TRANSPARENT AND PREDICTABLE WORKING CONDITIONS IN THE NETHERLANDS

Precarious employment relationships in the Netherlands: challenging Dutch labour law

European Working Group on Labour Law
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Introduction

The labour market in Europe has undergone major changes in recent decennia. Digital innovations, demographic developments and increased globalisation have paved the way for the rise of new and complex forms of employment.[1] Often, these new forms of employment form a sharp contrast to the more traditional employment relationships. The labour market of today has evolved significantly compared to the labour market around the time Directive 91/553/EEC was adopted - the latter concerning an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. This development is all the more clear in the Netherlands. Crowned as one of the frontrunners in this new era of modern employment, the Netherlands has one of the highest levels of flexible workers in Europe, with 30% of its labour force coming in third after Poland and Spain.[2]

The increased flexibility of the labour market comes with benefits, whether it is job creation, development of new business models or giving entry into the labour market to people who previously would have been excluded.[3] At the same time, however, these trends have also led to increased discussion in the Netherlands about the desirability of new working relationships and the level of protection offered to workers. The debate in question focuses amongst others, both academically and politically, on the apparent divide between those who are 'in', and those who are 'out'. More specifically, it concerns the growing divide between those workers who have a strong footing in the labour market - whether because of a permanent contract, excellent labour conditions, strong negotiation positions and/or possibilities to develop one's knowledge and skills - and those workers with unfavourable and insecure employment relationships who don't participate in the benefits of the increased flexibility. It is estimated that the latter group consists of almost 10% of the labour market in the Netherlands. Around 878.000 workers face precarious working conditions, flexible employment relationships and lower than average wages.[4]

This group of precarious workers face several negative effects because of their type of employment. Job, work and income insecurity is more present in the group of precarious workers. As a general rule: if there's no work, there's no income. And from a dismissal perspective, the precarious worker has no or little protection in case the employer decides that there is no work anymore. Precarious workers often lack a sufficient social safety net as well. They have a bigger chance of becoming unemployed compared to permanent workers.[5] The income level and income

[1] International Labour Organisation 2020.
[2] Centraal Bureau voor de Statistiek 2021.
[3] European Commission 2017.
[4] Inspectorate SZW 2019.
[5] Centraal Planbureau 2019.

security of Dutch precarious workers is also lower: on average, precarious workers earn 7% less for the same type of work than workers with a permanent contract.[6] Precarious workers also have fewer access to programs aimed at improving and developing their skills during the course of their career.[7] Additionally, studies show that precarious employment - through financial strain - reduces the mental health related quality of life and increases mental disorders such as symptoms of depression.[8]

These negative effects of precarious work touch upon a broader issue. They show that the problems precarious workers face on the Dutch labour market have large consequences for their social-economic position and possibilities as well. The relatively high job and income insecurity concentrates in this group of workers, and trickles through to other elements of life, such as housing, access to education and one's life choices.[9] Precarious workers with weak social-economic standing should be one of the groups of workers most protected by labour law, but the reality is, that this group of workers often lack sufficient protection.

Over the years, the debate has grown in the Netherlands regarding the position of precarious workers. More and more political parties and advisory institutions view the flexibilization of the Dutch labour market as a problem that needs urgent addressing. The Dutch labour market has become *too* flexible and precarious and is not in a sustainable shape. A striking element of this increased debate is the fact that, in 2020 only, there have been five large reports published on the state of the Dutch labour system.[10] Of these five, the government-issued report by the Independent Commission on the Regulation of Work (also known as the Borstlap Commission, named after the chairman) is of particular value. The Commission Borstlap fully evaluated the current Dutch labour system and came up with several solutions to solve the problems that precarious workers face today. This report, and its outcome, will make regular appearance in our report.

The precarious work relationships in the Netherlands and their subsequent legislative protection form the basis of this national report. Covering the transparent and predictable working conditions in the Netherlands, its aim is to provide a general overview of the Dutch legislation already in place and any possible legislative gaps that need to be amended in light of Directive 2019/1152 on Transparent and Predictable Working Conditions. The aim of the report is to make clear what aspects of Dutch labour law are already in line with the new Directive, and where clashes occur.

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[6] Centraal Planbureau 2019.
[7] Künn, *ROA* 2018.
[8] Ferrante, *BMC Public Health* 2019/19.
[9] Commissie Regulering van Werk 2020, p. 32.
[10] Wetenschappelijke Raad voor het Regeringsbeleid 2020, Commissie Regulering van Werk 2020, Ambtelijke Werkgroepen Brede Maatschappelijke Heroverwegingen 2020, Platform Toekomst van Arbeid 2020 and Nederland Kansrijk 2020.

Regarding the latter, it is especially interesting to map out the existing challenges on how to offer more and effective protection for precarious workers in Europe. For that reason, every topic of this report consists of an interim conclusion that places the discussed legislation in the scope of the new Directive 2019/1152. Additionally, as a general *cheat sheet* regarding Dutch labour law, chapter 1 and Appendix 1 include an overview of frequently used legislation and terms.

Chapter 1 – Introduction to the Dutch legal system

Labour law can be broadly described as the set of legal rules that relate to the employment relationship of the dependent workforce in the private and public sector.[11] The workforce in the Netherlands consists of a lot of flexible workers. The balance between permanent work, flexibility and security is therefore a difficult subject and Dutch labour law has undergone many changes in recent years. However, in the Netherlands the set of legal rules is not regulated in one place, but labour law is subdivided into several places. This chapter will provide an overview of the most relevant laws for this paper.

The backbone of Dutch labour law is the Dutch Civil Code. After the establishment of a Dutch Civil Code in 1838 the Dutch civil law system remained largely unchanged for over 100 years.[12] One large exception to that was the introduction of the Law on the Employment Contract of 1907. This law was included in the Dutch Civil Code. For the first time, specific rules were introduced that governed the employment contract, meaning that the employment contract didn't fall entirely under the general private law rules anymore.

Dutch labour law is regulated in Book 7 Title 10. Title 10 of Book 7 regulates the employment agreement. From the signing of an employment contract, its compliance during employment and all the way to the end, its dissolution. Labour law does not only entail the employment agreement, through more specialist laws other aspects of labour law are regulated. Examples of such specialist laws would be the Law on Collective Labour Agreements; the Law on Working Conditions and the Law on Unemployment. In the paragraphs below the function of the Dutch Civil Code in Dutch labour law will be elaborated upon, as will some key laws relevant to this paper.

1.1 The Dutch Civil Code (DCC)

The basis of the labour law legal system is the Dutch Civil Code. This is divided into ten books, each dealing with its own subject. Labour law is classified under Book 7 of the Dutch Civil Code, more specifically Book 7 Title 10. Book 7 Title 10 contains the broad outlines of Dutch labour law. First of all, it begins with rules concerning the establishment of an employment relationship. This includes arranging the probationary period, obligations for the employer or employee and the employer's wage payment obligation. It also regulates the wage payment obligation during the first 104 weeks of illness and the employee's reintegration obligation during illness, leave of the

[11] Bouwens, Houwerzijl & Roozendaal 2019, p. 1.
[12] Florijn, *AA* 1991/1078, p. 1.

employee and equal treatment. Finally, the end of the employment relationship is also regulated in Book 7 Title 10. Separate laws supplement these rules with special provisions.

In light of the topic of this report, the most important provision of the DCC is presumably the definition of the employment contract. Article 7:610 DCC specifies that definition, which includes the elements of work, salary and authority of the employer. Chapter 3 will further touch upon the definition of an employment contract. For now, it is important to note that in Dutch labour law, the protection and rights offered to employees are largely connected to the article 7:610 DCC definition of an employment contract. This article is the centerpoint of Dutch labour law and its provisions. As a result, new forms of employment relationships and their defining elements are compared to the traditional definition of an employment contract. This tension will be one of the focus points of our report.

As mentioned, the Dutch Civil Code forms the backbone of Dutch labour law. It is, however, not the only source of provisions governing the labour system. There are other, more specific laws in place as well that change the DCC on particular topics. For the sake of clarity, we will only highlight the laws that are of interest to this report. The Law on Flexibility and Security (WFZ), Law on Work and Security (WWZ), the Labour Market in Balance Act (WAB) and the Law on Flexible Working (WFW) are four laws of particular importance. These laws, introduced below, change or supplement – amongst others - the DCC in order to regulate flexibility on the Dutch labour market.

1.2 Wet flexibiliteit en zekerheid (WFZ)

The introduction to this report mentioned the core problems that precarious workers face. Job and income insecurity is one of the largest problems for these types of workers. It led the Dutch government in 1999 to introduce the Law on Flexibility and Security. The law served two goals: to give employers the possibility to hire flexible workers, and to provide a better legal position for these types of workers as well, especially when the employment period continues for a longer period.

The WFZ introduced several provisions for precarious workers. For example, the WFZ created a legal presumption of the existence of an employment contract (article 7:610a DCC) and of the scope of employment (article 7:610b DCC). Additionally, a minimum wage claim of three hours per call-in period was introduced in article 7:628a DCC. These provisions will be further discussed in chapter 7 and 8. The WFZ also created the chain rule provision of article 7:668a DCC. The chain rule stipulates when successive, temporary employment contracts are converted into a permanent employment contract. At the time of introduction, the chain rule constituted the rule

that a contract may be renewed with a maximum of three consecutive contracts in three years. After that limit had been reached, the employer was obliged to offer a permanent employment contract.

While the WFZ made several good steps to offer more protection to precarious workers, the Dutch government deemed these steps to be insufficient, and more legislative action was necessary. In 2015, the WFZ was succeeded by a new law, the Law on Labour and Security, which will be discussed below.

1.3 Wet werk en zekerheid (WWZ)

The 2015 law 'Wet werk en zekerheid' (WWZ) - literally the 'Law on Labour and Security' - was based on a mutual understanding between social partners and the legislator in 2013. This law added some provisions to the Dutch Civil Code and changed some provisions. The aim of the WWZ was to take appropriate measures in light of the economic crisis the Netherlands faced at that time. The WWZ contained a combination of objectives and measures to strengthen the legal protection of flexible workers and reduce the improper use of flexible workers.

The WWZ introduced a termination benefit ("*transitievergoeding"*) for the employee if the employment relationship came to an end and had a duration of at least two years.[13] The termination benefit is intended on the one hand to offer the employee compensation for the dismissal and on the other hand to enable him to facilitate the transition to another job.[14] A termination benefit also had to be granted by the employer to employees who had a fixed-term employment relationship that lasted longer than two years.

The WWZ also changed regulation on fixed-term employment relationships in order to find a balance between flexible labour and security for the employees. The WWZ changed amongst others the 'chain rule'.[15] The chain rule concerns the renewal of employment contracts within a limited time and number. Until 1 July 2015 the chain rule held that a contract may be renewed with a maximum of three consecutive contracts in three years. The following contract after this will then automatically be a contract for an indefinite period of time. The WWZ tightened up this chain rule. In the first place, this tightening held that conversion into an employment contract for an indefinite period of time would take place after two years instead of three years. The numerical limitation of three employment contracts remained unchanged. In addition, the interval regulation

[13] Visser & Ngalle, *AR* 2014/61.
[14] Bouwens, *NJB* 2014, p. 1.
[15] See Appendix 1 for 'chain rule'.

was extended. All employment contracts that follow one another at intervals of no more than six months will be included to the chain.[16]

The thought behind the tightening of this chain rule in the WWZ from three to two years was that employees would get an employment relationship for an indefinite period of time faster as a result. In practice, it turned out that it did not result in more permanent contracts. Employers were looking for creative solutions to prevent the contract from lasting a total of two years, also because of the introduction of a termination benefit after the end of an employment relationship that lasted at least two years.

With the introduction of the WWZ steps have been taken to offer flexible employees more security, to make unemployment benefits ("*WW-uitkering*") more activating and it attempted to make dismissal law clearer, simpler and cheaper. However, corrective measures of the regulations in the field of flexible employment, dismissal law and unemployment benefits were still necessary to create a new balance between security and opportunities within the employment contract. That is why the government wanted to improve the WWZ with the introduction of the Wet arbeidsmarkt in balans' ('WAB') - discussed in paragraph 1.3.

The WWZ appeared not successful in reforming labour law in order to accommodate employment relationships suited for the contemporary labour market. Due to the costs and risks associated with the permanent contract, employers were still reluctant to hire employees on a permanent basis after the WWZ. For workers, the opportunities on the labour market are unevenly distributed, whereby the prospect of a permanent contract for vulnerable groups in the labour market is often remote.[17]

1.4 Wet arbeidsmarkt in balans (WAB)

The law 'Wet arbeidsmarkt in balans' ('WAB') - literally the 'Labour Market in Balance Act' - has entered into force since the 1st of January 2020 and tried to correct a number of 'mistakes' from the WWZ. Just like the WWZ, the WAB also changed and added provisions to the Dutch Civil Code. The WAB aims to improve the balance between employment relationships for an indefinite period of time on the one hand, and precarious employment relationships on the other. The WAB aims to reduce the cost- and risk differences between contract forms, so that flexible work is used when the nature of the work requires it and not because of a potential cost advantage for the employer. Negative effects of specific forms of flexible work, such as insecurity about work and income and transfer of costs and risks, are limited.

[16] Bouwens, *NJB* 2014/1677, p. 2.
[17] *Kamerstukken II* 2018/2019, 35074, nr. 3

On the one hand, the WAB tries to achieve this by making entering into a flexibele employment relationship more expensive for employers and making an employment relationship for an indefinite period of time more attractive for employers, so that workers have more prospects of security. Since the 1st of January 2020, the employer has to pay higher unemployment contributions ("*WW-premie"*) for employees with a flexible employment relationship and lower unemployment contributions for employees with an employment relationship for an indefinite period of time. The WAB has also ensured that employees will receive a transition allowance if employees have worked less than two years. Under the WWZ, employees received this transition allowance after two years of work. On the other hand, the WAB extended the chain rule[18], which the WWZ tightened up to 24 months, again to 36 months.

In conclusion, the legislator is still struggling to find the right balance between flexible and permanent employment contracts. This balance has not been reached yet.

1.5 Wet aanpassing arbeidsduur (WAA) and Wet flexibel werken (WFW)

Introduced in 2000, the Wet aanpassing arbeidsduur (Law on Changing Working Hours, hereafter: WAA) aimed to offer employees the possibility to request a change in working hours. Another option was to request a more even spread of working hours across the work week. The ratio behind the WAA was to improve the division in labour and care tasks between men and women.[19] With the possibilities offered by the WAA, employees could combine their work and private life better. If an employee made such a request to change the working hours of his or her employment relationship, an employer could only refuse the request in case of weighty company interests (which will be touched upon further in chapter 10).

The WAA did not entirely live up to its expectations. The legislation provided insufficient possibilities to accommodate one's working life to one's private life.[20] For example, it was only possible to hand in a request to change the working hours once every two years. Additionally, the WAA took as the starting point that the changes have a long-term, structural nature.[21] Evaluation of the WAA showed that certain request were rather based on a shorter, temporary term.

Given that evaluation, the government introduced the Wet flexibel werken (Law on Flexible Working, hereafter: WFW) in 2016. Its aim was to effectively support the combination of private

[18] See Appendix 1 for 'chain rule'.
[19] *Kamerstukken II* 1998/1999, 26358, nr. 3, p. 9.
[20] *Kamerstukken II* 2010/2011, 32855, nr. 3.
[21] *Kamerstukken II* 2010/2011, 32855, nr. 3.

and work life by offering employees several possibilities to work in a more flexible way.[22] The WFW introduced three types of requests for employees: a change to the working hours, workplace and work times (compared to the sole possibility under the WAA to request a change to the working hours).

1.6 Independent Commission on the Regulation of Work (Commissie Regulering van Werk)

At the request of the cabinet, a special commission 'Commissie Regulering van Werk'- literally 'The Commission Regulation of Work' - has analyzed the current legislation and regulations on work. This Commission has written a report, which was published on the 23rd of January 2020, with recommendations to make the Dutch labour market future-proof. According to this report the earning capacity of the Netherlands is at stake if the policy remains unchanged. Such outcome would be a result of the convergence of many poorly protected and ill-equipped precarious workers and insufficient maneuverability within permanent employment contracts. The existing preference for external flexibility (via flexible contract forms) over internal agility within employment relationships for an indefinite period of time is unsustainable and causes economic, social and social damage. The Netherlands needs strong, well-equipped workers, highly productive companies and a government with high-quality public facilities. This requires a new balance between external flexibility and internal agility, between durable and temporary or otherwise flexible employment relationships. The broad guidelines set by the Commission are the following:

1. Promote internal agility, reduce flexibility in favour for permanent contracts.
2. Create a clearer system of contract types.
3. Enable all workers to develop and continue to learn.
4. Equal tax treatment and basic income security for all working people.
5. Provide an activating and inclusive labour market policy.[23]

We will further elaborate on this report in chapter 2 looking at the negative effects of precarious working and also in chapter 11 with regard to the reaction of the cabinet on the recommendations given in this report.

[22] Van Andel, *AR* 2017/24, p. 2.
[23] Commissie Regulering van Werk 2020, p. 10.

Chapter 2 – Precarious working in the Netherlands

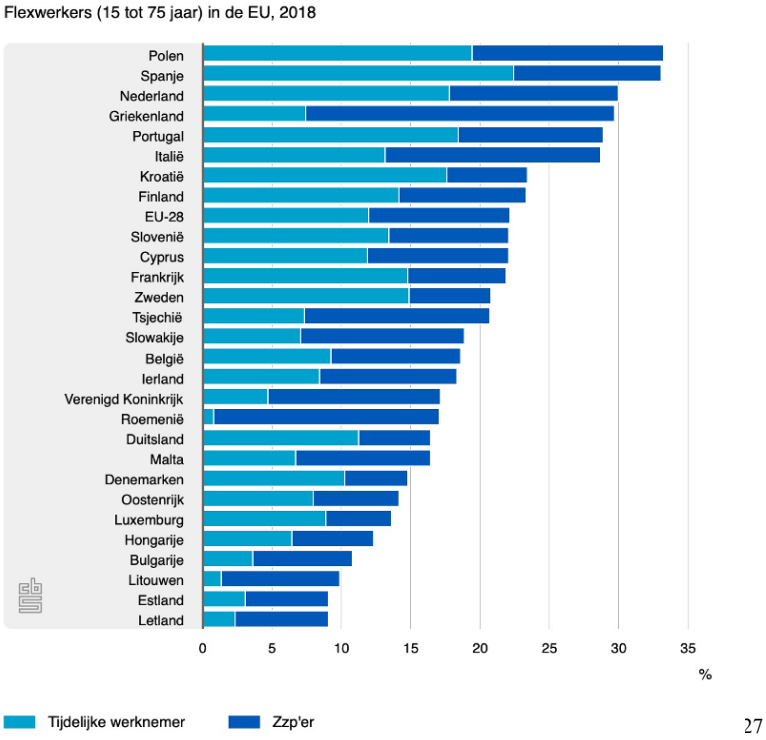
Precarious working may not have the same definition within the different member states of the EU. However, in this report precarious working will consist of vulnerable employees, that have insecure employment relationships and often few entitlements to income support during unemployment. This is the definition given by Broughton et al. (2016), which is based on the framework given by Olsthoorn (2014).[24] Precarious working has been growing over the years and flexible contracts have taken in an important role in the job market. With the growth of this particular area the negative side effects have also developed over time, like the insecurity and the stress that comes along with. The Commission on the Regulation of Work has described these effects extensively. An employment contract for an indefinite period provides people with income security and financial perspective when, for example, buying a house. The Commission has concluded that precarious workers face higher uncertainty with regard to these aspects. These workers are paid on average about seven percent less for the same work than employees with an employment contract for an indefinite period. In addition, the risk of poverty among employees with a flexible contract is three times as high. Not only the individual is confronted with the problems that come along with precarious working, but society also pays a high price for flexible contracts. A consequence of precarious working is that they more often rely on unemployment, sickness and incapacity for work and social assistance schemes. The costs of flexible contracts are therefore partially passed on to the collective premiums.[25]

Now that we have looked at the consequences of precarious working, we will focus on the existing forms in the Netherlands. In this chapter we will look at various employment forms, varying from fixed-term contracts to self-employed. Besides that, we will also look at how widespread precarious working is in the Netherlands. Although the starting point of the Dutch legal system is a contract for an indefinite period of time, there are several other more flexible forms.[26]

Figure 1 demonstrates a third-place position in flexible working for The Netherlands in the European Union, this means that flexible contracts are frequently used. The flexible contracts are divided into employees with temporary contracts (17,8%) and self-employed persons (12,2%).

[24] A. Broughton, et al., 2016, p. 20; Olsthoorn 2014, p. 421-441.
[25] Commissie Regulering van Werk 2020, p. 31-32.
[26] Bouwens, Duk & Bij de Vaate 2018, p. 20.

Figure 1



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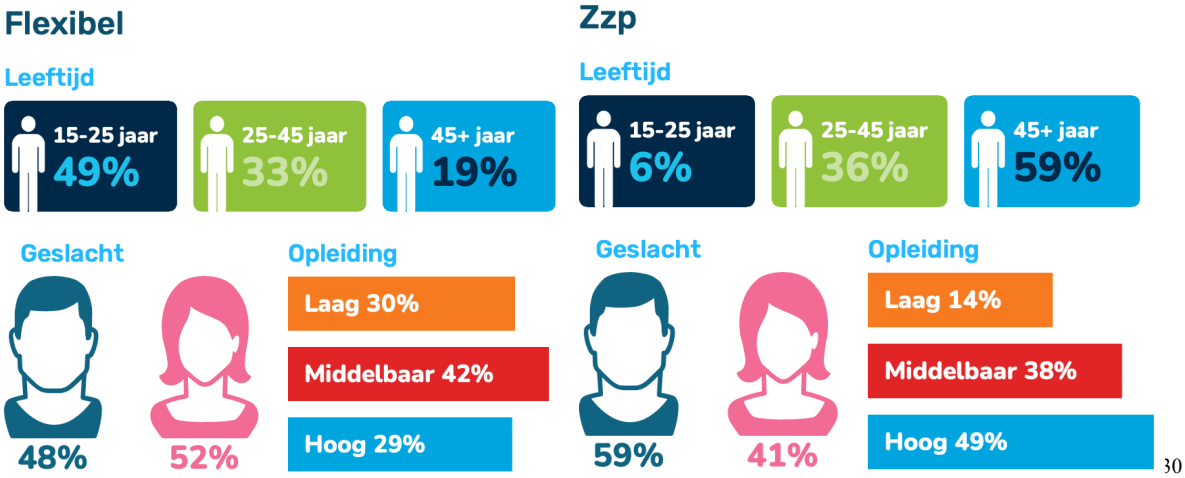
In the year 2000, the percentage of flexible contracts in The Netherlands was 21% of the working population.[28] This means that the use of flexible contracts rapidly grew over the last two decades from 21% to 30%. Furthermore, a flexible contract is more common among women, low-educated people, children living at home and people with a migrant background. However, men and highly educated people have a higher chance of being self-employed.[29] We will further discuss this looking at figure 2.

Figure 2 shows the relationships between age with regard to precarious work, flexible contracts (2.1, 'flexibel') or self-employed (2.2, 'zzp'). In addition, figure 2 also shows the ratio between less educated and highly educated people in flexible contracts or the self-employed.

[27] 'Flexwerk in Nederland en de EU', *CBS* (online, laatst geraadpleegd op 15 januari 2021).
[28] De Beer & Verhulp, *TRA* 2017/83.
[29] Bolhaar, Brouwers & Scheer 2016, p. 4.

Figure 2

Figure 2.1 Flexibel (*flexible*) Figure 2.2 Zzp (*self-employed*)



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The terms used in this figure are to be translated as follows:

Flexibel: flexible; *Zzp: self-employed;*
Leeftijd: age;
Geslacht: gender;
Opleiding: education
Laag: low; Middelbaar: medium; Hoog: high (Level of education)

It follows from this that flexible contracts are most often used for the young people (49% of the flexible contracts). However, they are also frequently used for workers from 25-45 years (33%). It also shows that the latter group covers 36% of the self-employed (zzp). This means that precarious working is widespread among this group, whether it is on the basis of a flexible contract or being self-employed. Secondly, figure 2 demonstrates that the less educated and the medium educated more often work on the basis of flexible contracts (72%) than the highly educated (29%). However, the chance of being self-employed grows with age (59% is over 45 years old) and is highest among highly educated (49%).

As we have discussed in the introduction of this chapter, precarious work comes with more financial and social insecurity. In addition, those who work on the basis of flexible contracts are also often groups with a less strong position on the labor market. These are, for example, young people and people with a migrant background. The uncertainty that arises from precarious working is greater among groups with a less strong bargaining position. The Commission warns for further social polarization, due to these facts.[31]

[30] Flexbarometer, (online, laatst geraadpleegd op 18 februari 2021).
[31] Commissie Regulering van Werk 2020, p. 33-34.

We can conclude that precarious working is widespread nowadays on the Dutch labour market. In the following paragraphs we will look at the different forms of precarious working in the Netherlands.

2.1 Fixed-term contracts

When an employment contract is concluded for a fixed period of time, this is called a fixed-term contract. It means that the date on which the contract ends, is fixed or the end of the contract depends on the end of a certain project. The contract ends by law (*ex lege*) on the expiry date, except for when parties have agreed that notice shall be given (Article 7:667 DCC).[32] An important condition for the fixed-term employment contract is that the end of the contract must be objectively determinable.[33] This is also the condition that distinguishes this form of contract from the employment contract under a resolutive condition. For the latter, the end of the employment contract depends on a future uncertain event. However, the contract under a resolutive condition is only permitted in exceptional cases.[34]

Under Dutch law these types of contracts can be renewed, however this is limited in time and number. The contract may be renewed with a maximum of three consecutive contracts in three years. The following contract after this will then automatically be a contract for an indefinite period of time. This is the so called 'chain rule' which is in line with clause 5 of the Directive 1999/70/EC. In the following section for on-call contracts we will see that this 'chain rule' also applies to these types of contracts.

2.2 On-call contracts

This concerns an employment relationship in which the employee declares his willingness to work during periods that yet have to be specified by the employer.[35] In the next chapters we will give an overview of the different types of on-call contracts, the details of the on-call contracts will be further discussed in chapter 7 and 8.

[32] De Casparis, in: *Praktijkboek flexibele arbeidsrelaties* 1.2.1 (online).
[33] Bouwens, Duk & Bij de Vaate 2018, p. 20.
[34] Bouwens, Duk & Bij de Vaate 2018, p. 21.
[35] Bouwens, Duk & Bij de Vaate 2018, p. 22.

2.2.1 Pre-agreement

The relationship can be entirely non-binding, in which case the employee does not have to answer the call and the employer has no obligation to call the employee regularly.[36] This is called a pre-agreement. When the employee responds to the call, a fixed-term contract will be established. This means a new employment contract is agreed upon for every new working period. One of the risks that will be further discussed in chapter 6 is the so called 'chain rule' which means that the fourth consecutive contract will be a contract for an indefinite period of time by law (*ex lege*). This is only the case if there has been less than six months in between the three previous contracts.

2.2.2 Zero-hours contracts

Another form of on-call contracts consists of a zero-hours contract. In this type of contract there is no guarantee to a minimum number of working hours. With this contract the employer is only obliged to pay wages for hours actually worked. However, the employee is obliged to respond to a call unless there are compelling reasons on the basis of which he may refuse.[37]

2.2.3 Min-max contracts

The second option is a min-max contract, in which the employer and employee agree upon a minimum and maximum hours of work per period (weekly, monthly or annually), but it is not determined when the work will be done. These contracts meet the requirements of article 7:610 DCC (work, salary and authority of the employer) and can be concluded for a fixed or indefinite term.[38]

2.3 Tripartite employment relationships

While many employment relationships consist of two parties, this is by no means always the case. In the following paragraphs we will describe the employment contracts that deal with three parties, the so-called tripartite employment relationships.

2.3.1 Temporary agency contracts

This type of contract is characterized by the involvement of a third party. The temporary agency is the formal employer even though the work is performed by the employee for a third party. The

[36] Bouwens, Duk & Bij de Vaate 2018, p. 22-23.
[37] Cremers-Hartman, in: *Praktijkboek flexibele arbeidsrelaties* 3.10.1.1 (online).
[38] Cremers-Hartman, in: *Praktijkboek flexibele arbeidsrelaties* 3.11.1.1 (online).

parties involved are: the employee who will perform work, the party that will make him available for performing work (the employer) and the party for whom the actual work is performed (the third party). The requirements are as follows. Firstly, there must exist an employment contract between the employee and the employer. Secondly, the employee must be made available to a third party in return for payment. Thirdly, the employee must be made available in the course of the employer's profession or business. And lastly, the work activities have to be performed under the supervision and management of the third party.[39] Between the employer and the third party a contractual relationship exists, an agreement of assignment as referred to in Article 7:400 DCC.[40]

2.3.2 Payroll contracts

As of January 1st, 2020, a distinction was made in the Civil Code between two types of temporary agency contracts, the "normal" temporary agency contract on the one hand and the payroll contract on the other. In article 7:692 DCC, the payroll contract is defined as a special temporary employment contract to which the enlightened employment law regime included in article 7:691 DCC does not apply.

In payrolling one party recruits and selects the employee, the payroll company hires the employee, and the payroll company then makes the employee available to that client on an exclusive and in principle long-term basis. This means that the payroll company acts as the employer "on paper" but does not play an independent and substantive role in the selection process and performance of the employment contract. The payroll company pays the wages to the employee, pays taxes and contributions, and in the case the employee gets fired the severance is also paid by the payroll company. The payroll company, therefore, takes away the legal and administrative issues for the actual employer.[41]

2.3.3 Secondment

A secondment occurs when a worker is going to perform work for a long period of time with a party other than his own employer, whilst staying employed with his employer. The objective of a secondment company is often to place specialized and/or highly skilled employees within a particular industry for a longer period of time with clients. These clients do not have the specific knowledge themselves and therefore hire these employees from the client.[42] Other motives for

[39] Article 7:690 DCC; Bouwens, Duk & Bij de Vaate 2018, p. 26.
[40] Bouwens, Duk & Bij de Vaate 2018, p. 26.
[41] Zwemmer, in: *Praktijkboek flexibele arbeidsrelaties* 4.1 (online).
[42] Bevers, in: *Praktijkboek flexibele arbeidsrelaties* 6.2.1 (online).

deploying secondment are fluctuations in the workload and the availability of the company's own personnel, secondment is then used to fill these gaps.[43]

2.4 Contracting (outsourcing)

A contracting agreement, also referred to as outsourcing, is used between two parties if one of them has a goal of accomplishing a certain work, whether or not of material nature. This work is outsourced by 'the client'. This work is done by the other parties and has to be delivered to the client. The difference between contracting and a temporary employment contract or payrolling lies in the fact that with contracting the personnel do not work under the supervision and direction of the client but of the third party.[44]

2.5 Self-employed

When talking about self-employed people in the Netherlands, they are referred to by the term independent workers without personnel ('zzp'er').

They work on the basis of a contract in which one party, the self-employed,
declares himself willing to perform certain work activities for another party, the client, in return for remuneration, while retaining his own freedom and independence. The duration of the contract can vary, it can be for a fixed period, for the duration of a project or for an indefinite period.[45] The contract between the self-employed and the client can be qualified as a commission contract (article 7:400 DCC) or a contract for work to be performed (article 7:750 DCC). The most commonly used form is a commission contract.[46]

[43] Heeger-Hertter, in: *Praktijkboek flexibele arbeidsrelaties* 6.3.3 (online).
[44] Bouwens, Duk & Bij de Vaate 2018, p. 31.
[45] Bungener, in: *Praktijkboek flexibele arbeidsrelaties* 9.1 (online).
[46] Bungener, in: *Praktijkboek flexibele arbeidsrelaties* 9.2.1 (online).

Chapter 3 – Legal relationships

In Dutch law the only existing legal employment relationship is the employment contract. Within this category there exist many different types, as we have explained in the section above. The distinction between self-employed workers and employees working on the basis of an employment contract within the meaning of article 7:610 DCC is sometimes difficult to make. This is due to the fact that the core elements (work, salary and authority of the employer) of the employment contract can also occur in the legal relationship between a client and a self-employed person.[47] In this chapter we will discuss problems arising from the definition of a European worker and/or Dutch employee.

3.1 Preamble 8 of the Directive 2019/1152

It follows from the preamble that flexibility must continue to be guaranteed for atypical forms of employment relationships. Employees and employers must not be deprived of the benefits of flexible work, but rather be able to enjoy the benefits. The objective of the directive is to improve working conditions and more predictable employment, while at the same time keeping the labor market flexible. It is emphasized in the preamble that the transition from precarious work to more secure forms of work must be stimulated. To fall within the scope of this Directive someone must be considered a 'worker'. In the following we will discuss the definition of a worker by the Court of Justice of the European Union (hereafter referred to as the ECJ) and we will look at how this definition relates to the current situation in the Netherlands.

For the definition of a worker preamble 8 refers to the jurisprudence of the ECJ. Various case law of the ECJ has shown that it is irrelevant for the interpretation of the European worker whether the person can be regarded as self-employed under national law. The ECJ has drawn up the so-called 'Lawrie-Blum formula', which gives substance to the European worker concept. A worker according to European jurisprudence is someone who performs services for another person for a certain period of time and under their authority and receives compensation for this in return. The authority criterion is fulfilled on the basis of organizational criteria.[48] Preamble 8 gives some examples of workers who can fall under the scope of the ECJ if they meet the requirements set by the ECJ. The examples are the following: domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices. This is a very wide range of types of workers. Nevertheless, self-employed persons are excluded from the definition unless they are bogus self-employed persons. The preamble also refers to the importance of the

[47] Bungener, in: *Praktijkboek flexibele arbeidsrelaties* 9.2.1 (online).
[48] Pennings, *TRA* 2021/3.

actual performance of the work and not the description by the parties. It is interesting to look at how the Lawrie-Blum formula was included in the proposal of the European Commission. However, this has remained a proposal and the Directive 2019/1152 does not give a definition.[49] Article 1 (2) only refers to a worker as someone '*who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice*'. The worker status is therefore based on national law, whilst taking into account the definition given by the ECJ.

For a long time, it was assumed in Dutch case law that the party intention could, but did not have to, play a role in the qualification of the employment relationship. The latest developments in the Netherlands are as follows. As of November 2020, the intention of the client and the contractor (the "party intention") is no longer a criterion in assessing whether someone is considered an employee in the Netherlands. The Supreme Court ruled that the actual performance of the contract matters most.[50] The question now is, what this development means for the qualification of, for example, platform workers. Looking at the preamble of the Directive platform workers are possible considered 'workers', but this might not always be the case according to Dutch law and jurisprudence. However, when we look at the employer's obligation to provide information (Article 7: 655 paragraph 6 DCC), the Netherlands already has a broad concept of employees that is in line with the Directive and thus the case law of the ECJ. The information obligation not only applies to standard employees, but also to part-time contracts, fixed-term employment relationships and on-call contracts. In addition, this information provision also applies to other relationships, not being defined as an employment relationship, where one party, a natural person, commits itself to work for another for remuneration. This will be further discussed in chapter 4 paragraph 8.

3.2 Conflicts arising from precarious working

Platform work has been growing over the last few years. The form of contract under which platform work is performed is almost always the commission contract, as defined in article 7:400 DCC. This means platform workers mostly work as self-employed in the Netherlands.[51]

There have been two court rulings involving Deliveroo. Deliveroo is an online platform (website/ application) where people can order food. Bicycle or scooter couriers deliver the meals to the customers at home. The first ruling in 2018 involved a delivery driver who was initially employed by Deliveroo as an employee. At some point Deliveroo decided that these employees would henceforth be working on the basis of a commission contract. The meal delivery driver argued that

[49] Pennings, *TRA* 2021/3.
[50] HR 6 november 2020, ECLI:NL:HR:2020:1746 (*X/Amsterdam*).
[51] Kruit & Ouwehand, *TRA* 2018/58

this was a case of a continued employment contract. In this case, the court concluded that there was a commission agreement between the delivery driver and Deliveroo and not an employment contract. The court stated that much had changed after the conclusion of the commission agreement compared to the period before.[52] As we have seen above, the fact that this person was not considered an employee for Dutch law, does not mean the delivery driver could not be considered as a worker within the meaning of the European definition. The delivery driver could derive protection from the directive if he does fall under the scope of a 'worker' looking at the Lawrie-Blum formula.

In the second ruling in 2019 that concerned Deliveroo delivery drivers, it was determined, in contrast to the first case, that an employment contract did exist between the delivery driver and Deliveroo. In this ruling, the court assigned greater significance to the actual performance of the contract.[53] The Higher Court has recently (16 February 2021) confirmed the decision of the court, the Deliveroo delivery drivers are employed on the basis of an employment contract. The Higher Court ruled that on the basis of the rights and obligations agreed between the parties, it must be assessed whether the elements "labor", "wages", "employed" and "for a certain period of time" have been fulfilled. Although the deliverers have a certain freedom with regard to the performance of the work, the other elements such as the method of payment of wages, the authority exercised, indicate the existence of an employment contract. As mentioned above, the intention of the parties is also no longer part of this analysis.[54] This ruling is in line with what preamble 8 of the Directive aims for. The actual performance of the contract matters in establishing whether someone is considered a European worker. Most likely these delivery drivers are also considered European workers since they perform services for another person for a certain period of time and under their authority and receive compensation for this in return.

[52] Rb. Amsterdam 23 juli 2018, ECLI:NL:RBAMS:2018:5183.
[53] Rb. Amsterdam 15 januari 2019, ECLI:NL:RBAMS:2019:198.
[54] Gerechtshof Amsterdam 16 februari 2021, ECLI:NL:GHAMS:2021:392.

Chapter 4 – Information about the employment relationship

Article 4 of the Directive 2019/1152/EU adapts the list of Directive 91/533/EEC with essential aspects of the employment relationship or employment contract of which workers are to be informed in writing. In this chapter we will answer the question what specific information of the employment relationship has to be given to the worker according to Dutch law and what the available remedies are when the employer does not provide the relevant information or not on time.

4.1 The essential aspects of the employment relationship

As mentioned in the introduction of this chapter above, Directive 2019/1152/EU adapts the list of relevant information from Directive 91/533/EEC. This last-mentioned Directive 91/533/EEC, from the 14th of October 1991, concerns the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The preamble of this Directive indicates that the measures to be taken are aimed at improving the protection of workers against possible disregard of their rights and also making the labour market more transparent.[55] To this end, a general requirement has been introduced at community level that every employer has a document containing information on the main elements of his employment relationship.

Based on article 4 of the Directive 2019/1152/EU, employers are required to inform workers on the essential aspects of the employment relationship. The essential aspects are listed in paragraph 2 of article 4. Because this article covers many subjects, the aspects are shown in the table down below.

The essential aspects of the employment relationship include at least:

(a) the identities of the parties of the employment relationship;
(b) the place of work;
(c) either the title, grade, nature or category of work or a brief specification or description of the work;
(d) the date of commencement of the employment relationship;
(e) in the case of a fixed-term employment, the end date or the expected duration thereof;
(f) in the case of temporary agency workers, the identity of the third party, when and as soon as known;
(g) the duration and conditions of the probationary period, if any;

[55] Cremers-Hartman, in: *Praktijkboek flexibele arbeidsrelaties* 3.8.1.2 (online).

(h) the training entitlement provided by the employer, if any;
(i) the amount of paid leave to which the worker is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;
(j) the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;
(k) the remuneration, including the initial basic amount, any other component elements, if applicable, indicated separately, and the frequency and method of payment of the remuneration to which the worker is entitled;
(l) if the work pattern is entirely or mostly predictable, the length of the worker's standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes;
(m) if the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of:
(i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;
(ii) the reference hours and days within which the worker may be required to work;
(iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation referred to in Article 10(3);
(n) any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded;
(o) where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer.

4.2 Information under the Dutch Civil Code

Title 10 of Book 7 of the Dutch Civil Code lays down the rules concerning the employment relationship. This part of the Dutch Civil Code ("*DCC*") is the law on the employment contract. Article 7:655 DCC is included in the Dutch Civil Code to implement the Directive 91/533/EEC. The predecessor of article 7:655 is article 7A:1639f DCC which expired on the 1st of April 1997.

Article 7:655 paragraph 1 requires that the employer has to provide information on the essential employment conditions of the employee. This list is not limitative, which follows from the words 'at least' (*'ten minste'* in the Dutch Civil Code). The information about the employment relationship can be provided to the employee in writing or electronically.[56]

According to article 7:655 of the Dutch Civil Code the information has to contain at least the following subjects:
(a) the name and place of domicile of both parties;
(b) the place of work;
(c) the function or nature of the employment relationship;
(d) the date of commencement of the employment relationship;
(e) in the case of a fixed-term employment, the duration thereof;
(f) entitlement to holiday leave;
(g) the duration of the notice period or the method of calculation;
(h) the remuneration, including the initial basic amount, any other component elements, if applicable, indicated separately, and the frequency and method of payment of the remuneration to which the worker is entitled;
(i) the length of the worker's standard working day or week;
(j) if the employee will participate in a pension scheme;
(k) if the employee will work abroad for a period exceeding one month, details about the duration of this employment, housing, applicability of Dutch social insurance, the currency in which payment will occur, fees for the employee and the method of return;
(l) the applicable collective agreements or regulation determined by an authorized administrative body governing the worker's conditions, or the applicable worker's conditions according to article 8 or 8a Waadi;
(m) whether the employment relationship is a temporary agency contract or payroll-contract;
(n) whether the employment relationship is engaged for an indefinite period of time;
(o) whether the employment relationship is an on-call contract.

The Waadi ('*Wet allocatie arbeidskrachten door intermediairs'*), literally 'Posting of Workers by Intermediaries Act', mentioned above in sub l, protects agency workers. This law lays down rules concerning, among others, wages of agency workers and equal employment conditions for agency workers as employees. According to article 8 and 8a Waadi an agency worker has the right to at least the same worker's conditions as employees in the same function at the company of the employment agency.

[56] Article 7:655 paragraph 1 DCC.

With the implementation of the WAB (*'Wet arbeidsmarkt in balans')* - which law is introduced in chapter 1 - on the 1st of January in 2020, article 7:655 paragraph 1 is extended with sub n and o.[57] The employer has to inform the employee in writing whether the employment relationship is engaged for an indefinite period of time or whether the employment relationship is an on-call contract.[58] If this is already clear from the employment relationship contract itself or the payslip the employer is not obliged to mention this again.[59]

On the basis of article 7:655 paragraph 1 sub m, the employer has to give information to the employee whether the employment relationship is a temporary agency contract. A worker with a temporary agency contract has less legal protection than a worker with a regular contract, so it is important that the employer is clear about a temporary agency contract. This follows, amongst others, from the court's judgement of the Court of Hof 's-Hertogenbosch on the 12th of April 2016.[60]

4.3 Comparison

If we compare article 7:655 DCC to article 4 of the Directive they are similar on subs (a), (b), (c), (d), (e), (j), (k), (l) and (n) of the Directive. This means that the information has to include the identities of the parties, the place of work and the title or function or description of the work. According to both articles the date of commencement of the employment relationship has to be written down and in the case of a fixed-term employment relationship, the end date or the expected duration thereof has to be given. Finally, according to both articles the employer has to inform the employee about the notice period, details about remuneration, details about the usual working hours and whether there is any collective agreement applicable.

The subs (f), (g), (h), (i), (m) and (o) of the Directive are not directly implemented in article 7:655 DCC. Nevertheless, some of these elements are regulated in other places than in article 7:655. Below we will now explain per sub of the Directive that is not directly implemented in article 7:655 whether and if so, where this topic is regulated in the Dutch law.

[57] Vegter, in: *Arbeidsovereenkomst* (online).
[58] Article 7:228a paragraph 9 and 10 DCC.
[59] *Kamerstukken II* 2018/19, 35074, nr. 3, p. 134-135.
[60] Gerechtshof 's-Hertogenbosch 12 april 2016, ECLI:L:GHSHE:2016:1429.

4.3.1 Sub (f): The identity of the third party in the case of temporary agency workers

This element is not specifically included in article 7:655 in the words of the Directive, but under Dutch law the identity of the third party falls under the scope of 'the place of work' of article 7:655 paragraph 1 sub b.[61] The temporary agency is the lawful employer and the third party is where the employee will perform the work. The Waadi, which we discussed earlier in chapter 4.2, further provides rules regarding the employment conditions for temporary workers. The Waadi ensures that the temporary employment agency provides the temporary worker with the same terms of employment with regard to wages and other allowances and on the basis of a collective labor agreement or other non-statutory provisions of general application that are in force within the company where the posting takes place to employees who work in the same or equivalent positions in the employ of the hirer.[62]

4.3.2 Sub (g): The duration and conditions of the probationary period

The probationary period is not listed in article 7:655 but there is a separate article about the probationary period. This is article 7:652 DCC. Parties are not obliged to agree on a probationary period but if they do, the most important requirement is that this probationary clause is in writing. In chapter 5 the probationary period will be explained in detail.

4.3.3 Sub (h): Training entitlement

With the implementation of the WWZ in 2015, as set out in chapter 1, article 7:611a is added to the Dutch Civil Code. This article concerns the training entitlement for the employee provided by the employer. The employer is only obliged to enable the employee to follow training that is necessary for the performance of his job and, insofar as this can reasonably be expected of him, for the continuation of the employment relationship if the employee's job is to be canceled or the employee is no longer able to fulfill them.[63] However, this means that training for broader employability in the labour market is therefore not covered by this article.[64]

According to the Independent Commission on the Regulation of Work ('Commissie Regulering van Werk 2020') training entitlement for broader employability on the labour market is very important. This has also emerged as an important recommendation according to the report of the

[61] Tanja, in: *Praktijkboek flexibele arbeidsrelaties* 5.15 (online).
[62] Article 8 paragraph 1 Waadi; Verhulp 2021
[63] Article 7:611a DCC.
[64] De Wolff, *TRA* 2015/24.

Commission. The Commission has made three recommendations regarding the development of workers. First of all, it is important that all workers have an individual development budget. Second, the committee recommends that a career store has to be created that supports all workers in using their development budget. Third, knowledge aging must be prevented.[65]

4.3.4 Sub (i): The amount of paid leave to which the worker is entitled

The amount of paid leave is not regulated in article 7:655 DCC. Most of the paid leave arrangements are regulated in the WAZO (‘*Wet Arbeid en Zorg’)* - literally ‘The Work and Care Act’. There are different types of paid leave; some topics are regulated by law in the WAZO and other topics employers can mutually agree with their employees. According to the WAZO the employee has the right to paid leave in the event of an emergency or short-term care leave.[66] According to the WAZO an employee has the right to unpaid leave in relation to pregnancy, childbirth, adoption and foster care.[67]

4.3.5 Sub (m): Information about an entirely or mostly unpredictable work pattern

According to sub m of the Directive the employer shall inform the worker of the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours; the reference hours and days within which the worker may be required to work; and the minimum notice period and the deadline for cancellation. This requirement is not listed in article 7:655, but article 7:628a of the law on the employment contract concerns information about an unpredictable work pattern in the case of on-call contracts.[68] This article is adapted with the introduction of the WAB on the first of January 2020. It contains minimum requirements for on-call contracts and this article 7:628a will be further discussed in chapter 8.

4.3.6 sub (o): Information about social security

According to article 7:655 paragraph 1 sub j the employer has to inform the employee whether the employee will participate in a pension scheme. In addition, article 7 of the ‘Pensions Act’ (in Dutch ‘*Pensioenwet*’) states that the employer will inform the employee within one month after the start of the employment relationship about the participation in a pension scheme and information about the pension provider.

[65] Commissie Regulering van Werk 2020, p. 76.
[66] Chapter 4 Wet Arbeid en Zorg (WAZO)
[67] Chapter 3 Wet Arbeid en Zorg (WAZO)
[68] Article 7:628a DCC.

The employer is obliged to provide the employee with a written or electronic statement of the wage amount and the specified amounts from which it is composed, as well as of the specified amounts that have been deducted from the wage amount.[69] This information can be given on the payslip.

Other information obligations for the employer about social securities are regulated in other laws. The 'Social Insurance Financing Act' (in Dutch '*Wet Financiering Sociale Verzekeringen'* 'Wfsv') provides details about the contributions of mandatory employee's insurances which the employer has to pay. The mandatory employee's insurances contributions are amongst others the contributions regarding the 'Unemployment Insurance Act' (in Dutch '*Werkloosheidswet*' 'WW'), the 'Sickness Benefits Act' (in Dutch '*Ziektewet'* 'Zw'), the 'Income according to Labour Capacity Act' (in Dutch *'Wet Inkomen naar Arbeidsvermogen'* 'WIA') and the 'Incapacity for Work Insurance Act' (in Dutch '*Wet op de Arbeidsongeschiktheidsverzekering*' 'WAO'). The payslip indicates the amount of contributions the employer pays per insurance. On the other hand, no information is given about the identity of the social insurer, which an employer has to according to paragraph 22 of the preamble of the Directive.

As mentioned above, the Wfsv and WW state that the employer is obliged to pay unemployment contributions ("*WW-premie"*) for employees. With the introduction of the WAB, the unemployment contributions for flexible employees became higher than for regular employees in order to find a better balance between flexible and permanent employment.

4.4 Other information obligations

In addition to the main information obligation of the employer that follows from article 7:655 of the law on the employment contract, there are other articles which oblige the employer to provide information to the employee.

At first, in virtue of article 7:611 DCC the employer has a general obligation to provide information. This general principle is called 'good employership'.[70] Article 7:611 does not cover a list of subjects such as article 7:655, but it includes an open standard. For example, an employer has to inform his employee about the adverse effects or the positive effects of the change in employment conditions.

Another information obligation derives from article 7:665a DCC. When business ownership will be transferred, the employer shall inform its employees in sufficient time about this decision to transfer the business ownership. This obligation applies to the employer if no works council or

[69] Article 7:626 paragraph 1 DCC.
[70] See Appendix 1 for 'good employership'.

staff representation has been established.[71] The information shall include the intended decision, the intended date of transfer, the reason of transfer, the legal, economic and social consequences of the transfer for the employees and the considered measures with regard to the employees.

According to article 7:668 paragraph 1 of the law on the employment contract the employer has to inform an employee with a fixed-term employment relationship longer than six months, one month before the end of that employment relationship, whether the employer wants to continue the employment relationship or not.

4.5 Specific period of time

According to article 5 paragraph 1 of the Directive, the information referred to in points (a) to (e), (g), (k), (l) and (m) of article 4 paragraph 2, shall be provided individually to the worker in the form of one or more documents during a period starting on the first working day and ending no later than the seventh calendar day. The other information shall be provided individually to the worker in the form of a document within one month of the first working day.

According to article 7:655 paragraph 3 DCC, the information shall be provided to the worker within one month of the first working day, or at the point in time when the employment relationship will end sooner.[72] It is possible for the employer to provide the information electronically to the worker, but only with consent of the worker.[73]

Concluding, this means that the Directive has a smaller period of time for most of the information topics than the Dutch Civil Code. We need to amend this term to a maximum of within a calendar week from the first working day of the employee according to the Directive.

4.6 Available remedies

The purpose of article 7:655 DCC is to oblige the employer to provide the relevant information of the employment relationship to the employee and in that way to strengthen the rights of the employee. According to article 7:655 paragraph 1, the employer has to provide the information mentioned above in writing or electronically or, according to paragraph 2, the employer has to refer to the applicable collective agreement.

If the employer lacks its obligation to provide the employee with the relevant information, the

[71] Article 7:665a DCC.
[72] Vegter, in: *Arbeidsovereenkomst* (online).
[73] Article 7:655 paragraph 8 and 9 DCC.

employer is responsible for the damage of the employee caused thereby.[74] This follows from the Dutch general contract law in article 6:74 DCC.

In principle, the employee has a period of five years to bring proceedings against the employee for the damages suffered.[75] This is based on the general principle of article 3:310 DCC. If the employee brings proceedings against the employer, the latter can claim that the employee could have received the relevant information in other ways, like for example by collective labour agreements.[76]

4.7 The burden of proof

The main rule concerning the burden of proof is that the person who claims legal consequences of facts, has to prove this, unless something different follows from reasonableness and fairness.[77] In principle, this main rule applies in labour law and article 7:655 DCC does not reverse the burden of proof. However, the government noticed that in cases where the employer lacks his obligation to provide the right information to the employee, and when the employer fails this obligation, this can lead to a burden of proof for the employer. In those cases, it is reasonable to burden the employer with proof instead of the employee. In that case the facts claimed by the employee are assumed to be right.[78] It is still possible for the employer to provide counter evidence. However, this burden of proof for the employer is depending on the specific circumstances of the case.

According to several judgments of the Court, the burden of proof between employer and employee is not uniform. In a recent case of the Court of Appeal in Arnhem-Leeuwarden on the 11th of January 2021, the Court commented on the burden of proof based on article 7:655 DCC.[79] This case concerned the question of whether there was an employment relationship for an indefinite period of time or a fixed-term employment relationship. According to the Court, article 7:655 is aimed at informing the employee about the essential characteristics of the employment contract but does not link this to the legal consequence that in the absence of such information provision by the employer, it must be assumed that there is an employment contract for an indefinite period of time. Nor does it follow from this article and Directive 91/533/EEG that in the event of unclear reporting, the burden of proof automatically rests with the employer. After all, Article 6 of Directive 91/533/EEG is without prejudice to national legislation or practices regarding the burden of proof regarding the existence and content of the agreement. Article 7:655 DCC lacks a specific

[74] Article 7:655 paragraph 5 DCC.
[75] Vegter, in: *Arbeidsovereenkomst* (online).
[76] Heerma van Voss, *SR* 1994, p. 67.
[77] Article 150 Rechtsvordering and *Kamerstukken I* 1993/94, 22810, nr. 4a, p. 1-2.
[78] Van der Loo & Jellinghaus, *Arbeid Integraal* 2003/1, p. 19.
[79] Hof Arnhem-Leeuwarden 11 januari 2021, ECLI:NL:GHARL:2021:179.

division of the burden of proof, so that in principle the general rules of the law of evidence apply. The evidence position of the employee and the employer has not changed according to the parliamentary history of this article. In this case, the Court of Appeal concludes that a reversal of the burden of proof can't be justified.

4.8 Type of workers who are entitled to receive information

According to the letter of the text of article 7:655 paragraph 6 DCC article 7:655 paragraph 1 up to paragraph 5 is not only applicable for regular employment relationships, but also for part-time contracts, fixed-term employment relationships and on-call contracts.[80] In chapter 2 we have already set out that on-call contracts are subdivided in pre-agreements, zero-hours contracts and min-max contracts. Temporary agency contracts and contracting also fall under the scope of workers who are entitled to receive information about the essential topics of their employment relationship.

'Other relationships, not being defined as an employment relationship, where one party, a natural person, commits itself to work for another for remuneration', also fall under the scope of article 7:655.[81] Only when parties have entered into the agreement 'acting in the exercise of a profession or business', the obligation for the employer to provide information is not applicable. This means that posting of workers - workers who work on the basis of a temporary agency contract, payrolling contract or secondment contract - would qualify to receive the information. This broad scope of workers who are entitled to receive information according to article 7:655 already seems to be in line with paragraph 8 of the preamble of the Directive.

In principle, self-employed people, as set out in chapter 2.5, do not fall under the scope of the information obligation of article 7:655 DCC. The contract between the self-employed person and the client can be qualified as a commission contract or a contract for work to be performed, instead of an employment relationship. However, the ECJ introduced the term 'false self-employed' in the *FNV Kiem/Staat der Nederlanden* judgement in 2014.[82] If there is a 'false self-employed', the person is therefore not an independent self-employed person and this person falls under the scope of the information provision of article 7:655 according to paragraph 6. This is in line with the Directive, because self-employed people do not fall under the scope of the Directive.

[80] Article 7:655 paragraph 6 DCC.
[81] Article 7:655 paragraph 6 DCC.
[82] European Court of Justice 4 December 2014, ECLI:EU:C:2014:2411 (*FNV Kiem/Staat der Nederlanden*).

Concluding, it means that there is also an obligation to provide relevant information for 'flexible employment relationships'. Whether it is an on-call contract, pre-agreement or other form of 'flexible employment relationship' has to be mentioned in the employment relationship itself.[83]

4.9 Expected changes regarding the employers' obligation to provide information

In conclusion, article 7:655 DCC sets out the main information obligation for the employer. Most of the essential aspects of article 4 of the Directive are already directly implemented in article 7:655. However, some essential aspects are listed in other articles or laws. In general, it seems that the information obligation of the employer in Dutch law already complies with the Directive.

There can be discussion about the aspect of information about social security, because in the Netherlands an employer provides the number of contributions on the payslip, but according to paragraph 22 of the preamble of the Directive the employer also has to provide information about the social insurer. That is not the case right now.

The type of workers who are entitled to receive information already complies with the Directive. The scope of workers in article 7:655 DCC is very broad, namely not only regular employment relationships, but also: "other relationships, not being defined as an employment relationship, where one party, a natural person, commits itself to work for another for remuneration'. This is in line with paragraph 8 of the preamble of the Directive.

[83] Article 7:655 paragraph 7 DCC.

Chapter 5 – Probationary period in the Netherlands

Article 8 of the Directive covers the probationary period. In this chapter we will answer the question on rules on the probationary period under Dutch law. The maximum length of a probationary period is depending on the type of employment relationship so we will set this out. In addition, we will describe the restrictions on when a probationary period can be used. Afterwards we will explain the most important requirement for a probationary clause and other provisions about the probationary period.

5.1 The probationary period

When both parties, the employer and employee, enter into an employment relationship, both parties take a risk. There can be uncertainty about: 'Is the employee suitable for the job?' or 'Will the employee like the company?'. If parties agree on a probationary period it is easy to end the employment relationship, see chapter 5.6, when the relationship between the employee and employer turns out not to be a match.

Article 7:652 DCC sets out the rules on the probationary period.[84] If an employment relationship has a duration of less than six months, it is not possible for an employer and employee to agree on a probationary period. This means that the employment relationship has to be engaged for at least six months or longer to agree on a probationary period. This restriction for the probationary period that an employment relationship has the duration of a period for at least six months, was introduced on the 1st of January 2015 with the WWZ and is maintained with the implementation of the WAB on the 1st of January 2020.[85] The reason for this restriction is that a short, meaning less than six months, employment relationship already brings a lot of uncertainty for the employee, and it is undesirable to increase this uncertainty for the employee with a probationary period.[86]

5.2 Maximum length

A distinction has to be made between employment relationships for an indefinite period of time and fixed-term employment relationships.

For employment relationships for an indefinite period of time the duration of the probation period can't exceed two months. In the case of an employment relationship for an indefinite period of time it is not possible to deviate from this maximum of probation by collective labour agreement or individual contracts.

[84] Article 7:652 DCC.
[85] *Stb.* 2014, 216.
[86] Vegter, in: *Tekst & Commentaar Burgerlijk Wetboek* (online) and *Kamerstukken II* 2013/14, 33818, nr. 3, p. 16.

In the case of a fixed-term employment relationship, the length of the probationary period is dependent on the duration of the employment relationship:

- The probationary period has a maximum of one month, when the employment relationship is engaged for at least six months and no longer than two years;
- The probationary period has a maximum of two months, when the employment relationship is engaged for at least two years.

The table below provides a short overview of the maximum probationary period per length of employment relationship.

Length of employment relationship	**Maximum probationary period**
6 months or shorter	No probationary period
6 months up to 24 months	1 month
24 months or indefinite period of time	2 months

If the end of a fixed-term employment relationship is not set on a calendar date, a maximum probation period can be set for one month. This is for example the case when the fixed-term employment relationship has the duration of the sickness of a sick colleague or the duration of a specific project.[87]

In the situation of a fixed-term employment relationship where the employment relationship is engaged for a period between six months and two years or when the end of the employment relationship isn't set on a calendar date, it is possible to deviate from the maximum period of one month of probation by collective labour agreement or regulation determined by an authorized administrative body at the expense of the employee.[88]

In the draft proposal of the WAB the maximum duration of the probationary period for an indefinite employment relationship, was extended to five months. In the case of a fixed-term employment relationship for at least two years, the maximum duration of the probationary period was extended to three months.[89] These extensions in the draft proposal led to opposition in the House of Representatives (*'Tweede Kamer'*). In the end, the maximum duration of the probationary period has not been changed to avoid the risk of misuse.[90]

[87] Vegter, in: *Tekst & Commentaar Burgerlijk Wetboek* (online).
[88] Article 7:652 paragraph 7 DCC.
[89] Kötter, *AR* 2019/16, p. 7
[90] *Kamerstukken II* 2018/19, 35074, nr. 38.

5.3 Exceptions on a probationary period

There are three exceptions on the possibility of a probationary period:

- If the fixed-term employment relationship is engaged for a maximum period of six months;[91]
- If it is a subsequent employment relationship between the employee and the same employer, unless this new employment relationship contains clear different activities than the previous employment relationship;[92]
- If it is a subsequent employment relationship between the employee and a different employer, but this employer reasonably has to be aligned with the previous employer.[93]

In these aforementioned cases it is not possible for parties to agree on a probationary period.

5.4 Requirements

The main requirement for a probationary period is that this clause has to be in writing. A probationary period only exists when it is agreed by both parties in writing in the employment relationship, so a probationary period does not automatically exist. This requirement exists because a probationary period has far-reaching consequences for the employee.[94] During the probationary period the employee has barely any regular protection against dismissal.[95] When a probationary period is written down in the relevant collective labour agreement this also fulfills this 'in writing' requirement, if the employment relationship refers to the relevant clause.[96] Another requirement is that if the parties agree on a probationary period, this period of time is equal for both parties.[97] The probationary period works in two directions: for the employer and the employee.

5.5 Deviations from the statutory rules are void

Every clause in breach of these aforementioned provisions is void.[98] According to jurisdiction of the Supreme Court, if a probationary period is covenant for a period longer than one or two months,

[91] Article 7:652 paragraph 6 sub a DCC.
[92] Article 7:652 paragraph 6 sub b DCC.
[93] Article 7:652 paragraph 6 sub c DCC.
[94] Kötter, *AR* 2019/16, p. 3.
[95] Bouwens, Houwerzijl & Roozendaal 2019, p. 174-175.
[96] For example Ktr. Amsterdam 18 februari 2020, ECLI:NL:RBAMS:2020:1161.
[97] Article 7:652 paragraph 1 DCC.
[98] Article 7:652 paragraph 8 DCC.

that probationary period is wholly void.[99] So for example, when the probationary period in the employment relationship of an indefinite employment relationship has the duration of three months, that probationary period is wholly void - it is not possible to shorten that period to two months. Or if the probationary period has not the same duration for both parties, that probationary period is wholly void. This brings about that the prevailing doctrine of the Court is that a probationary period cannot be suspended.[100] When an employee is sick during the probationary period, the probationary period won't be suspended. It is also not possible to convert a void probationary period into a valid probationary period.

5.6 Termination during the probationary period

Article 7:652 DCC contains the formal rules on the probationary period. In addition, article 7:676 paragraph 1 DCC states that an employment relationship can be ended immediately during the probationary period by each of the parties, as long as the probationary period is not expired. At the request of the employee, the employer can give the reason for terminating the employment relationship in writing.[101]

Normally, an employment relationship cannot be ended during sickness of the employee, during pregnancy of the employee, during draft and during works council membership of an employee.[102] These circumstances are called the 'during' termination prohibitions.[103] According to article 7:670a paragraph 2 sub b DCC, the regular 'during' termination prohibitions are not applicable in the case of termination of the employment relationship during the probationary period. This consequently means that the employment relationship can be ended in the case of sickness, pregnancy, draft and works council membership of an employee.

From article 7:676 DCC follows that an employment relationship can be terminated even before the probationary period has entered into force, so before the employment relationship has started.[104]

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[99] HR 27 februari 1930, NJ 1930, 977.
[100] Vegter, in: *Tekst & Commentaar Burgerlijk Wetboek* (online) HR 18 oktober 1991, *NJ* 1992/3 (*De Jong/Beyersbergen*), Gerechtshof Amsterdam 8 december 2005, *JAR* 2006/132 (*Ritman/Beekmans Tandheelkunde*) & HR 23 december 1983, *NJ* 1984/332 (*Keizer/Van Dijk*).
[101] Article 7:676 paragraph 2 DCC.
[102] Article 7:670 paragraph 1-4 and 10 DCC
[103] See Appendix 1 for ''during' termination prohibitions'.
[104] Derhaag, *AR* 2006/15.

5.7 Fixed-term employment relationship as probationary period

The probationary period in the Netherlands is relatively short compared to the maximum length of three to six months from the Directive. In practice employers often choose for a fixed-term employment relationship which will be used as a period where both parties can discover whether the employment relationship turns out well or not. This fixed-term employment relationship can be seen as a disguised or other form of the probationary period because the fixed-term relationship will be used as a trial employment relationship.

In the Netherlands, short fixed-term employment relationships can succeed each other, within the chain rule[105], so there is a possibility for the parties to the employment relationship to correct any errors in a new short fixed-term employment relationship.[106] If one of the parties does not want to continue the employment relationship for the fixed-term, they can choose to have the employment relationship terminated by law (ex lege) and they won't enter into a new employment relationship. On the basis of this consideration, the 'Stichting van de Arbeid'- literally 'Labour Foundation' - considered that if the parties opt for a fixed-term employment relationship, the need for a longer probationary period is usually less.[107]

5.8 Expected changes in line with the Directive

According to article 8 paragraph 1 Directive 2019/1152, the maximum period of a probationary period in an employment relationship for an indefinite period of time shall not exceed six months. In the Dutch law the rules on the probationary period are stricter than the maximum duration of the probationary period in the Directive, because the current maximum period under Dutch law is one month or two months.

According to article 8 paragraph 2 of the Directive, the length of the probationary period of a fixed-term employment relationship has to be proportionate to the expected duration of the contract and nature of work. This is more vague than the Dutch national law. Under both the Directive and Dutch national law it is not possible to agree on a probation period for the second fixed-term employment relationship when the function and tasks of that contract are the same.

According to article 8 paragraph 3 of the Directive, the maximum duration of a probationary period can be extended if that is justified by the nature of the employment or in the interest of the worker. This means that if a worker has been sick during the probationary period, the probationary period

[105] See Appendix 1 for 'chain rule'.
[106] Verhulp 2000, p. 3.
[107] Verhulp 2000, p. 3.

may be extended correspondingly, in relation to the duration of the absence. However, this is not possible under the current Dutch law - if a probationary period exceeds the allowed maximum period, that probationary period is wholly void.

Concluding, it seems that the maximum probationary period under the Directive is longer than the maximum probationary period in the Dutch law and that in Dutch law the probationary period cannot be extended due to circumstances. It is the question whether a longer probationary period is in the best interest of the employees, bearing in mind the uncertainty which comes along with a probationary period. But on the other hand, a longer probationary period can partly eliminate the disguised use of fixed-term employment relationships as a probationary period, which can reduce the number of flexible employment relationships in the Netherlands and people may find more employment relationships for an indefinite period of time. As discussed in chapter 5.2, during the preparation phase of the WAB a probationary period of 5 months was discussed, but this was ultimately not adjusted. Time will tell whether the probationary period in the Netherlands will be extended or not.

Chapter 6 - Ancillary activities

In this chapter we will elaborate on the rules ensuring that the employers do not prohibit workers to work for other employers. The Directive covers this subject in article 9. In the Netherlands an ancillary activities prevention can come about in three ways: an ancillary activities clause is in effect; through good employeeship and the Working Hours Act. All three of them will be discussed in this chapter.

Chapter 6.1 Ancillary activities clause

One manner in which an employee can be limited in having multiple jobs is by signing an ancillary activities clause. Ancillary activities are defined as: 'activities that an employee undertakes during their employment contract but outside of their working hours.'[108] Having an extra job besides regular employment would be a textbook example of an ancillary activity. An ancillary activities clause can impose multiple types of obligations on the employee concerning the matter of 'having multiple jobs'. These obligations can range from a blanket prohibition on having multiple jobs to a notification or consent requirement. An ancillary activities clause can be included in the employment contract or in a collective labour agreement. An ancillary activities clause is usually tied to a penalty clause which stipulates a monetary fine. A penalty clause has to be formulated in line with article 7:650 of the DCC. Article 7:650 stipulates that the employee has to be aware of the penalty clause and he is to agree with the penalty clause in writing.

An ancillary activities clause which seeks to limit having multiple jobs is naturally at odds with the constitutionally guaranteed freedom of choice of employment.[109] Therefore, an ancillary activities clause is to be tested against all of the interests involved. The interests of the employer would be: to have employees who do not perform competing activities outside of working hours; to have employees who will not potentially harm the image of the employer by performing ancillary activities and to have employees whose sole professional focus is their one job. The interests of the employee would be to earn more money on top of the wage from their primary employment contract; the freedom to choose their employer; to have variation in the type of work and to develop.[110] How a test of competing interests works in practice is exemplified by a ruling of the Higher Court in the Hague. The Higher Court ruled that a journalist can be forbidden by his employer, a newspaper, to serve as a city council member.[111] Not only was the freedom to choose employment hindered but also the freedom to hold public office. The Higher Court argued that, even though the employee's interests are valid, the employer has an interest to maintain an

[108] SDU Commentaar Burgerlijk Wetboek Boek 7 art. 650 en 651, aant. 2.1.
[109] Article 19 paragraph 3 Dutch Constitution.
[110] SDU Commentaar Burgerlijk Wetboek Boek 7 art. 650 en 651, aant. 2.1.
[111] Gerechtshof 's-Gravenhage, 28 september 2010, ECLI:NL:GHSGR:2010:BO0124.

objective and independent newspaper. For the journalist to hold public office would harm the newspaper's image of objectivity and independence.

When an ancillary activities clause is breached by an employee, the employer can impose different sanctions. Usually these sanctions are written down in a penalty clause in line with article 7:650 of the DCC. For example, the employer can: demand the employee to cease their ancillary activities; to pay a fine for each day the clause is breached or *in ultimum* to terminate the employment contract. Whether such a claim by the employer is legally justified depends on the competing interests of the case at hand.

Chapter 6.2 Good employeeship

Without an ancillary activities clause it is permitted, in principle, for an employee to have multiple jobs. A hindrance for the employee to have more than one job would be 'good employeeship'. 'Good employeeship' and 'good employership' are principles laid down in Dutch labour law. Article 7:611 of the DCC states that: 'employer and employee are obliged to behave as a good employer and a good employee.'[112] These relatively vague terms are used to codify all of the obligations that the employer and employee have towards each other. Good employer- and employeeship therefore comes into play, in relation to having multiple jobs, when an employee has more than one job but has not signed an ancillary activities clause. Without an ancillary activities clause, the employee could take the stance that they can take on as many jobs as the employee sees fit. This would be an undesirable situation since the interests of the employer as discussed in section 5.1 would be unprotected. This is where good employeeship enters the scene. The employee has to behave as a good employee towards the employer. In practice this means that they have to take the interests of the employer into consideration when they act.

Working more than one job is not in and of itself a violation of good employeeship. To combine multiple jobs is not automatically against the interests of the employer. The norm of good employeeship is violated when the ancillary activities stand in the way of the fulfilment of the agreed upon work.[113] Examples would be when both jobs compete against each other, when the ancillary activity takes place during working hours or when the extra job exhausts the employee.[114]

Chapter 6.3 Working Hours Act

The third manner in which an employee can be hindered in having more than one job, without having signed an ancillary activity clause, would be the Working Hours Act.

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[112] Article 7:611 DCC.
[113] Rechtbank Amsterdam, 22 oktober 2019, ECLI:NL:RBAMS:2019:7999.
[114] SDU Commentaar Burgerlijk Wetboek Boek 7 art. 650 en 651, aant. 2.4.

The Working Hours Act (WHA) seeks to regulate the amount of working and resting hours per day and per week. Article 5:7 paragraph 2 WHA states that the employer has to organise business operations in such a manner that employees shall work no more than twelve hours per shift; sixty hours per week, and on average 48 hours per week for every sixteen uninterrupted weeks. The amount of hours is an aggregate of the total amount of hours the employee has worked, regardless for which employer.

In order to achieve a clear understanding of the legislation discussed in this report, we will introduce the fictitious worker Robert (age 48). Robert has two part-time jobs. He works 20 hours per week as a package delivery driver and 20 hours per week as a caretaker in an elderly home.

Robert has two different employers, the package delivery service and the elderly home, but under the WHA he works 40 hours per week. Robert has to inform both the package delivery service and the elderly home that he has different forms of employment, ancillary activities, so that his employers can make sure the WHA is not violated.

If Robert takes on an extra job as a chauffeur for local start-up "Ober" the maximum of 48 hours per week has been exceeded. All of his employers would be in violation of the WHA and all are liable to receive a fine.[115]

The responsibility to ensure that the WHA is not violated rests with the employer.[116] The employer makes sure that the employee does not work more than legally allowed. If this obligation is not fulfilled, the employer risks a fine.[117] The employer has an active interest in making sure that the employees do not work more than article the limits that 5:7 WHA states.

The consequences of violating the WHA rest solely on the employer. Because of this disparity, the WHA creates an obligation for the employee to notify their employer of ancillary activities.[118] This obligation seeks to prevent unwanted violations of the WHA by the employer. The maximum amount of working hours does create a hindrance in taking on multiple jobs.

[115] Article 10:1 jo. Article 10:5 WHA.
[116] Article 5:15 paragraph 7 WHA.
[117] Section 10 WHA.
[118] Article 5:15 paragraph 6 WHA.

Chapter 6.4 Expected changes regarding ancillary activities

The implementation of article 9 of Directive 2019/1152 will have a significant impact on ancillary activities regulation in the Netherlands. As discussed before, there is no real legal basis to prohibit ancillary activities but it happens, nonetheless. Due to article 9 of Directive 2019/1152 the expiration date of the rules limiting ancillary activities seems to be coming up. Free choice of employment is a constitutionally guaranteed right, but workers are not able to claim this right in front of the courts. Article 9 of the directive might be the much needed push that is needed to give precarious workers the freedom they are longing for on the labour market. The right to free choice of employment is all but guaranteed. This does not mean that article 9 of the directive is exploring new territory, to the contrary, the right to free choice of employment already exists under article 15 of the European Charter for Human Rights.

The biggest fault seems that workers are not able to claim their right to free choice of employment in front of the courts against their employers. They are handed instruments that are of no use to them. With the implementation of article 9 of the directive they might finally be able to arm themselves against restrictive clauses and claim the freedom they want. Either way, the ball is in the court of the Dutch legislator to write, pass and implement a law that would finally protect a worker's right to have multiple jobs. At the moment of writing this report there are no plans by the Dutch legislator to implement such a law.

Chapter 7 - Protection of on-call workers in the Netherlands

The following chapter provides an overview of the Dutch legislation in place that serves to protect on-call workers in the Netherlands. We will highlight several provisions aimed to prevent abuse of this form of casual working.

7.1. Workers in the Netherlands with an unpredictable work pattern

In the Netherlands there is one category of workers with an unpredictable work pattern. Workers with an unpredictable work pattern usually work on the basis of an *on-call contract*. Under Dutch law an employment contract can be qualified as an on-call contract if the working hours are not established in the employment contract.[119] This new definition of an on-call contract was introduced in the WAB (see chapter 2 for a more in-detail description). There are two varieties of *on-call contracts*, the *pre-agreement* and the *employment contract with a deferred duty of performance* (d.d.p. contract).

The *pre-agreement* is an on-call contract which does not bind the parties to employment. It merely sets the terms for the employment contract if parties agree to partake in an employment contract. The pre-agreement covers the wage, employment conditions et cetera but does not cover the working hours. When an employer calls upon an employee to work an offer is made to enter into an employment contract. The employee is entitled to refuse the offer and not work when called upon.[120] If the employee agrees to come to work, an employment contract enters into force for the duration of the period that the employee was called upon. For example, if the employer asks the employee to work on Friday and Saturday and the employee agrees, they have entered into an employment contract for the limited duration of two days. After this period, the employment contract comes to an end by law (*ex lege*).

The pre-agreement contains risks for both the employer and the employee. The employer could be without much needed labour, since it does not create any obligation for the employees to consent to the offer the employer makes. A bigger risk could be that the employer enters into an employment contract of indefinite duration because of the chain rule**.** Due to the nature of the pre-agreement multiple employment contracts of limited duration can follow up on each other within a short period of time. By law (*ex lege*) the employer and employee then enter into an employment contract of indefinite duration. The threshold for the chain rule can be raised by collective agreement but not be completely excluded.[121] On the other hand, the employee does not enjoy the

[119] Article 7:628a paragraph 9 DCC.
[120] Kamerstukken II 2018/19, 35 074, nr. 3
[121] Article 7:668a paragraph 5 DCC.

employment protection that other workers with employment contracts for a more extended duration of time enjoy.

The d.d.p. contract is an on-call contract which must be regarded as an ongoing employment contract. The only condition not agreed upon by the employer and the employee is the working hours. Because there is an agreement between the employer and the employee to fulfil their duties - for the employee to come to work when called upon and for the employer to pay the wage of hours the employee has worked - the employee has an obligation to accept the offer made by their employer. The d.d.p. contract may contain a minimum or maximum amount of hours that the employee can be called upon. Such a guarantee for a minimum or maximum of working hours is not always included. Due to the nature of d.d.p. contracts, the risks rest mostly with the employee. The employee has to wait for the employer to call on them. If the employer does not require the employee then he or she will not work. Once the employer calls on the employee to come to work, the employee is required to come to work. This makes the employee dependent on the employer, the employee has to wait for the employer to call on them. Expectations on the side of the employee can also arise through time. What if an employee works full time for five years on the basis of a d.d.p contract for example? The Supreme Court ruled that if a d.d.p. contract loses its precarious nature, an employee enjoys the same rights which employees with a more permanent employment contract enjoy.[122] This makes sense, on-call contract is characterized by its' non-establishment of working hours.

7.2. Dutch legislation

As stated above, the Dutch labour law system knows various types of on demand contracts. All types of casual working generally provide no or few income security for employees. This precarious situation led the Dutch government back in 1999 to introduce the *Wet Flexibiliteit en Zekerheid* (WFZ). The law introduced rebuttable presumptions of the existence of an employee relationship (article 7:610b DCC) and the scope of the employment contract (art. 7:610b DCC) and provided a minimum compensation of wages to employees with an on-call contract (art. 7:628a paragraph 1). Both articles will be discussed in subsequent paragraphs below. More recently, the Dutch government introduced the *Wet arbeidsmarkt in balans* (WAB, or: Law regarding a balanced labour market) which is in force since 1 January 2020, as discussed in chapter 1. The new law aims to provide better protection for casual workers through various new or updated measures.

[122] HR 8 april 1994, *NJ* 1994/704, m.nt. PAS ; *JAR* 1994/94 (*AGFA*).

In January 2020, Robert started working at an elderly home in the historical city centre of Utrecht. He has an on-call contract for the duration of one year with fluctuating working hours. He has worked on average 24 hours per month in the period from January 2020 to January 2021 (12 months).

7.3. Presumption of contract of employment and scope of casual work

The WFZ created two provisions that have the aim to counter insecurity for employees regarding the nature of the employment relationship (art. 7:610a DCC) and the scope of an employees' working hours (art. 7:610b DCC). Both provisions have a rebuttable presumptive nature. These rebuttable presumptions strengthen the (procedural) position of casual workers.[123]

Art. 7:610a DCC stipulates that an employee, who works every week for three months straight or – if that is not the case – a minimum of 20 hours per month, is presumed to have an employment contract (*arbeidsovereenkomst*). This presumption means that it is up to the employer to prove that there is no employment contract in case the named criteria are met.

Whereas art. 7:610a DCC introduces a rebuttable presumption of *an* employment contract, art. 7:610b DCC concerns the *scope* of the employment. The article applies to employee relationships that have lasted at least three months. It aims to provide security in situations where the scope of the contract has not been (clearly) agreed to or when the actual scope of the working hours exceeds the originally agreed scope.[124] As is the case with art. 7:610a DCC, both parties have the opportunity to rebut the presumption.

Therefore, the Dutch legislator introduced articles 7:610b DCC which in combination with 7:628 DCC creates the legal presumption of working hours. The legal presumption comes into play when an on-call worker wants to claim continuation of payment. If an employment contract has lasted for at least three months a legal presumption of working hours comes into force. To calculate the working hours that make up the legal presumption the amount of hours worked in the reference period is divided by the amount of months in the reference period. There is no set reference period, but it consists of at least three months and at most one year.

If the employment has lasted three months or more, then the scope of the contract is assumed to be the average monthly working hours of the last three months. Having said that, in the case of sectors with more fluctuant working hours (such as fruit picking during the summer months), the

[123] *Kamerstukken II* 1997/98, 25263, nr. 33, p. 5.
[124] Verhulp, *Tekst & Commentaar* 2021b.

three-month period can be prolonged to offer a more representative working hour average.[125] Both parties can request this longer reference period. A successful rebuttal of the average monthly working hours by the employer does not mean that the on-call worker ceases his right to wage. The wage will only be lower, based on the eventual working hours average.[126]

Robert has no concrete agreement with his employer about the number of hours he will work. In October, November and December 2020, he has worked respectively 14, 28 and 18 hours each month. With an appeal to art. 7:610b DCC, the scope of Robert's employment contract is presumed to be 20 hours (average of the reference period). This rebuttable presumption improves Robert's procedural position when it comes to, amongst others, the amount of salary, the continued payment of wages in the event of illness and the build-up of holiday entitlements.

Linked to both article 7:610a DCC and 7:610b DCC is the obligation for the employer to inform the employee in writing of the nature of the employment relationship and the usual working hours per day or week. This obligation, laid down in article 7:655 paragraph 6 jo. 1 DCC further protects the position of the casual worker.

7.4. Long-term casual work

Besides the rebuttable presumption of an employment contract and the scope of it, Dutch legislation also aims to limit the use and duration of on-demand contracts. The WAB provides better protection for casual workers who work for a longer period. Employers of casual workers that have worked twelve months are obliged to offer a permanent contract, based on the average monthly working hours in the twelve months before (art. 7:628a paragraph 5). Wages paid over hours when the employee was ill, on holiday or on paid leave have to be included when establishing the average working hours.[127]

When calculating the average working hours of the twelve month-period, on-call contracts that have succeeded each other with intervals of six months maximum shall be added up. Concrete, this means that the employer must offer a permanent contract after 12 months of employment in all cases where the guaranteed scope of the labour has not been (unambiguously) agreed to. The employee is not obliged to accept the offer if he wishes to maintain the flexibility of an on-call contract. The working hours offered by the employer are based on the average working hours of the previous twelve months. If the employer does not make such an offer, the employee can claim

[125] *Kamerstukken II* 1997/98, 25263, nr. 33, p. 3.
[126] Olsthoorn & Schurrman, *TAP* 2020/191.
[127] *Kamerstukken II* 2018/19, 35 074, nr. 3, p. 131.

his wage during the period of the employer's shortcoming. This wage consists of the average monthly working hours of the 12-month period. The employee is offered a period of at least one month to contemplate whether to accept the offer.

7.5 Expected changes regarding avoiding abuse of precarious working

Article 11 of Directive 2019/1152 states that Member States shall take one or more of three types of measures to prevent abusive practices: i) limitations to the use and duration of on-demand or similar employment contracts, ii) a rebuttable presumption of the existence of an employment contract with a minimum number of paid hours based on the average hours worked during a given period and/or iii) other equivalent measures that ensure effective prevention of abusive practices.

Articles 7:610a and 7:610b DCC are a clear example of the second type of measures named in article 11 of the new Directive 2019/1152. As discussed in this chapter, the WFZ created two provisions that have the aim to counter insecurity for employees regarding the nature of the employment relationship (article 7:610a DCC) and the scope of an employees' working hours (article 7:610b DCC). Both provisions have a rebuttable presumptive nature. Additionally, the WAB introduced article 7:628a paragraph 5 DCC. Employers of casual workers that have worked twelve months are obliged to offer a permanent contract, based on the average monthly working hours in the twelve months before. This provision results in a limitation on the use and duration of on-demand (or similar) contracts, therefore fitting under the first complementary measure named in article 11 Directive 2019/1152. With articles 7:610a, 7:610b and 7:628a paragraph 5 DCC, the Dutch legislation is already in line with the new Directive.[128] Any additional measures are not necessary, although - from the viewpoint of precarious workers - additional measures may always be a welcome addition.

[128] Huisman, *TAP* 2019/8, p. 15.

Chapter 8 – Protection of on-call workers relating to shift changes

In this chapter we will elaborate on the rules and limits concerning changing shifts or working hours of workers with an on-call contract. The Directive covers this subject in article 10.

8.1. Time limits of notifications of working hours/shifts

Due to the fact that a worker who works on the basis of a pre-agreement is not required to accept the work if they are called upon, the matter of time limits of notifications mostly relates to workers with a d.d.p. contract.

Due to the nature of on-call work, employees with an on-call contract were often subject to a high amount of uncertainty. Oftentimes they do not know when they will be called upon and when they are expected to work. In recent years, the amount of on-call workers has increased,[129] and with the growth also came an increased demand in protections. For this reason, the Dutch government sought to increase the position of on-call workers with the WAB & WWZ, starting the 1st of January 2020.

Workers with a d.d.p. contract are only required to work if the announcement to come to work has been made four calendar days before the start of the shift.[130] The working day is not calculated within the notice period. So, if a worker has to work on Friday, they should be notified of their shift on Monday at the latest. Employee and employer can agree to increase the notice period, but not shorten it. The notice period can only be shortened by collective agreement or by a competent administrative authority.[131] It is only possible to shorten the notice period up to a minimum of 24 hours. If the announcement to come work has been made within the notice period, a worker is not obligated to come to work. The announcement has to be made either in writing or electronically. A work schedule that is accessible to the employee also counts as notification.[132] Naturally, this schedule must be published with a minimum of four calendar days before the start of the shift. It is important to note that the time limit of notification of working hours/shifts can be completely excluded. This is only possible for seasonal work and only by a collective agreement or a competent administrative authority.[133]

[129] Burri e.a., 2018, p. 10.
[130] Article 7:628a paragraph 2 DCC.
[131] Article 7:628a paragraph 4 DCC.
[132] SDU Commentaar Burgerlijk Wetboek Boek 7 art. 628a, Aant. A ; oproepen'.
[133] Article 7:628a paragraph 11 DCC.

On December 8, 2020, Robert is scheduled to work five hours in the afternoon shift, from 2PM to 7PM. One day before the start of his shift, on December 7, he receives a Whatsapp message from his boss: "Can you work tomorrow in the morning from 9AM to 2PM instead of the afternoon shift?" Sure, says Robert.

After his shift ends Robert claims to have earned 10 hours worth of wages. "That is nonsense" says his boss. "You worked five hours so I will pay you five hours worth of wages". Robert does not agree and believes that this boss cancelled his afternoon shift too late, maintaining Robert's claim to the wages of the afternoon shift. Plus he worked five hours in the morning, five plus five equals ten.

And Robert is right, because art. 7:628a paragraph 3 DCC entitles Robert to the wages of 10 hours and not the just the 5 he eventually worked, given that the employer changed the call-in within the four-day period before the start of work.

Another possible situation is that the employer has called upon the employee to work but decides to call off the employee. If an employer calls off an employee, within four calendar days before the start of the shift, the employee is entitled to the wage he would have earned if the shift was not cancelled.[134] This also applies to partial cancellations. For example, if an employee is notified of an eight-hour shift but four of the hours are cancelled, then they are still entitled to the wage of an eight hour shift. This time limit of four days can also be shortened up to a minimum of 24 hours by collective agreement or by a competent administrative authority.[135] If a shift is cancelled and an on-call employee is informed of the reinstatement of the shift, this constitutes as a new notification. Thus, if the same shift is cancelled and reinstated within the four day notice period, an employee is not obligated to work.

The reason behind these regulatory changes is understandable. If employers are allowed to make a last-minute cancellation of on-call work, it would starkly reduce the possibility of the employee to accept other work for that day due to the short notice of the cancellation.[136] This would lead to a situation where the employee is (almost) permanently available for the employer, due to the constant insecurity about the working hours the employee is already scheduled for, as well as the working hours that have not yet been scheduled. Coupled with the income insecurity for an employee as a result of a last-minute cancellation, it has led the Dutch government to institute this change.

[134] Article 7:628a paragraph 3 DCC.
[135] Article 7:628a paragraph 4 DCC.
[136] *Kamerstukken II* 2018/19, 35 074, 3.

8.2. Compensation

Workers with an on-call contract can maintain a right to wages if they have not worked or worked less than previously agreed upon. This right is only retained in specific situations and on specific legal grounds.

8.2.1 Continuation of payment

The first situation would be the right to continuation of payment. For an on-call worker to claim continuation of payment, two conditions have to be met. The first condition is that the amount of work has been agreed upon by both the employer and the employee. The second condition is that the non-fulfilment of the working hours is the result of grounds that reasonably fall under the risk of the employer.

In the min-max on-call contract an employer and employee agree upon the minimum and maximum number of hours the employee is expected to work.[137] This type of construction gives both the employee and the employer flexibility and safety. The exact working hours can be agreed upon later; the employee is certain that he will work at least an *X* amount per month; the employer knows that he can call upon the employee for at least an *X* amount of hours. This flexibility is limited by the ceiling of the 'max' in min-max contracts.

Due to the fact that the employee is entitled to a minimum amount of working hours in a min-max contract, the employee is also entitled to a minimum amount of wages. If the employer decides not to call upon the employee, for example because of the lack of work, this is a risk that rests on the employer. The employee can still claim the wages they are entitled to according to his min-max contract.[138] This falls in line with the reasoning of article 7:628 DCC, 'no working hours, still payment'. An exception is in a case where the employer can prove that the risk cannot be reasonably contributed to the employer.

On-call contracts without the guarantee of a certain amount of working hours, zero-hour contracts, do not meet this condition. On-call workers with a zero-hour contract cannot claim continuation of payment. Yet they are not without legal protection. Their legal recourse will be discussed in the following section titled 'legal presumption of working hours'.

8.2.2 Legal presumption of working hours

The situation exists that an on-call worker works more on a regular basis than the minimum amount of working hours agreed upon in the on-call contract. An example is the on-call worker with a

[137] Knipschild en Ridder, *ArbeidsRecht* 2015/22.
[138] Article 7:628 DCC.

min-max contract that mostly works the maximum amount. If there is no work available, a risk that rests with the employer[139], the min-max worker would only be compensated the minimum amount that is pre-agreed in his contract. On-call workers that have a zero-hour contract would have no legal recourse to fall back on since they do not have pre-agreed working hours. The employer could take the stance that a worker with a zero-hour contract is not entitled to any form of continuation of payment if no work is available.

This would be an undesirable situation since the *de facto* position of the worker does not match with the situation in the contract. Therefore the Dutch legislator introduced articles 7:610b DCC which in combination with 7:628 DCC creates the legal presumption of working hours. The legal presumption comes into play when an on-call worker wants to claim continuation of payment. If an employment contract has lasted for at least three months a legal presumption of working hours comes into force. To calculate the working hours that make up the legal presumption the amount of hours worked in the reference period is divided by the amount of months in the reference period. There is no set reference period but it consists of at least three months and at most one year.

In practice the legal presumption means that an on-call worker could still be entitled to continuation of payment, even if the employer has fulfilled their contractual obligations.

Chapter 7.3 offers a more detailed and extensive description of how the legal presumption of scope of work comes into play in on-call contracts.

8.2.3 Minimum wage claim

The third manner in which Dutch legislation seeks to ensure compensation for on-call workers is the minimum wage claim. Article 7:628a paragraph 1 DCC ensures that an on-call worker can claim at least three hours' worth of wage per shift. If an on-call worker has fulfilled a two hour shift, the worker can claim a three hour wage. There are two criteria for the application of art. 7:628a paragraph 1 DCC:[140]

- There exists an employment contract between employer and employee
- The working hours agreed to in the on-demand contract are less than 15 hours per week *and* the specific times of work have not been laid down, or the scope of the working hours has not or not clearly been agreed to.

An on-call worker can demand the minimum wage claim per individual notice given by the employer. The Supreme Court noted that every working period interrupted by a non-regular

[139] Flexibele arbeidsrelaties, 3.10.4.1, Recht op loon en uitsluiting loondoorbetalingsplicht.
[140] Zie ook A. Olsthoorn & D. Schuurman, 'De oproepkracht: alle onzekerheid verdwenen?', *TAP* 2020/6, p. 13.

stoppage, such as a lunch or coffee break, makes up two different shifts.[141] The following situation could occur: an on-call worker completes a shift of an hour, a non-regular stoppage occurs, and then works another hour. For two hours of labour, the on-call worker would be paid six hours. The double payment is not a quirk of the minimum wage claim but intended compensation for the uncertainty that on-call workers face.[142]

> Robert receives a text message from his boss asking him to work next week. When he arrives at the coffee bar, Robert is told that due to a lack of customers he can go home after only one hour. Art. 7:628 paragraph 1 DCC provides Robert with the right of three hours of wages, instead of just the one that he actually worked.

8.3 Expected changes regarding protection of on-call workers relating to shift changes

Article 10 Directive 2019/1152, as discussed in this chapter, aims to ensure that precarious workers are not required to work unless two conditions are fulfilled: (1) the work takes place within predetermined reference hours and days, and (2) the worker is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or national practice. Additionally, member states must take measures to ensure that the worker is entitled to compensation if the employer cancels, after a specified reasonable deadline, the work assignment previously agreed with the worker.

Looking at the Dutch legislation already in place, the WAB introduced the reasonable call-in period of four days (article 7:628a paragraph 2 DCC) and the right to compensation if an employer calls off the employee within that period of four days (article 7:628a paragraph 3 DCC).[143] If the employer notifies the on-call worker within the reference period of four days, he is entitled to refuse the call-in without any repercussions. Additionally, the on-call worker can claim the wages of the original call-in period in case the employer withdraws the notification within that reference period of four days. Both provisions correspond to article 10 Directive 2019/1152 and need therefore no amending.

[141] HR 3 mei 2013, ECLI:NL:HR:2013:BZ2907.
[142] *Kamerstukken II* 2018/19, 35074, nr. 3, p. 105.
[143] With the caveat that the reference period of four days can be limited to fewer days, with a minimum of one day, by collective agreement or regulation determined by an authorized administrative body (article 7:628a paragraph 4 DCC).

Chapter 9 - Transfer to more secure or permanent forms of working

This chapter evaluates the possibilities in Dutch legislation to request a transfer to a more secure or permanent form of working and – if indeed possible – what the conditions are for such a transfer.

9.1 Legislation and its development

In 2000, the Law on Changing Working Hours (*Wet aanpassing arbeidsduur*, hereafter: WAA) went into effect. Its aim was of a more traditional kind: by providing the option to employees to expand or reduce their working hours, the legislator hoped to balance the division in labour and care tasks between men and women more evenly.[144] The WAA offered employees the possibility to make a request to change their working hours. If an employee made such a request, an employer could only refuse the request in case of weighty company interests. The WAA did not offer any additional possibilities for employees. The law attracted criticism for not creating enough types of requests for employees. The waiting time was long as well. Once a request was made, an employee had to wait two years before being able to make another request.

In 2016, the *Wet flexibel werken* ('Law on Flexible Working', WFW) replaced the WAA. The WFW aims to stimulate a more flexible way of working. The parliamentary history of the WFW shows that there was a growing need amongst employees to be able to work in a (more) flexible way.[145] The traditional way of working, with its 9-to-5 working schedule, mandatory physical presence at the office and inflexible working hours, is increasingly seen as a barrier to effectively streamline one's work with one's private situation.[146] The purpose of the WFW was therefore to offer employees more possibilities to work in a more flexible way.

The Dutch government based the necessity of this changed legislation on various studies and statistics which claim that employees who are allowed to work flexible can handle more work (38%), work more efficiently and are mentally healthier than workers who don't have such possibilities.[147] Such study results are disputed, it should be noted. A large study by Statistics Netherlands shows, for example, that flexible workers have roughly the same health score as their permanent counterparts.[148] Another motive behind the introduction of the WFW is a preventive one. If employees are granted no or very limited possibilities to adapt their working conditions and/or hours, it is not a surprise that some of these employees will - in the words of the Borstlap

[144] *Kamerstukken II* 1998/1999, 26358, nr. 3, p. 9.
[145] *Kamerstukken II* 2010/11, 32889, nr. 3, p. 1-2.
[146] Van Andel, *AR* 2017/24, p. 3.
[147] *Kamerstukken II* 2010/11, 32889. 3, p. 3.
[148] *Arbeid, flexwerk en gezondheid*, 2020.

Commission - 'vote with their feet' and decide to make a living as a self-employed person.[149] The WFW therefore aims to strengthen the flexibility of employees and at the same time limit the increasing shift from employed to self-employed persons.

9.2 Available changes

Given the benefits of flexible working, what possibilities does the WFW offer? There are three changes employees can appeal to: changes to the working hours, workplace and work times. Article 1 WFW defines these three possibilities:

- Working hours: 'The number of hours agreed to that a workweek of the employee consists of' (Article 1(c) WFW)
- Workplace: 'Every place agreed to that is or ought to be used for carrying out labour' (Article 1(d) WFW)
- Work times: 'The specific hours agreed to on a workday or other time period during which the employee carries out labour' (Article 1(e) WFW)

The WFW stipulates that the three changes only apply to employees and employers. 'Employees' under the WFW are those who work on the basis of an employment contract or public sector contract, thus excluding for example self-employed workers (article 1(b) WFW). 'Employers' mean the contractual counterparty to those performing labour (article 1(a) WFW). The three possibilities are limitative. The WFW – currently – does not offer other types of changes to the employee relationship.

9.3 Procedural conditions

Art. 2 WFW contains the procedural aspects the employee must fulfill before he or she can request a change to the working hours, workplace or work times.

The employee must have at least six months' service with the same employer (art. 2 paragraph 1 WFW). The six months-term makes sure that there is a certain bond between the employee and employer.[150] In case of unforeseen circumstances, such as taking care of your dependent partner which requires a (temporary) reduction of working hours, the employee can hand in a request before the six months-period has ended.[151] Art. 2 paragraph 1 WFW states that the change can either be permanent or temporary, as well as varying in scope.

[149] Commissie Regulering van Werk 2020, p. 38.
[150] *Kamerstukken II* 1998/99, 26358, nr. 3, p. 14.
[151] *Kamerstukken II* 2014/15, 32889, nr. 20.

Robert has an employment contract with a 36-hour workweek spread over five days. He can request a change of the work hours to a 24-hour workweek spread over three days, both permanent and temporary (e.g. three months). Both options are available under the WFW.

The employee must make the request two months before the effective date and time via a written request to the employer (article 2 paragraph 3 WFW). The employee has to make a declaration containing all the requests, although there is no duty to motivate the request.[152] In the request, the employee must stipulate the preferred weekly working hours, workplace and/or work times.

Once the request has been handed in, the employer must react in writing at least one month before the envisaged starting date.[153] If the employer fails to do so, the change will take place according to the employee's request. It should be noted that – both when the request is granted or rejected – the employee must wait one year before he can hand in a new request to change the working hours, workplace or work times, notwithstanding special unforeseen circumstances that would allow the worker to hand in another request sooner than one year.[154] However, the parliamentary history states that a combined request is possible, meaning that a request to change the working hours *and/or* workplace *and/or* work times is possible. This means that, for example, an employee who requested a change of working hours does not face the one-year waiting period when requesting a change to the workplace and/or work times.[155]

The WFW does not apply to enterprises with less than 10 employees, counted at the moment of handing in the request.[156] Such an enterprise must, nevertheless, take measures to accommodate the right of employees to change the *working hours*.

9.4 Determining the request

The WFW grants employees a right of request and requires employers to decide on that request according to the procedural formalities. It does not, however, impose an obligation on employers to accept the request at all cost. The criteria to determine whether an employer must accept a request differentiate for each of the three possibilities.

[152] *Kamerstukken II* 1998/99, 26358, 5, p. 23.
[153] Article 2 paragraph 8 jo. paragraph 12 WFW.
[154] Article 2 paragraph 3 WFW.
[155] *Kamerstukken II* 2010/11, 32889, nr. 3, p. 9 and *Kamerstukken II* 2011/12, 32889, nr. 5, p. 5. *See further* Van Andel, *AR* 2017/24, p. 5.
[156] Article 2 paragraph 16 WFW.

Concerning a change to the *working hours* and *work times*, art. 2 paragraph 4 and 5 WFW state that the employer must consult with the employee and accept the requested change, unless weighty company interests prevent him to do so. A request to change the *workplace* only needs to be considered by the employer. If he rejects the request the employer must consult with the employee about the rejection.[157]

How should 'weighty company interests' be interpreted? Judges do not assume such an interest quickly, jurisprudence shows, because a certain amount of flexibility must be expected from employers.[158] In the case of expanding the working hours, art. 2 paragraph 10 WFW mentions weighty company interests of a i) financial or organizational nature, ii) not having enough work at hand and iii) inadequate budget for personnel. Weighty company interests in the case of a change to the work times are similar to the ones mentioned in paragraph 10. [159]

Art. 2 paragraph 13 and 14 WFW gives the employer the right to reconsider his decision in the case of weighty company interests that have emerged after the decision to grant the request. This possibility only sees to a change of the work times and workplace, not working hours. In the latter, a revision of the requested change of working hours is not allowed.[160]

9.5 Implications for temporary, on demand or casual workers

The WFW applies to workers who qualify as employees under Dutch national law. Given the three possibilities of the WFW – changes to working hours, workplace and work times – it is in principle possible to request a full-time employment, if the employee has at least six months' service and the change does not infringe weighty company interests. If a full-time employment is not the wish of the employee, he can request a smaller expansion of the working hours as well. Working more hours will improve the financial stability of the employee and will lead to a more secure form of working.

On-demand workers can request a change of the work times in a given week, more specifically the preferred spread of the working hours in the week. With this request, the on-demand worker is able to bring his or her working times more in line with their weekly planning. The nature of the on-demand contract, however, means that the wishes of the employee must fit within the hours the employer wants to make use of the on-demand workers.[161]

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[157] Article 2 paragraph 6 WFW.
[158] Van Andel, *AR* 2017/24, p. 4.
[159] Article 2 paragraph 11 WFW.
[160] *Kamerstukken II* 2014/15, 32889, nr. 25, p. 2.
[161] Heerma van Voss 2020, par. 129c.

For temporary workers, the period of six months' service can lead to difficulties. Sometimes the temporary employment contract will be less than six months, which excludes the application of the WFW altogether given the minimum employment period of six months (unless there are unforeseen circumstances as mentioned in 8.3). For temporary contracts longer than six months, a change in the working hours will only last for the duration of the temporary contract.[162] That said, if a temporary contract gets continued for a new period under the same changed working hours as requested in the previous period, the employee will be protected by art. 3 WFW. This article states that the employer cannot terminate the employment relationship because of the fact that the employee has requested a change of the working hours.

9.6 Future implications

In its 2020 report on the state of Dutch labour law, the Commission Borstlap concluded that employees find it difficult to materialize the offered possibilities to change their employment conditions under the WFW.[163] In order to give more substance to the WFW, the Commission recommended raising more awareness of the WFW amongst employees.[164] Additionally, the Commission advised the Dutch government to make it possible for employees to request a change in their *employment position*. Although the Commission does not provide an example of such a request, it would mean that, say a receptionist, can request a change to a different position, say an administrative assistant (or a function with similar skills prerequisites as the current position).

An employer would in that case be compelled to review the request and to give a written explanation in case he refuses the request (similar to the request to change the workplace). Important to note is that the Commission does not propose to apply the WFW-procedure when requesting a change in working hours and/or work times.[165] Would that be the case, then the employer would have to accept the requested change of employment position unless weighty company interests prevent him to do so. The Commission thus opts for the less-strict procedural regime of changing the workplace.

Interestingly, the Commission Borstlap advised the Dutch government to apply the possibilities of the WFW (or similar) to *employers* as well.[166] Concretely, this would mean that the internal flexibility of employers within the scope of the employment contract will be expanded, at least

[162] Hoffmans, *Sdu* 2016.
[163] Commissie Regulering van Werk 2020, p. 65.
[164] Commissie Regulering van Werk 2020, p. 66.
[165] Commissie Regulering van Werk 2020, p. 66.
[166] Commissie Regulering van Werk 2020, p. 65.

when it comes to changing the working hours, the workplace and/or the work times. The Commission proposed that the employer should be able to one-sidedly change these three aspects in the case of weighty company interests. More specifically: the employer could make an offer to the employee to change their employment conditions relating to the working hours, the workplace and/or work times, which the employee must accept unless weighty interests (rightfully) prevent him from doing so. The Commission adds that the employer should not have unlimited use of this possibility. They advise a maximum of one or two requests each year.

In essence, such a change to the current WFW would introduce the possibility of a partial termination of the employment contract (say the offer to go from 40 hours per week to 20 hours per week). Partial termination is currently not possible in the Netherlands except in a few instances (which we will not discuss in this report). Creating a *general* possibility for employers to change the working hours, workplace and/or work times would therefore mean a substantial shift from the current legislation. While it is too early to say if the Dutch government will follow the Commission's advice, it is interesting to see the debate concerning changing the employees' working conditions.

9.7 Expected changes regarding a transfer to a more secure or permanent form of working

Article 12 Directive 2019/1152 states that a worker with at least six months' service with the same employer may request a form of employment with more predictable and secure working conditions where available. To what extent does the Dutch Law on Flexible Working (WFW) already comply with article 12 of Directive 2019/1152?

9.7.1 Procedurally

From a procedural viewpoint, the WFW overlaps article 12 Directive 2019/1152 in a substantial way. Under the WFW, the worker must have at least six months' service with the same employer (corresponding with article 12). Regarding the requirement that the probationary period must be completed, the probationary period in the Netherlands cannot be longer than two months, meaning that once the minimum service period of six months is reached, the probationary period has already ended.

Article Directive 2019/152 provides Member States the possibility to limit the frequency of requests triggering the obligation of article 12. The WFW currently knows such a limitation. A worker must wait one year before he can hand in a new request to change the working hours, workplace or work times, unless special unforeseen circumstances would allow the worker to hand in another request sooner than one year. And under both the WFW and article 12 Directive 2019/1152, employers must reply in writing within one month of the request.

Concerning natural persons who act as employer and micro, small and medium enterprises, article 12 provides the possibility for Member States to extend the deadline to no more than three months and allow for an oral reply to a subsequent similar request submitted by the same worker if the justification for the reply remains unchanged. The WFW currently does not seem to comply with that measure. Article 2 paragraph 16 WFW states that the WFW does not apply to enterprises with less than 10 employees, although such an enterprise must take measures to accommodate the right of employees to change the *working hours*. Such a general exclusion of small enterprises seems not possible, since article 12 only recognizes an extension of the reply period and the right of an oral reply in case of a subsequent similar request. No mention is made of the possibility to *exclude* the rights of article 12 for micro, small and medium enterprises. It seems that the Dutch legislator should amend the WFW to apply the law to employers with 10 or less employees as well, notwithstanding the possibility to include the two exceptions offered by article 12.

9.7.2 Materialistically

As mentioned in chapter 10, the WFW currently provides employees with the possibility to request a change in working hours, workplace and work times. These are the three flavors. Under the WFW, a worker would be able to request to work full-time or more hours (both being a request to change the working hours). Such a request is thus already possible in the Netherlands.

The Dutch legislation currently does not know a system whereby the *nature* of the employment relationship can be changed upon the request of an employee. Available are the three options of the WFW. This means that it is currently not possible for an employee with a, for example, fixed-term contract to request an indefinite contract. The Dutch government will have to amend the WFW to make this possible. Having said that, a system whereby a temporary worker can request an indefinite contract will be at odds with the Dutch chain rule of art. 7:668a DCC. The chain rule stipulates when successive, temporary employment contracts are converted into a permanent employment contract. After the introduction of the *Wet Arbeidsmarkt in balans* (WAB), this is the case when more than three temporary employment contracts succeed each other or if the duration of the successive contracts exceeds a period of three years.

Would article 12 Directive 2019/1152 be implemented as to give workers the right to request a permanent contract, it would create the situation where a worker could make such a request *before* the period of the chain rule has ended. It can be argued that such an implementation would nullify the meaning of the chain rule. It is up to the Dutch government to find a compromise in that regard.

Chapter 10 - The core problems of atypical workers

In this chapter we will answer the question whether the rules on probation, having more than one job, time limit for changing working hours and avoid abuse of on demand contracts - as discussed in previous chapters - address the core problems of atypical workers.

10.1 Core problems for atypical workers

The more general problems that occur for atypical workers are, as mentioned in chapter 2, the financial and social insecurity. Employers and employees currently have the freedom to choose between many different forms of employment contracts, as discussed in chapter 2. The risks and costs of each contract type vary. A general rule of thumb is: the more flexibility a contract offers to the employer, the less risk he faces and the cheaper it is to hire the employee.[167] The discrepancies between the types of contracts have as a consequence that in the Netherlands the same labour can and is conducted under unequal conditions of employment.[168] It leads to increased flexibility as well. Currently, 60% of workers in the Netherlands have a permanent contract, while 40% consists of workers with a flexible contract.[169]

This growth in precarious work leads to several social disadvantages. The Borstlap Commission highlights several core problems that precarious workers face in today's Dutch labour system.[170] Job, work and income insecurity is more present in the group of precarious workers, as discussed in the introduction to this report. For example, precarious workers have fewer dismissal protection and often lack a sufficient social safety net. Their risk of becoming unemployed is higher compared to workers with a permanent contract. And their average earnings per hour are 7% less for the same type of work than permanent workers.[171]

Another core problem of precarious work is today's focus on *on demand* use of employees. Whereas flexible working started as a means for companies to adapt to periods of high demand or sick leaves, nowadays precarious workers are more and more seen as a way to structurally reduce employment costs.[172] 83% of Dutch precarious workers work every week at the same employer on (roughly) the same working hours.[173] In other words: these precarious workers are stuck in their

[167] Commissie Regulering van Werk 2020, p. 30.
[168] Commissie Regulering van Werk 2020, p. 30.
[169] Commissie Regulering van Werk 2020, p. 30.
[170] Commissie Regulering van Werk 2020, p. 29.
[171] Centraal Planbureau 2019.
[172] Commissie Regulering van Werk 2020, p. 32 and Sociaal en Cultureel Planbureau 2014.
[173] Commissie Regulering van Werk 2020, p. 31.

own flexibility, unable to take the next step to a permanent employment contract (with its subsequent benefits). As a result, the disadvantages of the previous paragraph are disproportionately placed on this group of workers.

These disadvantages are all the more striking when compared to the education background of precarious workers and permanent workers. Low- and middle-skilled workers are much more represented in the group of precarious workers than high-skilled workers.[174] Additionally, people with a - generally - less strong position on the labour market, such as young people and immigrants, form a relatively large percentage of precarious workers in the Netherlands.[175]

The current COVID-19 crisis confirms the existence of the core problems of precarious work. The general stimulus measures by the Dutch government, aimed at preventing unemployment, disproportionately protects workers with a permanent contract, a study by the Rabobank found.[176] Precarious workers are often the first ones who lose their job in times of crisis (which is in some way inherent to having a flexible employee relationship). The Dutch National Institute for Family Finance Information (NIBUD) further estimates that the amount of precarious workers with money struggles has risen from 36% in 2020 to 43% in the beginning of 2021.[177] The report states that precarious workers face greater income decline as a result of the loss of working hours, compared to employees with a permanent employment contract. The Dutch government introduced in the summer of 2020 a new financial package, aimed at precarious workers who have suffered income loss (minimum of 50%) as a result of the pandemic. Precarious workers who met the criteria received a one-time stimulus of €1.650. While that is a good sign, the COVID-19 crisis makes clear that atypical workers face disproportionate vulnerabilities in times of crisis, and highlights underlying socio-economic problems as well.

Given these core problems of precarious workers, we will now look at whether the rules on probation, having more than one job, time limit for changing working hours and avoid abuse of on demand contracts address them sufficiently.

10.2 Probationary period

It is the question whether rules on the probationary period address the core problems of atypical workers. However, in our opinion it is the question in general what length of probationary period is in the best interest of these workers to remove uncertainty as much as possible. As seen in

[174] Centraal Bureau voor de Statistiek 2018.
[175] Centraal Planbureau 2016.
[176] Rabobank 2020.
[177] Nationaal Instituut voor Budgetvoorlichting 2020.

chapter 5 the maximum duration is one or two months depending on whether it is an employment relationship for an indefinite period of time or fixed-term.

There can be discussion about the length of the probationary period and whether a relatively long or short probationary period is in the best interest of atypical workers. A relatively long probationary period ensures that workers are subject to prolonged insecurity. During a probationary period, the employment relationship can be terminated, which causes great uncertainty for the worker during this probationary period. For example, it is almost never possible to get a mortgage during the probationary period. This therefore argues for a shorter probationary period period on the one hand, so that the uncertainty lasts less.

On the other hand, a relatively short probationary period in the Netherlands entails that in first instance less employment relationships for an indefinite period of time are offered by the employer, but a lot of fixed-term employment contracts, for example for a year. When the fixed-term employment relationship comes to an end and the collaboration has gone well, an employment relationship for an indefinite period of time can be offered. As in the probationary period, getting a mortgage can be also more difficult when an employee has a fixed-term employment relationship.

Concluding, whether the length of the probationary period is a core problem of atypical workers cannot be said with certainty. In our opinion the best maximum duration is also not easy to say; both a short and a long period have associated disadvantages and it is not clear which maximum duration of the probationary period offers the highest level of protection to the employee.

10.3 Ancillary activities

Ancillary activities are the odd one out when it comes to labour law regulation in the Netherlands. There is no specific legal basis that prohibits taking on ancillary activities. The restristricions on ancillary activities mostly exist through specialist written clauses; legal concepts such as ‘good employeeship’ and the WHA. The WHA does not set out to regulate ancillary activities themselves but touches upon ancillary activities as a side effect. Ancillary activities are allowed, as long as they do not interfere with an ancillary activities clause, good employeeship or the WHA. All these limitations on ancillary activities are at odds with the right to free choice of employment, a constitutionally guaranteed right.[178] In theory this would mean that all restrictions on ancillary activities would be null and void. The reality is harsher. In practice the right to free choice of employment is hardly tested against an ancillary activities clause.[179] At most it can lead to a

[178] Article 19 paragraph 3 Dutch Constitution.
[179] Hagendoorn, *TAP* 2019/279.

modification of the fine as stipulated in a penalty clause that is tied to an ancillary activities clause, but often the right to free choice of employment is not discussed at all.[180]

With regards to the WHA the Commission Regulation of Work states the following in its report. The wish of precarious workers to work multiple precarious jobs is one out of necessity and not one out of luxury.[181] One job does not cover a living wage for these precarious workers, and they are forced into taking on ancillary activities. Rules which seek out to protect them, in practice hinder them. Rules, such as the Working Hours Act, hinder them from enjoying the flexibility which they want. They are limited in the amount of hours they can work and have to notify their employer if they have an extra job on the side.

10.4 Time limit for changing working hours

The time limit for changing working hours has only been recently introduced in Dutch labour law under the WAB. Because this regulation is relatively new, it is rather difficult to know if article 7:628a DCC protects workers with an on-call contract enough. The Commission Regulation of Work comes to the same conclusion but does state that the time limit on notifications is a step in the right direction.[182] In practice, a lot of the rights that are given to on-call workers are difficult for them to claim. Due to the nature of on-call work, they are naturally in a weaker negotiation position than their employer. Still the government has made it clear that its intention is to improve the position of on-call workers.[183]

10.5 Avoid abuse of on demand contracts

Art. 7:628a paragraph 5 DCC – as discussed in chapter 8 – states that casual workers are entitled to a permanent contract after they have worked for twelve months on the same on demand contract. The new regulation provides work and income security to long-term casual workers and shifts the initiative of providing the permanent contract to the employer. After the set period of twelve months, the employee should enjoy a certain level of security about the scope of his labour from which he receives his income. Facing years of work insecurity – with subsequent income insecurity – would hamper employees in making long-term commitments, such as buying a house or having children. The obligation for employers to offer a permanent contract after twelve months of on-call contracting leads to more stability and security in the employees' lives (at least that is the

[180] Hagendoorn, *TAP* 2019/279.
[181] Commissie Regulering van Werk 2020, p. 27.
[182] Commissie Regulering van Werk 2020, p. 68.
[183] Volk, *TRA* 2020/4.

expectation). By doing so, therefore, the limitation on the duration of an on demand addresses the core problems of atypical workers.

Regarding the presumption that there is an employee relationship, the Dutch legislation already knows the rebuttable presumptions of art. 7:610a and 7:610b DCC. Both articles function independently from the limitation of on demand contracts in art. 7:628a paragraph 5 DCC.[184] Articles 7:610a and art. 7:610b DCC reduce the uncertainty with regard to the nature and scope of the employment relationship. They, in all, serve to strengthen the (procedural) power of employees in employment conflicts, whereas the wage guarantee-regulation of art. 7:628a paragraph 5 DCC aims to improve the position of workers in a more material way.

[184] *Kamerstukken II* 2018/19, 35074, nr. D, p. 29.

Chapter 11 - Precarious work in the Netherlands: what's next?

The vulnerable position of precarious workers is a difficult topic that cannot be resolved immediately. In this chapter we will shortly discuss the cabinet's reaction to the recommendations from the report of the Borstlap Committee for improving the labour market. The parliamentary elections will take place in March 2021 and the position of the precarious worker is a hot topic so we will discuss the parliamentary elections too. We will conclude this chapter with our expected concrete amendments to the law according to the foregoing chapters.

11.1 Cabinet's reaction to The Commission Regulation of Work

We have discussed the report of The Commission Regulation of Work ('Commissie Regulering van Werk') throughout the whole paper. In this report the Commission made recommendations to make the Dutch labour market future-proof. The cabinet gave a reaction to the outcome of this report in November 2020.[185] In response to the report of the Commission, the cabinet stated that the recommendations had been used in the decisions regarding emergency packages to limit the economic consequences of the COVID-crisis. The crisis has only made the division in the labor market more obvious. Flexible contracts have proven to be very vulnerable and are often the first to lose their income. The Commission recommendations in the report are only broad guidelines. The Commission has not proposed any concrete changes but has issued guidelines on the basis of which concrete legislation and regulations can be drawn up. Below, we will briefly summarize the recommendations and describe the cabinet's response to each recommendation.
Firstly, the Commission recommends promoting internal agility and slowing down external flexibility (flexible contracts). The Commission recommends encouraging sustainable employment relationships with internal agility. The employer must be relieved of its obligations in, for example, continued payment of wages in the event of illness and dismissal, making the employment relationship internally more flexible. In addition, flexible employment contracts must also actually be used for temporary work.[186]

As a second recommendation, the Commission states that the number of contract types should be reduced. Chapter 2 shows the extensive system that the Netherlands has with regard to employment relationships. The Committee recommends reducing this to three types of contract: self-employed persons, employee and temporary agency contracts that perform temporary work. The employee must be distinguished from a self-employed person on the basis of, among other things, the European definition of a worker. The government believes that harmonizing taxation and social security is essential for this. The cabinet aims to have fewer differences between contract types

[185] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk'.
[186] Commissie Regulering van Werk 2020, p. 10.

and therefore to come more in line with the three proposed types. There must be more balance and clarity for workers and employers. There must be clarity about the qualification of the employment contract.[187]

The third recommendation means that all workers must be able to continue to develop. This should prevent knowledge obsolescence.[188]

The Commission then comes up with the fourth recommendation that workers should be treated equally in tax matters and that basic income security should be created for all workers. In the Netherlands, there exists a big difference between taxation for employees and the self-employed. The Commission proposes to tax all workers equally. In addition, the Commission recommends expanding social security for the self-employed. The problem that is currently occurring in the Netherlands is that self-employed persons are often not insured against incapacity for work. According to the Commission, all workers should be given basic security due to incapacity for work, for this matter it should be irrelevant whether they are self-employed or employed. [189]

The fifth and last recommendation is that an activating and inclusive policy should be pursued. This is to prevent people from dropping out of the labor market for a long time.[190]

The cabinet agrees that promoting internal flexibility is important and that precarious workers with less strong bargaining power and who perform temporary work should be better protected. According to the cabinet, the WAB already aims to slow down the use of flexible contracts by allocating a transition payment from the first working day. The premiums for flexible labor are also higher than for permanent contracts.[191]

Considering the second guideline, the cabinet emphasizes that the worker can never be given 100% certainty about the qualification in advance, this must be done on the basis of the facts and circumstances of the case.[192] The cabinet also recognizes the problems surrounding platform work. The cabinet is concerned about bogus self-employment. They consider to explicitly bring platform workers under the scope of the employment contract by introducing a legal presumption. As a result, platform workers are then automatically given protection under employment law.[193]

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[187] Commissie Regulering van Werk 2020, p. 10-11
[188] Commissie Regulering van Werk 2020, p. 11-12
[189] Commissie Regulering van Werk 2020, p. 12-13.
[190] Commissie Regulering van Werk 2020, p. 13.
[191] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk', p. 8-9.
[192] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk', p. 11-12.
[193] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk', p. 15-17.

The cabinet is aiming for a system in which the legal form has no influence on taxation and has less influence on which income protection you enjoy, particularly with regard to pensions and the risk of incapacity for work. Currently they are working on compulsory insurance for the self-employed.[194]

According to the cabinet, inclusiveness after the corona crisis should be aimed at supporting the precarious workers. The crisis has consequences not only for young people with flexible contracts, but also for the elderly. The cabinet acknowledges that people over 50 often have difficulties finding work once they are unemployed. An activating labor market policy must also be applied after the crisis. To prevent long-term outages, measures have also been taken to promote healthy and safe work conditions.[195]

In summary, the government acknowledges the problems that arise and agrees with the recommendations of the Commission in general. Flexible work should be used for temporary situations and when it is appropriate given the nature of the work. However, it will not be possible to eliminate the inequalities between employees and the self-employed, but a start is already being made by, for example, looking at compulsory disability insurance for the self-employed. The cabinet is considering introducing a legal presumption of an employment contract for platform workers, which will offer them more protection under employment law. In addition, the government recognizes that it is not feasible to implement the recommendations within a short period of time. This will require years of reforming our labour laws.

11.2 Elections

On 17 March 2021 there will be parliamentary elections in the Netherlands. Political parties have released their party program, revealing their envisioned future for the Netherlands. One of the topics that is most hotly debated is the precarious worker. By taking a look at the party programs it is possible to distil a guideline which different political parties want to follow to improve the current vulnerable situation of precarious workers. For the purpose of this paragraph the programs of the five highest polling parties[196] have been analysed.

From the outset it becomes apparent that all five parties recognize the fact that precarious workers find themselves in a difficult spot on the Dutch labour market.[197] Most of the political parties

[194] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk', p. 19.
[195] De Kabinetsreactie op de Commissie Regulering van Werk en het WRR-rapport 'Het Beter Werk', p. 20-21.
[196] Politieke Barometer (online, consulted on 6 february 2021).
[197] VVD, ‘Samen Aan de Slag’, Verkiezingsprogramma 2021-2025 , p. 19; PVV, ‘Het gaat om U’ Verkiezingsprogramma 2021-2025, p. 25; CDA, ‘Nu Doorpakken’ Verkiezingsprogramma 2021-2025, p. 51-51; D66, ‘Een Nieuw Begin’ Verkiezingsprogramma 2021-2025, p. 42 - 44; GroenLinks, ‘Tijd voor een Nieuw Realisme’ Verkiezingsprogramma 2021-2025, p. 55 - 57.

mention that the COVID-19 Crisis has brought the problems that precarious workers face to the foreground. Precarious workers are the ones with the least amount of protection and without a substantial social security system to fall back on. The solutions range from wanting to implement the Danish 'flexicurity' model in which precarious workers can more reliably fall back on a comprehensive social security system[198]; to expressing the desire to roll back the flexibility of the Dutch labour system.[199] Nevertheless, they will offer precarious workers more substantive protection has been expressed by all five parties. It is therefore reasonable to assume that the next government will make protecting precarious workers one of the top priorities.

11.3 A look ahead

The problem of the flexible worker has come to light even more in recent months due to the consequences of the COVID-19 pandemic. The position of precarious workers is a vulnerable one and with Directive 2019/1152/EU precarious workers will be better protected. Nevertheless, the Dutch legal system will have to undergo fundamental adjustments in addition to the implementation of the Directive.

The government has given a reaction to the report of the Commission on the Regulation of Work. Both, the cabinet and the Commission, recognize the problems arising from precarious working and the need for change. However, big changes cannot be achieved overnight, this will take time. The cabinet wants to aim for a situation in which flexible contracts are only used for temporary shortages or when this is really desired. The government also wants to reduce, if not eliminate, the difference between self-employed people in the field of work incapacity insurance and taxation. In fact, the plan is to introduce a legal presumption that will give platform workers the benefit of the doubt regarding the existence of an employment contract. These give an indication of the possible changes in the future. The expected changes to the Dutch labour system, discussed throughout this report, will form the first step in ensuring a more equal and sustainable labour market in the Netherlands.

In general, we expect that the necessary changes in light of the implementation are primarily of a minor nature. Dutch labour law already complies with the Directive in a substantive way. Amongst others, it seems that the information obligation of the employer in Dutch law already complies with the Directive, with some small amendments needed. That is also the case for the provisions regarding the minimum predictability of work (article 10 Directive). With articles 7:610a and 7:610b DCC providing a legal presumption regarding the nature of the employment relationship and the scope of an employees' working hours, and article 7:628a DCC constituting a limitation

[198] VVD, 'Samen Aan de Slag', Verkiezingsprogramma 2021-2025, p. 19.
[199] PVV, 'Het gaat om U' Verkiezingsprogramma 2021-2025, p. 25.

on the use and duration of on-demand contracts, it appears that Dutch labour law is already complying with the Directive.

The same conclusion can be made for the rules concerning the protection of on-call workers relating to shift changes. Currently, the reasonable call-in period of four days (article 7:628a paragraph 2 DCC) and the right to compensation if an employer calls off the employee within that period of four days (article 7:628a paragraph 3 DCC), correspond to article 10 Directive and its conditions. Additionally, the Dutch provisions regarding a transfer to a more secure or permanent form of working are also generally in line with the new Directive, with the exception that it is currently not possible in Dutch law to request a change of the nature of the employment relationship (say, a permanent contract).

Nevertheless, our report concludes as well that the Dutch labour system is not entirely in line yet with the new Directive 2019/1152. The implementation of this Directive will undoubtedly lead to important debates and possible legislative changes. We conclude, amongst others, that the maximum probationary period under the Directive is longer than the maximum probationary period in Dutch law, and that in Dutch law the probationary period cannot be extended. This will possibly lead to an extension of the probationary period. More significant perhaps is the implementation of article 9 Directive regarding ancillary activities. Implementing this article will limit the current possibilities for employers in the Netherlands to prohibit or prevent workers from working for other employers. It provides much-needed legal firepower for employees to realise their free choice of employment.

In conclusion, we don't expect the new Directive 2019/1152 to cause fundamental changes to the Dutch labour system. Although there will be important implementations to be made, the new Directive will not represent a paradigm shift in the current debate about tackling the negative effects of precarious work and ensuring a tenable and sustainable labour market for all. It is up to the Dutch government to come up with more fundamental legislation to address the root problems.

Appendix 1 - List of frequently used terms

English	**Explanation**	**Dutch**
Ancillary activities	*All the work an employee engages in, that is not related to the primary employment relationship.*	Nevenwerkzaamheden
By law (ex lege)	*The manner in which a certain individual acquires/loses certain rights/liabilities merely by the application of the legal rules.*	Van rechtswege
Chain rule	*When successive temporary employment relationships are converted into an employment relationship for an indefinite period of time.*	Ketenregeling
Collective labour agreement	*A negotiated agreement between an employer and employees' representatives covering the schedule of wages, rules and working conditions. In principle this is no formal legislation.*	Collectieve arbeidsovereenkomst (cao)
Court	*The Court in first instance that can judge labour law disputes.*	Kantonrechter
'During' termination prohibitions	*Under the Dutch Civil Code, it is prohibited to terminate the employment contract of an employee during certain periods. These main prohibitions are during sickness, pregnancy or works council membership of the employee.*	'Tijdens'-opzegverboden
Dutch Civil Code (DCC)	*Dutch law in which the civil law is codified.*	Burgerlijk Wetboek (BW)

Employment contract with deferred duty of performance (d.d.p.)	*An on-call contract in which the duty to perform (work) has been deferred until the employee is called upon by the employer. Every time an employee works, he has the right of a minimum remuneration for three hours.*	Arbeidsovereenkomst met uitgestelde prestatieplicht
Fixed-term employment relationship	*An employment relationship in which is agreed upon a date on which the employment relationship ends.*	Arbeidsovereenkomst voor bepaalde tijd
Good employeeship	*According to article 7:611 of the Dutch Civil Code the employee has to act like a good employee. This norm is intentionally kept vague so the courts can give meaning to it.*	Goed werknemerschap
Good employership	*According to article 7:611 of the Dutch Civil Code the employer has to act like a good employer. This norm is intentionally kept vague so the courts can give meaning to it.*	Goed werkgeverschap
On-call contracts	*This concerns an employment relationship in which the employee declares his willingness to work during periods that yet have to be specified by the employer.*	Oproepcontract
Part-time contract	*A form of an employment relationship that carries fewer hours per week than a full-time employment relationship.*	Deeltijd-arbeidsovereenkomst
Payroll contract	*The client recruits and selects the employee, the payroll company hires the employee, and the payroll company then makes the employee available to that client on an exclusive and in principle long-term basis.*	Payrollovereenkomst

Pre-agreement	*An employment agreement to which neither parties has yet to bind themselves to. The pre-agreement only covers employment conditions not related to the working hours.*	Voorovereenkomst
Precarious working	*Any sort of work-relationship that is not for an indefinite period of time and/or full time.*	Precaire arbeidsrelaties
Secondment posting	*When a worker is going to perform work for a long period of time with a party other than his own employer whilst staying employed with his employer.*	Detachering
Self-employed	*Independent workers without personnel, who work on the basis of a commission contract (Article 7:400 of the Dutch Civil Code) or a contract for work to be performed (Article 7:750 of the Dutch Civil Code).*	Zelfstandige zonder personeel (zzp'er)
Temporary agency contract	*The temporary agency is the lawful employer even though the work is performed by the employee for a third party.*	Uitzendovereenkomst
The Court	*The lowest court within the hierarchy of courts in the Dutch jurisdiction, in civil law, criminal law and tax law.*	Rechtbank
The Higher Court	*The second highest court within the hierarchy of courts in the Dutch jurisdiction, in civil law, criminal law and tax law.*	Gerechtshof
Subdistrict court	*The judge at the Court who is authorized to handle a case on his own. Less difficult, simpler cases will be brought to the subdistrict court.*	Kantonrechter

The Supreme Court	*The highest court within the hierarchy of courts in the Dutch jurisdiction, in civil law, criminal law and tax law.*	De Hoge Raad
Voidable	*In case a contract/decision/etc. is voidable: one of the parties has to invoke the nullity (then one of the parties is entitled to declare it as invalid). A successful claim means the contract had never lawfully existed.*	Vernietigbaar
Void	*Null or ineffective contract/decision/etc. If a legal action is void, it has no legal consequences because the action was never valid. It was invalid from the moment there was an agreement.*	Nietig

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