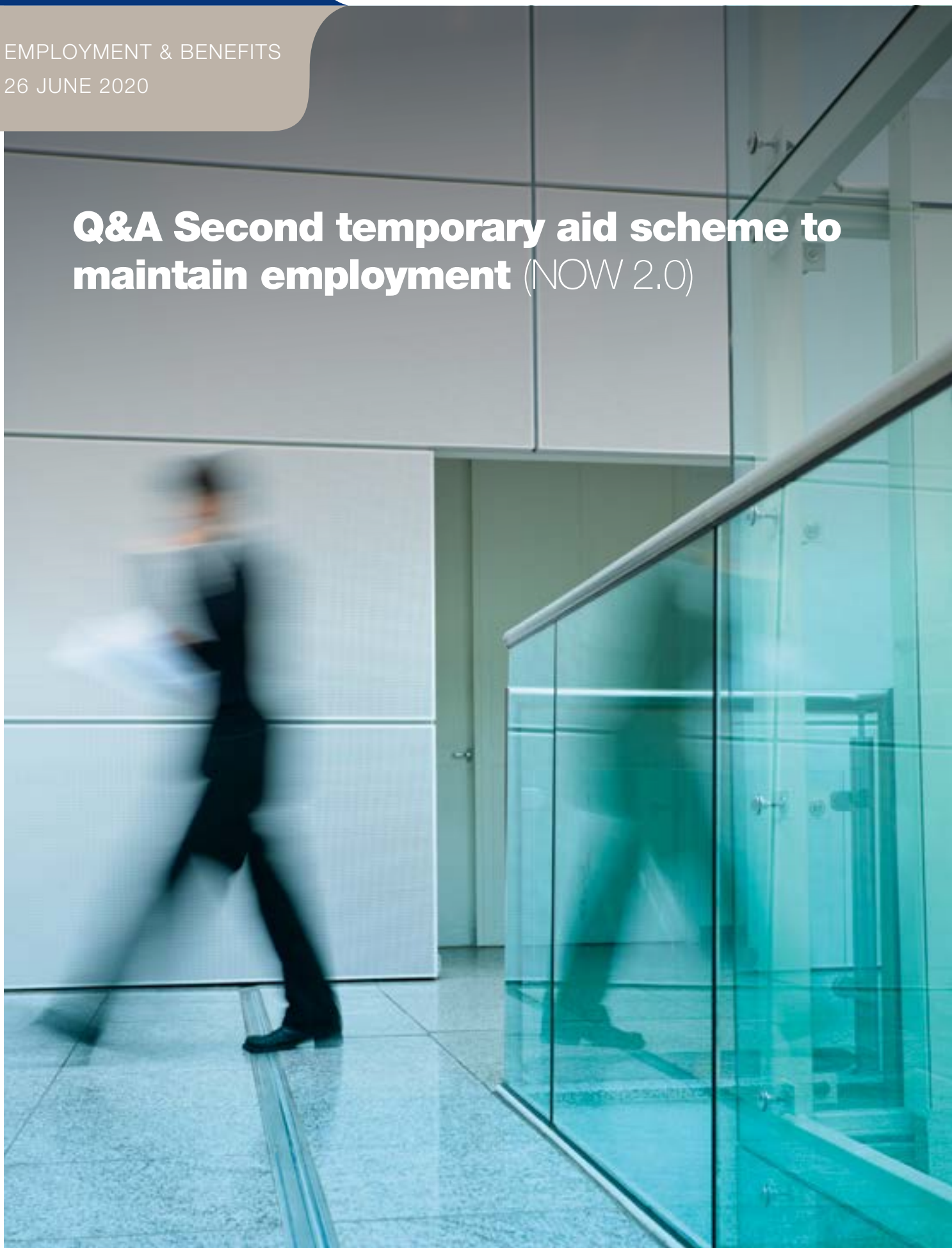


# Q&A Second temporary aid scheme to maintain employment (NOW 2.0)



# Q&A Second temporary aid scheme to maintain employment (NOW 2.0)

## Introduction

**On 25 June 2020 the NOW 2.0 was published in the *Staatscourant*. On the basis of the NOW 2.0 employers with a loss of turnover of at least 20% may qualify for a subsidy (aid) up to 90% of the wage costs in the period from 1 June until and including 30 September 2020. Employers must continue to pay the employees' salaries in full during the period they receive aid. The NOW 2.0 is accessible to both employers who have applied for NOW 1.0 and those who have not. Although the NOW 2.0 builds on the NOW 1.0, a number of elements have been added or modified in the NOW 2.0. In this Q&A the principal elements of the NOW 2.0 are discussed.<sup>1</sup>**

### 1. What is the purpose of the NOW?

The purpose of the NOW is to prevent unemployment resulting from a sudden drop in turnover caused by extraordinary circumstances that cannot be considered to be a normal entrepreneurial risk, to the extent that the turnover drops with at least 20%. Employers are thus given the opportunity to retain employees. The NOW 2.0 explicitly states that it is not the intention to pay out profits or bonuses or to purchase own shares. On the basis of Article 17 NOW 2.0, this obligation appears to be limited to the board and management of certain companies (see question 12).

We would like to point out that Article 20 NOW 2.0 provides that the aid may be withdrawn or amended if it becomes apparent that the employer has acted contrary to the purpose of the NOW 2.0.

### 2. In respect of which employees may aid be requested?

Employers may request aid to compensate the wage costs for those employees (i) that are employed by the employer and (ii) that are compulsory insured under employee insurance policies (insured wages for national insurance contributions purposes, hereinafter referred to as **SV wages**). Thus, aid may also be requested in respect of employees on flexible contracts, provided they continue to be employed by the employer during the period in which aid is granted and continue to receive wages from the employer. Temporary work agencies and payroll employers may also request aid.

Foreign employers who employ employees that are insured under the Dutch national insurance system may also submit a request under the NOW. The NOW does not apply in respect of employees that are seconded to the Netherlands but are insured under foreign national insurance systems.

Because the overall wage bill is determined on the basis of all employees who receive SV wages, the NOW also applies in respect of employees that are what is called 'fictitiously employed', but not in respect of uninsured Directors-Owners (*DGA's*) or voluntarily insured persons.

### 3. How is the amount of the aid calculated (percentage)?

The aid is related to the percentage-wise loss of turnover of the employer or, where applicable, the group (see question 5). The maximum entitlement to aid, paid in the event of a 100% loss of turnover, is capped at 90% of the overall wage bill. If the loss of turnover is less, the aid will also be proportionally less:

<sup>1</sup> In Article 24 NOW 2.0, the NOW 1.0 is amended. These are, in particular, textual changes which are not dealt with in this Q&A.

100% loss of turnover:	aid equal to 90% of the overall wage bill;
50% loss of turnover:	aid equal to 45% of the overall wage bill;
25% loss of turnover:	aid equal to 22.5% of the overall wage bill;
< 20% loss of turnover:	no aid.

#### 4. How is the loss of turnover calculated?

The term turnover has the meaning given in accounting law. The net turnover is taken as basis, i.e. the income from the supply of goods and services by the relevant legal entity's business after deducting discounts and the like from the tax charged on the turnover.

The term turnover in the NOW 2.0 is the same as in the NOW 1.0. This means, among other things, that subsidies and other compensation are part of the turnover calculations, including subsidies that are increased or provided to compensate companies in the context of the COVID-19 coronavirus outbreak. An employer should be aware of this when reporting the loss of turnover. However, the aid that the employer receives under the NOW does not constitute turnover.

For the NOW 2.0, the loss of turnover is determined by comparing one third of the turnover of 2019 (the **reference period**) with the turnover of a four-month period to be chosen by the employer starting on 1 June, 1 July or 1 August 2020 (the **turnover period**). The choice for the turnover period must be made at the time of application. Please note that if an employer has submitted an application for the NOW 1.0 and aid has been granted, the employer has no freedom of choice. The period of loss of turnover for the NOW 2.0 must then immediately follow the period of loss of turnover for which aid was applied for in the NOW 1.0.

For some specific situations, such as, for example, companies that only started after 1 January 2019 or companies facing a transfer of undertaking after 1 January 2019, a different reference period applies to determine the loss of turnover.

#### 5. My company forms part of a group. How will the loss of turnover be calculated in my instance (Article 6 lid 7 NOW 2.0)?

If the legal entity or company is part of a group, the loss of turnover of the group (as the group was composed on 1 June 2020) is assumed. A group is an economic unit in which legal entities and companies are organizationally interconnected. For the purposes of the NOW each parent-subsidiary-relationship is also qualified as a group.

If a parent company has several subsidiaries, the turnover of the parent company and its various subsidiaries must therefore be jointly determined.

The explanation to the NOW 2.0 does not pay specific attention to private equity firms. From the frequently asked questions (**FAQ**) of the Dutch Professional Association of Accountants (**NBA**) as published on the website of the NBA, it seems to follow that the above also applies if a private equity firm is the majority shareholder of one or more top-holding companies in the portfolios in which it holds an interest. In those cases there is a parent-subsidiary relationship and all such portfolios will jointly be treated as a group.

For the calculation of the loss of turnover, the starting point is the consolidated net turnover of the group (adjusted for a change in projects in progress accounted for in the profit and loss account). From this, the consolidated net turnover of the foreign entities without SV wages in the Netherlands is deducted (**carve-out**). The FAQ of the NBA shows that intra-group turnover from deliveries to group companies that fall outside the scope of the group under the NOW as a result of the carve-out, must be added to the consolidated net turnover of the group for the calculation of the decrease in turnover.

#### 6. An operating company has a loss of turnover of more than 20%, but the loss of turnover of the group as a whole is less than 20%. Can the NOW 2.0 be applied for at the level of the operating company or part of the group (Article 7 NOW 2.0)?

If the loss of turnover of the group as a whole is less than 20%, but is at least 20% at the level of the operating company or at the level of part of the group, the aid can be applied for at that level (Article 7 NOW 2.0).

Such application is subject to a number of additional conditions, which are discussed under question 13. For the calculation of turnover at the level of the operating company or at the level of part of the group: i) turnover must be adjusted upwards if during the period of aid employees are seconded to another employer; ii) the same transfer pricing rules and principles of valuation and determination of results must be applied as in the most recently adopted annual accounts; iii) movements in inventories must be allocated to turnover; and iv) turnover must be adjusted if other companies within the group have carried out assignments or projects at the expense of the company for which the aid is granted within the group.

## 7. How long will the aid be provided?

The aid under the NOW 2.0 will be granted in respect of wage costs for a four-month period (1 June 2020 up to and including 30 September 2020).

## 8. How to calculate the amount of aid?

The aid depends on the turnover loss of the company and is maximized at 90% of the wage bill during the four-month period of June-September 2020. The aid is calculated, in principle, on the basis of the SV wages paid to employees employed in the month of March 2020. The holiday allowance paid by the employer is not included in the wage bill. The same applies to an 'extra period of salary' that is paid in such month in addition to the regular salary and holiday allowance as a result of an agreement in the individual employment contract or collective bargaining agreement. Please note that it only concerns an extra period of salary that is not dependent on company results or the employee's qualitative or quantitative performance. As an example of an extra period of salary the 13th month is mentioned.

If on 15 May 2020 the Employee Insurance Agency (**UWV**) does not have wage details in respect of March 2020 in their administration, the wages for the month of November 2019 are taken as basis. If no details are available in respect of November 2019 either, no aid may be requested under the NOW 2.0.

The wage bill consists of the aggregated wages paid to all employees under the relevant employer's withholding tax number (*loonheffingnummer*). The wage of each individual employee in respect of whom aid may be requested is capped at twice the maximum daily wage per

month. This means that no aid is given in respect of gross monthly wages in excess of EUR 9,538.

Additional charges and costs, such as employer's and employee's contributions to pension schemes and the accrual of holiday allowance will also be compensated; it has been decided to set the employer's charges at a fixed percentage of 40% for all instances.

In other words, the overall wage bill on which the aid is calculated will be equal to four times (the SV wages in March 2020 + 40%). If the actual SV wages over the period June to September 2020, inclusive, are lower (e.g. as a result of not extending employment contracts for a definite period of time or redundancies), the aid will be adjusted downwards. If the wage bill is reduced, the level of loss of turnover is not taken into account; if the wage bill over the period June 2020 up to and including September 2020 is lower, the amount of the aid is reduced according to the following formula: (wage bill March 2020 x 4 – wage bill 1 June until and including September 2020) x 1,4 x 0,9. This means, among other things, that the impact is proportionally (much) higher in case of a lower turnover decrease compared to a larger turnover decrease.

The NOW 2.0 does not compensate for any increase in actual SV wages over the period June 2020 to September 2020, compared to four times the SV wages in March 2020.

Contrary to the NOW 1.0, the NOW 2.0 does not have an alternative regime for seasonal companies.

## 9. When does the UWV pay an advance, and will it be paid as a lump sum?

The UWV has a decision period of 13 weeks after receipt of the complete application. With the decision to grant aid, the UWV provides the employer with an advance payment of 80% of the aid, as calculated on the basis of the information provided with the application about the expected loss of turnover. The advance will be paid in no more than two instalments. In practice, the aim is to pay the first instalment within 2 to 4 weeks of receipt of the complete application.

## 10. What are the principal obligations the employer must fulfil who receives aid?

Article 15 of the NOW 2.0 sums up a number of obligations the employer must fulfil. Failure to comply may have consequences for the grant, or the amount of aid to be received. The principal obligations are:

- the employer is expected to make every effort to keep its wage bill as equal as possible;
- in the period from 1 June 2020 up to and including 30 September 2020, the employer may not submit a request for permission to terminate an employment contract for business economic reasons to the UWV;
- if the employer makes a notification in the meaning of the Collective Redundancy Notification Act (**WMCO notification**) in the period from 30 May 2020 up to and including 30 September 2020, the employer is obliged (i) to have consultations with a view to reaching an agreement with the trade unions concerned about the intended dismissals, or, in the absence thereof, the Works Council, employees' representatives (**PVT**) or staff meeting, and (ii) not to submit requests for permission to the UWV to terminate the employment contract for economic reasons earlier than four weeks after the WMCO notification;
- the employer may only use the aid to pay its wage costs;
- the employer must inform the Works Council or PVT, or if none exists, the employees directly, about the aid;
- the employer is obliged to make efforts to encourage employees to participate in an advice to further develop or training course. The Dutch government offers support to training activities with the crisis package *Nederland leert door*;
- the employer must keep verifiable records to ensure that all information relevant for calculating the aid may be inspected and must allow inspection of these records upon request for up to five years after the date on which aid was granted;
- the employer must submit its payroll tax forms on the prescribed dates;
- the employer must notify the Minister immediately in writing of any circumstances that may give reason to revise, withdraw, or grant the aid;
- after the period during which aid was received the employer must submit a final statement of the loss of turnover, accompanied by an audit opinion; and
- the employer must cooperate with any audit carried out by or on behalf of the Minister during a period of five years after the date on which aid was granted,

for instance by providing all necessary information, data and records and documents, aimed at providing the Minister with information that may be important for taking the decision on whether or not to grant aid, determining whether it was justified, or for the development of the policy adopted by the Minister.

Articles 16 and 17 of the NOW 2.0 contain two additional obligations. These obligations do however not apply to all employers who make use of NOW 2.0. Please see question 11 and 12 in this respect.

## 11. When does the obligation to provide an auditor's report apply?

An auditor's report is required for companies that receive an advance payment of EUR 100,000 or more. If a (too low) advance payment is received, after which, when the aid is determined, it turns out that the company is entitled to a final aid of EUR 125,000 or more, then there is also an obligation to provide an auditor's report (Article 16 NOW 2.0). These amounts are based on the amount of aid awarded to the entire group (within the meaning of NOW 2.0) or, if there is no group, to the legal or natural person.

Companies applying for subsidies at operating company level on the basis of Article 7 NOW 2.0 must always submit an auditor's report.

The auditor's report must be submitted with the application for the final aid.

Furthermore, if no auditor's report has to be submitted and the advance payment exceeds EUR 20,000 or if the final aid is higher than EUR 25,000, a statement from a third party (e.g. an administrative office, a financial services provider or a trade association) confirming the decrease in turnover will have to be submitted.

## 12. Which employers are subject to the obligation not to pay dividends and bonuses?

Article 17(1) NOW 2.0 stipulates that the entity applying for aid and required by Article 16 NOW 2.0 to provide an auditor's report (see question 11), may not pay any dividend to shareholders for 2020 up to and including the date of the meeting at which the annual accounts are adopted in 2021. In addition, this entity may not pay bonuses to directors of the top holding company and of the entity in question. Nor may these entities repurchase

their own shares. Other profit distributions to third parties are deemed equivalent to dividends for this purpose. Please note that if there is a statutory obligation to pay dividends or an obligation that exists on the basis of a settlement agreement with the Dutch tax authorities, this remains permitted.

The term directors includes not only the directors under the articles of association, but also persons who determine the company's policy (temporarily or otherwise). This obligation therefore does not apply to other 'regular' employees within the company.

If on the basis of Article 7 NOW 2.0 the possibility is used to determine the loss of turnover at the level of the operating company or part of the group (see question 6), the ban on dividend payments and repurchase of shares applies to the entire group, including the topholding company. This means that none of the entities within the group may pay dividends or repurchase its own shares. The prohibition on the payment of bonuses applies only to the directors of the topholding company and the entity applying for aid.

Prior to the application, the operating company must have a written declaration from the topholding company that the obligation not to pay dividends and bonuses has been complied with.

The NOW 2.0 indicates how to deal with this obligation in the event of a split financial year (Article 17(6) NOW 2.0).

If no compliance with Article 17 NOW 2.0 is observed, the aid will be set at nil and there is a repayment obligation for aid that has already been paid.

### 13. What additional conditions apply if NOW 2.0 is requested at the level of operating company or part of a group?

In addition to the obligations laid down in Articles 15, 16 and 17 of the NOW 2.0 (as discussed in question 10, 11 and 12), the following additional conditions apply to the operating company or part of a group for which aid under Article 7(1) NOW 2.0 is applied for:

- the operating company is no personnel company (i.e. a company which mainly seconded employees to other group companies);
- the operating company (employer) acts in accordance with a dated job retention agreement, concluded prior

to the application with the trade unions concerned or, in the absence thereof, a representation of employees, such as the Works Council, PVT or staff meeting.

In the case of an operating company with less than 20 employees, the agreement of an employee representative body, such as the Works Council, PVT or staff meeting, will suffice;

- orders or projects of the operating company may not be transferred to other entities within the group;
- the group's loss of turnover is less than 20% in the four-month consecutive turnover period.

Furthermore, operating companies that invoke Article 7 NOW 2.0 always have to provide an auditor's report when applying for aid (Article 16(2) NOW 2.0). Also in this case, the obligation not to pay dividends and bonuses as laid down in Article 17(3) NOW 2.0 always applies. See in this context question 11 and 12.

### 14. Is an employer not allowed to dismiss employees during the period in which he receives aid?

Employers are not permitted to submit a request for permission to terminate an employment contract for business economic reasons to the UWV. If an employer does submit a request for permission to terminate an employment contract for economic reasons to the UWV in the period of 1 June 2020 up to and including 30 September 2020, this will affect the amount of the aid; see question 15. Furthermore, the employer will have to demonstrate when applying for permission from the UWV that the dismissal is necessary and that the NOW aid or any other aid measure does not provide a solution in his case. However, there must be room for the employer to take such decisions; the UWV will therefore marginally test this.

It appears also to be possible under the NOW 2.0 to terminate an employment contract for business economic reasons with mutual consent by concluding a settlement agreement. However, it is to be wondered if this would be in line with the purpose of NOW 2.0; and therefore this might affect the amount of the aid. The NOW 2.0 also does not prohibit termination on other grounds, e.g. long-term sickness or inadequate performance. Please note that if the termination of the employment contract takes place during the subsidy period, this may have consequences for the amount of the wage bill and the amount of the aid (see question 8).

## 15. What are the consequences if the employer submits an application for dismissal with the UWV during the term of the NOW nevertheless?

If a request for dismissal is submitted to the UWV and it is not withdrawn (or not in time i.e. within five working days after the request for dismissal has been submitted), an adjustment will be made when the aid is established. In this case, 90% of the wage bill of March 2020 (multiplied by 3) of the employees for whom dismissal is sought, will be deducted from the final aid (salary employees targeted for dismissal x 3 x 1,4 x 0,9).

If (i) the employer makes one or more WMCO notifications in the period from 30 May 2020 up to and including 30 September 2020, and (ii) the employer applies for dismissal for business economic reasons for 20 or more employees in a WMCO work area during the period of aid between 1 June up to and including 30 September 2020, the total amount of aid will be reduced by 5%. However, this penalty does not apply if an agreement on the request for dismissal has been reached between the employer and the trade unions concerned (or, in the absence thereof, another representation of employees, such as Works Council, PVT or staff meeting). Or, if such agreement has not been reached, these parties have requested mediation from a committee to be set up at the Labour Foundation.

## 16. How and when may a request for aid be submitted?

The employer can apply for aid from 6 July 2020 up to and including 31 August 2020 using the application form made available on the UWV website. The employer can submit one application for each withholding tax number. This means that if aid is refused, the employer may not submit another application for the same withholding tax number.

## 17. What information must the employer provide with the request for aid?

The employer must in any case submit the following information:

- a. the anticipated loss of turnover (percentage);
- b. the turnover period chosen by the employer;
- c. the employer's withholding tax number (*loonheffingnummer*);

- d. the bank account number on which the employer receives payments in respect of taxes and national insurance contributions from the Tax Authorities;
- e. whether Article 6(4) is invoked.

If the employer is part of a group or has multiple withholding tax numbers, multiple requests for aid must be submitted. The request of each legal entity and company (and each withholding tax number respectively) forming part of the group, must state the same percentage and the same turnover period.

We would like to refer you to the [checklist on the website of the UWV](#) where you will find exactly which information you need to apply for NOW 2.0.

When applying for aid, the employer must state that he, if applicable, is consulting the trade unions concerned about the WMCO notification, or in the absence thereof, the Works Council, PVT or staff meeting, and he must submit applications for dismissal to the UWV no sooner than four weeks after the WMCO notification. Furthermore, the employer must declare that he will comply with the obligation not to pay out dividends and bonuses, provided, of course, that this obligation applies to the employer.

By submitting the application, the employer agrees to disclose the name and location of the employer, the advance payment made and the final amount of aid.

## 18. Should the Works Council's advice or consent be asked?

No, but the employer is obliged to inform the Works Council or PVT of the request for aid. If the employer has no Works Council or PVT, the employees must be informed directly.

## 19. When should the final application be submitted?

The employer must submit an application for the determination of the final aid within 24 weeks after 15 November 2020. If the turnover period ends after 15 November 2020, the employer must request determination of the aid within 24 weeks after the end of the turnover period. For employers who are required to provide an auditor's report (see question 11), a period of 38 weeks applies.

When applying for the determination of the aid, the employer must also provide certain information, including the definitive data on the loss of turnover, an auditor's report (if required) and a declaration that a number of the obligations laid down in Article 15 NOW 2.0 have been met. Additional requirements apply to companies applying for aid at operating company level on the basis of Article 7 NOW 2.0.

The Minister will determine the final aid within 52 weeks of receiving the application. If an application for determination of the aid is not made in time, the aid will be withdrawn and the advance payment will be reclaimed.

## 20. May advance payments be repaid or can the amount of aid be recalculated?

The advance received may have to be repaid fully or in part if no entitlement existed, or if too much was received, or if the obligations referred to in Articles 15, 16 or 17 NOW 2.0 are not fulfilled (see question 10, 11 and 12).

The Minister may also withdraw or recalculate the aid to the detriment of the employer if it is at any time established that the employer has acted contrary to the purposes of the NOW 2.0 during the period in which he received the aid, see question 1.

## 21. Will abuse/inappropriate use of the NOW be sanctioned?

The employer is responsible for the information he supplies with his request. The information supplied by the employer will be verified on the basis of information exchanged between the Tax Authorities and the UWV. This exchange will focus first of all on the name and the account numbers supplied by the employers. The UWV may also suspend payment of the advance if there is a strong suspicion that the conditions for receiving aid are not being met.

If, when deciding on the request for aid, there is a reasonable suspicion of a criminal offence the UWV may report this suspicion to the public prosecutor's office. The public prosecutor's office may subsequently decide to start a criminal investigation and bring charges.

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