one hand, to examine the different modes of "time and geographical" flexibility introduced by each country in its positive law and, on the other hand, to identify other emerging modes of flexibility that would have appeared in order to ensure greater flexibility in the work schedule and the workplace of an employee.

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Questions

[1] **Does your country have laws or regulations on work schedules?**
In The Netherlands there are both a law, the Working Hours Act (in Dutch: Arbeidstijdenwet) and regulations, the Working Hours Decree (Arbeidstijdenbesluit) applicable on working hours for employees. The Act and Decree are in accordance with

the rules provided in the Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organization of working time.

[2] If so:

a) What are the general rules applicable to the duration of working hours?

The Working Hours Act stipulates how many hours per day and per week an employee may work and when he (or she, further also referred to as 'he') is entitled to a break or rest. These rules have been established in order to protect the worker's health, safety and well-being, but also to enable him to combine work with his private life and family responsibilities. The rules apply for employees aged eighteen and older. Separate rules apply for children under 16 and young people aged 16 and 17. A few special rules also apply for women who are pregnant or who have recently given birth.

The standard rules are:
An employee may work a maximum of 12 hours per shift. The maximum working hours per week is set at 60.
However, an employee may not work the maximum number of hours every week. When considering a longer period than a week, the working hours are as follows:
• Per week during a 4-week period: on average 55 hours per week during a period of 4 weeks; deviating agreements on this may be made in a collective arrangement (CAO - collective labour agreement - for example). But an employee may never work more than 60 hours per week;
• Per week during a 16-week period: on average 48 hours per week during a period of 16 weeks. The employer and employee jointly agree on which hours the employee works per day and per week.

Rest after working hours
• After a working day, an employee must be allowed 11 consecutive hours of non-work time. This rest period may be shortened to 8 hours once in a 7-day period if the nature of the work or the business circumstances so require.
• In the event of a 5-day working week, an employee must have 36 consecutive hours of non-work time after the end of the working week.
• A longer working week is also possible, provided the employee has at least 72 consecutive hours of non-work time in a period of 14 days. This period may be split into two periods of at least 32 hours each.

Breaks
• If an employee works for more than 5 ½ hours, he is entitled to at least 30 minutes of break time. This may be split into two 15-minute breaks.
• If an employee works for more than 10 hours, he must have at least 45 minutes of break time. This may be split into several breaks, each of which must be at least 15 minutes.
A collective arrangement (CAO for example) may include agreements on fewer breaks. However, if the employee works for more than 5 ½ hours, he must at least have 15 minutes of break time.

In principle the Working Hours Act applies to everyone who works for an employer, so

for all employees, including interns, temporary employees and seconded employees. In a number of cases the Working Hours Act also applies to the self-employed.
This is the case in situations in which the safety of third parties is also at stake, such as in transport sectors.

b) Has the legislator considered any general exemptions from these rules?

The Working Hours Decree contains exceptions and additions to the Working Hours Act. In addition to general exceptions, there are also additional regulations for healthcare, mining and a number of other sectors.
These sectors are therefore subject both to the general rules of the Working Hours Act and Working Hours Decree and the separate sector regulations.

Some rules from the Working Hours Act and many of the general and sector regulations from the Working Hours Decree can only be applied by 'collective arrangement,' i.e. after consensus has been reached in collective (mutual) consultation. A collective arrangement may be a CAO (collective labour agreement) or the regulations on the legal status of public servants, but it may also be a written agreement between the employer and the co-determination body (the works council or employee representation).

c) Apart from these general derogations, has the legislator provided for any other special exemptions applicable to the duration of working hours?

In some situations the Working Hours Act does not, or does not fully, apply. This may be the case for example in the event of sudden, unforeseen dangerous situations, whereby compliance with the statutory regulations would impede adequate action.
The Working Hours Act also does not apply if compliance with it would disrupt the maintenance of public order (this is the case for the intelligence and security services of the government and police).
Some forms of work are also exempt or partially exempt from the Working Hours Act. The regulations for Sunday work do not apply for people who hold a religious office in the church for instance.

Other groups of employees to which exceptions apply are:
• Employees who earn at least 3 times the minimum wage (unless they are engaged in dangerous work or work in night shifts, or when work by non-managers in the mining sector is concerned);
• Volunteer work;
• Professional athletes;
• Scientific researchers;
• Parents in foster homes;
• Performing artists;
• Medical and dental specialists, nursing home doctors, general practitioners, and public health physicians;
• Supervisors at school and holiday camps;
• Military personnel during deployment and exercises.

[3] In any event (whether in the absence or presence of a regulation on the duration of working hours):

a) What forms of flexible working hours have been considered, whether by your legislator, the social partners (in collective agreements), or even by the company (intern regulations, employment contract)?

- **Could you explain how it works?**

Practically all sorts of flexible arrangements are being used in the Netherlands, such as part-time work, on-call work, seasonal work. Alternatives for a direct employment relationship between the employer and employee are using temping agencies to provide labour as required or hiring interim personnel and/or outsourcing services to third parties.

With regard to employment contracts (fulltime or part-time) a new Act, the Flexible Working Hours Act (Wet Flexibel Werken) has come into effect as of January 1, 2016. The purpose of the Act is to support the combination of work and private life.
Under the Dutch Working Hours Adjustment Act (Wet Aanpassing Arbeidsduur), which was in force until abovementioned date an employee could only file a request for amendment (increase or reduction) of his working hours.
Under the new Act employees are entitled to file a request with the employer for amendment of their working hours (increase or decrease), working times and workplace. This, however, does not mean that the employer is obliged to comply with the request. The employer retains the right to refuse the requested amendment in case of substantial business interests (which are specified further in detail in the Act). The employer is obliged to consult with the employee before denying a request for amendment of the working place (for example a request to work from home). In all cases the employer is obliged to inform the employee on his decision in writing, stating the reasons in case the request of the employee is denied.
The new Act reduces a few time limits, which were included the Dutch Working Hours (Adjustment) Act:
- formerly an employee had to submit the request four months prior to the desired starting date. The new Act reduces this to two months;
- furthermore, the period of service of the employee with the employer, which was at least one year, is reduced to six months employment before an employee may submit a request and
- under the former law an employee had to wait two years after a denial or approval of a request before he was allowed to file a new request. This time limit is shortened to one year.

The new Act is not applicable for employees who fall under the scope of a collective labour agreement which includes provisions for flexible working hours. However, this does not apply for a request pertaining to reduction of the working hours. Furthermore, the new Act only applies for employers who employ more than ten employees.

b) Moreover, does your country have one or more of the following forms of flexibility (or other forms of flexibility to be specified):

- **Successive fixed-term contract, interim, layoff, teleworking, part-time work, on-call work contract, occasional work, etc.**

Successive fixed-term contracts
One has to bear in mind that in the Netherlands an employment agreement cannot - other than through lapse of the specified time the employment agreement was entered into and the decision of the employer not to renew such contract - be terminated by the employer unless:
a. the employee gives his (written) consent or
b. the employer has obtained a permit to dismiss the employee from UWV (Employee Insurance Agency, an autonomous administrative authority, commissioned by the Ministry of Social Affairs and Employment) prior to giving notice or - in cases as specified in the law - applies for and obtains a decision from the Court to terminate the employment agreement;
c. there are urgent reasons for instant dismissal;
d. during the (limited) probationary period.

Therefore employers usually choose to have as much flexibility as possible. Hardly any new employment agreements are entered into for an indefinite term, but start out as a fixed-term contract.
However, although employers generally wish to have flexibility, there is on the other hand much (dismissal) protection for the employee. For example there is a limit to the number of fixed-term contracts and the period of time in which an employer can effectively enter into fixed term contracts and still have the employment agreement end by operation of law at the end of a term. At present the rule is that as soon as more than three consecutive contracts are entered into between the same parties within a period of 24 months and the possible breaks in between the contracts are six months or less, the last contract automatically becomes a permanent contract.

Interim work, telework, part-time work see answer 3a.

[4] More specifically, in your country, is there a possibility to work outside of the workplace, for example at home?

Depending on the employer and the kind of work the employee is hired for, it is possible to work outside the workplace. Obviously such employees as sales representatives usually don’t have a fixed workplace as they have to visit customers to solicit orders or service personnel who have to provide the service at the customers premises.
With regard to working at home see answer 3a.

[5] If so:

a) What kind of control can the employer have over the employee working outside of the workplace?

As there are no provisions in the law, it is up to the employer to set the conditions of working at home and the way he wants to supervise and control (the quality of) the work. The employer has to be aware of the fact that he may be held responsible for the working conditions of the employee.

b) Do the employers have to reimburse the employee for certain costs associated with this type of work?

There are no legal requirements for the employer to reimburse the costs associated with work outside the workplace.

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