

COVID-19: NOW 2.0

On 22 June 2020, the Dutch government published the Second temporary emergency measure for bridging work retention (NOW 2.0). This alert provides a practical overview of the conditions for NOW 2.0.

1 NOW 2.0

On 20 May 2020, the government announced its intention to extend the NOW scheme as well as the relevant conditions thereof. We have already briefly discussed this in previous alerts. The NOW 2.0 was published on 22 June 2020. The conditions of NOW 2.0 are discussed below.

NOW 2.0 is essentially equal to NOW 1.0:

- ▶ employers who expect at least 20% decrease in turnover over a continuous period of three months may apply for a subsidy amounting to maximally 90% of the wage costs. The exact amount of the compensation is related to the turnover decrease;
- ▶ the employer can apply for a subsidy per wage tax number once;
- ▶ an operating company can submit a NOW application, if the group has less than 20% turnover decrease;
- ▶ Corona related employers' subsidies count as turnover; any NOW subsidy not;
- ▶ employers are required to continue to pay employees' full wages;
- ▶ the employer informs the works council, staff representative body or, in the absence thereof, the employees about the granted NOW subsidy;
- ▶ the UWV provides an advance payment of 80% of the subsidy; final determination of the NOW subsidy will take place afterwards.

2 Conditions NOW 2.0

Differences between NOW 2.0 and NOW 1.0:

- ▶ the turnover decrease needs to be determined over a chosen four-month period, starting on 1 June, 1 July or 1 August 2020. If the employer also applies for the NOW 1.0, the period for NOW 2.0 must follow the chosen period for NOW 1.0;
- ▶ the subsidy will be granted on the wage costs for the period from 1 June 2020 up to and including 30 September 2020;
- ▶ the subsidy will be based on the wage costs for March 2020;
- ▶ the flat-rate wage costs surcharge is 40%;
- ▶ payment restrictions of bonuses in the event of a notification pursuant to the Collective Redundancy in the event of a notification under the Collective

Redundancy Act, hereinafter referred to as WMCO-notification, during the period from 30 May 2020 up to and including 30 September 2020, the employer is obliged to: (1) consult with the trade unions (or other employee representative body) to reach an understanding, and (2) only apply for a dismissal permit four weeks after the WMCO-notification;

- ▶ reorganizations are permitted subject to conditions (see point 5 below);
- ▶ the employer has a best-efforts obligation to encourage employees to undergo further training or retraining, for example by providing time and resources. To facilitate so, the government will introduce a crisis package called: 'NL learning by doing'.

3 Auditor's report

- ▶ when applying for the NOW subsidy, the employer is obliged to provide an audit report on NOW compliance, on receipt of a subsidy of minimally EUR 125,000 or an advance payment of minimally EUR 100,000;
- ▶ if no audit report is required, a form containing an expert third party's report on the turnover decrease must be submitted. The Minister will appoint designated persons thereto.

4 Bonus and dividend under NOW 2.0

Under NOW 2.0 there is a prohibition to pay bonuses and dividends. More specifically, the following conditions apply:

- ▶ if an auditor's report is required, the employer is not permitted to pay out any dividend to shareholders or bonuses, including profit sharing, to the board of directors and management of the group and the employer, for 2020 up to and including the date on which the annual accounts are adopted in 2021. The employer is also not allowed to repurchase its own shares. Other profit distributions to third parties are equated with dividends;
- ▶ the bonus and dividend prohibition can also apply to a foreign company;
- ▶ the prohibition to pay out bonuses applies to the board of directors and the management. The concept of board of directors and management should be interpreted broadly. Registration with the Chamber of Commerce is not decisive in this respect, not even whether there is a power of decision or signing. Board members, directors or members of the management who determine policy belong to the board of directors or management and are therefore subject to this provision. The internal job title is irrelevant. The person who temporarily has a seat in the board of directors or the management also falls under the bonus prohibition;
- ▶ the bonus prohibition does not extend to other personnel who are variably remunerated through bonuses;
- ▶ the dividend prohibition does not extend to the other legal entities within the group for which no NOW 2.0 has been applied for, unless the subsidy has been applied for at the level of an operating company;
- ▶ if an application for NOW 2.0 is made at the level of an operating company, the bonus and dividend prohibition will apply to the employer, the group and the parent company. Prior to applying for NOW 2.0, the operating company must have a written declaration from the group head/parent company that they are compliant with this requirement;
- ▶ if the employer is obliged to pay dividends on the basis of a settlement agreement with the Dutch tax

authorities or a legal obligation, this remains permitted;

- ▶ in the event of a broken financial year, this obligation will apply to the financial year or financial years falling in the period from 1 June 2020 up to and including 30 September 2020 and up to and including the meeting at which the annual accounts for that financial year or that last financial year are adopted.

5 Reorganization under NOW 2.0

Redundancies under NOW 2.0 remains the ultimate remedy, but the government acknowledges that employers may be forced to plan a reorganization for economic reasons nonetheless. This is permitted under NOW 2.0 subject to the following conditions:

- ▶ if the employer applies for a dismissal permit in the period from 1 June 2020 up to and including 30 September 2020, the wage costs of the redundant employees will be deducted from the wage costs of March 2020. The "fine" increase of 50% under NOW 1.0 does not apply under NOW 2.0;
- ▶ the total amount of the subsidy will be reduced by 5%, if the employer does one or more WMCO-notifications in the period from 30 May 2020 up to and including 30 September 2020 and applies for a dismissal permit during the period from 1 June 2020 up to and including 30 September 2020 for 20 or more employees in the same UWV work field;
- ▶ the employer can avoid the 5% fine by reaching an understanding with all relevant trade unions (or, in the absence thereof, another employee representative body) on the redundancies mentioned in the WMCO-notification. In the absence of an agreement with the trade unions, the parties must have jointly requested a committee, to be set up by the Labor Foundation, to assess whether the proposed number of redundancies is necessary and the employer has not withdrawn this request at the time of applying for the dismissal permits;
- ▶ 'other employee representation' means the works council, the employee representation or the staff meeting as referred to in the Dutch Works Councils Act;
- ▶ the UWV assesses the dismissal application in accordance with the regular assessment framework for redundancies for economic reasons.

6 Application and determination NOW 2.0

- ▶ NOW 2.0 will be open for both employers who have applied for NOW 1.0 and employers who have not applied for NOW 1.0;
- ▶ NOW 2.0 may be applied for during the period 6 July 2020 to 31 August 2020;
- ▶ the advance payment is provided in two parts; the first advance payment is expected to be made within 2 to 4 weeks after the NOW application;
- ▶ the final determination of NOW 2.0 may be requested within 24 weeks of 15 November 2020. If the turnover period ends after 15 November 2020, the final determination may be requested within 24 weeks after the end of the turnover period. The
- ▶ 24-week period will be extended to 38 weeks if an auditor's report is required.

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COVID-19 helpdesk

Contact our helpdesk via info@hvglaw.nl or visit our special coronavirus webpage for more alerts: www.hvglaw.nl/en/corona-updates-english



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