

# Newsletter

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## Employment Law

This Employment Law Newsletter of the Holland Van Gijzen Employment Law Section is to provide you with concise information on recent case law, legislation and current developments in the Dutch employment law arena.

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## 1. Does a termination payment included in the employment contract fall under the periodic payments entitlement exemption?

If an employee is given a termination payment at the end of the employment contract, the payment is taxable at the time when it is paid. However, if the employee sets up a "private company incorporated to make periodic payments" (in Dutch: *stamrecht B.V.*), the levy of tax on the termination payment can be deferred. This is called a "periodic payments entitlement exemption".

Employees can agree a contractual termination payment with their employer at the start of the employment contract, also known as a "golden parachute", which will be paid to the employee at the time of (early) termination.

The Dutch Tax & Customs Administration (*belastingdienst*) recently published its new policy on the use of the periodic payments entitlement exemption in the case of contractual termination payments that are agreed at the start of the employment contract. The Tax & Customs Administration says that a right of entitlement to periodic payments does not exist if the employee already stipulated a one-off termination payment when entering into the employment contract, because this relates to a one-off payment and not to the replacement of lost earnings. In that case, the periodic payments entitlement exemption cannot be used.

Although the Tax & Customs Administration's policy can be disputed, the employer can possibly - if it pays a contractually agreed termination payment by depositing that termination payment in the former employee's "private company incorporated to make periodic payments" without withholding wages tax and national insurance contributions - be subsequently held liable to pay wages tax and national insurance contributions on the termination payment. This can entail additional costs for the employer, if those costs cannot be recovered from the former employee.

It is therefore important to take account of the Tax & Customs Administration's policy when including contractual termination payments in the employment contract. If the parties include the entitlement to a termination payment and the amount of that payment in the employment contract - but stipulate that the form in which that termination payment will be made (in the form of an entitlement to periodic payments or a one-off payment to replace lost earnings) will only be decided when the termination occurs - the parties can use a periodic payments entitlement exemption if an entitlement to periodic payments is chosen at the time of early termination. In this way, the levy of tax on the termination payment can still be deferred.

We advise that "golden parachute" arrangements that have already been agreed should be altered before the early termination occurs, so that for these too (if desired) a periodic payments entitlement exemption can be used, and additional costs can be avoided.

## 2. Management and Supervision Bill

On 31 May 2011 the Upper House of the Dutch parliament passed the Management and Supervision Bill relating to public limited liability companies (NVs) and private limited liability companies (BVs). This Bill enables NVs and BVs to choose between a two-tier board model, with a Board of Directors (*Raad van Bestuur*) and a separate Board of Supervisory Directors (*Raad van Commissarissen*), and a one-tier board

model, where the single board is made up of executive and non-executive directors. Within this model, a supervisory role is fulfilled by the non-executive directors. The one-tier board model, which is similar to and consistent with a system that exists in Anglo-American countries, is already permitted under current law (unless the company is a "*structuurvennootschap*", a two-tier board company) but had not yet been regulated by law. The new Act will come into force on 1 January 2012.

The Bill also provides that the legal relationship between the director and an NV that is listed on the stock exchange may no longer be regarded under civil law as an employment contract. It is expected that between the listed company and the director there will be a "contract for services" within the meaning of Article 7:400 of the Netherlands Civil Code. The fact that the director must be regarded as a contracted party and not as an employee means that the director cannot derive any rights from the legal protection given to employees by Dutch employment law. Thus a director will no longer, for instance, be entitled to compensation for unfair dismissal. Directors of listed companies will also lose the protection of the prohibitions of termination of employment provided by Article 7:670 of the Netherlands Civil Code, including protection from dismissal during illness or pregnancy.

They will not only have less protection under employment law; under certain circumstances the directors, now that they are not employees, will no longer be able to participate in a group pension scheme within the meaning of the Pensions Act. It is possible that the Minister of Social Affairs and Employment will make it possible for directors of listed companies to be equated for the purposes of the group pension scheme with employees who perform work on the basis of an employment contract.

Although from the civil law point of view an employment contract will not exist between the director and the listed company, there will be a notional employment relationship for the purposes of wages tax. Wages tax and income tax will have to be paid on the remuneration that the director receives for the work that he performs for the listed company.

Also for social security law, there will be a notional employment relationship between the director and the listed company. A director will continue to be insured as an employee for the employee insurance schemes if he/she fulfils the condition of personally performing work for usually at least two days per week.

A director could, however, consider whether to apply for a Declaration of Independent Contractor Status (VAR), so that the company is not required to withhold wages tax and national insurance contributions.

The Act's entry into force will have no consequences for existing employment contracts, but it will not be possible to conclude new employment contracts, or to extend fixed-term employment contracts.

Listed companies must therefore take account of the fact that from 1 January 2012 they will no longer be able to conclude employment contracts with directors. The most obvious contract to conclude with a director will be a "contract for services". We will be pleased to assist you with the formulation of such a "contract for services".

### 3. Does a “director and major shareholder” have a claim to salary after liquidation?

On 5 July 2011, Leeuwarden Court of Appeal gave an opinion on the question of whether the employment contract between a company and an executive director who is also a “director and major shareholder” (DGA) ceases to exist if the executive director petitions for the company’s liquidation.

This case concerned X, the sole director and sole shareholder of a holding company that was part of an operating company. On 1 June 2004 an employment contract was concluded between X and the operating company, under which the employee entered employment as a director. At a certain point, X himself petitioned for the liquidation of the operating company. After the liquidation order was given on 8 April 2008, X’s work was discontinued. In December 2008 X submitted a claim to the liquidator for “back salary” over the period from the liquidation order to the date on which the employment contract would have terminated in a legally valid way. X also considered that he had a claim against the liquidated company for the loss of the lease car. In response to this, at the end of December 2008 the liquidator terminated the employment contract with X, insofar as this contract still existed, and did not comply with the acknowledgement of X’s claims. X then commenced legal proceedings, claiming the continued payment of his salary. The subdistrict court rejected X’s claim, and X then appealed this decision.

The Court of Appeal examines the question of whether an employment contract exists between employee X and the operating company, which would justify the employee’s claims. In this, the Court of Appeal considers that in principle an employment contract between a major shareholder / director and a company is possible. However, the Court of Appeal sees cause to relativise the employment contract. According to the Court of Appeal, the employment contract must be relativised because *“if X had conducted the enterprise in a different legal form (sole proprietor, general partnership or limited partnership), he would also have had no entitlement whatsoever to compensation for lost income as from the date of liquidation, to be paid from the company assets, which would de facto have priority over all the pre-liquidation debts.”*

The Court of Appeal adds that because X as the sole shareholder was in complete control, and had petitioned for the liquidation of the operating company himself, it cannot be said that there is a situation of authority and a dependent position of the employee, which precisely characterise the existence of an employment contract. Therefore, according to the Court of Appeal, an employment contract and the rights associated therewith cannot be said to exist. The Court of Appeal rejects X’s claim for “back salary”.

This ruling offers support for the assertion that the legal relationship between a company and an executive director who is also a “director and major shareholder” cannot be regarded as an employment contract. This line has already been taken for some time by the Central Appeals Tribunal (CRvB) for social security matters, which states that in principle a “director and major shareholder” is not insured for employee insurance schemes.

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