

Employment law updates post Covid: important changes for employers

Current working from home situation

As of March, 15, 2022, the advice to work from home has been lifted by the Dutch government. This means that employees can work on the business location again, without any restrictions. Therefore it is, for example, no longer required to keep 1.5 metres' distance on the work floor (it is of course still wise to maintain and ensure a safe distance). Despite lifting the working from home advise, the Dutch government urges employers to make it possible for their staff to work from home, for example for employees who worry about their health. However, employers are not (yet) obliged to do so. For employees who have corona-related health complaints the general rule remains: stay at home, and take a corona self-test.

Right to insist on working from home post corona

At present, a right to work from home is not embedded in Dutch employment law. However, employees have a right to insist on working from home under the Flexible Working Act (in Dutch: *Wet flexibel werken*). It follows from this act that employees who have been employed by the employer for at least 26 weeks can submit a request to work (partially) from home (this does not apply to employers with less than ten employees). Under the Flexible Working Act, the employee can ask the employer if his/her conditions of employment can be changed in order to permit the employee to work (partially) from home. This request needs to be submitted at least two months prior to the date on which the employee wants the change in workplace to enter into force (this does not apply to employers with less than 10 employees). The employee's request must, in any case, state the desired starting date and the desired workplace. The employer is obliged to take the request of the employee in consideration. The employer has no longer than one month before the desired starting date to make its decision and the employer must inform the employee in writing of its decision. If the employer decides to reject the request of the employee, the employer is required to provide the employee with the reason(s) of the rejection. Furthermore, the employer is obliged to discuss the rejection with the employee in person. The rejection can, in principle, be stated on any grounds. Although court rulings have been published in which an employer had to allow an employee to work from home under certain (specific) circumstances, employees are yet likely to be dependent on the employers flexibility to work from home.

Legislative proposal: 'Work where you want'

It follows from the aforementioned that the employee's right to insist on working from home is limited under the Flexible Working Act. The legislative proposal 'Work where you want' aims to change this. Under the proposed legislation, the request for a (partial) change of the workplace is treated in the same way as a request for an adjustment of working time or working hours. This means that the employer should, in principle, grant a request to work from home, unless there are compelling business or service interests at stake. Examples of compelling business and service interests are economic, technical or operational interests that cause serious harm to the business of the employer if the request of the employee would be granted. When rejecting the request, the employer must argue why there are compelling business or service interests at stake. In view of the above, the legislative proposal strengthens the position of the employees who desire to work (partially) from home. Moreover, it will become quite a challenge for employers to refuse a request to work (partially) from home, if the employees were able to work effectively from home during the pandemic.

The legislative proposal is currently being debated in the House of Representatives. If the legislative proposal passes in the House of Representatives, the proposal (still) needs to be approved by the Senate. Although it is not yet certain that the legislative proposal will enter into force, it is advisable to keep a close eye on the developments in this regard.

Working from home arrangements

Although working from home does not change employee obligations under the terms of the employment agreement and company policies, it is advisable to draw up a 'working from home policy' or add a chapter regarding working from home to the employment handbook. In such documents the employer can describe what is expected from employees that work (partially) from home. The document can, for example, state that the employees must remain contactable during working hours, attend to face-to-face meetings when necessary, take reasonable precautions to protect company property and information etcetera. Please note that the works council (if any) should be involved if the company is considering a working from home policy. Therefore, and because the works council usually knows what employees find (most) important, it is advisable to involve the works council at an early stage.

Providing a safe and healthy workplace

Under the Dutch Civil Code and the Dutch Working Conditions Act, employers are responsible for providing a safe and healthy workplace and to keep employees informed about health risks that may arise in performing their duties. These responsibilities are also applicable for employees working (partially) from home. In this regard, employers are required to conduct a risk inventory & evaluation (RI&E) in order to assess the occupational risks related to working from home and to describe the measures to be taken to mitigate these risks. Pursuant to this, employers must ensure that the employees working from home are provided with an ergonomically designed workplace (e.g. ergonomically chair and desk, monitor, keyboard). The obligation to provide an ergonomically designed workplace does not apply if this cannot reasonably be expected of the employer. This is, for example, the case when employees work from home for only a short period of time. Moreover, the obligation to provide an ergonomically designed workplace does not apply if the employee already has such a workplace at home. Costs that incur in the context of providing a safe and healthy workplace are borne by the employer, such as the costs in relation to the ergonomic design of the workplace. Please note that the employer is (also) required to conduct a policy on psychosocial workload for employees working from home. In what manner the employer ensures care for a safe and healthy workplace and the psychosocial wellbeing of the employees can (also) be described in a working from home policy.

Tax

Employers can pay - tax-exempt - allowances for expenses for IT (e.g. internet subscription) and H&S facilities for the home office as well as a daily allowance up to EUR 2. Commuting allowances cannot be paid tax-free for days worked at home.

Working from home in situations where the employee is a tax resident of another country results in the country of residence becoming entitled to tax part of the salary and can also lead to a change in the employee's social security position. For the employer, this can lead to (administrative) obligations in the employee's country of residence.

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