Delivering expert knowledge to global counsel

International Law Office®

Employment & Labour - Netherlands

Dealing with sick employees

Contributed by CMS Derks Star Busmann

June 30 2010

Author

Katja Van Kranenburg-Hanspi

One key element of Dutch employment law is the obligation that the employer continue to make salary payments during the first 104 weeks of illness. During this period, the employee is strongly protected against termination of the employment agreement because a legal prohibition on giving notice applies. This update looks at the obligations of both the employer and the employee during the 104-week period, and sets out some practical dos and don'ts for the employer in order to prevent additional salary costs and penalties.

Employer and employee obligations

Under Dutch law an employee is deemed to be sick if he or she is not able to fulfil his or her contractual obligations (ie, his or her own job) fully and completely. This means that if the company doctor decides that the employee can work only 30 of the contractual 36 hours in his or her own position, the employee is deemed to be sick. This finding sets the date on which the 104-week period begins.

In case of illness, the most important obligation for an employer is to facilitate the employee to return to his or her own job fully, or to provide suitable alternative work. This obligation can require the company to create alternative work for the employee or the employee to seek alternative work outside the company.

The sick employee must participate with all reintegration activities set by the employer in close cooperation with the company doctor.

Gatekeeper Improvement Act

The rules, obligations and applicable terms for the employer and the employee are laid down in the Gatekeeper Improvement Act. One such obligation under the act provides that the employer and employee should draft a so-called action plan after six weeks of illness. It is important to comply with the obligations of the act in order to, for example, prevent the compulsory term of 104 weeks of paid salary from being extended.

Third parties

Company doctor

Every Dutch company, with the exception of those with fewer than 10 employees, must arrange for a (possibly external) company doctor to assist the employer with its legal obligations. One of the doctor's main tasks is to examine sick employees and to decide which reintegration options concerning suitable work (either internal or external) the employee has. The doctor assists the employer and the employee in defining the steps to be taken during the period of illness, as well as with the wording and documentation thereof.

UWV employment specialist

Another party involved is the UWV WERKbedrijf employment specialist. The UWV plays a significant role as it assesses whether the employer and the employee have complied with the Gatekeeper Improvement Act. If the UWV decides that after 104 weeks the parties have not complied with the act, it may require the employer to continue salary payments for an additional period of up to 52 weeks. Such extension is highly unpopular as it also prolongs the period within which the employer may not give notice to the employee. Both the employer and the employee may ask the UWV to issue

a second opinion if one of the parties does not agree with the decision of the company doctor regarding the employee's capabilities of the employee. Usually the decision of the UWV overrules the decision of the company doctor.

Termination of the employment agreement

After the 104-week period
Other than the dissolution of the employment agreement by the court for reasons other than illness, there are two points at which the employment agreement of a sick employee can legally end. One is if the employer, shortly before the end of the 104-week period, can prove that (i) no suitable alternatives for the employee exist, and (ii) the employee is unlikely to be fully recovered within 26 weeks. If the employer can substantiate these points, it may file a request with the UWV to obtain permission to give notice to the employee. The UWV will assess whether both parties have fully complied with the Gatekeeper Improvement Act and whether the two points above apply. The employee receives a copy of the employer's request and has the opportunity to respond in writing. Once the permission (usually only valid for a restricted period of time) is granted, the employer may give notice to the employee.

The employee may, within six months after the termination of the employment, claim compensation for the notice if, according to him or her, the notice was 'manifestly unreasonable'. This topic is frequently discussed by the courts and some award compensation solely if the employer failed to offer any compensation in light of the notice given.

During the 104-week period
Other than the situation described above, the sick employee's employment agreement may also be ended (before the expiry of the 104-week period) if the employee constantly fails to comply with the Gatekeeper Improvement Act. The act allows for the employer first to stop salary payments to the employee and then, if the employee still fails to comply, to terminate the employment agreement. Under certain circumstances the employer may even opt to terminate the employment agreement for urgent cause by immediate notice.

Practical dos and don'ts

The 104-week sickness period and the corresponding obligation to continue salary payments ends if the employee is deemed to be fully recovered for a consecutive period of four weeks. A new 104-week period can commence if the employee becomes sick again. Experience shows that some employees are fully 'recovered' at the end of the 104 weeks, only to call in sick again after four weeks. It is therefore important to communicate all relevant information to the company doctor in light of his or her assessment of the employee's options, particularly if this situation occurs. If the doctor is fully aware of all facts and circumstances, he or she may more easily state that the employee is not ill and therefore is fully able to work.

As mentioned above, an employee is deemed to be sick if he or she cannot fully perform his or her own work. Case law shows that if it is not clear on what basis an employee performs alternative work during the illness, the employee can claim that the alternative position has become his or her new own position. If the latter situation occurs, this could lead to the ending of the 104-week period, which may commence again if the employee becomes ill in the 'new' position. It is therefore vital to confirm in writing the basis on which alternative work is performed.

The employer should ensure that all rules concerning illness within the company are laid down in company rules. The company rules should cover not only in which manner the employee should call in sick and which rules and obligations apply, but also the fact that in case of non-compliance, the employer is entitled to stop salary payments and even to terminate the employment agreement for urgent cause.

For further information on this topic please contact Katja Van Kranenburg-Hanspians at CMS Derks Star Busmann by telephone (+31 20 301 6301), fax (+31 20 301 6333) or email (katja.vankranenburg@cms-dsb.com).