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Netherlands National Report

COVID-19: A pressure test for Occupational Health and Safety (OHS).

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Table of contents

Chapter 1: An overview of the Occupational Health and Safety policy in the Netherlands

1.1 Introduction

This report will look at the occupational health and safety policy in the Netherlands. In chapter 1 there will be a general introduction of the Dutch system, and how it changed over the past years. This will be followed by chapter 2, in which various obligations that this system entails for the employer are discussed, specifically focused on obligations of interest regarding the corona pandemic and working hours. After this, chapter 3 will deal with the obligations for the employee, also in light of the corona pandemic. Chapter 4 entails the specific rights and obligations for the employer and employee in light of the Covid-19 pandemic. Chapter 5 deals with the Dutch Working Hours Act (in Dutch: Arbeidstijdenwet). Thereafter, in chapter 6 there will be an overview of the employee representation like work councils and trade unions. The report will come to an end with chapter 7, which discusses the enforcement of the occupational health and safety policy and what happens when employers or employees do not obey the rules.

1.2 The occupational health and safety policy in the Netherlands

In the Netherlands, the main rules for the occupational health and safety policy are regulated within the Dutch Working Conditions Act (in Dutch: Arbeidsomstandighedenwet, hereafter: Arbowet). The Dutch occupational health and safety policy has a layered structure. Three layers belong to the public domain and one to the private sphere:

1) The Arbowet;
2) The Arbeidsomstandighedenbesluit (Working Environment Decree, hereinafter: Arbobesluit), which is based on the Arbowet;
3) The Arbeidsomstandighedenregeling (Working Environment Regulation), which has more concrete norms and standards;
4) Arrangements by the parties itself, laid down in health and safety Catalogues (catalogues).

The Arbowet came into force on the 18th of March in the year 1980, and it replaced the Veiligheidswet which came into force in the year 1934. Starting in 1983, the Arbowet was introduced to the Dutch public in phases. Since its introduction, the law has undergone several significant changes.[1] There has been a shift in terminology used by the legislator. This can be seen as a sign of a changing approach to the issue of occupational health and safety.[2] In this new law, the government used the term 'work environment' to replace the traditional terms 'health and safety'.

The discussion that led to this change, was about more than a simple change of wording. The main goal of the discussion was the humanization of labour. The general view about labour law is that the primary responsibility (for safe and healthy working conditions) has to lie with those who create the risk and those who work with them.[3] This view should imply a retreat of the government and the central legislator from the field of occupational health and safety by offering more room to the parties directly

[1] *Evaluatie Arbowet 1998* 2005, p. 15.
[2] Chapter 10 of Health and Safety at Work, written by Frans Pennings & Teun Jaspers, p. 329 (hereinafter: Ales e.a. 2013, p. 329.
[3] Ales e.a. 2013, p. 329.

involved, such as employers and employees themselves.[4] The government should create a framework to enable the industry to impose a better health and safety policy.[5]

Consequently, the focus was on the 'duty of care' of the employer and the obligation of the employee to co-operate as much as reasonably could be required from him. There could no longer be spoken of a 'top-down' approach, it became more of a mutuality approach.[6] Apart from the redistribution of responsibilities between the government, the employer and the employee and the introduction of self-regulation instead of state regulation, the change can also be seen in terms of modern citizenship. The Arbowet sets goals but leaves it to the parties themselves to choose the instruments and the way in which they can achieve these goals.

Although the main and primary task lies with the employer, as already been said, the employee has been made jointly responsible for the work environment, which is in line with the ideology of the recent governments of treating employers as well as employees as self-responsible actors and not as only addressees of top-down regulation.[7] With this approach, the Dutch government clearly demonstrates the importance of the idea of citizenship as a guiding principle.[8]

Since the change of approach, the Arbowet has the character of a framework act. It contains a series of obligations for employers and employees, aimed at improving and maintaining healthy and safe working conditions. The act does not contain concrete provisions about the obligations for the employer, nor concrete norms and standards which have to be applied. Instead, it imposes on the employer the obligation to develop and implement a policy aimed at ensuring healthy and safe working conditions.[9] An important tool for achieving this is an inventory of the risks faced by the employees.

Another general principle of the framework act is the involvement of employees' representatives. These representatives sometimes have the right to consent regarding intended decisions of the employer to determine, adapt or adopt health and safety policies.[10] In addition to this, the employer must provide these representatives in an effective way.[11]

Moreover, the law describes the function and tasks of labour inspectors in general terms. In specific circumstances, the inspectors have the power to issue orders to the employer. Such orders may include a warning, an order to comply with the law and the imposition of a fine. By a more recent amendment of the law, the labour inspector has been provided with a specific tool: the administrative coercion.[12]

The government's intentions with the Arbowet were to increase the effectiveness and efficiency of the working conditions policy.[13] It wanted to do this by, among other things, increasing and strengthening the responsibility of both employers and employees within companies themselves. In addition to this, the government wanted to create freedom for employers and employees to give concrete substance to the working conditions policy pursued within a company in their own way.[14] The rules should be cast

[4] Ales e.a. 2013, p. 330.
[5] Ales e.a. 2013, p. 330.
[6] Ales e.a. 2013, p. 330.
[7] Ales e.a. 2013, p. 330.
[8] Ales e.a. 2013, p. 330.
[9] Article 7:658 BW; Article 3 Arbowet.
[10] Chapter IVA, article 27 par. 1 sub d Works Council Act (in Dutch: Wet op de Ondernemingsraden).
[11] Ales e.a. 2013, p. 334.
[12] Article 1 Policy Rule on imposing fines on working conditions legislation (in Dutch: Beleidsregel boeteoplegging arbeidsomstandighedenwetgeving).
[13] *Kamerstukken II* 1997/8, 25879, 3.
[14] *Kamerstukken II* 1997/8, 25879, 3.

in the form of target regulations; this would prescribe the result but leave the way to achieve this result up to the parties.[15]

There are several reasons why a proposal has been made to replace the old working conditions regulations with the new Arbowet. This new law would do more justice to the changing views on the tasks and responsibilities of employers and employees, as well as the government. In addition, an administrative fine in casu of non-compliance with the Arbo rules has been introduced and changes have been made to the supervisory provisions. A provision has also been included that allows for the possibility of deviating regulations if employers and employees jointly agree to do so.[16]

The Arbobesluit replaced numerous decrees dating from before the introduction of the Arbowet. At the time of the most recent amendment in 2007, the aim was to bring the Dutch protection and safety system to the level described by the EU Framework Directive. At the same time, the more detailed regulations of the older law were replaced by more general rules with objectives to be achieved or limits to be observed.[17]

In contrast to the first three instruments mentioned above, the catalogues are not made by the government, but by employers and (employee)organisations. The requirements for the preparation of the catalogues are given in the Beleidsregel arbeidscatalogi 2019 (Public Rule on Health and Safety Catalogues 2019). Article 1 states that a catalogue is the following: a written agreement between representatives of employers and employees on a national level, in a business sector, or in a branch, including the government, in which measures or provisions for the prevention or limitation of occupational risks are laid down concerning the way in which one or more regulations which are set by or pursuant to the Arbowet. This approach implies the involvement of trade unions and/or work councils. They are the main actors for the implementation of the law by drafting implementation regulations.[18]

A catalogue is a guiding, practical and accessible tool that provides employers with options for complying with target requirements of the Arbowet and reflects the agreements that employers and employees have made together. A catalogue describes the various methods and solutions that representatives of employers and employees have agreed on.[19]

In order to put a catalogue into operation, it must first be tested and approved by the Inspection SZW. The requirements for this are set out in article 3 of the Beleidsregel:

- It must describe the working area, which is national, at sector level or at the level of a branch or industry, for which it is intended;
- The compilers of the catalogue represent the employers and employees in the relevant employment area, which is national, at sector level or at the level of an industry;
- The catalogue must be made available for everyone free of charge and shall be easily accessible;
- The measures or facilities described in the catalogue are pursuant, or at least not contrary, to the Arbowet;
- The measures or facilities described in the catalogue are of such that it can reasonably be assumed that compliance will ensure compliance with one or more regulations under or pursuant to the Arbowet;
- The catalogue will indicate whether, and if so how, the proposed measures or facilities take account of special categories of workers.

[15] *Kamerstukken II* 1997/8, 25879, 3.
[16] *Kamerstukken II* 1997/8, 25879, 3.
[17] Ales e.a. 2013, p. 336.
[18] Ales e.a. 2013, p. 338; *Evaluatie Arbowet 1998* 2005, p. 44.
[19] *Evaluatie Arbowet 1998* 2005, p. 43.

A general feature of the Dutch regulations is that they are imposed by the government, but must be implemented by private parties. This private involvement is not unlimited, but without a doubt goes quite far. This can also be seen in the approach to the financial consequences of damage caused by accidents at work or diseases. The aim of all the regulations is prevention. Only when prevention has failed, then compensation is an option.[20]

Besides the Arbowet, The Netherlands also has two different pillars of regulations which address health and safety. The oldest one is the Dutch Civil Code (Burgerlijk Wetboek, hereafter: BW). The BW imposes the obligation to provide healthy and safe working conditions on the employer. When he fails to meet these obligations, he is liable for the damages which his employees suffer because of lack of care by the employer.[21] Furthermore, employers are statutorily obligated to continue payment of at least 70% of the salary during a 104 week-period in which employees aren't able to work due to illness.[22]

Both legislations find their basis in the duty of care, but they both know different ways of enforcement. The Arbowet contains specific offences for which the employer can get a fine. The BW contains provisions on the liability of an employer in the event of damage sustained by an employee while at work. Later on in this report we will discuss both the Arbowet and the BW, and the ways in which these legislations are enforced and which obligations and rights the employer and employee have under these laws.

Apart from the just mentioned laws which see on the health and safety of employees, there is also the Dutch Social Security Legislation (in Dutch: socialezekerheidswetgeving), that provides in benefits in case of illness or disability regardless whether the employer has caused it by not respecting his safety and health obligations.

[20] Ales e.a. 2013, p. 339.
[21] Article 7:658 BW.
[22] Article 7:629 BW

Chapter 2: General obligations of the employer and employee in the BW

2.1 General context

The general obligations of the employer and employee are set out in the BW. These general obligations also apply to various employment law issues that arose during the pandemic. We will explain the basic legal provisions first, so that it is clear what those provisions are, before we discuss the specific regulations regarding Covid-19 in Chapter 4.

2.2 Obligation to be a good employer and employee (art. 7:611 BW)

Article 7:611 BW reads as follows:
'The employer and the employee are obliged to behave as a good employer and a good employee.'

This is a very general obligation for both employer and employee. Many circumstances that arise during the course of the employment contract are not regulated in detail by law, collective labour agreement or otherwise. In such circumstances, this article can provide a solution. It is therefore also considered to be a safety net.

The obligation to be a good employer means that the employer must take the rights of the employee into consideration when he is making decisions.[23]

The obligations of the employee can be described as follows. The employee has a duty to behave as a good employee. The obligation to be a good employee can serve as an assessment criterion in circumstances that are not provided for by specific regulations.[24]

For example, in an incidental case an employee will be obliged to comply with a request for overtime on the grounds of the obligation to be a good employee, if no further regulations have been laid down in this regard in an individual employment contract or collective labour agreement.[25]

2.3 Continued payment (art. 7:628 BW)

Article 7:628 BW obliges the employer to continue paying the salary if the employee has not performed the agreed work in whole or in part, unless the entire or partial non-performance of the agreed work should in all reasonableness be borne by the employee.[26] For example, the employer can be obliged to continue payment of salary when the employer can be blamed for a disrupted employment relation, while the employee, as a reaction, has chosen to stay at home without being ill.[27]

2.4 Duty of care setting up a workplace/tools and measures/instructions to prevent damage to the employee (7:658 BW)

Article 7:658 BW reads as follows:

[23] Bouwens e.a. par. 3.3.2.
[24] Verhulp aant. 1.
[25] HR 26 oktober 2012, LJN BW9244, JAR 2012/313 (*Querijns/TGB*).
[26] Article 7:628(1) BW.
[27] HR 27 juni 2008, ECLI:NL:HR:2008:BC7669, JAR 2008/188 (Mak/SGBO)

‘The employer is obliged to set up and maintain the premises, equipment and tools in or with which he has the work performed in such a way as well as to take such measures for the performance of the work and to provide instructions as reasonable.’

The article contains the employer's duty of care for the safety of the employee's work environment. The employer must take those measures that are reasonably necessary to prevent the employee from suffering damage in the performance of his job.[28] The employer will only have to reimburse the damage suffered by the employee when he does not live up to his duty of care.[29] The employer is responsible for not only his own employees but everybody who performs work for the employer.[30] This also includes freelancers.

In the first case the extent of the duty of care of the employer should be determined based on the regulations in the field of the working conditions of the employer. According to the legislator there is no material difference between the employer's duty of care laid down in article 3(1) Arbowet and the civil law duty of care.[31] The duty of care has a broad scope just like the criterion ‘during the performance of his work’. The duty of care is not intended to create an absolute guarantee for the protection of the employee against the danger of accidents at work, not even with regard to employees whose work entails special risks. However, in view of the broad scope of the duty of care just stated, it cannot easily be assumed that the employer has complied with this and is therefore not liable for damage suffered by the employee during the performance of his work.[32]

2.4.1 During the performance of his work

In the first place the duty of care applies to the workplace of the employee. The workplace is defined as any place which is used in connection with the performance of work. However, the duty of care is not limited to the workplace of the employee but does also include places where the employee comes during the performance of his work. This could be the public road. The duty of care of article 7:658 BW entails that the employer takes measures regarding the performance of the work and gives instructions to prevent the employee from suffering damage as much as possible. In the case *Van Uitert/Jalas* the Dutch Supreme Court considered that ‘during the performance of his work’ must be interpreted as work performed with regard to his employment contract. This cannot be altered by the fact that he may have deviated from the assignment given to him when performing those activities.[33]

In the case *Reclassering/S* a probation officer was hit on his head approximately forty times by a client at his own home in the evening. The Dutch Supreme Court considered that the obligation of article 7:658(1) BW does not only arise from the socio-economic position of the employer in relation to his employee but is also closely related to his control over the workplace and his authority to give his employee instructions regarding the performance of their work. As a rule, there is no such control and authority when it comes to the private situation of the employee. When an employee suffers damage in a private situation related to work, this cannot be governed by the special regulation of article 7:658 BW. Instead it must be decided based on the circumstances of the given case based on what, in that case, the requirement to behave as a good employer entails. It should also be noted that this question can only

[28] Vegter 7:658 BW.
[29] Bouwens e.a. 2019 p. 136-138.
[30] Article 7:658(4) BW.
[31] HR 12 december 2008, ECLI:NL:2008:BG1213 (*Maatzorg de Werven*), par. 3.5.2.
[32] HR 12 december 2008, ECLI:NL:2008:BG1213 (*Maatzorg de Werven*), par. 3.5.3.
[33] HR 15 december 2000, ECLI:NL:HR:2000:AA9048, (*Van Uitert/Jalas*), par. 3.3.

be answered in the affirmative under special circumstances, in which cases such as the present one may involve a specific and serious danger, also known to the employer.[34]

2.4.2 Intent or conscious recklessness of the employee

The employer will need to compensate the damages the employee suffers in the course of his work when there is a causal connection between the damage and the work being done, unless the employer can prove that he lived up to his duty of care, or that the damage to a significant extent was caused by intent or conscious recklessness of the employee.[35]

The employer is not liable if he can prove that he lived up to his duty of care, or that the damage to a significant extent was caused by intent or conscious recklessness of the employee.[36] Conscious recklessness is only at stake when the employee during the performance of his conduct immediately prior to the accident was aware of the reckless nature of his conduct. It is not sufficient that the employee has been warned repeatedly.[37] To a "significant extent" means that the conduct of the employee must be contributing to the accident to such extent that the employer's failure to fulfill his obligations are insignificant in comparison to the conduct of the employee.[38] This approach is based on the opinion that daily routines on jobs lead to less careful actions by employees. The employer has to be aware of that. It cannot be expected of the employee to carry these risks taking into consideration the salary he receives. The fact that the damage was caused by intent or conscious recklessness of the employee cannot lead to a reduced compensation. The court has only two options: either the employer has to carry the entire damage or the damage was caused by intent or conscious recklessness of the employee by which the damages have to be borne by the employee.[39]

2.5 Right of instruction (art. 7:660 BW)

Article 7:660 BW reads as follows:
'The employee is obliged to comply with the regulations concerning the performance of work as well as those that serve to promote the good order in the employer's business, given to him by or on behalf of the employer within the limits of generally binding regulations or an agreement with the employee individually or together with others'

The employer's authority to instruct is regulated in this article. This once again expresses the fact that the employee is under the control of the employer. Under article 7:660 BW it is explicitly prescribed that the employee must adhere to instructions by the employer regarding the performance of the work and to instructions regarding good order in the company. The instructions should fall within the limits of the employment contract and, of course, the generally binding regulations. The instruction can be given to an employee individually, but also to a group or to all employees.

The employer's right of instruction also has limits, only those which are generally binding regulations or stemming from the employment contract itself.[40]

[34] HR 22 januari 1999, ECLI:NL:HR:1999:AD2996, p. 3.3.
[35] Article 7:658(2) BW.
[36] Article 7:658(2) BW.
[37] HR 20 september 1996, ECLI:NL:HR:1996:ZC2142 (*Pollemans/Hoondert*), p. 3.4.
[38] HR 20 september 1996, ECLI:NL:HR:1996:ZC2142 (*Pollemans/Hoondert*), p. 3.6.
[39] Bouwens e.a. 2019, p. 139-140.
[40] Vegter, 7:660 BW.

2.6 Reasonable accommodations for workers whose disability was caused by the violation of safety obligations (art. 7:658a BW)

The employer is obliged to help employees who are unable to perform their stipulated work because of unsuitability due to illness offering re-integration in his company. This is a general obligation which is not only applicable when the disability to work was caused by the violation of safety obligations. The employee should preferably be re-integrated in his own job. Only when this is not possible, the employee can be re-integrated in another suitable job within the company of the employer. Re-integration in a company of another employer is only required when re-integration in the company of the employer is not possible.[41] The employer must take such measures and provide instructions which are reasonably necessary, to enable the employee to perform his own or other suitable work.[42] Suitable work is defined as all work that suits the employee's strengths and abilities, unless acceptance cannot be required for reasons of a physical, mental or social nature.[43] The employer is required to develop and offer a plan aiming at re-integration of the employee. The employer and the employee have to evaluate the plan regularly and adjust it if necessary.[44] The obligation of the employer offering re-integration is closely related to the obligation of the employee to cooperate with the employer as to the re-integration. That means that the employee must comply with reasonable instructions given by the employer or by an expert designated by the employer as well as cooperate with measures taken by the employer or an expert, implying also with the re-integration plan and the evaluation and adjustment of the plan. The employee is required to perform suitable work in the sense as explained above.[45]

2.7 The employee's liability for damages (art. 7:661 BW)

In case, the employer is suffering damage due to the actions of the employee, the employee cannot be held responsible for damages suffered by the employer. The employee is only responsible in case of intent or conscious recklessness or in special circumstances to be assessed in view of the nature of the employment contract.[46] Employer and employee can make other agreements with regard to damages suffered by the employer provided it is laid down in writing and the employee is insured for the damages.[47]

[41] Article 7:658a(1) BW.
[42] Article 7:658a(2) BW.
[43] Article 7:658a(4) BW.
[44] Article 7:658a(3) BW.
[45] Article 7:660a(1) BW.
[46] Article 7:661(1) BW.
[47] Article 7:661(2) BW.

Chapter 3: General obligations of the employer and employee in the Arbowet

3.1 General context

This chapter will discuss the general obligations for employers and employees in the light of the Corona-pandemic.

3.2 Definitions

In order to ensure proper application of the Arbowet, it is important that the terms used in the Arbowet are clear to everyone. Therefore, the first chapter focuses on various definitions that one needs to know in order to apply the Arbowet. Not all definitions are relevant to this chapter of the report, but the definitions of 'employer' and 'employee' are.

The concept of 'employer' in article 1 Arbowet is widely interpreted in the law itself. It means 'the party from whom another person is required by contract of employment or by public law to perform work'. The definition is much wider compared to the general definition of article 7:610 BW. The legislator has drawn up some smaller exceptions.[48]

The definition given of 'employee' is directly related to the definition of employer: it is 'the other person', to whom is referred to in the definition of employer. That means the person who is required by contract of employment or by public law to perform work.[49]

3.3 General obligations for the employer and employee

Occupational health and safety is the policy that an employer pursues within his company in the field of working conditions. A good working conditions policy leads to sustainable employability and increased productivity. The health and safety policy limits the health risks, reduces absenteeism, and promotes reintegration.[50]

The Arbowet creates several rights and obligations for employers. The most important obligation of the Arbowet is mentioned in article 3 of chapter 2: the employer must ensure the safety and health of the employees in all aspects related to work and must therefore implement a policy aimed at the best possible working conditions, taking into account the obligations given in the extension of this article. Article 3 gives some more general obligations for the employer. Later on in the Arbowet, various specific additions are made to these general obligations.

What a health and safety policy consists of differs from company to company. Every employer must draw up and implement a health and safety policy. Drawing up and implementing a good and applicable health and safety policy is a cyclical process. The employer must draw up his own policy by planning, doing, checking and acting (PDCA), he has to evaluate and continue to improve this policy.[51] This policy cycle consists of the entire process of making an inventory of the risks, defining and implementing

[48] Article 1 lid 1 sub a 1 and 2 Arbowet
[49] Article 1 lid 1 sub b Arbowet
[50] 'Arbobeleid', arboportaal.nl.
[51] 'Arbobeleid', arboportaal.nl.

measures and evaluating (and subsequently adjusting) the policy and the individual measures. Those involved should work closely together to achieve this.[52]

A health and safety policy consists of various components and instruments. The elements that must be included are, among others:

- A risk inventory and evaluation (RI&E): A RI&E states what risks the nature of the work entails or can entail in terms of the health and safety of employees. Part of this is a plan of approach that includes the additional measures that will be taken to overcome the risks.
- Occupational health and safety service or company doctor: For prevention and absenteeism, an agreement with the occupational health and safety service of the company doctor is mandatory. The supervision of a sick employee must be carried out by a company doctor.
- Prevention officer: Companies are obliged to appoint at least one employee as prevention officer. If a company has no more than 25 employees, the employer may himself take on the duties of prevention officer. In all cases the prevention officer must work within the company.
- Company emergency officer: At least one company emergency officer must be present in the company.
- Information: Companies must provide information, training and instructions to their employees on safe and healthy working practices and supervise them themselves.
- Occupational health and safety expert: Employers must provide access to an occupational health and safety expert. They must also ensure that the right expertise is used to implement an effective health and safety policy.
- Periodic occupational health examination: Employees must be offered a periodic occupational health examination.

For RI&E, agreements with health and safety services and the appointment of a prevention officer the consent of employees' representatives (works council) is required.[53]

In order to elaborate the standards of the Arbowet, employers and employees make agreements for their own sector or company, laid down in a so-called health and safety catalogue. This catalogue provides a clear and understandable overview of the agreements and possible solutions to problems relating to safe and healthy working that are specific to the industry.[54]

3.3.1 The obligation of adjustment of the workplace

Article 3 paragraph 1 sub c Arbowet deals with the workplace of the employee. According to the Arbowet, every place where work is performed or where work is going to be performed is regarded as a workplace.[55] The workplace must be adapted in such a way that it meets the personal characteristics of the employee as much as possible. Of course, this is not unlimited; it must go as far as can be demanded from the employer. Since most people spend (except during covid-19) about a third of the whole day (eight hours) at work, it is important that the layout of the workplace meets the relevant health and safety requirements.

[52] 'Arbobeleid', arboportaal.nl.
[53] 'Arbobeleid', arboportaal.nl.
[54] 'Arbobeleid', arboportaal.nl.
[55] Article 1 lid 3 sub g Arbowet

A general requirement for the design of workplaces is that they must be safely accessible and safe to leave.[56] Workplaces must be designed, constructed, equipped, commissioned, operated and maintained in such a way as to prevent any risk to the safety and health of workers as far as possible. They shall also be kept clean, free of dust as far as possible and, where the safety of the workplace so requires, in an orderly manner.[57] As a supplement to this, article 3.2a Arbobesluit has been temporarily introduced during the COVID-19 pandemic. In order to prevent or limit the risk of contamination of employees and third parties in workplaces, the necessary measures and provisions must be taken in good time.[58] In any case, this includes observing sufficient hygiene provisions, providing effective information and training to employees about the fight against COVID-19 in the workplace and keeping adequate supervision of compliance with the necessary measures and facilities referred to in this article.[59] The Arbobesluit contains many specific regulations on the design of workplaces. However, this decree does not fully apply in the case of working from home. The main rule is that the articles in the Arbobesluit do not apply, unless the article explicitly indicates otherwise. The employer is for instance obliged to pay for the furnishing of the home workplace by means of a work-related costs scheme. The employer must also compose a work-from-home agreement with the employees or a work-from-home policy. Agreements must be made about breaks, maintenance of computers, equipment or machines, among other things. In addition, the employer is obliged to inform employees about the risks they run, such as the risk of Repetitive Strain Injury (RSI) or work stress. The employee again has the corresponding obligations. He is obliged to inform the employer when the workplace needs to be adapted, or when he experiences complaints. A proactive attitude is therefore expected from the employee.

Article 4 of the Arbowet requires the adaptation of workplaces for employees with structural, functional limitations. This concerns employees who are prevented from performing the stipulated work due to incapacity caused by illness.

3.3.2 The obligation of inventory and evaluation of risks

Article 5 of the Arbowet provides for the recording in writing of the inventory and evaluation of the risks that the work entails for the employee. Every employer is obliged to draw up a RI&E. This describes the main health and safety risks of the work. Companies are free to further elaborate the RI&E themselves. The RI&E is adjusted as often as experience gained, changed working methods of working conditions, or when the state of the art and professional services give cause to do so.[60] A RI&E should comprise the following points:

- Inventory of the hazards present and of the risk reducing measures already taken in the field of safety and health.
- Inventory of the hazards present with regard to employees who belong to the 'special categories of employees'.
- Assessment and periodization of the risks.
- Plan of approach determining what measures will be taken and when.
- Attention for employee access to a prevention officer or health and safety expert.

[56] 'Wat zegt de wet over arbeidsplaatsen?', arboportaal.nl.
[57] Article 3.2 Arbobesluit
[58] Article 3.2a(2) Arbobesluit
[59] Article 3.2a(3)(a) Arbobesluit; Article 3.2a(3)(b) Arbobesluit; Article 3.2a(3)(c) Arbobesluit.
[60] 'Wat zegt de wet over de RI&E?', arboportaal.nl.

After the RI&E, it may turn out that further, specific inventories are needed. Consider, for example, noise of psychosocial workload. This deepening of the RI&E is also a part of the mandatory actions assigned to an employer.[61]

It is therefore primarily up to the employer to analyse the hazards and risks and to list them in the RI&E. In doing so, the employer is obliged to seek the assistance and advice of one or more experts, such as a prevention officer. The prevention officer has an important role in assisting in the performance and preparation of the RI&E and the plan of approach.[62]

Because it is often difficult to deal with all the risks simultaneously, it may sometimes be needed to seek advice from an occupational health and safety expert or the occupational health and safety service. This is not required by law. If the health and safety expert of the occupational health and safety service is asked for advice, they must assess the RI&E and the plan of approach on the basis of the criteria stipulated in article 2.1 of the Arbobesluit. They draw up an assessment report and send it to both the employer and the works council. This report can then be a reason to amend the RI&E and/or the plan of approach.[63]

When an employer draws up a plan of approach, it is wise to ask the employees which measures they consider important. In this way, they are involved in the development of company safety. In that case, they will be more inclined to cooperate in the implementation of the plan. In addition to this, every employee has the right in any case to be informed of the RI&E and the plan of approach. They also have a say in determining the RI&E and the plan of approach through the works counsel's right of consent.[64]

3.3.3 The obligation to provide information

Pursuant to article 7 of the Arbowet, the employer must provide information provided by himself and designated by order in council. The employer must do this on his own initiative; the employees do not have to ask for it.

3.3.4 The obligation to educate

Pursuant to article 8 of the Arbowet, the employer is obliged to effectively inform and educate the employees about the work to be performed and the associated risks, as well as about the measures aimed at preventing or limiting these risks. For this information to be useful, it is important that the employees take an active attitude during the 'briefing'.

Information cannot be given 'just like that'. There are various requirements which the information and instructions must meet.[65] Some of these requirements are:

- The information and instructions must be geared to the results of the RI&E.
- The information and instructions must be adapted if changed circumstances give cause to do so.
- Employees under 18 years of age must be given extra attention during the information.
- The instructions for use of work equipment or personal protective equipment must be pointed out at the employees and their use must be monitored.
- Employees should be made aware of the danger of nearby machines even if they are not used directly.

[61] 'Waaruit bestaat de RI&E?', arboportaal.nl.
[62] 'Wie geeft input op de RI&E?', arboportaal.nl.
[63] 'Wie geeft input op de RI&E?', arboportaal.nl.
[64] 'Wie geeft input op de RI&E?', arboportaal.nl.
[65] 'Voorlichting gezondheidsrisico's', arboportaal.nl.

Another important point regarding the information and instructions is that the employer must be able to prove that the briefing has actually taken place and notify who gave and received it. It is also important that this is not a one-off information event. The employees must be briefed regularly.[66]

[66] 'Voorlichting gezondheidsrisico's', arboportaal.nl.

Chapter 4: Rights and obligations for the employer and employee specifically for Covid-19

4.1 General

In this chapter the specific requirements for both employer and employee to the fulfilment of Occupational safety and health (OHS) in the pandemic will be explained in the following sections: quarantine, remote work, measure temperature, test and vaccinate and other covid-perils in the workplace.

It can be noted that in the Netherlands the employee him/herself has only a few obligations. Most of the obligations are linked to the employer's obligations. In this chapter, therefore, the obligations for employer and employee are combined where necessary.

4.2 Quarantine

4.2.1. General context

Since the start of the pandemic, a government measure obliges individuals to go into quarantine if they have Covid-19, Covid-19-related complaints, have someone who is living in the same household (hereinafter: housemate) who is infected or have come from a high-risk area. This logically raises many labour law issues. These issues are discussed in this subsection.

4.2.2 Continued payment of wages

Quarantine because of infection

A question arises whether employees who are infected with the coronavirus and therefore cannot perform their work will have the right to continued payment of their wages by their employer. Employees who are ill have the right to receive payment during sickness. This right can be found in article 7:629(1) BW and can be invoked for the first 104 weeks of sickness. The employee will receive at least 70% of his daily salary. For the first 52 weeks the payment cannot be below the legal minimum wage. The employee must not have been able to perform his stipulated work due to unsuitability as a result of illness, pregnancy or childbirth.[67] An employee is unsuitable because of illness when he is not able or allowed to perform the eligible work on medical grounds.[68] He must be unable to or not allowed to perform the work agreed on. There must be a causal relation between the illness and the inability/allowance to perform the work. The employee does not have the right to receive payment - and on the other hand, the employer is not obliged to continue to pay wages - during sickness, pregnancy or childbirth if one of the following applies:

- if the illness was caused by his intention or is the result of a defect about which he provided false information in the context of an appointment examination and as a result the assessment against the load-bearing capacity requirements drawn up for the position could not be carried out correctly;[69]
- for the time during which his healing is hindered or delayed by his actions;[70]

[67] Article 7:629(1) BW.
[68] Article 19(1) ZW.
[69] Article 7:629(3)(a) BW.
[70] Article 7:629(3)(b) BW.

- for the time during which, although he is able to do so, he does not perform suitable work as referred to in article 658a(4) without sound grounds;[71]
- for the time, during which he refuses without good reason to cooperate with reasonable regulations or measures taken by the employer or by an expert designated by him that are aimed at enabling the employee to perform suitable work as referred to in article 658a(4);[72]
- for the time during which he refuses to cooperate without good reason in drawing up, evaluating and adjusting a plan as referred to in article 658a(3).[73]

When an employee is infected with Covid-19 but does not have any complaints, he is still considered to be ill and will continue to be paid wages. Especially in the case where an employee is not able to do his work from home.

Quarantine because of infected housemate

The question raises what the situation is if a person is not infected with the coronavirus, but their housemate is? Until recently, government measures obliged such people to stay at home in that situation. It cannot be excluded that this measure will be re-installed when the infection-rate becomes problematic again. Is the employee then entitled to continued payment of wages and on what basis? That is a difficult question, because strictly speaking the person is not ill, and therefore not entitled to continued payment of wages under article 7:629 BW.

Two situations can be distinguished here. The first situation is the situation that the worker has the possibility to work from home. In that case he or she will simply continue to be paid because the work is still done. The second situation is that a person cannot perform the work from home, which is the case with for example employees in production processes, shift work and hospitals. The question arises whether an employee who is in quarantine but not sick should be paid based on article 7:628 BW or 7:629 BW. This is of importance for two reasons. First, based on article 7:628 BW the employee has the right to 100% of his salary. Based on article 7:629 BW this is only 70%. Secondly, it is statutorily allowed to agree that the employee will not receive payment for the first two days of sick leave.[74] In a case of 30th of June 2020 this was the central question. When this case took place people were required to go into quarantine when a family member or roommate had a fever, unless they had a crucial profession or were part of a vital process. The court considered that if an employee has been in contact with a person who might be infected with COVID-19 or has a sick roommate and has to be quarantined and is unable to work from home because this is impossible in his/her profession, this is a circumstance that cannot be at the employee's risk. In that case, the employer is obliged to pay the salary. Because there is no illness in this situation, the employer is not allowed to deduct waiting days from the wage and the employer must continue to pay the full wage.[75]

[71] Article 7:629(3)(c) BW.
[72] Article 7:629(3)(d) BW.
[73] Article 7:629(3)(e) BW.
[74] Article 7:629(9) BW.
[75] Rb Limburg 23 juni 2020, ECLI:NL:RBLIM:2020:4465, p. 4.5.

4.3 Remote work

4.3.1 General context

Perhaps one of the biggest changes with lasting consequences of the pandemic is working from home on a large scale. That makes sense because during the pandemic, the advice from the government was to work from home when possible. For many employees, the office workplace is replaced by a table in their own living room or the desk in their own study. Of course, there are also employees who cannot work at home, for various reasons. This may be because of their work requirement to be at the workplace, or because they simply do not have a suitable place to work at home. Various studies however have shown that a large proportion of workers want to continue to work at home for a substantial part of their working time. The question arises to what extent the employee can 'demand' this from his employer.[76] Another question that arises is how to regulate situations where the employer cannot supervise the workplace the employee has at home or at any other place besides their home. They do not know if it is a safe place and if people are complying with the rules which are set out for the pandemic. These questions will be discussed in this subsection.

4.3.2 Current law

Right to work from home

Under current legislation, the Flexible Working Act, there is no right to work from home. An employee can submit a request to change the workplace no later than two months before the date he wants to start working from home. The employer may reject the request on any ground. If he decides to reject the request, he will only have to inform the employee of his decision and of the reasons for it. Employees thus have a right to request to work from home, and the employer has a duty to consider this request, but this does not constitute a right to work from home. According to the court in Nijmegen, a government advice to work from home does not make this any different:

> *The very generally formulated government advice about working from home as much as possible does not interfere with this specific legal relationship to such an extent that [employee] can derive a 'right to work from home' from it.*[77]

Duty to work from home

But now a reverse scenario, because not only employees see the benefits of working from home, but many employers also see savings in expensive square metres of office space and less travel expenses, with more productive and happier employees. Can an employer require an employee to work from home? This question can be answered partially in the affirmative. The employer has the authority to give instructions with regard to the work based on article 7:660 BW. He can therefore oblige the employee to partially work from home. However, he must also take into account the obligation to be a good employer under article 7:611 BW. If under certain circumstances it cannot be required of the employee to work from home, the employer cannot oblige the employee to do so. Consider, for example, an employee with small children who do not go to daycare. In the event that the employer wants the employee to work from home forever, this is not possible without further ado. It is beyond the scope of this paragraph to go into this any further.

[76] Akopova & van den Heuvel 2021.
[77] Rb. Gelderland 16 juni 2020, ECLI:NL:RBGEL:2020:2954.

4.3.3 New law

Due to the pandemic, an initiative bill by members of the parliament has been drafted, namely the 'Work where you want Act'.[78] Note: Before the pandemic only 39% of the working population in the Netherlands usually or occasionally worked from home.[79] Whereas by the end of 2020 this share has already risen to 48%.[80] This initiative bill was submitted on 27 January 2021. It provides for the right of the employee to work from home or at a workplace designated by the employer. The initiators of the proposal want to facilitate the dialogue between the employee and the employer about the possibilities of adapting the workplace. The proposal must still be dealt with in the Parliament. As long as the proposal has not passed the Parliament, the Flexible Work Act will remain the starting point in assessing requests to work from home.[81]

This bill is an attempt to give the employee more freedom of choice with regard to the workplace and thus to strengthen his position. The bill states that a request by an employee to (partially) work from home should be accepted by the employer, unless there are compelling business interests.[82] These compelling business interests may include:

- Problems in the field of safety, planning, finance or organisation;
- Risk of erosion of social cohesion within the organisation;
- Very heavy burdens on employers (e.g. heavy security measures to enable digital working from home in positions with professional secrecy to make).

If there is therefore no compelling business interest, the employer will have to grant the employee's request under this bill. Whether this bill will be adopted, is still unsure. The House of Representatives is expected to be critical regarding the extra burden this bill might cause for employers. On March 30 2022 an advice regarding the regulation of such requests was published by the Dutch Social Economic Council, which is an advisory body to the government in which independent experts and employee and employer representatives have a seat. The council deviated from the criterion of compelling business interests that was included in the bill. Instead thereof, the council suggests to obligate employers to accept a workplace-request in case, given the circumstances and based on reasonableness and fairness, the employer's interest must take second place to the employee's interests and the request concerns a workplace within the EU at which place the employee will live or that is a fitting place to work from. When the request does not meet these criteria, the employer will discuss the request with the employee in case he intends to refuse it, the council suggests.

4.3.4 Obligation to ensure a safe workspace

As mentioned before, in the view of the corona pandemic, the standard workplace has been changed for many employees. This raises questions on how to regulate such situations. Employees come and go, and the employer does not have sight of the workplace they have at home or at any other place besides their home. The obligation to ensure a safe workspace kind of shifts from the employer to the employee. The employee in his turn, is obliged to inform the employer of his work-from-home situation and to follow the employer's instructions. Finally, the employer must inform the employee that he adheres to the safety regulations for proper furnishing of the home workplace.

[78] *Kamerstukken II* 2020/21, 35714, nr. 2.
[79] 'Bijna 4 op de 10 werkenden werkten vorig jaar thuis', CBS.nl.
[80] Oude Hengel e.a., 2021.
[81] Besselink 2022, p. 4-18.
[82] Derks & Van der Toorn 2021.

4.4 Measure temperature, test and vaccinate

4.4.1 General context

The most sensitive corona-issue in the workplace, by far, is whether the employer can oblige or urge his employees to test his temperature, get tested, vaccinated or to show a corona-access certificate. The employer has in fact a right of instruction with regard to safety in the workplace according to article 7:658a BW and article 3 Arbowet. Does, however, this right of instruction go to the extent that the employer may oblige his employees to be tested, vaccinated or have their temperature measured? In answering this question the right of the employee to physical integrity and privacy play an important role, as well as the GDPR that prohibits employers to process health data of employees. We will discuss these topics in this subsection.

4.4.2 Right to physical integrity and respect for privacy vs. the interests and duties of the employer

There is no direct obligation to be vaccinated, in the sense that an employee is forced to be vaccinated. There is no legal basis for it and such an obligation does not fit into an employment relationship.

Some sort of obligation to measure temperature or test for the coronavirus before showing up for work can infringe the right to physical integrity and respect for privacy (articles 10 and 11 of the Dutch Constitution, article 8 ECHR and article 17 ICCPR).[83] It follows from the case law Dirksz v Hyatt I[84] that European fundamental rights relating to the inviolability of the human body and respect for privacy have direct effect, which means that an employee can invoke those fundamental rights directly against their employer. However, an infringement of a fundamental right by the employer may be justified under certain circumstances. According to the Supreme Court, when assessing whether an infringement is justified, it must be assessed whether the act that infringes serves a legitimate aim and whether the act is a suitable means to achieve that aim. In addition, it must be assessed whether the infringement is proportionate in relation to the employer's interest in achieving the intended goal (proportionality) and whether the goal cannot also be achieved in a less drastic way (subsidiarity). There have been a small number of cases where the judge has ruled on whether an employer can oblige its employees to be tested or vaccinated.

In one of these cases[85], a Curaçao employer asked an employee to be vaccinated against the COVID-19 virus. The employee refused, after which the employer immediately fired her. The judge ruled that a general vaccination obligation does not exist and such obligations do not fit within the employment relationship either. After all, vaccination affects the fundamental right of citizens to inviolability of the human body and the right to respect for privacy. Employers must respect these fundamental rights in accordance with Dirksz/Hyatt I. Under certain circumstances an infringement of these rights is allowed, as previously discussed. The court ruled that the business operations and way of working (the employee's work was limited to processing data behind the computer and visits to the office by third parties were minimal) did not constitute a legitimate aim to infringe on the employee's fundamental rights. In addition, there was no consultation with the employee or joint consideration of the possibilities of limiting the risk of infection if the work continued. The summary dismissal did not last, partly because

[83] Barentsen e.a. 2022.
[84] HR 14 september 2007, ECLI:NL:HR:2007:BA5802, NJ 2008/334, m.nt. E. Verhulp, p. 3.4.2. (*Dirks/Hyatt I*).
[85] Gerecht in eerste aanleg van Curaçao 16 juli 2021, ECLI:NL:OGEAc:2021:132.

a summary dismissal must be regarded as an ultimum remedium and the refusal to vaccinate without a statutory vaccination obligation does not qualify as an urgent reason.

In a case from December 2021, the employer, a dance company, informed the artists that not only the guests but also the employees needed to show a valid QR code proving that they were either vaccinated, tested or recovered. A dancer informed the employer that he did not have a valid QR code. The employer asked the employee not to show up at work and announced that he would not continue payment of the employee's wages. The judge considered that requiring testing and having to communicate the results to the employer constitutes a violation of the employee's privacy and physical integrity. However, the judge ruled that the contested infringement of the employee's fundamental rights was justified. The General Data Protection Regulation (GDPR) was not applicable in this case, since the employer did not store test results in a document. It was then considered that, against the background of the fact that almost 100% of the employee's work involves contact at less than 1.5 metres, the employer's testing policy was reasonable.[86]

In the dissolution procedure[87] between an after-school care facility and a group teacher, the Amsterdam court concluded that the employer's instruction to require a PCR test from the employee in certain situations does indeed constitute an infringement of the right of physical integrity and respect for privacy but is nevertheless reasonable because the conditions for restricting fundamental rights were met in this case. According to the judge, the employer's aim to create a safe (working) environment through instruction outweighed the employee's objection to having to undergo a PCR test. The court therefore considered the infringement of the fundamental rights of the employee to be justified. By systematically failing to comply with the employer's reasonable instructions, the court judged that the employee had acted culpably. The employment contract was therefore dissolved.

It follows that at this moment, disciplinary sanctions following an employee's refusal to test or get vaccinated, can be legitimate, but not unconditionally. In each case, the right to physical integrity and privacy of the employee have to be carefully weighed against the interests of the employer.

4.4.3 General Data Protection Regulation (GDPR)

It is prohibited to temperature people and thereby process their health data according to the General Data Protection Regulation (GDPR). Employers often think they are allowed to process these data after permission of the employee. But that is not possible in an employment relationship, because there is no equality. An employee may feel pressured to give consent. An employer cannot play a doctor. Only a company doctor may perform health tests and process the medical data of staff. Employers are therefore not allowed to ask about the health of their employees. In addition, employers are not allowed to process medical data of staff themselves. This can, however, be done through the company doctor. The company doctor may not share individual information with the employer. To give an example, the company doctor is not allowed to inform the employer regarding which employees have been vaccinated. The company doctor may, however, give a general view on how many people have been vaccinated in the company.

[86] Rb. Amsterdam 14 december 2021, ECLI:NL:RBAMS:2021:7321.
[87] Rb. Amsterdam 11 februari 2022, ECLI:NL:RBAMS:2022:418.

4.5 Specific rights and obligations in the view of the Corona-pandemic based on case law

4.5.1 General context

In this subsection we will discuss specific case law with regard to other labour law-perils in times of the pandemic.

4.5.2 The requirement of a facemask at the workplace

This case concerned an employee who transported food between the various branches of the company. The employer had instructed the employees by email that they had to wear face masks from that moment on. In addition, he indicated that if employees had a problem with the measure or could not wear a face mask on medical advice, they could contact the employer. The concerned employee did not wear a face mask during work, did not notify his employer about this and was confronted about this by his boss. Still, the employee did not change his behaviour and refused to follow his employer's instruction regarding wearing a face mask. His employer subsequently placed him on non-active and suspended the payment of wages. The employee claimed at the court that, when he drove a car, he could not reasonably be asked to wear a face mask. According to him, wearing a face mask caused nuisance, discomfort and health risks without overriding interests. In addition, the obligation to wear a face mask infringed on the privacy of the employee.

The Court of Utrecht ruled that the introduction of a mask obligation in the workplace falls under the employer's right of instruction based on article 7:660 BW. Wearing a mask serves two legitimate purposes, according to this court, namely the legal obligation of the employer to ensure a healthy and safe working environment and to protect his business interests, because he has an obligation to continue to pay wages in the event of illness. The employee argued that there should be a difference in instructions with regard to different functions. He was a driver who 80-90% of the day was driving around and only incidentally had to be at the workplace where he had close to no contact with his colleagues. This argument was not accepted by the court. The drivers did not have to wear a mask while driving but only when they were at the workplace. Although the usefulness and necessity of face masks were still disputed by experts, the court ruled as a provisional measure that wearing them during the pandemic can contribute to health and safety. The employee should have followed the instruction and the employer was allowed to suspend wages and deny the employee access to work as long as he did not meet the obligation in this specific case.[88] It can be concluded, from various rulings, that the weighing of the employers' interest in providing a safe and healthy workspace against its business interest, on the one hand, and the employees right to privacy, on the other, will quickly end up in the employer's favour.[89]

4.5.3 The obligation to keep distance

This case concerned an employee who, after being absent from work for a long time, hugged a colleague, while a 1.5 metre distance had to be kept based on the employer's instructions. The colleague tried to turn away but couldn't hold back the hug. The employer subsequently fired the employee with immediate effect. The employee then applied to the district court to annul this dismissal. The court ruled that the employee acted extremely clumsy and unwise by hugging his colleague. The employee's defence that he had done things out of enthusiasm, because he was happy to see his colleague again does not mean that he could refuse to obey the instructions given by his employer based on article 7:660 BW. This

[88] Rb. Midden-Nederland 13 januari 2021, ECLI:NL:RBMNE:2021:51.
[89] Rb. Midden-Nederland 13 januari 2021, ECLI:NL:RBMNE:2021:51; Rb. Noord-Holland 5 november 2021, ECLI:NL:RBNHO:2021:10055.

applies all the more in view of his managerial position of supervisor and the exemplary function he has in that regard. However, in this particular case, surveillance camera images were shown at the hearing. These showed that other colleagues did not keep 1.5 metres distance from each other either. There was also a merry atmosphere. In addition, the actions of the employee have had no consequences for the health of his colleague, at the time of the embrace, he appeared not to be infected with the coronavirus. Due to all these circumstances, the court declared that the summary dismissal was null and void.[90] However, the employee could be fired with the required notice period because the employment relation was disrupted due to the fact that the employee disobeyed instructions multiple times and had received several warnings.[91]

4.5.4 Obligation to close all catering

Another case concerned an employee who was a manager of a fast-food restaurant. Under the Covid-19 government measures, all restaurants had to close their doors. The employer had informed all employees of the new measures. The employee had responded affirmatively to this message, indicating that he had read and understood it. However, a few days later, the employee decided to open the doors of the restaurant and the employer immediately dismissed the employee. The employee had taken this to the sub district court and had demanded that the dismissal be declared null and void. The court ruled that the immediate dismissal was legally valid. After all, the employee had created a dangerous situation by increasing the risk of contamination and had thereby also damaged the company's image.[92]

4.5.5 Refusal to work

In a case from the 1st of October 2020, the employer was found to have taken insufficient measurements to avoid infections with COVID-19.[93] At the time this case took place the government advised people to work from home. The work of the employee consisted, among other things, of answering the telephone and processing mail.[94] From the beginning of the pandemic, the employee has told the employer that she would only dare to show up at work when the workplace was safe. This was because the employee is at a high risk if infected with COVID-19.[95] The employer did not make it possible to work from home. The court established that the employee made herself available for work, stated that she was willing to work for the employer and even offered to pay for adjustments in order to make her workplace safe. According to the court there was no refusal to work and the employer was therefore obliged to pay the employee's salary.[96]

[90] Rb. Rotterdam, 14 augustus 2020, ECLI:NL:RBROT:2020:7517.
[91] Rb. Rotterdam, 14 augustus 2020, ECLI:NL:RBROT:2020:7517, par. 5.12.
[92] Rb. Rotterdam 28 augustus 2020, ECLI:NL:RBROT:2020:7567.
[93] Akopova en Van Den Heuvel 2021, p. 18.
[94] Rb. Limburg 1 oktober 2020, ECLI:NL:RBLIM:2020:7495, par. 4.6.
[95] Rb. Limburg 1 oktober 2020, ECLI:NL:RBLIM:2020:7495, par. 4.7.
[96] Rb. Limburg 1 oktober 2020, ECLI:NL:RBLIM:2020:7495, par. 4.8.

Chapter 5: The Working Hours Act (in Dutch: Arbeidstijdenwet)

5.1 General

As indicated earlier, in addition to the Arbowet, the Arbeidstijdenwet is important for occupational health and safety policy in the Netherlands. The Arbeidstijdenwet has two objectives. Firstly, to protect the safety, health and welfare of the employees by laying down minimum regulations for working- and rest times, and secondly, to facilitate the combination of work and private life.[97] These minimum rules do not only provide protection for the worker, but also interfere with the management of undertakings and determine the extent to which employers and employees will be able to take responsibility for working hours and rest periods.[98] It imposes a duty of care on the employer in the sense of an obligation to conduct a policy in the undertaking with regard to working time. According to the general structure of the Arbeidstijdenwet, the employer's policy on working time should be based on a (written) inventory and evaluation of the risks, determining which risks may be caused by the actual working time. On that basis, the actual working time shall be regulated in such a way that the damage to health and safety of an employee does not occur. Here, too, prevention is the first objective of any regulation by the employer. The law contains only minimum standards that must be met.[99]

In principle, the entry into force of this law on 1 January 1996 creates a uniform regime for all employees, regardless of the sector in which they work. This was made possible by the introduction of the system of standard and consultation arrangements which gives the social partners room for deviating agreements tailored to the specific situations within a sector or company. Obviously, this scope is not unlimited.[100]

In this section, the general obligations for the employer will be discussed. Because not all the general obligations are important with eyes on the corona pandemic, only the ones of policy, inventory and evaluation will be discussed.

5.2 The obligations of policy, inventory and evaluation for the employer

Pursuant to article 4:1 of the Working Hours Act, the employer shall ensure the best possible policy in respect of employees' working hours and rest periods, and in doing so he shall take into account, insofar as this can reasonably be required of him or her, the personal circumstances of these employees. This policy must be implemented in conjunction with the Arbowet. The policy on working hours and rest periods must be laid down in writing by the employer. Every employee must have the opportunity to take note of it.

Once the policy has been established and put in writing, the employer must review the policy in the light of experience and how this experience relates to new developments in the organisation of working- and rest times.

Regarding this last point, it is important to look at the situation as it is now in times of the corona pandemic. Employees are now working from home to a large extent, and this brings with it the risk of working too long. After all, the step to work is less big when someone can grab his or her laptop on the couch or the dinner table than when someone actually has to travel to work during office hours. Different maximums are given for the time an employee may work. Based on the rest of article 5:3 of the Working Hours Act, the employer must ensure that the employee, aged 18 or older, has an uninterrupted rest period of at least 11 hours in each 24-hour period. In addition to this, pursuant to article 5:4, it is

[97] *Kamerstukken II* 2005/6, 30532, 3.
[98] *Kamerstukken II* 2005/6, 30532, 3.
[99] Ales e.a. 2013, p. 349.
[100] *Kamerstukken II* 2005/6, 30532, 3.

important that after performing 5,5 hours of work, a break of at least 30 minutes is included. Currently, because a lot of work is done from home during this time, it is difficult for the employer to keep track of this. It must be clear for the employees that these rules must be observed even when they are working from early in the morning until late in the evening, with minimal breaks. The policy surrounding the working times must be clear. Even though it is difficult to keep track of the actual working periods of the employees, employers must take notes of these and evaluate the experiences.

Chapter 6: Employee representation

6.1 The works council

6.1.1 General

In the previous chapters it has already been mentioned that employee representatives can play an active part in determining and pursuing the health and safety policy of companies. In this chapter we'll elaborate on this role and explain how that works out in practice.

The most well-known employee participation body in the Netherlands is the works council. The regulations for and about works councils are laid down in the Works Council Act or in Dutch 'Wet op de ondernemingsraden' (hereafter: 'WOR'). When a company has at least 50 employees, it must install a works council.[101] If there are less than 50 employees and thus no obligation to set up a works council, the company may decide to install a works council or staff representation voluntarily.[102]

The works council has several rights set out in the WOR. The most important rights are the consultation rights, advisory rights, consent rights and information rights. The meaning of these rights will be explained below. Then we will discuss how these rights relate to the COVID-19 pandemic.

Consultation rights
The board and the works council will have consultation meetings at least twice a year.[103] One of the parties will request the meeting and the meeting will take place within two weeks.[104]

The consultation meetings serve to discuss the general state of affairs. In some cases, a mandatory consultation meeting is prescribed. That is for example the case when the works council has an advisory right. The consultation right has been included in the WOR because the works council is most effective when it is being involved in the preparation of the decision-making process at an early stage.[105]

Advisory right
The works council has the right to give advice on a certain number of important decisions.[106] The given advice must be able to have a substantial influence on the decision-making process, so the works council must be asked for its advice in time. Connected to the advisory right is the right of appeal, laid down in article 26 of the WOR. The council can appeal against the decision before the Amsterdam Court, in case the company's decision deviates from the advice given by the works council or when facts and circumstances become known that, would these have been known before giving advice, would have led to another kind of advice from the works council. Appeals may only be lodged on the grounds that the company, in weighing the interests involved, could not in all fairness have arrived at the said decision.[107] When that is the case, the Court can take the following measures against the company[108]:

[101] Article 2 WOR.
[102] Article 5a paragraph 2 WOR.
[103] Article 24 WOR.
[104] Article 23 WOR.
[105] Sprengers 2017.
[106] Article 25 WOR.
[107] Article 26, paragraph 4 WOR.
[108] Article 26, paragraph 5 WOR.

- Order the company to rescind his decision in whole or in part, and to reverse specified consequences of the decision;
- Prohibit the company from performing certain actions or causing them to be performed in implementation of the decision or parts thereof.

Right of consent
The works council has a right of consent regarding decisions to adopt, amend or repeal certain policies.[109] It concerns policies related to secondary conditions of employment, illness, re-integration and privacy.[110] So, when a company has a works council, then the works council has a strong and important influence on decisions regarding the employment conditions.

Information Rights
The works council must be well informed about what is going on within the company. The employer is therefore obliged to provide the works council with information on various matters. For instance, pursuant to Article 31d of the WOR, the employer must inform the works council at least once a year about the content of the employment conditions regulations and agreements for each group of persons working in the company. In addition to the specific regulations, there is also a general right to information. This means that the works council must be provided with all the information it requests and which it reasonably to carry out its duties.

6.1.2 The role of Works Councils during the COVID-19 pandemic

It is very important that the works council is consulted by the employer on policies and measures concerning the COVID-19 pandemic. Employers must establish policies and take measures to ensure a healthy and safe workplace for employees.[111] That also applies now in this pandemic. For the works council, it is important that the potentially adverse consequences for employees and the company are limited as much as possible. As mentioned before, the works council has a right of consent regarding decisions to adopt, amend or repeal regarding conditions of employment, illness, re-integration and privacy.

The works council promotes compliance with the applicable regulations in the field of employment conditions, working conditions and working hours.[112] The employer must consult with the works council on matters relating to the working condition policy and its implementation. It is important for the works council to keep discussing the subject with the employer. It should insist on clear communication and information to employees about risks, the measures being taken and also to prevent contamination by deploying protective equipment where contamination is a risk.

Work from home
Due to COVID-19 the government recommended working from home as much as possible. Based on the government recommendation, some employers made policies and required employees to work from home or partially from home. That means that the working conditions changed. When an employer is changing the working condition policy, the works council's consent is required. Also, when important financial or organisational changes take place, the works council cannot be ignored. In those cases, it has an advisory right.

[109] Article 27 WOR.
[110] The privacy concerns the policy of the employer, not specific cases.
[111] Article 3 Arbowet.
[112] Article 28 WOR.

NOW Regulation
The NOW Regulation is a government subsidy to help employers who have lost turnover due to the COVID-19 pandemic. This subsidy should help to retain as many jobs as possible. When an employer would like to make use of this regulation, it must inform the works council.[113] If an employer does not comply, the works council can invoke the general right to information as laid down in Article 31 of the WOR. In some versions, employers were given training obligations in which the Works Council had the right to consent.

Privacy
If an employer decides to take extra control measures, such as setting up a personnel monitoring system or a time registration system, the works council's consent is required. But also if provisions are taken that are suitable for monitoring the behaviour of employees, this must be submitted to the works council for approval. For example, remote login systems and software to work on files together.

6.2 Trade unions

Labour unions are employee organisations that represent the interest of its members, which are employees. Employees can become a member of any trade union voluntarily. The largest labour unions in the Netherlands are the FNV and the CNV. The primary task of the labour unions is to negotiate working conditions and establish a collective labour agreement (hereafter: "CLA") with employers' organisations or single employers.

A CLA contains terms and conditions of employment which carries over into the individual employment contract. Employers have to apply CLA's when they enter into one themselves or when they are a member of the employer's organisation that entered into the CLA for their branche or when the minister declares the CLA to be generally binding for the whole branch of the employer.[114] Except for when the CLA is generally binding, the CLA only has to be applied to the employees who are a member of the union involved in the CLA. However, employers often choose to then use incorporation clauses in all employment contracts.[115] These clauses cause the CLA to apply to all employees, irrespective of whether they are a union-member or not. The CLA is regulated by the *Wet op de collectieve arbeidsovereenkomsten* (hereafter: "WCAO") and the *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* (hereafter: "WAVV"). A CLA has a term for which the agreements apply, which is a maximum of five years.[116] At the end of the term, a new CLA can be closed or not.

Employers cannot simply adjust the working conditions if a CLA is applicable. This requires consultation with the unions. A lot of CLA's have a break-open clause. This means that the CLA can be adjusted in special circumstances with mutual agreement.[117] In the case of COVID-19, it will not be easy to change the working condition when there is an applicable CLA.

Due to the COVID-19 pandemic the negotiations between the unions and the employers' organisations did not go so well. This is mainly because of the rising inflation and the refusal of employers to raise

[113] Article 13 NOW Regulation.
[114] Article 2 WAVV.
[115] Article 9 WCAO.
[116] Article 18 WCAO.
[117] Jacobs 2017, par. 5.5.1.

wages. Also, union surveys show that not all employers comply with the COVID-19 measures given from the government. For example, CNV conducted a survey with over 2.000 members of which 20% said they had to come to work while having COVID-19 complaints.[118] Also FNV announced that it had received thousands of complaints of its members concerning the fear for their safety. They see in many sectors that employers do not comply with the measures and employees are exposed to safety risks. A survey of FNV with over 10.000 members shows that 45% of the employees felt that employers were not taking sufficient COVID-19 measures.[119] The unions often called on employees and employers to comply with the measures given from the government.

[118] https://www.cnv.nl/nieuws/cnv-onderzoek-werknemer-moet-ook-bij-klachten-naar-werk-komen/
[119] https://www.fnv.nl/nieuwsbericht/algemeen-nieuws/2021/02/bijna-twee-derde-werknemers-is-bang-om-corona-op-d

Chapter 7: Enforcement

7.1 Labour Inspectorate

7.1.1 General

The Dutch Labour Inspectorate monitors whether employers and employees comply with laws and regulations concerning working conditions, the labour market and labour relations. The Labour Inspectorate's main task is to ensure that employees can work safely and healthily and that they are not exploited or underpaid. The tasks of the Labour Inspectorate include supervision and enforcement. Supervision means that they check whether the rights of employees are respected and whether employers comply with the laws and regulations that apply to them. The Labour Inspectorate is also detecting fraud. It makes great efforts to detect illegal labour, or unreliable labour mediation, exploitation, but also human trafficking and other forms of crime.

It is important that the Labour Inspectorate is able to perform its task properly, and for this purpose they have been granted broad powers. For example, they have the right to enter the premises of a company for inspection, even unannounced. The company must then cooperate and give the Labour Inspector access to all rooms. The Labour Inspector may question anyone who is present in the company. The employer and all workers are required to cooperate. In addition, the Labour Inspector may inspect the records and, if necessary, take them with him.

A Labour Inspector may also impose sanctions if a violation is found and a company therefore does not comply with the laws and regulations. In general, the worse the violation, the heavier the measure. A Labour Inspector can impose a fine, but can also completely shut down the company in particular in case of an immediate danger for persons.

7.1.2 COVID-19 pandemic

It is important for the Labour Inspectorate to know whether workers in the workplace become infected with the COVID-19 virus and if so, what the cause is, since the Labour Inspectorate checks whether employees can work safely and healthily. COVID-19 primarily poses a threat to public health. The government imposes measures to prevent the number of infections and a rapid spread among the population. These measures also extend to the workplace. The measurements are keeping distance, in some cases wearing a facemask, staying home when you have symptoms and working from home as much as possible. When the Labour Inspectorate enforces, it enforces based on the *Arbowet*. The Labour Inspectorate has no authority to enforce government measures related to COVID-19, such as keeping distance or wearing a facemask on the workfloor. The Labour Inspectorate does not directly enforce the COVID-19 government measures but does so based on the *Arbowet*, through the occupational health and safety system.

The Labour Inspectorate can take enforcement action if employees are at risk of becoming infected in the workplace. The employer has to ensure the safety and health of all employees in all aspects related to work and to implement a policy to this end.[120] The employer has to make an inventory of all risks.[121] Exposure to COVID-19 is such a risk in the workplace.

[120] Article 3 Arbowet.
[121] Article 5 Arbowet.

Enforcement
Enforcement action can be taken in the event of violation of these two articles *Arbowet* by means of a warning, a demand or a fine. Which instrument is chosen, is determined on the basis of the enforcement policy of the Labour Inspectorate. With a demand, the general standard is filled in with concrete measures by means of which the employer can be made to comply. These could include measures to maintain a distance of 1.5 metres, the use of screens or other technical measures or organisational measures such as working in fixed teams and the indication of walking routes or markings on the floors.

In the COVID emergency law that came into force on December 1, 2020, a link is made with the *Arbowet* that makes the enforcement possibilities of the Labour Inspectorate expanded and strengthened. This is done with Article 28 of the *Arbowet*, which means shutting down a company when measures in relation to corona are seriously not taken and article 3.2a of the *Arbeidsomstandighedenbesluit* which says: establishment of workplace: taking measures in relation to COVID-19, observing hygienic facilities, giving effective information and instruction, keeping adequate supervision.

Reports
Employees can report to the Labour Inspectorate. Of all the reports received by the Labour Inspectorate in 2020 (the first year of the pandemic), there was a 92% increase over the previous year (the year without the pandemic). Of those reports, almost half were COVID-19-related.

The reports that were made, concerned:
- The inability to maintain adequate distance in the workplace (93%)
- People working with symptoms (53%)
- No personal protective equipment such as a facemask (48%)
- Hygiene in the workplace, such as the lack of disinfecting gel and washing hands (45%)
- No opportunities to work from home (33%)

These reports follow from a survey among Labour Inspectors.[122]

On average, two-thirds of the reports received in the field of health and safety at work are investigated. Only those reports that offer sufficient starting points for a further investigation are investigated, provided that there is a suspicion of a violation and the report also falls within the scope of the Labour Inspectorate.

At the beginning of the COVID-19 pandemic, the companies were approached by telephone and an adversarial process took place. Gradually, the Labour Inspectorate changed the method and was asked for documentary evidence of the measures that were taken. On the basis of the telephone call and the evidence, the Labour Inspector then judged whether the employer had to make improvements. If the Labour Inspector has doubts about the course of action, he can still conduct an on-site inspection. Employers often appear to be willing to take measures to create a healthy and safe workplace.

[122] Rapport IZW 2021, p. 21.

7.2 Government enforcement

7.2.1 General

Governing bodies have been given powers in the law to supervise public order and take enforcement action. These powers are laid down, among others, in the *Algemene wet bestuursrecht* and the *Gemeentewet*. When individuals, but also companies, do not comply with the law and regulations, the government can enforce them. For example, in general situations not having the required permits or building constructions without permitted by the zoning plan.

Governing bodies have a duty of principle to enforce. This means that the governing body must use its enforcement powers when a statutory provision is violated, unless there are special circumstances.[123] Governing bodies have the power to impose an administrative order[124] or impose a penalty payment[125].[126]

Administrative order
An administrative order is a remedial sanction and not a fine. It is a measure aimed at ending a violation. With the administrative order the offender is given the opportunity to end the offending situation within a period of time. If the violator does not end the situation, the governing body will do so and recover the costs from the violator. When it is possible to apply the administrative order, then automatically the governing body can apply a penalty payment.[127]

Penalty payment
A penalty payment is also aimed at ending a violation. This is also a remedial sanction and not a fine. The offender also gets the opportunity to end the offending situation within a period of time. If he fails to do so, the governing body may impose a penalty payment. This means that amount is forfeited per unit of time, per separate violation or all at once. The violator must pay this amount when he fails to comply with the conditions of the penalty payment.

The two enforcement powers of the governing body can never be imposed together. However, they can be imposed one after the other.[128]

7.2.2 COVID-19 pandemic

Since December 1, 2020, the *Tijdelijke wet Maatregelen COVID-19* entered into force. This law amends the *Wet publieke gezondheid* (public health). The *Wet publieke gezondheid* includes a chapter with temporary provisions to combat COVID-19 pandemic. This includes rules on maintaining a safe distance, group formation and other rules. It also mentions that persons entering confined spaces must comply with the measures listed in the law.[129]

The enforcement of the rules in such a place is done by the mayor and by the Minister of Health, Welfare and Sport. When the closed space is a place where a profession or business practices, only the Minister is authorised to give directions and orders. If it appears that the rules are not being complied with, the

[123] RvS 29 mei 2019, ECLI:NL:RVS:2019:1752.
[124] Dutch: last onder bestuursdwang.
[125] Dutch: last onder dwangsom.
[126] Article 5:21 Awb; article 5:32 Awb.
[127] Sibma, Vermeer & Visser 2016, par. 1.3.2.
[128] Sibma, Vermeer & Visser 2016, par. 1.6.1.
[129] Article 58l Wpg.

Minister may give a written instruction to the person in charge.[130] If it is an urgent situation, the Minster may also issue an order. When the order is given verbally, it must be put in writing and made known as soon as possible. The order is addressed to the person responsible within the company who has violated the duty of care. This person must then ensure that the COVID-19 measures can be complied with.

The governing body has the power to impose an administrative order or a penalty payment also in case of violation of the Covid-measures. The basis for enforcement of the COVID-19 measures is found in article 58u *Wet publieke gezondheid*.

[130] Article 58l second paragraph Wpg.

Chapter 8: Bibliografy

8.1 Literature

Akopova & Van den Heuvel, Arbeidsrecht 2021/13
E. Akopova & L. van den Heuvel, 'Arbeidsrecht in tijden van corona', Arbeidsrecht 2021/13.

Ales e.a. 2013
E. Ales e.a., Health and Safety at Work. European and Comparative Perspective (Studies in Employment and Social Policy, 42), Alphen aan de Rijn: Kluwer Law International 2013.

Barentsen e.a. 2022
B. Barentsen, 'Coronatoegangsbewijzen op de werkvloer en botsende grondrechten', ArbeidsRecht 2022/1.

Bouwens, Houwerzijl, Roozendaal & Bakels 2019
W.H.A.C.M. Bouwens, M.S. Houwerzijl & W.L. Roozendaal, H.L. Bakels, Schets van het Nederlandse Arbeidsrecht, Deventer: Wolters Kluwer 2019.

Besselink, *Tijdschrift Arbeidsrechtpraktijk* 2022
P.J.B.M. Besselink, 'Kroniek twee jaar corona-arbeidsrechtspraak', *Tijdschrift Arbeidsrechtpraktijk* 2022, afl. 3, p. 4-18.

Derks & Van der Toorn, *ArbeidsRecht* 2021/34
C.B.G. Derks & T.E. van der Toorn, 'Te land, ter zee en in de lucht; hybride werken … werkelijkheid of risicovolle klucht?', *ArbeidsRecht* 2021/34, afl. 8/9, p. 34-38.

Jacobs 2017
A.T.J.M. Jacobs, '*Collectief arbeidsrecht (Monografieën Sociaal Recht nr. 28*), Deventer: Kluwer 2017.

Oude Hengel e.a. 2021
L. Oude Hengel e.a., 'De impact van de COVID-19 pandemie op werknemers. Stand van Zaken in 2020', *TNO Work Health Technology* 2021, p. 6, 27.

Sibma, Vermeer & Visser 2016
A. Sibma, F.R. Vermeer & F.W. Visser, *De last onder dwangsom (Bestuursrecht in praktijk)*, Deventer: Wolters Kluwer 2016.

Sprengers, *ArbeidsRecht* 2017/35
L.C.J. Sprengers, 'Waar moeten ondernemer en ondernemingsraad rekening mee houden bij advies- en instemmingstrajecten', *ArbeidsRecht* 2017/35.

Vegter
Vegter, *T&C Burgerlijk Wetboek*, commentaar op artikel 7:658 BW.

Verhulp
Verhulp, *T&C Burgerlijk Wetboek*, commentaar op artikel 7:611 BW.

8.2 Jurisprudence

Rb. Gelderland 16 juni 2020, ECLI:NL:RBGEL:2020:2954.
Rb Limburg 23 juni 2020, ECLI:NL:RBLIM:2020:4465.
Rb. Rotterdam, 14 augustus 2020, ECLI:NL:RBROT:2020:7517.
Rb. Rotterdam 28 augustus 2020, ECLI:NL:RBROT:2020:7567.
Rb. Limburg 1 oktober 2020, ECLI:NL:RBLIM:2020:7495.
Rb. Midden-Nederland 13 januari 2021, ECLI:NL:RBMNE:2021:51.
Rb. Noord-Holland 5 november 2021, ECLI:NL:RBNHO:2021:10055.
Rb. Amsterdam 14 december 2021, ECLI:NL:RBAMS:2021:7321.
Rb. Amsterdam 11 februari 2022, ECLI:NL:RBAMS:2022:418.

Gerechtshof in eerste aanleg van Curaçao 16 juli 2021, ECLI:NL:OGEAC:2021:132.

HR 20 september 1996, ECLI:NL:HR:1996:ZC2142 (*Pollemans/Hoondert*).
HR 22 januari 1999, ECLI:NL:HR:1999:AD2996.
HR 15 december 2000, ECLI:NL:HR:2000:AA9048, (*Van Uitert/Jalas*).
HR 14 september 2007, NJ 2008/334 (*Dirksz/Hyatt I*).
HR 27 juni 2008, ECLI:NL:HR:2008:BC7669, JAR 2008/188 (*Mak/SGBO*).
HR 12 december 2008, ECLI:NL:2008:BG1213 (*Maatzorg de Werven*).
HR 26 oktober 2012, LJN BW9244, JAR 2012/313 (*Querijns/TGB*).

RvS 29 mei 2019, ECLI:NL:RVS:2019:1752.

8.3 Parliamentary documents

Kamerstukken II 1997/8, 25879, nr 3.
Kamerstukken II 2005/6, 30532, nr 3.
Kamerstukken II 2020/21, 35714, nr. 2.
Kamerstukken II 2021/22, 35971, nr. 2.

8.4 Other

***Evaluatie Arbowet 1998* 2005**
Evaluatie Arbowet 1998, Den Haag: Sociaal-Economische Raad 2005.

Rapport IZW 2021
Rapport IZW, 'Het werk in coronatijd, waarnemingen en ervaringen Inspectie SZW tijdens de pandemie', 2021.

8.5 Websites

'Aanvullende eisen Arbobesluit vanwege coronapandemie', arbonet.nl.
'Arbobeleid', arboportaal.nl.
'Bijna 4 op de 10 werkenden werkten vorig jaar thuis', CBS.nl.
'Bijna twee-derde werknemers is bang om corona op de werkvloer op te lopen', fnv.nl.
'CNV-onderzoek: werkgevers vragen werknemers ook bij coronaklachten naar werk te komen', cnv.nl.
'Voorlichting gezondheidsrisico's', arboportaal.nl.
'Waaruit bestaat de RI&E?', arboportaal.nl.

‘Wat zegt de wet over arbeidsplaatsen?’, arboportaal.nl.
‘Wat zegt de wet over de RI&E?’, arboportaal.nl.
Wie geeft input op de RI&E?’, arboportaal.nl.