LOYENS & LOEFF

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Quoted

Transparent and predictable working conditions

LOYENS & LOEFF

In this edition

1. Introduction

The Act implementing the EU Directive on transparent and predictable working conditions (*Wet implementatie EU-Richtlijn transparante en voorspelbare arbeidsvoorwaarden* – the **Wtva**) is expected to become law on 1 August 2022. As can be deduced from the title, the bill for the Wtva (the **Bill**) serves for the implementation of a European directive (Directive (EU) 2019/1152 – the **Directive**).[1] The purpose of the Directive is to improve the situation of employees by:

i. fostering more transparent and more predictable working conditions; and at the same time
ii. creating labour market adaptability.[2]

The expected entry into effect of the Wtva will entail several changes to existing employer obligations. Taking into consideration the fact that the Bill does not contain any transitional provisions, it is important that employers take measures to comply with the new legislation before the Wtva enters into effect on 1 August 2022.

In this edition of Quoted we discuss the four most important points of the Bill.[3] Where possible we have included suggestions for measures that employers can take to comply with the new legislation.
We close with a brief conclusion and a number of practical recommendations.

2. The most important points of the Bill

We will discuss the four most important points of the Bill, in the order presented below:

i. the extension of the employer's information obligation;
ii. the employer's obligations with regard to mandatory training (and the expected consequences for the use of a study costs clause);
iii. the restriction on the ban on ancillary activities; and
iv. the amendment of the Flexible Working Act (*Wet flexibel werken* – the **FWA**).

2.1 The extension of the employer's information obligation

2.1.1 The proposed information obligation

Article 7:655 of the Dutch Civil Code (*Burgerlijk Wetboek* - **DCC**) currently stipulates, among other things, that, within a month after the start of employment, the employer must inform the employee about the place (or places) where the work will have to be performed.[4] In the Bill, the existing information obligation is broadened quite substantially. We will provide further clarification on this extension below.

2.1.1.1 Information that has to be provided within one week

Once the Wtva enters into effect, not only will employers have to provide *more* information, they will also have to provide (some of) that information considerably *earlier*. For example, it is proposed that, within one week after the start of employment, an employer will have to inform its new employee in writing about:

1 The Bill is currently under debate in the Dutch Senate (see link) and serves for the implementation of the Directive (see link). The Dutch Government has opted for a so-called 'undiluted' implementation of the Directive. Consequently, the proposed legal text of the Wtva scarcely differs from the wording of the Directive.

2 Briefly put, this relates to the capacity of employees to adapt to the 'new' forms of employment which have come about during the past thirty years (for example platform work). Given that some of these new forms of employment are substantially less predictable than traditional employment relationships (and therefore can lead to uncertainty regarding the applicable laws and social protection of the employees concerned) it is important that employees are informed (fully and in time) about their essential working conditions and get a number of new minimum rights. This is reflected in the preamble (consideration 4) to the Directive.

3 For the sake of completeness, please note that the Bill also includes a proposal for a limited amendment to the Posted Workers in the European Union (Working Conditions) Act (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*). Given that this amendment is only of interest to a specific group of employers, we have not discussed this amendment in this contribution. If you have any specific questions on this topic, your contact at Loyens & Loeff would be more than happy to provide you with a tailor-made advice.

4 This follows from the existing article 7:655, paragraph 1, under b DCC.

i. if applicable: the term (or end date) of the employment agreement;
ii. if applicable: the duration and conditions of the trial period;
iii. the usual place(s) of work or – if applicable – the fact that the employee is free to determine its own place of work;
iv. the starting salary, the salary components[5],the way in which the salary is to be paid out and on what bank account; and
v. the normal working hours and break times and the arrangements regarding overtime (as well as the salary for overtime).[6]

2.1.1.2 Information that has to be provided within one month

Employers will be granted some additional time to provide other types of information. From the moment that the Wtva comes into effect employers will, for example, within one month after the start of employment[7], have to inform new employees in writing about:

i. the entitlement to paid leave;
ii. the employer's training policy; and
iii. the applicable procedures in the event of dismissal (including the notice periods).[8]

In our view, the Bill has yet to provide sufficient clarity on the three above-mentioned points. For this reason, in the paragraphs below, we have provided some further clarification on how employers might fulfil their information obligation with regard to these specific points.

i. The entitlement to paid leave

Under the current legislation, employees (only) have to be informed about their entitlement to holidays.[9] On the basis of the Bill, the scope of this information obligation will be extended. Consequently, employers will have to provide new employees with information about the entitlement to *all* forms of paid leave (i.e., leave that is offered by an employer and that can be taken with retention of the employee's *full* salary). Examples include emergency leave, pregnancy leave and parental leave (provided the benefit is supplemented by the employer to 100%).[10] Strictly speaking, employers do not have to provide relevant information with regard to leave that cannot be taken with retention of the employee's full salary. However, from a practical point of view, we expect that the extra effort, required to provide this broader provision of information, is minimal. For that reason, employers could consider informing their employees about *all* forms of leave on a voluntary basis (regardless of whether such leave can be enjoyed with preservation of the employee's full salary). In practice, employers could comply with this information obligation in the following manner:

- the most straightforward option to inform new employees is to include the necessary information in the employee's written employment agreement.

- If the entitlement to leave is arranged in an applicable collective labour agreement (**CLA**) or a staff handbook, it is sufficient for the employment agreement to include a reference to this specific provision in the CLA or the staff handbook.[11]

5 The term salary components (point iii.) covers all individual elements of the salary (such as monetary or non-monetary contributions, overtime payments, bonuses and other rights which the employee directly or indirectly receives within the context of its work). To that end employers could, for example, include a summary in the salary clause of their employment agreements of the elements which will make up the employee's salary (upon the start of employment).

6 These points follow consecutively from article 7:655 paragraph 1 under e DCC (which is an amended version of the existing article: hereinafter referred to as **amended wording**), article 7:655 paragraph 1 under q DCC (new), article 7:655 paragraph 1 under b DCC (amended wording), article 7:655 paragraph 1 under h DCC (amended wording) and article 7:655 paragraph 1 under i DCC (amended wording).

7 We would like to point out that, within one month after the start of employment, employers will also have to inform new employees about (i) the identity of the hirer (in the event of a temporary employment agency contract) (article 7:655 paragraph 1 under p DCC (new)) and, insofar as this falls under the responsibility of the employer, (ii) the identity of the social security institutions that receive the social contributions within the framework of the employment relationship and any protection relating to social security provided by the employer (article 7:655 paragraph 1 under s DCC (new)). For employers that send employees abroad to work for a period of, at least, four consecutive weeks, we also wish to point out the proposed extension of the information obligation pursuant to article 7:655 paragraph 1 under k DCC. Given the relatively limited practical implication of the aforementioned information points, we will omit a further discussion on these points.

8 In consecutive order, this follows from article 7:655 paragraph 1 under f DCC (amended wording), article 7:655 paragraph 1 under r DCC (new) and article 7:655 paragraph 1 under g DCC (new).

9 See the current wording of article 7:655 paragraph 1 under f DCC.

10 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 15 (Explanatory Memorandum).

11 It should be noted, however, that a general reference to an entire CLA will not be sufficient.

- If not all forms of paid leave are arranged in such manner, or if there is no applicable CLA or staff handbook, employers could include the following reference to the Work and Care Act (*Wet werk en zorg* - **Wazo**) in their standard employment agreements:

  *"In addition to the entitlement to holidays the employee may also be entitled to other forms of paid leave (subject to certain conditions). An overview of these other forms of paid leave and the manner in which they are calculated is included in the Work and Care Act which can be consulted via the webpage of the Dutch Government (at www.overheid.nl). A practical explanation of the different types of paid leave and the manner in which such leave can be requested can also be found on the webpage of the Employee Insurance Agency (**UWV**) and the Dutch Government."*

  Please note that the wording of the Wazo is quite technical and, consequently, we do not expect that every employee will find this legislation easy to read and understand. For this reason, we deem it preferable to provide employees with some kind of simplified explanation – in addition to the reference to the Wazo – (for example via a staff handbook or information memorandum), so that the entitlement to paid leave is clear to every employee.

ii. The training policy

The employee will have to be informed about the employer's training policy. The Explanatory Memorandum of the Bill is fairly brief when it comes to an explanation of the term 'training policy'. In any event the legislator has stated explicitly that employees have to be informed about the number of days made available to them in order to attend training.[12] We would argue that employers should also provide information about the possibilities for training facilitated by the employer and the conditions on the basis of which employees may participate in such training. If an employer has already included these points clearly in a written training policy, then it will be sufficient for the employment agreement to include a reference to the relevant provisions in that policy.

iii. The applicable procedures in the event of dismissal

From (the Explanatory Memorandum of) the Bill it is not immediately clear how employers must interpret the term 'applicable procedures in the event of dismissal'. In any event employers must inform employees about the applicable notice period and the requirements for unilateral termination of the employment agreement. The Explanatory Memorandum of the Bill also reveals that employees have to be informed about the expiry period (*vervaltermijn*) in the event of a summary dismissal (i.e., the period in which the employee has the possibility to file an application for nullification of the summary dismissal).[13] Rules that are not literally referred to in the Explanatory Memorandum of the Bill but that, in our view, may be deemed to fall under the scope of this information obligation, are, for example, special rules of procedural law in the event of an appeal to the court of appeal and/or the Supreme Court in employment law cases and the expiry period and reflection period (*bedenktermijn*) which are relevant to the employee in the event of termination of the employment agreement. Currently, there is still some uncertainty on how employers can fulfil this information obligation. Could they suffice, for example, by simply making a general reference to the rules in the DCC? As with the entitlement to paid leave, we expect that a general reference will not provide sufficient clarity to every employee. Therefore, it could be considered to also clarify the procedural rules relating to dismissal in another way, for example by way of a brief information memorandum which is then issued to employees upon signing of their employment agreement and which might (ideally) also be available on the intranet.

2.1.1.3 Further extension of the information obligation in the event of an entirely of mostly unpredictable work pattern

If the work which has to be performed is entirely or mostly unpredictable for the employee (*specifically: if more than 50% of the working hours are unpredictable*), employers will be subject to an even broader information obligation.[14] An unpredictable work pattern implies a situation in which the times when the work has to be performed are unpredictable and are also predominantly (directly or indirectly) determined by the employer (as, for example, in the case of on-call workers). In such instances employers will have to inform employees about: (i) the fact that the

12 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 17 (Explanatory Memorandum).

13 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 15 (Explanatory Memorandum).

14 This follows from article 7:655, paragraph 1, under i DCC (new).

working times are variable, (ii) the number of guaranteed paid hours, (iii) the salary for work performed on top of these guaranteed hours, (iv) the reference hours and days during which the employee can be obliged to work and (v) the minimum notification period the employee is entitled to before a work assignment starts and, where relevant, the cancellation period (to be observed by the employer) for notifications already made by the employer.[15]

2.1.2 Other considerations regarding the information obligation

i. The manner in which the information should be provided

The Bill stipulates that the information must be provided in such a way that the employee can save, print and still have access to it at a later date.[16] Employers are also required to save a proof of transfer or receipt. Incidentally, that proof does not necessarily have to contain the information issued to the employee. From a practical perspective employers could ask new employees to simply sign for receipt of the information. Alternatively (or additionally) the information could be shared via an e-mail with a 'confirmation of receipt'. Lastly, it is recommendable to publish the information on the intranet so that it is accessible for all employees (at all times).

ii. Who falls under the scope of the information obligation?

In any event, the extension of the information obligation applies to any employment agreement that is entered into on or after 1 August 2022. However, the Bill also includes a provision for employees whose employment agreement was entered into *before* 1 August 2022 (hereinafter referred to as: **existing employees**).[17] Existing employees can use this provision to submit a request to their employer to receive the relevant information as well. Employers must then provide this information to the existing employee within one month after receiving the request. Even though, employers are, in principle, not obliged to issue the information *proactively*, we would suggest that employers make a timely assessment on whether the existing employment agreements and/or staff handbooks are already sufficiently compliant with the proposed extension of the information obligation and, subsequently, commit the missing and/or incomplete information to paper. Particularly for large employers such action could help avoid a situation in which they might be overwhelmed by information requests which they then must respond to rather quickly (i.e., within one month after receipt of the request).

iii. Consequences of non-compliance with the information obligation

If employers fail to comply with the information obligation, they can be held liable for the resulting damages incurred by employees. This liability already exists under current law and will remain unchanged.[18] A so-called 'protection from dismissal or equivalent detriment' also applies.[19] This protection implies that employers are not allowed to take any detrimental action against the employee in response to the employee exercising its rights under the information obligation (whether judicially or extrajudicially) or to the employee filing a complaint or assisting another employee in this regard.

2.2 Employers' obligations with regard to mandatory training (and the expected consequences for the use of a study costs clause)

The second important change that is included in the Bill relates to the costs of mandatory training. Consequently, this change has consequences for the use of a study cost clause (which is currently considered quite common). The Directive prescribes that training which employers are required to provide (i) must be offered to the employee free of charge, (ii) will be regarded as working time and (iii) where possible must take place during regular working hours.[20] The Bill includes a proposal that stipulates that any clause on the basis of which the costs for mandatory training are payable by the employee (directly or via set-off)

15 This follows from the proposed article 7:655 paragraph 1 under DCC (new) in conjunction with article 7:628b paragraph 3 DCC (new) and article 7:628a paragraph 9 DCC.

16 This follows from the proposed article 7:655 paragraph 7 DCC. We also refer to: *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 18 (Explanatory Memorandum).

17 Article 7:655 paragraph 10 DCC (new).

18 This already follows from article 7:655, paragraph 5 DCC.

19 Article 7:655 paragraph 11 DCC (new).

20 See article 7:611a paragraph 2 DCC (new).

shall be null and void.[21] The impact of this proposal should not be underestimated. Especially, given the fact that this proposal thwarts the possibility of agreeing on a valid study costs clause[22] insofar as the clause in question relates to 'mandatory training'. In the Directive 'mandatory training' is described as training which employers are obliged to offer to employees by Union or national law or by collective agreements. An example of what may be considered as mandatory training is safety training and training to maintain necessary skills.[23] However, the scope of the term 'mandatory training' is broader than one might expect on the face of it. For example, during the debate on the Bill in the House of Representatives it became clear that 'mandatory training' also covers training which employers are obliged to provide to employees on the grounds of the existing article 7:611a DCC.[24] This implies that training which relates to the continuation of the employment agreement in a different position (when the employee's existing position will cease to exist) also qualifies as 'mandatory training'. Consequently, such training must also be provided free of charge, be regarded as working time and – if possible – take place during regular working hours. Furthermore, it has been suggested that the term 'mandatory training' is also relevant in the context of underperformance. After all, one of the requirements for dismissing an employee due to underperformance is that the employer has given the employee sufficient opportunity to follow training.[25] The above would mean that the possibility of agreeing upon a valid study costs clause will be substantially limited once the Wtva enters into effect. Although, given the current state of affairs relating to the Bill, this issue has not been clarified in detail yet, we have already identified a number of practical points to consider:

i. Assess what training might qualify as mandatory training

If – on or after 1 August 2022 – an employer wants to bind an employee to a valid study costs clause, the employer will have to assess whether the training/course that is the subject of this study costs clause, could qualify as 'mandatory training'.

- ***In the event of non-mandatory training***:
  In the event of non-mandatory training, the employer and the employee can agree upon a valid study costs clause, provided that they comply with the so-called *Opzeeland*-criteria (as referred to in Dutch case law).[26] To summarise, the *Opzeeland*-criteria stipulate that it must be clear from the wording of the study costs clause:

  a. during which period the employer is deemed to benefit from the knowledge and/or skills acquired by the employee during its studies;
  b. that repayment of study costs is based on a so-called 'sliding scale'. In other words, that the employee's repayment obligation reduces proportionally to the continuation of the employment agreement during the period referred to above under i.-a.; and
  c. that agreeing upon the study costs clause may have serious consequences for the employee. It must be entirely clear to the employee that it is consenting to a repayment obligation. Due to the potentially far-reaching consequences for the employee a study costs clause must always be (i) agreed upon in writing and (ii) signed by the employee.

21 See article 7:611a paragraph 4 DCC (new).

22 Employers and employees can use a study costs clause to make agreements about the conditions of (partial or otherwise) repayment of training which the employee is allowed to follow at the employer's expense. The parties can, for example, agree that the employee will have to repay a fixed percentage of the study costs to the employer if the employee gives notice to terminate its employment agreement within (for example) six months after completing the training.

23 Directive (EU) 2019/1152, Article 13 (and consideration 37).

24 *Parliamentary Papers II* 2021/22, 35962, no. 6, p. 22 (Note on the report on the Bill). We also refer to: P.A. Hogewind-Wolters, 'De scholingsplicht en het studiekostenbeding voor en na implementatie van de Arbeidsvoorwaardenrichtlijn', *TAP* 2022/49, p. 18 and D.J.B. de Wolff, 'Implementatie van de Richtlijn betreffende transparante en voorspelbare arbeidsvoorwaarden', *TRA* 2022/12, p. 4.

25 Hogewind-Wolters, *TAP* 2022/49, p. 11.

26 Supreme Court 10 June 1983, ECLI:NL:HR:1983:AC2816, *NJ* 1983/796 (*Muller/Van Opzeeland*). *NB*: The Minimum Wage and Minimum Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*) may also limit the possibility of concluding a study costs clause.

- ***In the event of mandatory training***:
  The employer will have to offer this training free of charge. In addition, the time spent on the training must be regarded as working time and the training will have to take place, wherever possible, during regular working hours.

ii. Mandatory training must be offered free of charge
If the training qualifies as mandatory training, then the employer must cover *all* related costs. In practice, this means that the employer will not only have to pay the direct costs of the training, but also the associated costs, for example, the costs of books and other study materials as well as travel expenses and examination fees.[27] The fact that the employer must cover these costs also means that the employer may not (directly or indirectly) recover the costs in question from the employee (for example by way of a set-off against a claim of the employee). Even if the employee does not complete the training (or does not complete the training within the agreed timeframe) or if the employee takes the initiative of terminating their employment with the employer before the training has been completed, the employer is still obliged to cover all of the training costs.[28]

iii. The complexity of compliance in the event of vocational training or training to obtain, retain or renew a professional qualification
For some types of training, employers should be extra careful before they conclude a study costs clause. Vocational training or training to obtain, retain or renew a professional qualification does not, in principle, fall within the scope of the term 'mandatory training', meaning that the employer is not obliged to reimburse the costs of such training. However, in some cases, an exception applies (for example if it follows form the applicable CLA that certain professional training has to be offered). Since the question, of whether such exception might apply, is not easily answered, we recommend employers to seek legal advice in a timely manner.

iv. The lack of transitional provisions
The Bill does not include any transitional provisions. In practice, this means that study costs clauses which are not in compliance with the new requirements as of 1 August 2022 will then be null and void. The same sanction will apply to a study costs clause that is included in an existing employment agreement which clause the employer wishes to invoke on or after 1 August 2022. We recommend employers to timely assess (i) the type of training for which they can conclude a legally valid study costs clause in the future and (ii) whether (from 1 August 2022 and onwards) employees could potentially invoke the nullity of study costs clauses already agreed upon prior to 1 August 2022.

v. Protection from dismissal or equivalent detriment
For the sake of completeness, please note that the protection from dismissal or equivalent detriment discussed (see paragraph 2.1.2. iii.) will also apply in the context of the intended rules regarding mandatory training.[29]

2.3 The restriction on the ban on ancillary activities

The third important change that is included in the Bill relates to the freedom of employees to perform ancillary activities elsewhere outside the working hours that have been agreed upon with the employer.[30] In practice, employment agreements often include an ancillary activities clause on the basis of which the possibility of performing ancillary activities is significantly limited or even excluded. Often, an employment agreement will include general stipulations to the effect that ancillary activities are not permitted without the employer's prior written consent. Although, currently, this practice is not, or hardly, a subject of discussion, this might be different once the Wtva has entered into effect. The Bill stipulates that any clause that bans (or otherwise restricts) an employee from performing ancillary activities outside its regular working hours is null and void unless the ban can be justified on the basis of an objective reason. In stark contrast to the situation under current law, from 1 August 2022 and onwards, employers will have to provide clear reasons for using the ancillary activities clause. To that end the Directive contains a (non-exhaustive) list of reasons that may qualify as an

27 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 10 (Explanatory Memorandum).
28 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 12 (Explanatory Memorandum).
29 Article 7:611a paragraph 5 DCC (new).
30 In the Bill this point is expressed in a new article 7:653a DCC.

'objective reason'. These include, amongst others, health and safety, the protection of business confidentiality, the integrity of the public service and the avoidance of conflicts of interests.[31] Since this list is non-exhaustive, employers could also argue that they have an objective reason which is based on different circumstances.

From a practical point of view, we must emphasise that there is no requirement for employers to state the objective reason in writing. In fact, an ancillary activities clause which does not include an objective reason is not, by definition, null and void. Employers may also inform employees on the objective reason at a later stage, for example once the employer wants to invoke the clause or once the employee requests prior permission to perform ancillary activities. The clause is then not immediately null and void provided, of course, an objective reason actually exists. At that point in time, the employer must inform the employee about the objective reason. If the employers omits to do so, then the sanction will be triggered after all and, consequently, the clause will be null and void. To summarise, there is no direct necessity to redraft existing ancillary activities clauses, but it is advisable that employers consider (in any event before the intended coming into effect of the Wtva on 1 August 2022) the objective reason which may justify application of an ancillary activities clause. On the basis of the current legislation (and the corresponding case law) an action for compliance with a ban on ancillary activities is usually imposed without much discussion.[32] We expect this practice to change once the Wtva enters into effect. Consequently, it will become more difficult for employers to restrict the freedom of their employees when it comes to the performance of ancillary activities.

For the sake of completeness, we wish to point out that the discussed protection from dismissal or equivalent detriment (see paragraph 2.1.2. iii.) will also apply in the context of ancillary activities.[33]

2.4 The amendment of the FWA

The final important change that is included in the Bill is an amendment of the FWA.[34] The proposed amendment will create a possibility for employees, whose work pattern is entirely or mostly unpredictable, to file a request with their employer for a form of employment with more predictable and secure working conditions. In short, this means that:

i. Employees with at least 26 weeks of service with the employer will be allowed to submit a written request to the employer for a form of employment with more predictable and secure working conditions.
ii. The employer will then respond to the employee's request in writing (in any case, informing the employee about the decision and the rationale behind this decision). Employers with a workforce of at least ten employees must inform the employee of their decision within one month after receipt of the request. A deadline of three months applies to employers who employ less than ten employees.
iii. Although the reasoning of the employer's decision is not subject to any specific requirements[35], it is important that the employer actually takes a decision and informs the employee accordingly. In fact, if the employer does not inform the employee about its decision, or if the employer omits to inform the employee in time, then the request will be deemed granted. In other words, the form of employment will be changed in accordance with the employee's request. Even if a form of employment with more predictable and secure working conditions is evidently not available within the employer's business (for example a company that is exclusively involved in fast-track deliveries), it therefore remains essential that the employer informs the employee accordingly in time (and in writing); and
iv. If the request is rejected, then – notwithstanding unforeseen circumstances - the employee cannot submit a new request for another year. After this year, in the event of a subsequent request, the applicable decision deadline of the employer is equal to the deadline referred to above under point ii.

31 Directive (EU) 2019/1152 consideration 29.

32 See for example District Court of Rotterdam 28 August 2020, ECLI:NL:RBROT:2020:7965, *AR Updates* 2020/1105, District Court of Rotterdam 12 March 2021, ECLI:NL:RBROT:2021:3001, *AR Updates* 2021/0449 and Court of Appeal in 's-Hertogenbosch 15 March 2018, ECLI:NL:GHSHE:2018:1131, *TRA* 2018/50 with note by J.J.M. de Laat.

33 Article 7:653a paragraph 2 DCC (new).

34 Specifically: the introduction of a new article 2b FWA.

35 *Parliamentary Papers II* 2020/21, 35962, no. 3, p. 19 (Explanatory Memorandum).

However, small employers (who employ less than ten employees) are allowed to respond verbally to new (similar) requests, provided that the employer's reason for denial of the request is unchanged.

For the sake of completeness, we wish to point out that the discussed protection from dismissal or equivalent detriment (see paragraph 2.1.2. iii.) will also apply in the context of a request for a form of employment with more predictable and secure working conditions.

3. Conclusion

In this edition of Quoted we discussed the four changes included in the Bill that we deem most relevant for employers. To summarise, employers should prepare for the following changes before 1 August 2022:

i. Employers will have to provide employees with *more* information about the applicable working conditions and, in some cases, employers will be provided with *less time* to provide this information (in comparison with the current legal framework).
ii. Employers will have to offer employees mandatory training free of charge. In addition, the time spent on this training must be regarded as working time and, wherever possible, the training will have to take place during regular working hours. From 1 August 2022 onwards a study costs clause on the basis of which the costs of mandatory training can be (wholly or partially) recovered from the employee will be null and void.
iii. Employers will face more difficulty in restricting employees' freedom when it comes to performing ancillary activities. From 1 August 2022 onwards an ancillary activities clause will have to be justified on the basis of an 'objective reason'. If an employer fails to provide such objective reason, the ancillary activities clause will be null and void. We expect that, in practice, this change will hinder employers in enforcing ancillary activities clauses.
iv. The FWA is to be amended. As a result, employees whose work pattern is entirely or mostly unpredictable will be able to file a request with their employer for a form of employment with more predictable and secure working conditions.

4. Practical recommendations

In view of the changes included in the Bill, we would like to conclude this edition of Quoted with a few practical recommendations. A number of these recommendations have already been discussed in more detail above.

- The Bill will result in an additional administrative burden for employers. This burden was anticipated in the preamble to the Directive with the comment that Member States can provide templates and models to support employers at a national level. Although we have kept a close eye on the web page of the Dutch Government, it remains unclear whether the Dutch Government is actually going to produce any such supporting materials (let alone on time). As the date on which the Wtva enters into effect approaches, employers would be well advised to take a proactive approach to the intended changes.
- Please ensure that you reach out to your contact at Loyens & Loeff in time (in any event before 1 August 2022) so that your contact may provide assistance and advise you about changing your standard employment agreement. We would like to point out that compliance with a large number of requirements relating to the extended information obligation can already be ensured by redrafting a few clauses in the employment agreement (and/or by including specific references to CLA the provisions, or a staff handbook). With regard to some topics, the extended information obligation requires more attention (for example the entitlement to paid leave or the procedures which apply in the event of dismissal). To that end we have already included a number of specific tips in paragraphs 2.1.1.2. i. and iii.
- If your business uses ancillary activities clauses, we recommend to start thinking about the objective reason which would justify application of the clause.
- If your business uses study costs clauses, please ensure to assess in good time – in any case before 1 August 2022 - (i) for which training your business can continue to conclude a valid study costs clause in the future and (ii) whether the study costs clauses already agreed upon might include clauses of which employees could invoke the nullity from 1 August 2022 onwards.

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Quoted

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You can of course also approach your own contact person within Loyens & Loeff N.V.

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