

EMPLOYMENT AGREEMENTS, DO'S AND DONT'S



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Employment agreements: Do's and Dont's

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Topics

1. Employment agreement (realization)
2. Employment agreement for an indefinite period of time vs for a defined period of time
3. Contractual clauses



Employee protection

An employment agreement offers the employee protection with regards to for example:

- Salary (payment)
- Contractual clauses
- Termination protection



Requirements

Regardless of the parties intentions, an employment agreement exists when:

- the employee is obligated to perform labor (no substitution)
- the employer is obligated to pay salary
- the labor is to be performed for a certain period of time
- the employee is in service of the employer (relationship of authority)





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Equation with an employment agreement

Article 7A:1613aa CC

- Paid labor performed for another party
 - For a period of three consecutive months
 - ≥ 20 hours per week or ≥ 80 hours per month
 - Unless no relationship of authority is intended
- Case law: this stipulation is intended for situations where there is no agreement on the scope and/or duration of the engagement. The specific circumstances of the situation will determine the qualification of the engagement.



Employment agreement: indefinite period of time vs defined period of time

- Indefinite period of time: agreement does not specify duration; in order to terminate the agreement, the termination rules must be observed.
- Defined period of time: agreement entails an objectively determinable duration; the agreement automatically comes to an end after the agreed upon duration lapses, unless tacitly extended.



Employment agreement for a defined period of time

Only possible when agreed upon in writing and in the following scenario's:

1. The employer has a necessity for temporary workers during part of the calendar year in connection with increased business in said period; or
2. If the employee is to replace a temporarily unavailable employee; or
3. The employee is needed for the execution of an accurately described work or project; or



Employment agreement for a defined period of time (cont'd)

4. The employee is to perform casual, non-scheduled work.
- If none of these circumstances exist, the employment agreement may not be terminated without due observance of the stipulations regarding termination; the agreement will not automatically terminate at the end of the agreed upon period. Additionally, the employee may demand damages.



Employment agreement for a defined period of time (cont'd)

Exceptions:

1. Pension termination clause (employee might have a right to cessantia-payment!);
2. Employment agreements entered into after the employee has reached the legal pension age.



Some possible clauses

- Penalty clause
- Trial period clause
- Non-compete clause
- Non-solicitation clause
- Moonlighting clause
- Confidentiality clause
- Pension termination clause

Not possible:

Unilateral amendment clause



Penalty clause

- Only possible with regards to violations of provisions of a regulation. The provision needs to be specific and the penalty (fine) is to be mentioned;
- The penalty clause is to be agreed upon in writing;
- The agreement/regulation is to specifically mention the destination of the penalty (fine);
- The fine may not be destined to (directly or indirectly) benefit the employer or person imposing the fine;
- The fine may not surpass the daily salary of the employee;



Penalty clause (Cont'd)

- In the event the employee is fined more than once during one week, the combined fines may not surpass his/her daily salary.
- The possibility of fining an employee does not stand in the way of an employer demanding damages for the same violation. The employee does however have to choose between the fine and the damage claim.



Trial period clause

- Equal for both parties
- Agreed upon in writing
- ≤ 2 months
- Strict application of the trial period!
- Reason must not be discriminatory or in bad faith



Non-compete clause

- Usually accompanied by a fine
- Only valid if agreed upon in writing
- Employee needs to be 18
- Enforceability may be fought in different ways by the employee



➤ Non-solicitation clause, moonlighting clause & confidentiality clause

- Usually accompanied by a fine
- No specific legislation



Non-solicitation clause

During the Term of Employment and for a period of 24 months following the Employee's termination of that employment with the Company, the Employee shall not, without the written permission of the Company or an affected affiliate, directly or indirectly (i) solicit, employ or retain, or have or cause any other person or entity to solicit, employ or retain, any person who is employed by the Company or was employed by the Company during the 6-month period prior to such solicitation, employment, or retainer; (ii) encourage any such person not to devote his or her full business time to the Company; or (iii) agree to hire or employ any such person.



Moonlighting clause

Employee agrees during the term of this contract not to engage her time or attention, or be interested, directly or indirectly, in any other business than employers.



Confidentiality clause

The Employee shall not (except in the proper course of their duties), either during the agreement or at any time after its termination (however arising), use or disclose to any person, company or other organization whatsoever (and shall use their best endeavors to prevent the publication or disclosure of) any Confidential Information. This shall not apply to:

- (a) any use or disclosure authorized by the Board or required by law;
- (b) any information which is already in, or comes into, the public domain other than through the Employee's unauthorized disclosure.



Following topics to be discussed:

- Other types of employment
- Labor Ordinance applicability and relevant articles
- Illness reporting procedures
- Employee Handbook



Other options to (direct) Employment

- Temporary employment through temp agencies (Tempo / Flexo Manpower Services)
- Assignment/service contract – *Overeenkomst van opdracht/dienstverlening*
- (Management services / tech support services)



Applicability of Labor Ordinance

Article 3: Income Threshold

- According to the Labor Ordinance, it is not applicable to employees earning an annual income above the threshold stipulated in the Minimum Wage Ordinance, multiplied by two.
- The multiplication factor (2) has been raised by 0,1 as of January 1, 2014. It will be increased with 0,1 per year until it has reached the maximum of 2,5. It is currently at 2.4.
- As of January 1, 2018, the annual income threshold is Minimum wage (Afl. 1.711,15) x factor 2.4= **Afl. 4.106,76**



Applicability of Labor Ordinance

- What if you fall above the income threshold?
- For example higher earning positions, such as Managers.
- Some of the same rules apply if they have been taken up in the employment contract or Employee Handbook.



Labor Ordinance – Relevant articles

Article 8 & 9: Maximum working hours

- a. Workweek of six days >>> maximum of 45 hours per week, provided that the working hours per day may not exceed **eight** hours per day;
- b. Workweek of five days >>> maximum of 40 hours per week, provided that the working hours per day may not exceed **eight** hours per day;
- c. Workweek of a maximum of four days >>> maximum of 36 hours per week, provided that the working hours per day may not exceed **nine** hours per day.



Labor Ordinance

Article 8 & 9: Maximum working hours (cont'd)

The employer is allowed to deviate from the above by means of a collective labor agreement, or if there is no collective labor agreement, if 60% of the employees agree in writing

In addition the Director of the Labor Department may grant an employer an exemption, to deviate from the foregoing legal maximum working hours. An exemption may apply for a maximum of 60 hours per week, including overtime, calculated over a period of four weeks, as reasonably justified by the business requirements of the employer.



Labor Ordinance

Chapter 3 (Article 13-18): Overtime

Maximum working hours including overtime per week is **55** hours calculated over a period of four weeks, provided that the working hours per day, including overtime, do not exceed 12 hours.

Deviation by means of a collective labor agreement is allowed.

The Director of the Labor Department may grant an employer an exemption to deviate from the foregoing legal maximum working hours including overtime (article 9 paragraph 1).



Labor Ordinance

Chapter 3 (Article 13-18): Overtime (cont'd)

Regular employees:

- a. Overtime worked in excess of daily working hours >>> 100% regular wage + 50% overtime pay >>> **150%**
- b. Overtime worked on the weekly resting time after 1 pm (for six-day workweek) >>> 100% regular wage + 50% overtime pay + 25% additional overtime payment >>> **175%**
- c. Overtime worked on the weekly resting day, such as Sunday >>> 100% regular wage + 50% overtime pay + 50% additional overtime payment >>> **200%**
- d. Overtime worked on an official holiday >>> 100% regular wage + 50% overtime pay + 100% extra overtime charge >>> **250%**



Labor Ordinance

Chapter 3 (Article 13-18): Overtime (cont'd)

Shift employees: (difference)

- d. Overtime worked on a scheduled official holiday >>> **200%**
regular wage

- e. Overtime worked on an official holiday >>> 100% regular wage
+ 50% overtime pay + 100% extra overtime charge >>> **250%**



Labor Ordinance

Article 21 & 22: The holidays and memorial days are:

- a. New year's eve
- b. The day after the big carnival parade
- c. Good Friday
- d. Easter
- e. Ascension day
- f. First and second day of Christmas
- g. King's day
- h. Labor day (if it falls on a Sunday, the Monday will be off)
- i. 18th of March (Himno y bandera)
- j. 25th of January – Betico day
- k. The funeral of the King, the governor, or a minister of Aruba



Labor Ordinance

Article 24: 24-hour labor organizations

- Work that is not exclusively of supportive nature;
- Type of business or production process requires non stop labor
- Exceptions on the resting time and official holidays and memorial days;
- Only applies to labor that relates primarily to the continuous nature of the company;
- Entitled to half hour break every six hours;
- Workweek max. 60 hours including overtime.



Labor Ordinance

Article 26: Night shifts

- Work, other than overtime, performed for at least four hours, between 0.00 (midnight) and 6.00 (a.m.).
- The night shift: max. 8 hours, excluding breaks.
- The employee may not be scheduled for night shifts more than 14 times during a period of 4 consecutive weeks, unless it regards work that is typically done at night, e.g. security personnel.



Labor Ordinance

Article 26: Night shifts (cont'd)

Uninterrupted resting time of at least 12 hours, after completion of night shift, in the event the shift ended on or before 2 am, or 14 hours in the event the shift ended after 2 am. The resting time may be reduced one time to 8 hours during a consecutive period of 7 days.

Resting time of at least 48 hours after performing night shift for at least 6 consecutive times.



Procedures for reporting illness

- Employment Contract
- Employee Handbook
- Procedure through SVB
- Procedure through Company doctor (for example Medwork)



Employee Handbook

- An employee handbook may regulate all related procedures amongst which the elaboration of the following procedures and policies:
- Drug testing;
- Sexual harassment;
- Working hours policy;
- Sickness reporting procedure etc.



Employee Handbook

- Article 7:1613l Civil Code: Parties may only differ from the handbook if agreed upon by means of a written agreement.
- The handbook is solely binding if the content is not in conflict with the content of employment agreement.
- Article 7:1613k: A clause in which the employee commits to agree to any rules laid down in the future or any future amendment of an existing handbook is void.



Employee Handbook

- "Article ...
- "This employment contract is subject to the employee handbook, which forms integral part of employment contract. The employee declares to have received the employee handbook and agrees with its content. The employee handbook governs, among other things...."



Employee Handbook

- The employer is free to set extra requirements in an Employee Handbook – in particular regarding procedures for reporting illness;
- These requirements are only valid if they are not out of line with legislation on the matter;
- The employer may require the employee to visit an appointed medical expert;
- The employer may also require the employee to report his/her illness to both the employer and SVb within a stricter time limit;
- Non-compliance could lead to disciplinary actions by the employer;
- Please note that these extra requirements can also be found in the individual labor contract .



Questions?



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ALWAYS ONE STEP AHEAD!

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