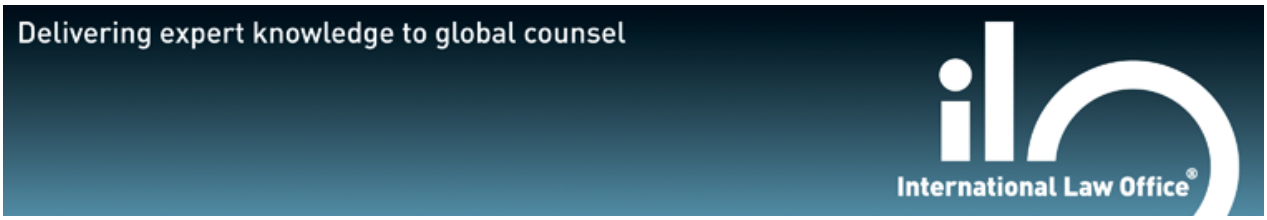

Employment & Labour - Netherlands

New employers restarting after bankruptcy

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Statistics Netherlands records that 10,559 companies were declared bankrupt in 2009. This update outlines a number of key points from an employment law perspective when continuing the activities of a bankrupt company.

No transfer of undertaking

In general, if all or part of a business undertaking is transferred, the employment agreement between the vendor and its employees, including its terms and conditions, automatically transfers to the buyer. However, this rule does not apply in the event that the vendor is declared bankrupt and the undertaking is part of the bankruptcy estate. In case of bankruptcy, the trustee usually investigates whether a continuation of activities is feasible and verifies whether any parties are interested in acquiring all or part of the activities.

Choosing ex-employees

As the transfer of undertaking rules do not apply, the new employer can choose the employees of the bankrupt company to whom it wishes to offer new employment. It is recommended that the relevant employee files be assessed before hiring an ex-employee.

Conditions of employment

The new employer is not obliged to offer the same employment conditions to ex-employees. This situation may differ if the new employer has agreed upfront with the trustee that it will offer ex-employees similar employment conditions. In order to avoid disputes, the employment conditions for ex-employees should be set out explicitly in the purchase agreement.

Successor employers

Although the rules of transfer do not apply, a new employer may, in certain circumstances, be obliged to carry over an ex-employee's length of service. This is the case if the new employer is a so-called 'successor employer'.

Pursuant to case law, two conditions must be met in order to be considered a successor employer. First, there must be a significant link between the former employer and the new employer. This is the case if, for example, the shareholders or managing directors of the bankrupt company are the same as those of the new employer. Second, the function of ex-employees and the conditions in which they perform their roles must be the same, or else their position must remain essentially unchanged.

If the employees' length of service is carried over, the new employer is bound by the rules of Dutch employment law, which limit the number of employment agreements that may be concluded for a set period. If no collective bargaining agreement applies, Dutch law allows for a maximum of three consecutive fixed-term employment agreements (or fixed periods with a total maximum duration of three years). However, a temporary law in place until January 1 2012 makes an exception for employees under 27 years old. This

temporary law allows an employer to enter into a maximum of four consecutive fixed-term agreements (or fixed periods with a maximum total duration of four years). Once either of these limits is exceeded, the employment agreement is considered to be of an indefinite period - hence, dismissal protection will apply.

Furthermore, a successor employer cannot include a probationary period in the employment agreement allowing either party to terminate the employment agreement with immediate effect.

Avoiding successor employer status

In certain cases a new employer may be considered a successor employer. There are a few options to avoid this situation, although they may not always be fully workable in the given circumstances. One option is to offer ex-employees an entirely different job function; another is to offer ex-employees an employment agreement which commences three months after the termination of employment with the former employer.

Obligation to pay severance

In the Netherlands, an employee is usually entitled to receive a severance payment if his or her employment agreement is terminated. The severance payment is calculated based on the cantonal court formula, which consists of three factors: A x B x C. A equals the number of weighted years of service and is multiplied by the gross monthly salary (B), including fixed emoluments. C is a correction factor which is usually set at 1 (ie, neutral weighting), but may be set higher or lower depending on culpability.

The Supreme Court has yet to determine whether length of service rights accumulated with a bankrupt company should be taken into account when calculating severance payment in cases of successor employment. Case law from the lower courts differs: some courts have decided to take account of such years of service, whereas others have not.

Comment

If a new employer is regarded as a successor employer, it is plausible that in case of termination, the severance package will be based on the length of service accumulated with the bankrupt former employer. A new employer which takes over activities from a bankrupt company should be aware that it cannot always start with a clean slate.

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