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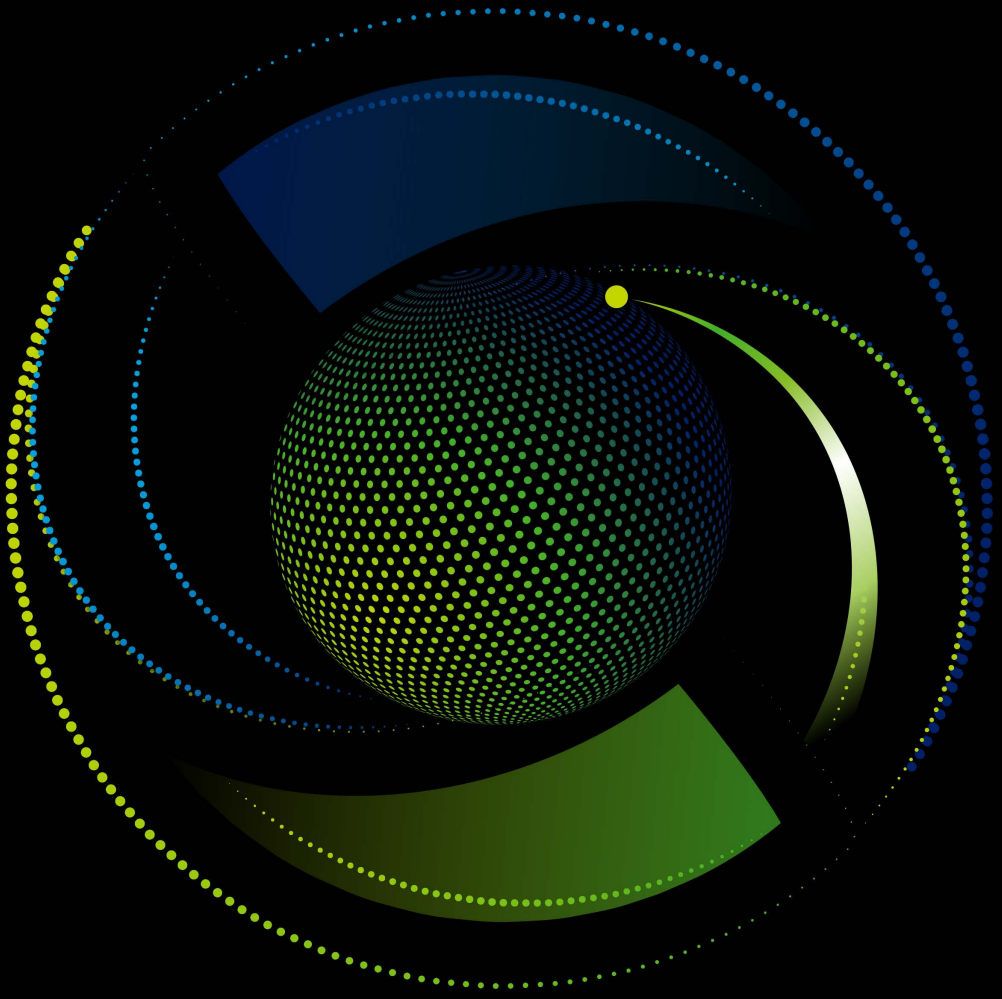

Draft Legislation for implementation Pay Transparency Directive

The Netherlands have published their implementation proposal for the Pay Transparency Directive

April 2025

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A deep dive reveals the complexity and impact of the forthcoming legislation

On 26 March 2025, the Dutch legislator published the initial draft legislation for implementing the European Pay Transparency Directive (here after referred to as the Draft Legislation), which has now been submitted for consultation. While the legislator has opted to achieve an implementation without gold plating, the Draft Legislation appears to go beyond the minimum requirements outlined in certain areas of the Directive. This article provides a concise overview of the key and most notable elements of the Draft Legislation, along with its potential implications.

If you have any questions regarding the Draft Legislation, feel free to contact us. We are happy to share insights as well as our experiences. For a comprehensive overview of the obligations arising from the Directive, we invite you to view our video.

"While the legislator opts for implementation without gold plating, the Draft Legislation appears to go beyond the minimum requirements outlined in certain areas within the Directive.

The Draft Legislation carries significant implications for employers, and its compliance and practical enforceability are expected to bring considerable complexity."

Fraukje Panis & Roel van der Weele
Deloitte Netherlands

Key elements of the Draft Legislation that go beyond the minimum requirements of the Directive:

- A broader definition of an employer leads to more in-scope organizations, and forces independent units of companies and public institutions to independently meet certain requirements.
- Hired employees, such as temporary agency workers, are in scope.
- The influence of the works council / employee representation is significantly increased.

1. Impact on private and public organisations

When approaching the decision in deeming what classes an organization as an employer, the Netherlands have chosen to adopt a wide scope of application. The definition of an employer has been derived from the broad definition of an enterprise, as outlined in the Works Councils Act (WOR), where it describes any "independent unit" where work is performed under a private law or public law employment contract.

Several obligations in the Draft Legislation depend on the size of the business (i.e. the number of employees). To determine this size, the total number of full-time equivalent positions (FTEs) from the preceding calendar year must be considered (i.e. for the obligations in 2027, the FTE count in 2026 is leading). This calculation includes only those employees with a private law or public law employment contract. In addition to the employees employers directly employ, employers may also be required to take into account the hired workers made available to them (please see Section 2 for further details).

Self-employed individuals without employees (ZZP'ers) are excluded from the scope of this Draft Legislation.

Impact

The definition of an employer implies that public organisations, such as the Ministry of Defense and the Judiciary, will also need to comply with the Draft Legislation.

In addition, the applicability of the enterprise concept under the WOR allows a business unit, such as a branch of a company or a department of a ministry, to qualify as an independent enterprise and, as such, be responsible for complying with certain reporting obligations. Particularly in larger companies and organisations with numerous subsidiaries, it will become necessary to investigate whether multiple businesses need to report separately rather than as one.

- More organisations than expected fall within the scope of the Draft Legislation.
- Unexpectedly, independent units of companies and public institutions may need to comply with (reporting) obligations on their own.

2. How to deal with hired workers?

Next to employees, the Draft Legislation also applies to hired workers that fall within the scope of the Workers Allocation by Intermediaries Act (Waadi). This means that the Draft Legislation is also applicable to temporary agency workers, employees employed through a payrolling agent, and all other employees who perform work under the direction and supervision of a third party.

In principle, there is shared responsibility between the lending party (also known as the formal employer) and the hiring party for the hired worker. This entails that the transparency obligations, such as openness about the criteria used to determine pay, pay bands, and pay development, will generally apply to both the lending party and the hiring party.

An exception to the shared responsibility principle applies regarding the gender pay gap reporting and evaluation obligations, and the right to information. For the gender pay gap reporting and evaluation obligations, the hiring party is required to include their hired workers in its pay gap reporting and, if necessary, conduct further pay gap evaluations. In terms of the right to information, the lending party is responsible for providing information about the individual pay of the hired worker. To the contrary, the hiring party is responsible for providing information to the hired worker about the average pay levels of employees performing equal work or work of equal value, broken down by gender.

Impact

Since hiring parties must report on all workers working under their direction and supervision, collecting the required information about these hired workers is essential for companies that engage them. This encompasses not only salary details but also data regarding individuals' work experience and educational backgrounds, both of which are essential for calculating the adjusted pay gap.

Furthermore, the correct application of the equal treatment standard from Article 8 of the Waadi will become increasingly important, particularly due to the reporting obligation and the right to information. Hired workers will be able to verify relatively easily whether they are compensated in accordance with the equal treatment standard. Recent case law indicates that this standard should be broadly interpreted, creating a risk of significant pay claims (with retroactive effect). In cases of suspected unequal pay, the hired worker must raise the issue with the lending party, which, as the formal employer, is responsible for ensuring that the hired worker is paid fairly. If the lending party fails to pay the hired worker correctly, the hired worker may also turn to the hiring party under the principle of chain liability.

Finally, the Draft Legislation currently does not address cross-border situations. The question arises, among others, of how to deal with foreign hired workers when their employment relationship is with their foreign employer, that is not governed by the Dutch legal system.

- Hired workers are in scope of the Draft Legislation.
- Far-reaching information obligations for lending and hiring parties.
- A correct application of equal treatment standard under the Waadi will become increasingly important.
- Unclear how to deal with foreign hired workers.

3. The definition of pay forces employers to make more conscious remuneration decisions

The Dutch legislator aligns with the definition of pay used by the Netherlands Institute for Human Rights (CRM). The CRM defines pay as "all current or future benefits in cash or in kind that the employer pays, directly or indirectly, to the employee in connection with the employee's work." The pay definition in the Draft Legislation thus not only includes base pay, but also supplementary and/or variable components, including benefits in kind. This means that an extensive pay definition needs to be applied in terms of the right to equal pay.

Specifically, and solely for the gender pay gap reporting, a less extensive definition of pay may be applied. Pay components that cannot be attributed to an individual employee or that are equally available to all employees do not have to be included in the pay report. After all, these components should not result in any pay differences. Which pay components specifically need to be included in the reporting will be further specified in secondary legislation.

Impact

While the Dutch legislator offers a helpful clarification of the definition of pay, some uncertainty still remains. The Draft Legislation is aligned with the notion that pay encompasses all payments made by the employer to the employee. Consequently, costs that solely affect the employer and do not provide any benefit to the employee are excluded from the definition of pay. This includes taxes on excessive severance payments and Early Retirement Schemes (RVUs). Conversely, any other payment, whether in cash or in kind, that the employee receives in connection with their employment may be classified as pay. Examples include continued payment of wages during illness, severance pay, or a Christmas bonus.

The question remains how to deal with compensation and benefit arrangements that provide employees with a choice, such as flex budgets, or tax schemes that facilitate salary exchange for tax advantages.

Regardless, it is crucial for employers to meticulously document their pay components, including the options associated with them, and the rationale behind their pay decisions.

- The Draft Legislation encompasses all payments made by the employer to the employee, whether in cash or in kind.
- No clarity (yet) on which pay components should be included in gender pay gap reporting.
- No clarity (yet) on how to deal with flexible benefit arrangements.
- No further clarification (yet) around the valuation of pay components.

4. Objective justifications as an escape

A pay gap between a man and a woman performing the same work or work of equal value does not automatically indicate an unjustified pay difference and, thus, prohibited discrimination. Pay differences can arise from objective factors unrelated to gender discrimination. The Explanatory Memorandum accompanying the Draft Legislation has indicated that the circumstances of each case will determine whether a specific situation can be deemed as an objective justification. Examples of such factors include seniority, years of service and work experience, performance, and educational and training qualifications.

Notably, the Explanatory Memorandum accompanying the Draft Legislation also confirms that 'previously acquired rights' (for example, maintaining certain employment conditions after a reorganization), labour market shortages, and 'different promotion and classification rules following revised remuneration policies' can serve as legitimate objective justifications for pay disparities, provided that they are well substantiated, demonstrable and temporary.

Impact

Interpreting (uncorrected) pay differences in the appropriate context is essential for the proper application of the obligations arising from the Draft Legislation. Access to comprehensive demographic data is crucial, which goes far beyond just pay figures. Many employers' records and documentation still lack the necessary detail concerning factors such as work experience, educational background, and performance.

It is expected that employers will face considerable legal complexities when addressing pay disparities while also respecting historical rights acquired, for example during a transfer of undertaking. Although, the Dutch legislator emphasizes the necessity for employers to take an active approach in this regard to prevent pay discrimination, the practical application of this requirement raises questions, particularly how long an employer can rely on these objective justifications (e.g., a transfer of undertaking).

- Employers may encounter difficulties in timely securing accurate demographic data.
- It is essential for employers to carefully identify the relevant objective justifications while navigating the associated legal complexities.

5. Crucial role for works councils and employee representation

The Directive highlights the significant role that will be taken on by workers' representatives in various measures. The Dutch legislator has chosen to align with the existing right of consent held by works council's. This means that the employer must seek the works council's approval for any decision it intends to make regarding the establishment, amendment, or withdrawal of:

- Objective and gender-neutral criteria for pay structures.
- Classification of employees in groups of equal work or work of equal value.
- How unjustified gender pay gaps are addressed (pay remediation).
- The pay evaluation.

Furthermore, the employer's board of directors is required to consult the works council before confirming the accuracy of the information included in the gender pay gap report and before disclosing this information to the monitoring body. To facilitate this process, the works council should get access to the methodologies applied by the employer.

For employers that do not have a works council but do have employee representatives ("personeelsvertegenwoordiging"), the employee representatives will obtain the right to approve objective and gender-neutral criteria for pay structures and the classification of employees into categories of equal work or work of equal value.

Impact

No legally valid decision-making can occur without the approval of the works council, making it essential to adhere strictly to the approval process.

In this context, questions may arise regarding the topics for which the works council should be involved in and the nature of its involvement. Notably, the works council does not have approval rights concerning the amendment of primary employment conditions, such as pay bands and the duration and scope of work. This implies that changes to a remuneration system are not subject to approval if they pertain solely to the level of base pay. Consequently, employers must navigate carefully when modifying their internal pay structures for specific pay components that require approval versus those that do not, especially in the context of pay evaluations and remediation.

Finally, due to the complexity of this legislation, it is likely that the works council may lack the necessary knowledge to accurately assess the information provided by the employer. Therefore, it is advisable to offer the works council timely training or support from an expert.

- By aligning with the right of consent, the influence of the works council and employee representation is significantly enhanced.
- Involving works councils or employee representatives in a timely manner is essential for the proper application of equal pay obligations.
- Direct involvement necessitates training and upskilling for the works council or employee representatives.

6. What else is important?

Finally, the legislator provides further clarity in the Draft Legislation regarding the effective date, the relationship with existing regulations on data protection, and enforcement mechanisms:

- The implementation assumes immediate effect, with the Draft Legislation coming into force on 7 June 2026.
- The Dutch legislator recognizes that various obligations (e.g., the right to information), may involve the processing of personal data. This could raise concerns about the traceability of pay information, particularly in smaller groups of employees. The Dutch legislator believes that the processing is compliant with the General Data Protection Regulation (GDPR) and that the significance of ensuring equal pay takes precedence over data protection concerns. Therefore, it has been decided that the Draft Legislation establishes a legal basis for the processing of this personal data and, therefore, not to pursue the alternative information route via employee representatives.
- The Netherlands Labor Authority (NLA) will oversee administrative enforcement. In cases of non-compliance with the obligations, the NLA may impose an administrative fine of up to €10,300 (amount applicable in 2024), which can be increased by 100% in the case of a repeated violation within a five-year period.

Contact us

Would you like to know more or share your experience? We would be happy to connect and further discuss with you.

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