LOYENS & LOEFF

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Q&A - Employment in the Netherlands

A guidebook for employers

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Introduction

You are about to receive or hire an employee from outside the Netherlands. Or maybe you are a foreign employer, seconding an employee to work in the Netherlands. Probably the employee and even his family members will be moving to the Netherlands. In our experience, these situations might lead to questions, such as:

- do we need a work or resident permit for the employee?
- will we be confronted with Dutch mandatory labour law?
- does the employee have to pay tax in the Netherlands and do we have a payroll obligation?
- must we pay Dutch social security contributions?
- how can we arrange for the participation in our company pension plan?

In this guidebook we will provide the answers to these and many other questions, grouped per subject, based on our knowledge and years of experience.

We know that each situation triggers its specific questions. Consequently, we cannot rule out that you will still have questions after having read out guidebook. Moreover, since rules and regulations in the relevant areas are very detailed, it is impossible to give you an exhaustive overview. We will be more than happy to answer your questions and provide you with additional information.

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Immigration law

When do we need a Dutch work permit for the employee?

The main rule of the Foreign Nationals Employment Act ('WAV') is that a work permit must be requested for each foreign national who wants to work in the Netherlands, with the exception of nationals of EU Member States, the European Economic Area (EEA; which includes the EU as well as Norway, Liechtenstein and Iceland) and Switzerland. Apart from the regular employment situation, a work permit must also be obtained for part-time work, jobs aimed at obtaining work experience, training on the job-positions and volunteer positions. Even if the employee is hired from another company, for instance an employment agency, a work permit is required. There are certain exceptions to these rules. The principal for whom the work is actually being carried out is responsible for ensuring that a work permit is obtained.

Which persons are exempted from a work permit obligation?

- knowledge migrants, as explained further on
- intra corporate transferees, as explained further on
- foreign nationals who are allowed to stay in the Netherlands on the basis of community law (i.e. nationals of EU/EEA-countries and of Switzerland, and their family members)
- foreign nationals who have a permanent residence permit
- foreign nationals who have been exempted in view of specific activities to be performed during a very short period of time in the Netherlands, for instance to repair machinery, attend business meetings, attend training courses, or install software
- foreign nationals who have a residence permit, with an annotation stating that the foreign national is permitted to freely carry out work.

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- foreign nationals who have had a residence permit for at least five years with the purpose of legally working in the Netherlands
- foreign nationals who have a residence permit for the purpose of becoming/being self-employed

For UK nationals a work permit will be required as of 1 January 2021.

Which conditions must be met to obtain a work permit?

Pursuant to the WAV, a work permit will be refused if there are employees on the 'local labour market' who can fill the position. This labour market not only includes the Netherlands, but the entire EU/EEA and Switzerland. Another requirement is that the position must be advertised within the EU/EEA and Switzerland well in advance (at least five weeks before the work permit is requested), in other words: before the employee is recruited from abroad. Furthermore, sufficient efforts must be made to hire nationals from the EU/EEA and Switzerland. These grounds for refusal do not apply in the case of an intercompany transfer of specialised employees. Several other conditions must also be met.

How long will the work permit be valid?

The validity of a work permit is limited to only one year. If the employee needs to continue his activities in the Netherlands after this period, the work permit application process will have to start over again. In case of an intercompany transfer the work permit can be valid for a period of three years.

What is the penalty for not complying with the work permit requirements?

For each employee who works in the Netherlands without the required work permit, you will owe a fine of € 8,000 or more, whether you acted in conflict with the law deliberately or not. Other companies may be fined for the same offence and to the same amount, if they can (also) be considered employers pursuant to the WAV. Furthermore, the company may be registered in a public register, making the violation of the rules public.

For which employees/nationals a Dutch residence permit is required?

All foreign nationals (except those from EU Member States, the EEA and Switzerland) who want to reside in the Netherlands for a period exceeding three months (90 days), need a residence permit.
For UK nationals a work permit will be required as of 1 January 2021.

A residence permit is always explicitly issued for a specific purpose of stay in the Netherlands, e.g. work, study or family reunification. In order to obtain a residence permit, several conditions must be met. A residence permit is normally granted after a work permit has been granted.

Employees who are employed by an employer located outside the EU/EER or Switzerland and who are seconded to a group company in the Netherlands as manager, specialist or trainee have to apply for a residence permit as an intra corporate transferee. If a residence permit has been granted, the intra corporate transferee is allowed to work in the Netherlands without the additional requirement of having a work permit. This is explained further on.

If the employee is not an intra corporate transferee, an alternative residence permit may be obtained for highly skilled migrant workers ('knowledge migrants'). If the conditions for this alternative route are met, the knowledge migrant is allowed to work in the Netherlands without the additional requirement of having a work permit. This alternative is explained further on.

Do we have to obtain an entry visa ('MVV') for the employee who needs a residence permit

In most cases, those who wish to obtain a residence permit must first apply for an entry visa ('MVV'). If an MVV is required and the employee has not obtained one, his residence permit will not be issued. There are exceptions: e.g. nationals of one of the EU Member States, the EEA or Switzerland, the US, Canada, Australia, New Zealand, Japan, South Korea, Monaco and Vatican City do not need to apply for an MVV.

UK nationals may be exempt from the obligation to obtain an MVV as of 1 January 2021.

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How do we apply for an MVV and a residence permit for the employee?

The residence permit application and, if required, the MVV application must be filed by the Dutch employer/receiving company with the Immigration and Naturalisation Services (IND) while the employee is still residing abroad. If the employee meets all requirements for staying in the Netherlands, the IND will approve the applications. The MVV will be marked in the passport, by means of a sticker, by the Dutch embassy or consulate in the home country of the employee, in the nearest country in which the Netherlands has representation or in the country in which the employee legally resides. It allows the holder of this passport to enter the Netherlands. Upon entering the Netherlands, the employee is entitled to a residence permit.

If an MVV is required, the employee cannot enter the Netherlands prior to having been issued the MVV.

What is an intra corporate transferee?

Intra corporate transferees are employees who are employed by an employer located outside the EU/EER or Switzerland and assigned to a group company in the Netherlands as manager or specialist on bachelor level or as a trainee with a master degree. The intra corporate transferee must in principle receive an income that is in line with the salary test for highly skilled migrant workers (see below). Intra corporate transferees have to apply for a residence permit under the intercompany transferee programme. National programmes as the highly skilled migrant programme cannot be used if the employees fall under the under the intercompany transferee programme.

What is a highly skilled migrant worker (kennismigrantenregeling)?

Highly skilled migrant workers ('knowledge migrants') are employees (other than self-employed persons) whose income exceeds a certain level and is in line with prevailing market salaries. The salary test is applied on a monthly basis. This salary is set at € 4,612 gross in cash per month, excluding holiday allowance, for those over 30; for those under 30, the amount is € 3,381 gross in cash per month, excluding holiday allowance (amounts 2020).

To be able to use the highly skilled migrant programme the Dutch employer/receiving company must be recognised as sponsor for the purpose of the programme.

Under certain conditions, foreign university graduates are allowed to stay in the Netherlands for a period of one year to find a job as a knowledge migrant after completing their studies in the Netherlands or abroad. Before that year ends, they must have entered into an employment contract. The minimum income that is required in this situation amounts to € 2,423 gross in cash per month, excluding holiday allowance (amount 2020). Income in kind and variable salary components (bonuses) are not taken into consideration for the above salary-standard tests.

Another category of knowledge migrants are those working on a PhD.; for them there is no age requirement or income limitation. Also postdoctoral or university professors under the age of 30 are considered knowledge migrants, regardless of the level of their income.

Do we need a work permit for a knowledge migrant/intra corporate transferee?

No, knowledge migrants and intra corporate transferees are allowed to work in the Netherlands without a separate work permit.

What is the duration of the residence permit for knowledge migrants?

Knowledge migrants receive a five-year residence permit if they have an employment contract for an indefinite period of time. If they have an employment contract for a limited period of time, the residence permit is granted for that period.

What is the duration of the residence permit for intra corporate transferees?

Intra corporate transferees receive a residence permit for the duration of the assignment with a maximum period of three years.

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What are the obligations for us as non-Dutch employer?

For you, being the non-Dutch employer, there are no obligations.

What are the obligations for us as the receiving company?

The Dutch company (employer, or fictitious employer based on the applicable rules and regulations) is regarded a sponsor and has certain obligations: e.g. all changes of circumstances which may be of influence to the status of the employee must be reported immediately, certain documents must be kept in the administration and the employees must have been carefully recruited from abroad.

It is essential that all obligations are met carefully, as you risk owing a fine of € 3,000 for each violation. A recognized sponsor may even lose his status as recognized sponsor and the employee may lose his status as a knowledge migrant.

Carefully observe if all obligations are met, as the IND has increased its possibilities to investigate any violations of the obligations.

Carefully observe the income requirement for knowledge migrants and intra-corporate transferees. You must always be able to guarantee and prove that the required cash income is paid to the bank account of the employee each month.

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Labour law

Will Dutch labour law become applicable if we hire an employee from abroad?

Certain Dutch provisions of employment law will apply on the employee. Usually, in the employment agreement a choice of law is made. Irrespective of this choice of law in the employment contract, the fact that the employee will be working in the Netherlands, will result in the application of certain mandatory provisions of Dutch labour law.
As from the first day, the Terms of Employment (Cross Border Work) Act ('WagwEU') applies to all employees from outside the Netherlands who work in the Netherlands. The following provisions in Dutch law and Collective Labour Agreements (which have been declared generally binding) apply to the employment agreement of each employee who works in the Netherlands:

- maximum working hours and minimum resting hours
- minimum number of paid holidays per year (4 weeks)
- minimum wage, including payments for overtime, excluding complementary company pension schemes
- conditions for the hiring out of employees
- health, safety and hygiene at work
- protective measures regarding employment conditions and working conditions for specific groups of employees
- equal treatment of men and women, as well as other subjects of non-discrimination

Do we need to offer the seconded employee a Dutch employment contract?

In general, this is not necessary. Whether or not you choose to do so depends on the length of the secondment, the position of the employee within the Dutch company or the group assignment policy. Offering a Dutch employment contract may be relevant for tax, social security and/or pension reasons or for the ability of the employee to obtain a residence and/or work permit.

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Check whether a Dutch employment contract is required.

Can we offer the employee a Dutch employment contract for a definite period of time?

You can, within a total period of two years, enter into three consecutive employment contracts for a definite period of time with the employee. If this is followed by a fourth contract, this fourth contract will automatically be considered to be an employment contract for an indefinite period of time. Also, if the total period of two years is exceeded, the temporary contract automatically turns into a contract for an indefinite period of time. This does not apply if there is an interruption of more than six months between two contracts, during which period the employee neither has an employment contract with you nor works for you through an employment agency.

Will the laws of the home country continue to apply to the employee?

Yes, if the Netherlands is the country where the employee only works temporarily, the law of the home country remains applicable. Moreover, certain Dutch regulations apply mandatorily.

However, the longer the assignment lasts, the higher the risk that the Netherlands will be regarded as the country in which the employee habitually works, meaning that more mandatory rules of Dutch law may apply than only the ones mentioned in the WagwEU, which offer the employee better protection than similar provisions in his home country. For example, the protective rules on dismissals and payment during illness.

If the Netherlands is the country in which the employee works and Dutch social security already applies, you may consider opting to have Dutch law apply to the employment contract.

Is there a minimum amount of information that we have to share with the employee?

Usually employers inform their employees on the essential aspects of a secondment, but within the EU you *must* share at least the following information with the employee:

- a written employment contract, a letter of appointment and/or a written document containing various particulars of the employment agreement or employment relationship, e.g. the identity of the parties, the place of work, the salary, etc. prior to the employee leaving his home country
- the duration of the period of employment in the Netherlands
- the currency in which the salary will be paid
- if applicable, the social security aspects during his stay in the Netherlands
- if applicable, the arrangements regarding the employee's return to his home country

Which employment conditions should we address in particular under Dutch labour law?

If you want to offer the employee a local contract in the Netherlands, a few aspects are important to address.

The trial period

A statutory maximum applies. An employment agreement for a definite period of more than two years may contain a trial period of a maximum of two months. An employment agreement for a definite period of more than six months but less than two years may contain a trial period of a maximum of one month. An employment agreement of six months or less may not contain a trial period. The trial period should be agreed to in the individual employment contract or in the applicable Collective Labour Agreement.

The non-compete clause

If you want to include a non-compete clause, this has to be laid down in writing in the individual employment contract. In temporary contracts, non-compete clauses can only be concluded if you explicitly motivate in detail why a non-compete clause is important for this particular employee.

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Sickness and reintegration

In case of sickness of the employee, you have to pay at least 70% of the maximum daily wage and holiday allowance during a maximum of two years as defined in the Civil Code. You can only dismiss the employee on the grounds that he is ill after two years of illness. During the illness, you and the employee have to cooperate as much as possible on the reintegration of the employee. The Dutch requirement of continuation of salary payments may conflict with the social security benefits if the employee is subject to the social security system of his home country. A special provision in the employment contract should cover this situation.

Liability for accidents and work-related disease

If the employee has an accident or develops an occupational disease at work, he can hold you liable. You can only avoid liability if you can prove that you have taken all necessary precautions to avoid the accident/disease, or if you can prove that the accident/disease is the result of deliberate action or conscious recklessness of the employee. In practice, deliberate action or conscious recklessness turns out to be very difficult to prove.

Do we have to meet registration requirements when an employee is seconded to the Netherlands?

The WagwEU determines that employers from other countries within the European Economic Area and Switzerland that post workers to the Netherlands or that performs a temporary assignment in the Netherlands have to register this at the website of the Minister of Social Affairs and Employability. The following details need to be provided: (i) the identity of the service provider, (ii) the identity of the posted employee (iii) company data, (iv) identity of the service recipient, (v) the branch in which the work will be performed in the Netherlands, (vi) address where the work will be performed, (vii) expected duration of the posting, (viii) identity of person that is responsible for the payment of the salary, (ix) A1 certificate or other proof that the social security premiums will be paid.

Are there other administrative requirements we must meet when seconding an employee to the Netherlands?

During the secondment period the WagwEU requires for you to make (among other things) the following documents available at the workplace of the seconded employee (in Dutch, English, French or German only).

- The employment contract
- Proof of the identity of you, the seconding employer
- Proof of the identity of the employee
- Document A1 (if not subject to Dutch social security) and proof of payment of the social security contributions
- Pay slips
- Summaries of working hours

You should inform about the Dutch WagwEU requirements to be met. They may differ from similar requirements based on the EU Posted Workers Directive and the EU Enforcement Directive in other countries.

Can you explain the Dutch law on dismissal?

If an employee has an employment contract for an indefinite period of time and there are no urgent grounds for termination, there are three ways in which an employee can be dismissed:

Dismissal permit from the UWV

In case of redundancies due to economic reasons or if the employee has been sick during a period of two years or more the employer can obtain a permit of a governmental institution (the UWV). If the UWV issues a dismissal permit, you can terminate the employment contract in accordance with the terms of notice. These terms of notice vary from one to four months, depending on the total duration of the employment. The employment agreement can contain a longer notice period.

Court decision

This option is used when the reason for a dismissal is other than on economic grounds or long-term illness. You can ask the court to dissolve the employment contract.

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If the employer initiates the termination, he will have to pay a transition payment (*transitievergoeding*). Only in case of severe culpability on the side of the employee, he loses his right to the transitional payment.

Mutual settlement

In most cases, the employer and the employee enter into a settlement agreement in which the terms for termination of the employment agreement are laid down. The willingness of employees to agree to a mutual settlement generally depends on how strong the alternative case is (i.e. a termination via the UWV or court).

What about directors of a Dutch company?

Under Dutch law, a formally appointed board member ('Director') holds a special position. Usually, the general meeting of shareholders is authorised to dismiss or suspend a Director, in accordance with corporate law. If the Director also has an employment agreement with the company (which is not always automatically the case), and he is dismissed by the shareholders in accordance with the corporate law, his employment contract ends automatically as a consequence of the corporate dismissal. This means that you do not have to obtain prior consent of the UWV, or ask the Court to dissolve the employment contract. Only two protective employment law provisions apply to the Director. The first one is that the (contractual or statutory) notice period for termination of the employment agreement must be observed. The second one is that, if the Director is ill, the employment agreement does not end automatically after the corporate dismissal. A Director, who is dismissed, may request the competent court to award compensation for his dismissal via a claim for a reasonable severance payment. However, the Director cannot request the court to restore the employment relationship.

Under Dutch law, the legal relationship between a Director and a listed company cannot be regarded as an employment relationship and, hence, the contractual relationship will qualify as a contract for services. As a result, the two protective employment law provisions as mentioned above, will not apply to the Director. Moreover, the Director will not be able to demand compensation for his dismissal via a claim for a reasonable severance payment. Whether a notice period must be observed for this purpose will largely depend on the agreement between the parties.

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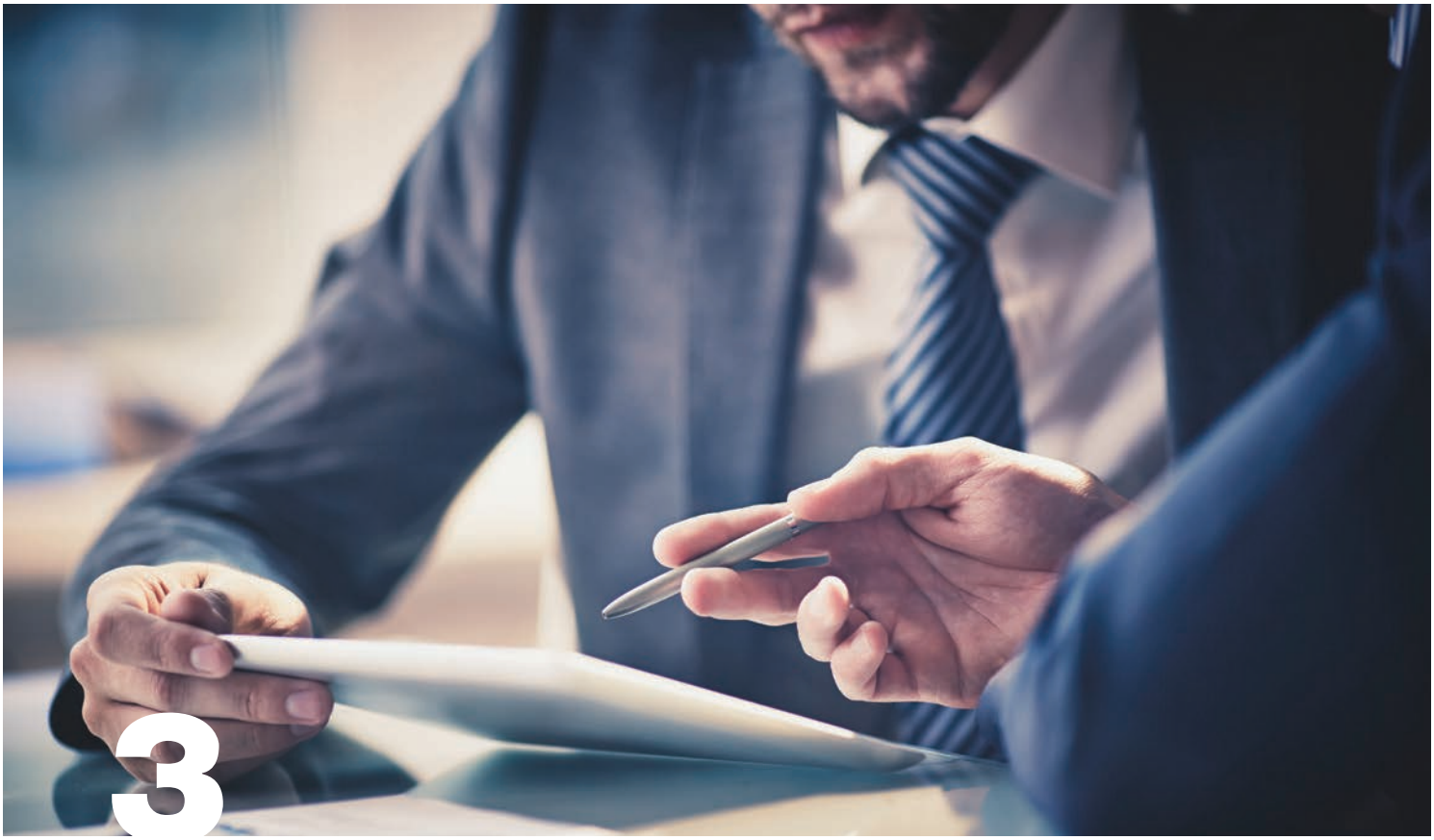

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Wage withholding tax

What is wage withholding tax?

Wage withholding tax is an income tax due by an employee, to be withheld and paid by the employer on a – usually – monthly basis. The employee can credit the tax against his personal income tax eventually due. On certain fringe benefits (lump sum) tax may be due by the employer on the basis of the Employment Costs Scheme (*werkkostenregeling*; 'WKR'). This scheme provides specific tax regulations for reimbursements or allowances for work related expenses.

Use the possibilities of the WKR to optimize the tax treatment of the remuneration package of your employee who is coming from abroad. Special attention should be given to the 30%-ruling.

Which payroll obligations do we have?

Each employer has to register with the Dutch Tax Administration as 'withholding entity' for the payment of wage withholding tax (and, if applicable, social security contributions) due on the taxable wage of employees.

Dutch employer

If you are a Dutch employer and already run a payroll administration, you can simply add the employees coming from abroad to your payroll.

Non-Dutch employer

If you are *not resident* of the Netherlands but have a permanent establishment (office or branch) in the Netherlands your employees are working for, you have to register as withholding entity and file monthly wage withholding tax returns. For that, you can seek the assistance of specialized payroll bureaus.

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If you, as a non-Dutch employer, hire out personnel to work for a principal (either a third party or a Dutch group company) in the Netherlands, you are considered to have a 'notional permanent establishment' (for Dutch wage withholding tax only) and therefore have to maintain a payroll administration.

Under certain conditions, a Dutch group company may take over your responsibilities. This requires prior consent from the Tax Administration.

If a Dutch group company takes over your wage tax withholding obligations the group company must be aware of the consequences and you and the group company must request prior approval from the Tax Administration.

Does the employee have to register his presence in the Netherlands?

If the employee wishes to stay in the Netherlands for a period of more than four months, he must register – in person – with the municipal authorities ('BRP') within five days after arriving. He must submit:

- a valid passport (this also applies to his spouse and children)
- a legalised copy of his birth certificate (this also applies to the spouse and children)
- a legalised marriage certificate (if applicable)
- if either partner was previously married, a copy of the divorce decree

Non-residents staying in the Netherlands for a period not exceeding four months also have to register (in person), but as non-residents ('RNI' registration).

Upon registration, the municipal authorities will issue a 'BSN' (Citizen Service Number), a unique personal ID for tax and social security, but used by Dutch public authorities for many more purposes.

The BSN is an important personal number in respect of your payroll obligations, as well as for the employee to get things started in the Netherlands. Make sure he gets one as soon as he can.

What is employment income?

Employment income is defined very broadly and can be, for example:

- Income in cash: such as regular employment income, expat allowances, commissions, bonuses, etc.
- Income in kind: such as the taxable benefit in relation to the private use of the company car, free accommodation, free meals, free travel, shares, goods, etc. The taxable benefit of the private use of the company car amounts to 22% of the Dutch list price of the car; this is 4% for fully electric cars.
- Entitlements: conditional rights to receive one or more future benefits, to be taxed in the future. E.g. pensions, certain social security benefits, etc.

The taxable benefit in relation to the private use of a company car can be avoided if your employee does not exceed 500 private kilometres per year (he has to keep a daily record of the kilometres driven) and obtains a confirmation thereof from the Tax Administration.

How are Long Term Incentive Plans taxed in the Netherlands?

Often, the entitlement to LTIP incentives depends on targets to be reached and is therefore conditional and subject to a vesting period. In general, such incentives are taxable on the vesting date. In case of cross border employment, the (possibly partially) Dutch tax obligation has to be determined based on the tax position of the employee during the vesting period. This means that you may still have to pay wage withholding tax after the employee has left the Netherlands.

Stock option rights are taxable at the time they are exercised. Tax is due over the gain realised at that moment, being the difference between the fair market value of the underlying shares at the moment of exercise and the exercise price of the stock option rights. A gain realised with the exercise of stock option rights granted in the period prior to the start or after the end of the employment in the Netherlands may also be (partially) taxable in the Netherlands.

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Which expenses can we reimburse in a tax friendly way?

Most work related expenses incurred by an employee can be reimbursed free of tax under the WKR. For this, you have to designate reimbursements and allowances in your administration as tax-free under the WKR. This applies for e.g. travel expenses, moving expenses, costs of meals, courses, mobile phones and computers.

A special category is that of the 'extraterritorial expenses', such as home leave, double housing, language courses. These expenses may be reimbursed as explained above. However, if certain conditions are met, a fixed tax-free allowance for extraterritorial expenses can be paid, based on the so-called 30%-ruling. Reference is made to chapter 4 on the 30%-ruling.

Do we have to pay Dutch wage withholding tax on the full salary if non-resident employees also work outside the Netherlands?

In general, non-resident employees only owe tax in the Netherlands on income generated on 'Dutch work days' (as determined by physical presence). Therefore, you only have to withhold wage tax for this part of the remuneration. If no tax treaty applies or the remuneration for non-Dutch work days is not subject to tax anywhere, you may also have to pay wage withholding tax for the salary paid over non-Dutch work days, based on Dutch national law. These situations require special attention, e.g. when the employee claims a tax exemption in the home country or on the basis of non-remittance in the UK.

Carefully check the tax residence status of the employee in both countries since it is a determining factor for all kinds of taxes, as well as for social security.

How to tax the fee of a Director of a Dutch company?

Director's fees are taxed in the same way as the salary of an employee, meaning you have to deduct wage withholding tax. However, in general director's fees are taxable in full in the country in which the company is resident. So, if you as a Dutch company have non-resident directors, taxation may not be limited to Dutch work days.

Under certain Dutch tax treaties you do not have to tax the full director's fee.

You do not have to deduct wage withholding tax for fees paid to supervisory board members (*commissarissen*). This also applies to non-executive board members of a listed company with a one-tier board. However, under certain conditions, you and the individual supervisory board member or the non-executive board member respectively can choose to nevertheless go for wage tax withholding ('opting in'). This may be beneficial, e.g. as it could allow the 30%-ruling to apply.

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Expatriate tax regime: the 30%-ruling

What is the 30%-ruling?

The 30%-ruling is a tax incentive for employees who are seconded or hired from abroad to work in the Netherlands, and have 'scarce specific skills'. They are assumed to incur so-called 'extraterritorial expenses'. You can pay (up to) 30% of the remuneration as a fixed allowance free of tax if certain conditions are met. The tax break may also reduce the amount of social security contributions due by you and your employee. The conditions of the 30%-ruling are explained in the Employee section.

What exactly are extraterritorial expenses?

Extraterritorial expenses are *extra* expenses your employee incurs in connection with working outside his home country, *extra* meaning: compared to his regular expenses in his home country. These can be expenses for travelling/commuting between the home country and the Netherlands, home leave, higher cost of living, double housing expenses for a non-resident employee, a language course, fees for international schools, etc.

Can extraterritorial expenses be reimbursed free from tax?

As a general rule, extraterritorial expenses can be reimbursed free from tax under the WKR (Employment Costs Scheme), provided you explicitly designate these payments in your administration as a specific tax exemption (for extraterritorial expenses) under the WKR. You need to keep proof of the costs, such as invoices, receipts, tickets, specified expense reports.

Why should we apply for a 30%-ruling instead of reimbursing the actual extraterritorial expenses?

Firstly, if the 30%-ruling has been granted, you can reimburse extraterritorial expenses free from tax without having to prove the actual extraterritorial expenses. Furthermore, in case of a net salary agreement, the 30%-ruling will reduce your total salary cost.

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In addition, the application of a 30%-ruling may offer some additional benefits.

- If the employee is a Dutch tax resident and the 30%-ruling applies, he can choose to report his income from investments and assets , as well as his income from substantial shareholdings, as a 'partial non-resident taxpayer' (based on a limited tax liability). This implies that, in general, he does not have to report such income. From a Dutch tax point of view, in general, this tax position is beneficial for the employee.
- It may be easier for the employee to exchange his foreign driving licence for a Dutch driving licence.

What if we reimburse extraterritorial expenses in addition to the fixed 30% allowance?

If you reimburse expenses or pay a separate allowance for expenses which are to be qualified as extraterritorial expenses in addition to applying the 30%-ruling, these additional payments will in principle be taxable. An exception to this applies to qualifying international school fees.

Can we reimburse tuition fees for international schools free from tax?

Yes, tuition fees for international schools or schools recognised as such by the Tax Administration – since such fees are regarded as extraterritorial expenses – can be reimbursed free from tax, whether the 30%-ruling is applicable or not. Please note that you always have to designate the reimbursement as tax-free allowance with the WKR.

Which conditions should be met to apply the 30%-ruling?

As a main rule, the following requirements have to be satisfied to apply for the 30%-ruling:

- The employee qualifies as an 'incoming' employee, i.e. seconded or hired from another country to work in the Netherlands
- The employee lived (i.e. his tax residency) at a distance exceeding 150 km from the Dutch border during more than 16 out of 24 months prior to the start of the employment in the Netherlands
- The employee's taxable salary exceeds a certain minimum threshold (for 2020: € 38,347)
- The salary is reported, and wage withholding tax is deducted from it, through a Dutch payroll
- You and your employee jointly file a request for application of the 30%-ruling with the Dutch Tax Administration

Some exceptions may apply to the requirements mentioned under 1, 2 and 3 (for example, in case of change of employer, employees with certain degrees or under a certain age, or employees of certain qualifying scientific or educational institutions).

Special attention should be paid if the employee had a former job in the Netherlands in respect of which a 30%-ruling applied. In that case, he may still qualify if the period in between jobs does not exceed three month (including garden leave).

We are happy to assess the applicability of the 30%-ruling on a case-by-case basis in more detail if the general requirements don't seem to be met.

Can the 30%-ruling be applied to a director of a Dutch company?

A formally-appointed board member of a Dutch company is regarded as an employee, and hence a director may qualify for the 30%-ruling. This applies even if the director does not physically work in the Netherlands.

A supervisory director (*commissaris*) is in principle not regarded as an employee. In order to apply the 30%-ruling to a supervisory director, both the company and the supervisory director have to opt in for the supervisory director to be regarded as an employee (subject to certain conditions). The same applies to a non-executive director of a listed company.

Can we apply for the 30%-ruling if the employee does not move to the Netherlands?

Yes, the employee does not have to actually move to the Netherlands in order to qualify for the 30%-ruling. Also non-residents may qualify.

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For how long can the 30%-ruling be applied?

The maximum term is five years. Earlier periods of presence or work in the Netherlands may reduce this term. An exception is made for those periods of presence or work in the Netherlands which *ended* more than 25 years ago.

When should the 30%-ruling be applied for?

If the application is filed within four months as of the start of the employment, the 30%-ruling can be applied in the payroll retro-actively. If the application is not filed on time, the 30%-ruling can be applied starting the month following the month in which the application was filed.

What if the Tax Administration denies the 30%-ruling?

If your application is denied and you disagree, you and your employer can file a notice of objection within six weeks. If necessary, you can go to court.

Which agreement on the 30%-ruling should we make with our employee?

You have to agree with the employee (in writing, and preferably in an addendum to the employment/ secondment contract) that part of the gross salary initially agreed is paid as a tax-free 30%-allowance, and what the consequences thereof are for the employee.

Contact us for a draft of an addendum on the 30%-ruling.

How can we pay the 30%-allowance without having to deduct tax?

In the payroll administration, you have to designate part of the remuneration that is paid as allowance under the 30%-ruling (and if applicable, the payment or reimbursement of international school-fees) as a specific tax-exemption (*gerichte vrijstelling*) for extraterritorial expenses in accordance with the WKR.

How to deal with taxable benefits in the payroll administration?

If the 30%-ruling applies, you should check what is more beneficial: designating the benefits as a specific tax-exemption (for extraterritorial expenses) under the WKR or taxing the benefits on the individual pay slip of the employee. The difference is the applicable tax rate. Whether or not the benefit is a gross or a net benefit plays a role here.

Can we include the 30%-allowance in the pensionable base in our company pension scheme?

Yes, that may be possible, but only if your pension scheme allows the accrual of pension rights on such tax exempted income.

What is the benefit of the 30%-ruling for the social security contributions due by us as the employer?

If the gross income of the employee is reduced with the 30%-allowance, you may end up having to pay less employer contributions – but only if the reduced salary is under the capped social security income (€ 57,232 in 2020). Of course, it will also reduce any benefits (disability, unemployment) the employee might receive. You should inform your employee about this in the agreement (addendum) on the 30%-ruling.

Can we apply the 30%-ruling to a severance payment?

The 30%-ruling is not applicable to termination payments. As of the date the employee leaves your service, you have one additional month to make the final settlement of vacation pay, vacation days etc. and apply the 30%-ruling.

The 30%-ruling may no longer be applicable at an earlier point in time if the employee is on ‘garden leave’ first.

What is the impact of the special status of US citizens for our payroll?

If your employee is a US citizen (or Green Card holder) and he is tax resident in the Netherlands, his salary may be taxed as if he were a tax *non*-resident: only income earned on work days physically spent *in* the Netherlands is taxable

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in the Netherlands. The condition is that on his income tax return he elects the partial non-resident taxpayer status. You have to reduce the taxable salary in the monthly payroll administration on the basis of a workdays record.

For Directors the days allocation is different.

Contact us for advice on how to simplify this administrative process.

How can we avoid our employees having to file an annual income tax return to cash our tax refund?

If the employee is working under a net-salary agreement, any tax refund has to go to the employer. Especially in years of immigration or emigration such tax refund may be substantial. In order to avoid an administrative and costly tax-filing process and problems with claiming the tax refund from the employee, you can seek approval from the Tax Administration to make a final – annual – (re)calculation of the taxable wage in the payroll administration.

Contact us for assistance in this process.

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Social security

Do we have to pay social security contributions for an employee seconded from abroad?

The basic rule is, that the employee is subject to the social security system of the country in which he works (physical presence), meaning that Dutch contributions will have to be paid. This may be different if he comes from a country for which a bilateral or multilateral social security treaty with the Netherlands is in place. An important multilateral treaty is Regulation (EC) no. 883/2004 (the 'Regulation') which applies to the EU Member States, Switzerland, and the EEA countries Norway, Iceland and Liechtenstein (together referred to as 'Regulation-countries').

Situations involving the UK must be checked for the existing rules and regulations in view of the Brexit. In principle, Dutch social security rules will apply when working in the Netherlands after the Brexit, unless special arrangements apply after the Brexit.

Can the employee continue the social security coverage in his home country?

This depends on where he was resident and insured compulsorily for social security prior to coming to the Netherlands. Another factor is where his employer resides. In principle, he will become subject to the Dutch social security system if he works in the Netherlands. However, within the Regulation countries, and if the Netherlands has concluded a social security treaty (also called 'totalisation agreement') with another country, he may be able to continue the application of his home country social security. This may even be mandatory, based on applicable international rules.

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In most cross border situations where the Regulation or a social security treaty applies, the employee can continue the social security coverage of his home country.

What is the impact of the Regulation for the employee coming from abroad?

Based on the Regulation, the employee may remain subject to the social security legislation of his home country instead of having to join the Dutch schemes, if the following conditions are satisfied:

- the employee was insured under the social security schemes of the sending country
- the employee is a national of one of the Regulation countries (in most Regulation countries, the Regulation also applies to third-country nationals, provided that they reside legally in the EU/EEA and migrate within the EU/EEA)
- the employee remains in the employment of the sending company
- the wages for the work carried out in the Netherlands are borne by the sending company
- the anticipated duration of the duties for which the employee is seconded to the Netherlands does not exceed 24 months
- his employer must have substantial (for employment agencies, habitual) activities in the home country
- the employee is not sent to replace another person who has reached of the maximum term of secondment
- you will not post the employee to work for yet another company.

The Regulation also provides special rules for the situation in which an employee works in more than one country simultaneously. The employee will always be subject to the social security system of one country only. That is his country of residence if that is where he works at least a substantial part of his time (25%) there. Special rules apply if this test is not met.

If it is in the interest of the employee it is possible to – in mutual consultation between the two countries – deviate from the above rules, e.g. when it is clear beforehand that the durationof the secondment will exceed 24 months. Such approval is usually given when the anticipated duration of the secondment is less than five years.

Try to get a good picture of where, and how frequently, the employee will be working in the various countries to establish which provision of the Regulation applies in his situation.

The Regulation provides specific rules for specific professions, such as employees working on board a vessel at sea or flight crew or cabin crew members performing air passenger or freight services.

Can the employee continue the social security coverage in his home country under a social security treaty?

If the secondment is temporary, most treaties allow the legislation of the sending country to remain applicable. The conditions generally are:

- the employee must be a national of one of the two treaty states
- the home country employment is continued during the posting to the Netherlands
- the salary costs are borne by the home country employer
- the employee was covered by the social security legislation of the sending country immediately prior to the secondment

The period during which the above is allowed in general varies from twelve months to five years. It is advisable to apply for a ‘Certificate of Coverage’ confirming the applicable legislation. In some treaty states, this (application for a) certificate is actually one of the conditions for the above rules to apply.

The Netherlands has concluded social security treaties with (among other countries):
Australia, Bosnia-Herzegovina, Canada (including Quebec), Chili, China, Egypt, India, Israel, Japan, Cape Verde, Chanel Islands (Jersey, Guernsey, Alderney, Herm, Jethou), Kosovo, Macedonia, Morocco, Montenegro, New-Zealand, Serbia, Tunisia, Turkey, Uruguay, United States, South Korea.

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What if neither the Regulation nor a social security treaty applies?

In general, the Dutch social security system applies in full if the employee is a resident of the Netherlands. If not, there may be an exemption, e.g. if the employee is a non-resident and is working in the Netherlands for a non-Dutch employer for a period of less than six months. In that case, you will not have to pay the employee insurance contributions.

Which contributions must we pay as employer?

The national insurance contributions (AOW, Anw and Wlz) are withheld from the salary of the employee. The maximum contribution is 27.65% over your annual income, which is capped at € 34,712 (2020).

Te contributions for the employee insurance schemes are fully paid by the employer.

The contributions for the ZVW consist of an income-related part, paid by the employer, and a nominal contribution which the employee needs to pay to an insurance company. This nominal contribution varies per insurance company. The contributions for the employee insurance schemes (Sickness Benefits Act ('ZW'); Work and Income according to Earnings Capacity Act ('WIA'); Unemployment Insurance Act ('WW') are fully paid by you. These contributions are due over a capped income of € 57,232 (2020) and determined per type of industry.

All Dutch social security contributions are due over a capped income. From an employer cost perspective, it may therefore be interesting to explore the possibilities of applying the Dutch social security system instead of the home country schemes. Of course, when looking into this, the level of benefits should be taken into account as well.

How do we pay these contributions to the authorities?

You have to withhold and pay all contributions through a Dutch payroll. You must be registered with the Dutch Tax Administration and file monthly tax returns. Non-Dutch employers may have to register as a withholding entity for the payment of employee insurance contributions only.

Do we need proof to show that the employee is not subject to Dutch social security?

Yes, first of all, the factual circumstances must be clear and must result in an exemption from Dutch social security, based on international rules or Dutch national law. Furthermore, if the Regulation or a social security treaty applies, a document A1 or a 'Certificate of Coverage' must be obtained from the social security authorities of the employee's home country, preferably prior to coming to the Netherlands. He may also need this certificate in order to continue his social security coverage in his home country. You can ask the employee to take care of the application or help him with this process.

In most situations a document A1 or a Certificate of Coverage is mandatory.

What is the social security position of the family members of the employee?

The position of the family members must be checked case by case. If they become residents of the Netherlands, in principle they will be subject to the Dutch national insurance schemes and the ZVW. Should they work under an employment agreement in the Netherlands, they are also covered by the employee insurance schemes.

For Regulation countries, under certain circumstances, the family members are entitled to continue the home-country health care insurance, based on the social security position of the employee.

Under some social security treaties the family members 'follow' the social security of the employee. In that case, if the employee continues to be subject to the social security system of his home country, this also applies to his family members.

Always check the social security position of the family members. In many cases they do not follow the social security position of the employee.

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How to treat social security contributions paid abroad in the payroll calculations?

When making your monthly payroll calculations, you have to determine whether employer contributions constitute taxable wage for the employee or not, and whether the employee contributions are tax-deductible or not.

The Dutch Ministry of Finance has issued guidelines on this.

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Pension

Are we required to offer employees participation in a Dutch pension scheme?

An employer is required to offer the employee participation in a pension scheme if the employment falls within the scope of an industry-wide pension scheme. Almost 80% of all employees in the Netherlands falls within the scope of an industry-wide pension scheme. In case there is no mandatory participation in an industry wide pension scheme, it is market practice for Dutch employers to offer participation in a company pension scheme.

What types of pension schemes are common in the Netherlands?

Both defined benefit schemes and defined contribution schemes are common in the Netherlands.

What is the definition of pensionable income in the Netherlands?

The pensionable income is more or less equal to the taxable income. However, the pensionable income is capped at € 110.111 (2020) for a full-time employee.

What to do if seconded employees prefer to continue participation in a pension scheme in their home country?

First of all, you must check whether this is possible based on the foreign pension scheme. Secondly, without an approval from the Dutch Tax Administration there will be no tax facilities available for the contributions paid. You can file an application to have the foreign pension scheme approved as a qualifying pension scheme for Dutch tax purposes. Of course, you should make sure that you and your employee understand all the consequences of a

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(Dutch tax-favourable) continued participation. Please note that an approval is possible for a limited period only.

Since many aspects play a role when making decisions regarding a pension scheme, this should always be done on an individual basis.

Is the pension contribution paid relevant for the Dutch payroll?

Yes, the employee contributions related to a Dutch pension scheme or a qualifying foreign pension scheme are deductible and employer's contributions are tax-free for wage withholding tax purposes. Contributions related to a home country pension scheme which is not a qualifying foreign pension scheme in the Netherlands, are not deductible and are taxable, respectively.

Does the 30%-ruling affect the employee's pension?

In principle not, because the 30%-ruling does not affect the amount of pensionable income of an employee. However, the pension scheme must allow this.

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Other aspects to consider

Should we inform the employee about other things to consider in view of his transfer to the Netherlands?

We would advise the employee to check the possible impact of his transfer to the Netherlands, among other things, in respect of:

- matrimonial property law and inheritance law
- gift tax and inheritance tax
- Import duties, VAT and excise duties (household goods, (company) car)

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List of abbreviations

AKW	General Child Benefit Act (*Algemene Kinderbijslagwet*)
Anw	Surviving Dependants Act (*Algemene nabestaandenwet*)
AOW	General Old Age Pensions Act (*Algemene Ouderdomswet*)
BES Countries	Bonaire, Saba and Sint Eustatius
BPM	Dutch Registration tax on private cars and motorcycles
BSN	Citizen Service Number (*Burgerservicenummer*)
EEA	European Economic Area (EU Member States, Norway, Iceland, and Liechtenstein)
EU	European Union
IND	Immigration authorities (*Immigratie- en Naturalisatiedienst*)
Knowledge migrants	Highly skilled migrant workers (*Kennismigranten*)
MVV	Immigration Entry visa (*Machtiging tot voorlopig verblijf*)
PhD	Doctor of Philosophy
Regulation	Regulation (EC) no. 883/2004
Regulation-countries	EU Member States, EEA and Switzerland
UK	United Kingdom
US	United States of America
UWV	Social Security Board (*Uitvoeringsinstituut Werknemersverzekeringen*)
VAT	Value added tax (*Omzetbelasting*)
WAGA EU	Terms of Employment (Cross Border Work) Act (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid*)
WAGWEU	Terms of Employment (Cross Border Work) Act (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*)
WAV	Foreign Nationals Employment Act (*Wet arbeid vreemdelingen*)
WIA	Work and Income according to Earnings Capacity Act (*Wet werk en inkomen naar arbeidsvermogen*)
WKR	Employment Costs Scheme (*werkkostenregeling*)
WLZ	Long term care Act (*Wet langdurige zorg*)
WOZ value	Official value of a home, determined by the municipality
WW	Unemployment Insurance Act (*Werkloosheidswet*)
ZVW	Health Care Insurance Act (*Zorgverzekeringswet*)
ZW	Sickness Benefits Act (*Ziektewet*)

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Employment & Benefits

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