

Is my employee allowed to perform secondary activities?

Introduction

As of August 1, 2022, a new article has been added to Book 7 of the Dutch Civil Code ("BW"). This article provides better protection to employees in the area of performing secondary activities. Until now, the legal grounds to rely on (for employees) when arguing that an employer should allow secondary activities were limited. This has now changed as a result of the Dutch 'Act Implementing the EU Directive on Transparent and Predictable Terms of Employment'.

This blog discusses what exactly this change entails and how an employer could deal with this new rule.

What does the new rule mean?

The new article added to Book 7 BW reads as follows (*unofficial translation*):

"Article 653a

- 1. An employment term pursuant whereto the employer prohibits or restricts the employee from performing secondary activities outside the working hours of that employer shall be null and void, unless such term can be justified by an objective cause.*
- 2. The employer shall not prejudice the employee by reason of the fact that the employee, in or out of court, has asserted the rights granted to him pursuant to this article, has provided assistance or has lodged a complaint in this respect."*

An employer may thus no longer, without an objective cause, prohibit/restrict its staff in their ability to work for others outside their working hours. If an employer wants to invoke such a prohibition/restriction, it should be justified by an objective reason. Without justification, the clause is null and void.

In simple terms, nullity means that the clause is deemed to have never existed. Thus: when inserting a prohibition or restriction relating to secondary activities in an employment agreement, the employer should consider if there may be arguments to justify for this. Examples of valid objective reasons (justification) could be:

- secondary activities that compete with the employer's products or services;
- secondary activities that could damage the reputation or image of the employer;
- protection of employee's health and safety;
- protection of confidential business information;
- avoidance of conflicts of interest.

What about current employment conditions, containing a prohibition to perform secondary activities?

The new rule will apply to all current employment conditions, containing a prohibition to perform secondary activities, too. So, under the new rule, there is no distinction between employment conditions agreed before or after 1st of August 2022.

What can we do for you?

Considering the above, it is advisable that employers review their employment conditions that aim to prohibit or restrict their staff in performing secondary activities. A new policy or internal guideline may help an employer to make sure future cases are handled in a consistent way, based on pre-defined objective reasons for justification. In addition, in specific cases we are happy to discuss and advise you (as employer) as to relevant objective reasons in your situation.

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