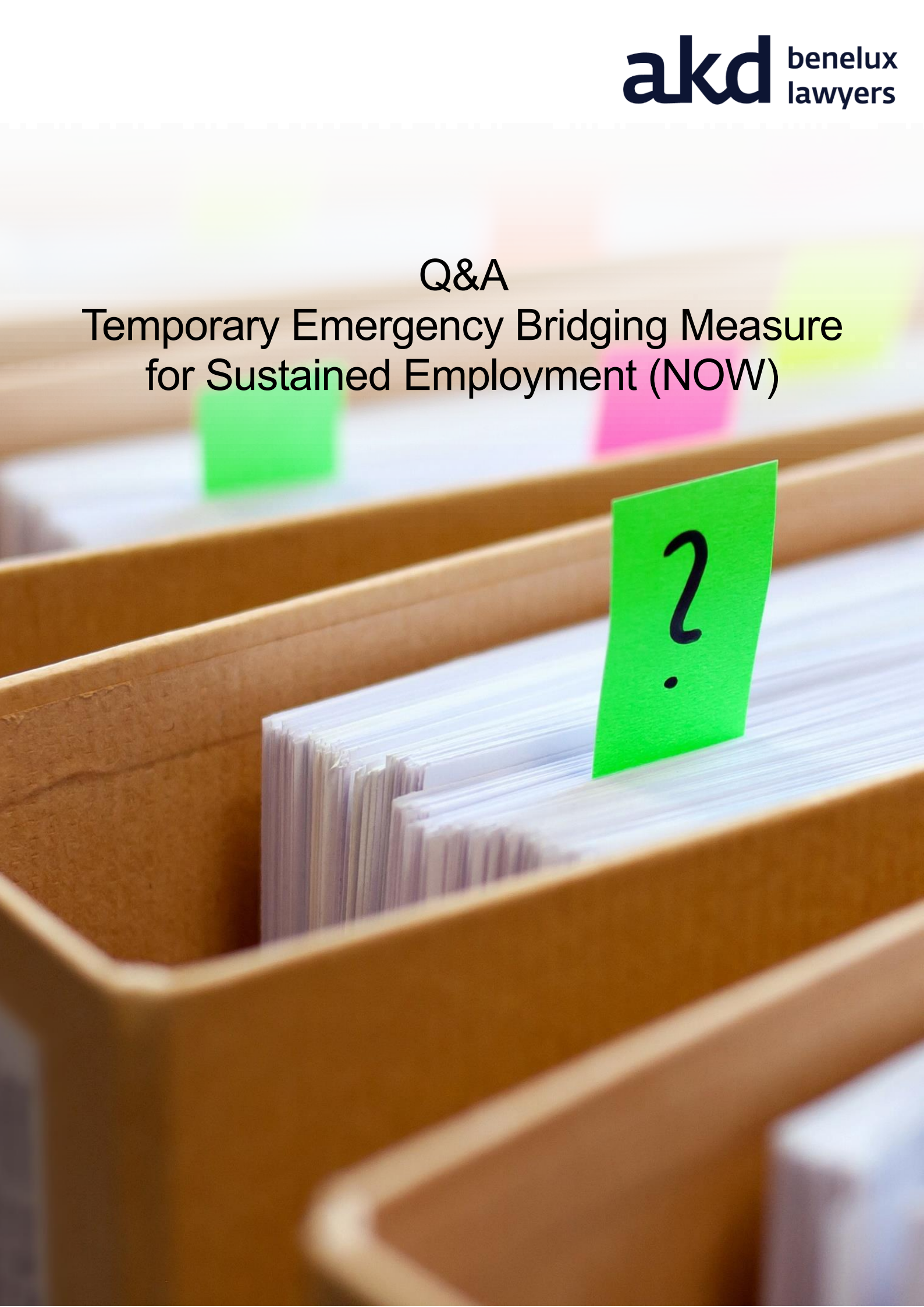


Q&A

Temporary Emergency Bridging Measure for Sustained Employment (NOW)



Earlier, the Temporary Emergency Bridging Measure for Sustained Employment (*Tijdelijke Noodmaatregel Overbrugging voor behoud van Werkgelegenheid*, or NOW for short) was brought into effect. This Q&A will outline the most frequently asked questions - and answers - about the NOW. Please note that the NOW provides for very specific financial requirements in addition to its basic conditions. As we do not want you to get lost in the details of the scheme, we will address them only briefly. Should you have any questions that are not answered in this Q&A, you are most welcome to contact any of our employment lawyers.

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CHAPTER 1 - INTRODUCTION

What is the purpose of NOW?

The purpose of the scheme is to help employers pay the wages of their staff. Employers expecting a sharp **turnover loss** of at least 20% over a period of three consecutive months due to decreased activity caused by exceptional circumstances such as the coronavirus crisis, can claim compensation towards wages. The compensation should enable employers to keep their staff in jobs for the number of hours they worked before business activity decreased.

What is the nature of NOW?

Employers can apply to be granted **compensation towards wages**. The compensation enables them to continue to pay the wages of staff with permanent and flexible contracts alike.

In this document, we will explain the terms turnover loss, wage sum, compensation and employer obligations and provide information about the procedure.

CHAPTER 2 - NOW SCHEME APPLICABLE THROUGH 5 JUNE 2020

I TURNOVER LOSS

How is turnover loss calculated?

The turnover loss must occur over a period of three (3) consecutive months between 1 March 2020 and 31 July 2020. This period commencing on 1 March, 1 April or 1 May, turnover in the period will be compared with the turnover for the 2019 calendar year, divided by four, provided the company was started not later than 1 January 2019.

Example: In 2019, an employer had an average monthly turnover of EUR 100,000, or EUR 1,200,000 over the entire year. Over the period from 1 March through 31 May 2020 - in this example the period over which the employer wishes to calculate his turnover loss - his average monthly turnover was EUR 70,000, or EUR 210,000 over the entire three-month period. In this case, the turnover loss calculates at:

$$\frac{(\text{€ } 1,200,000 / 4) - \text{€ } 210,000}{(\text{€ } 1,200,000 / 4)} = 0.30 = \mathbf{30\% \text{ turnover loss}}$$

If an employer had not started operations on 1 January 2019, a different calculation applies.

The government has made an online tool available to help calculate turnover loss:

<https://www.rekenhulpomzetverlies.nl/>

How is the turnover loss calculated if the employer is part of a group of companies?

If the employer is part of a group of companies, the premise is that turnover loss will be determined at the group level. The reference date for the turnover loss of the group will be 1 March 2020. The composition of the group on this date is leading.

If the group records a turnover loss that equals or exceeds 20%, each employer within the group, separated by withholding tax number, may apply for an NOW grant. The period over which the turnover loss is determined must be the same for each of the separate companies. The applications must state identical turnover loss percentages.

Subject to the condition that they pay social security contributions in the Netherlands, it is possible for foreign legal entities to be included in the determination of the turnover loss as well.

Please note: If the turnover loss for the group is less than 20%, the separate entities within the group may - subject to strict conditions - be eligible for subsidy under the NOW scheme. The amended text of the NOW scheme was published on 1 May 2020. With these changes in place, it is now possible for individual operating companies to apply for a subsidy under the NOW scheme without the necessity of having to prove the entire group has suffered a turnover loss of at least 20%.

- **Group turnover loss less than 20%** - If the group turnover loss equals or exceeds 20%, no compensation can be applied for on the basis of the turnover loss of a single operating entity. This is possible only if the turnover loss of the entire group is lower than 20%. It follows that the first thing to do is to determine whether the group turnover loss has reached the 20% mark. The percentage is calculated by the group's auditor. In his opinion, the auditor will have to

demonstrate that the group turnover loss does not exceed 20% and that the turnover loss suffered by the operating entity equals or exceeds 20%.

- **Corporate capacity** - The operating company that wishes to be eligible for the exception must be incorporated.
- **No personnel company** - The applying operating entity may not be a personnel company (*personeels-bv*) or, in any event, not more than 50% of the activities of the operating entity may involve the placement of employees at the disposal of other entities within the group. Personnel companies must always expect the group to suffer a turnover loss because the turnover (or turnover loss) and the deployment of personnel converge at this level. At the level of operating entities within groups with a personnel company, this convergence is absent, because the wage sum is paid by the personnel company, whereas the turnover is generated (or lost) by the other operating entities. For this reason, personnel companies cannot apply for subsidy under the NOW scheme.
- **Agreement employment representatives on sustained employment** - Before applying for the subsidy, the operating company (the employer) with 20 or more employees must enter into an agreement with the relevant employee associations, or in the absence thereof with other employee representatives, on sustained employment at the operating company. If there are fewer than 20 employees, a mere agreement with other employee representatives suffices.
- **No bonuses or dividends, no share buybacks** - Groups of which one operating company invokes the NOW scheme must, before filing the application, issue a declaration that they will not pay bonuses or dividends over 2020 or buy back shares in their own capital up to and including the date of the shareholders' meeting in which the annual accounts are adopted in 2021. This declaration must be kept as part of the company's records. Groups are required to honour the substance of the declaration. Bonuses include profit-sharing amounts and other bonus payments. The ban on bonus payments only affects directors and officers of the group and of the operating entity filing the application. It does not affect other staff. If this condition is not met, the NOW subsidy will be nil.

According to the Minister, this sweeping measure is justified by the fact that the subsidy is offered by the State to finance staff wages, so there is no need for groups to pay those wages from their own means. The purpose is to avoid that groups use this elbow room in the end to pay bonuses to officers and directors of the group and the applying operating company, and to pay profit-sharing amounts or buy back shares.

The government has implemented additional monitoring safeguards to prevent strategic conduct by groups.

- i. The other operating entities in the group are not allowed to carry out assignments or projects at the expense of the entity applying for the subsidy, which assignments or projects are normally carried out by the latter entity and fall outside the scope of normal activities of the other entities
- ii. If at any time during the subsidy period employees of the individual operating entity applying for the NOW subsidy are supplied to other companies, the turnover loss is corrected by the theoretical turnover arising from the supply
- iii. The transfer pricing system as applied in the 2019 annual accounts (or such annual accounts as most recently adopted) will be the guiding principle and cannot be changed
- iv. Fluctuations in the stocks of finished products will be attributed to the turnover of the operating entity

How is turnover defined?

The net turnover is the basis for the calculation. This is in line with the definition from the accounting and reporting rules laid down in the Dutch Civil Code (Section 2:377(6)) and the consistent policy of the undertaking.

'Net turnover' means the income from the supply of goods and services from the business of the legal entity after deduction of discounts and the like and of taxes levied on turnover. Revenue is income from the ordinary business activities of an undertaking.

The turnover definition must be as closely in line with the activity level of the undertaking, establishment or the group as possible.

How is the relevant turnover determined where there has been a transfer of undertaking?

As the implementation of the NOW scheme progressed, it was found that in the specific case of companies acquiring other companies the determination of the wage sum or turnover did not reflect the actual situation. In such circumstances, determining the wage sum or turnover will be in line with the existing provision relating to the determination of the turnover for start-ups. This means that the turnover *from the first calendar month after the day of transfer in 2019* will be the reference figure for all (full) remaining calendar months of 2019 and for the calendar months of January and February 2020. The resulting turnover figure is then converted into a three-month figure, meaning that the turnover amount is divided by the relevant number of calendar months and then multiplied by three. The acquisition/transfer must have been no later than January 2020, as the calculation requires that at least one reference month (in this particular case, February 2020) remains.

When is an auditor's opinion required?

It is required for companies to present an auditor's opinion if

- i. they received an advance grant equal to or in excess of EUR 100,000, and/or
- ii. the subsidy to be determined will equal or exceed EUR 125,000.

Companies that received advances lower than EUR 100,000 are responsible for estimating whether the subsidy will be determined at EUR 125,000 or more, in which case they also are required to present an auditor's opinion. An online tool will be made available for entrepreneurs to help them estimate whether or not an auditor's opinion will be required. Each amount relates to the subsidy amount granted to the group of companies as a whole or, if there is not group, the legal entity or natural person. The amounts do not relate to the subsidy amount granted on the basis of withholding tax numbers submitted.

Companies making use of the option provided by Article 6a to determine their turnover loss at the level of the operating company are at all times required to submit auditor's opinions.

In cases where no auditor's opinion is required but the advance exceeds an amount of EUR 20,000 or the subsidy determined exceeds an amount of EUR 25,000, applicants must submit a statement by a third party confirming the turnover loss. Such third party may be an administrative firm, a financial service provider, or the industry organisation.

II WAGE SUM

How is wage sum defined?

The wage sum are the combined wages for the purpose of national insurance contributions. Remuneration elements forming part of these wages, such as unsocial hours allowances, are included in the calculation of the wage sum. The relevant information is known by the Dutch Tax and Customs Administration on the basis of the employer's payroll tax form.

How is the wage sum determined?

In the application for an NOW grant, the employer supplies his withholding tax number. This enables the UWV, the agency handling the application, to determine the wage sum. **Borrowed workers (such as payroll and temporary workers) do not count towards the wage sum of the company where they perform work.**

The wage sum for the month of January 2020 will serve as the basis for determining the advance on the subsidy. The sum encompasses the wages of all employees on the applicant's payroll in January 2020.

For the purpose of calculating the subsidy, wages are capped at **EUR 9,538**.

The wage sum does not include the employer's social security contributions. After all, these are compensated through the UWV already. Any holiday allowances paid do not count towards the wage sum either.

In addition to wages, employers have other costs as well in relation to their staff, such as pension contributions (both the employees' and the employer's components), employee insurance and, in many cases, a reservation for holiday allowances to be paid. The NOW scheme provides for their compensation as well. For this purpose, the UWV applies a **fixed surcharge of 30%** on top of the wage sum (the wage for each individual employer, including this surcharge, still **capped at EUR 9,538**).

Is the wage sum, on which the grant will be based, at the time of application for the advance identical to the wage sum at the time the definitive compensation is determined?

For the purpose of determining the advances and the definitive compensation, the UWV uses the wage sum for the month of January 2020 or, if there are no data for that month, November 2019.

When determining the definitive compensation, the UWV can apply some corrections:

- If the wage sum for January 2020 encompassed benefits (such as sickness benefits under a no-risk policy, which the UWV compensates), these are **not** included in the wage sum
- If in January periodic salaries - such as thirteenth month's salaries - were paid, these will **not** be factored into the calculation of the maximum wage sum for the purpose of the NOW subsidy
- If an employer having made a reservation for holiday allowances has paid out holiday allowances, these reserved and unexpectedly paid holiday allowances are not included in the wage sum (the 30% surcharge includes the holiday allowance)
- If an employer who has not made a reservation for holiday allowances (paying all-in wages, for example) has paid out holiday allowances, a correction is made to prevent that the holiday allowance is compensated doubly through the 30% surcharge.

What if the wage sum for the month of January 2020 is not representative, meaning that it's lower than the normal monthly wage sum?

If the wage sum for the months March, April and May 2020 exceeds a sum equal to three times the wage sum for the month of January 2020, the wage sum for the months of April and May 2020 will be capped at the March 2020 level (March 2020 then being the reference month). This element of the NOW scheme was

amended with retrospective effect on 20 May 2020. As a result, applicants without wage sums in January 2020 and November 2019 but with wage sums in March, April and May 2020 may be eligible for subsidy under the NOW scheme after all. All such companies having received decisions denying applications will be approached by the UWV.

What is the consequence of having a lower wage sums for the months March, April and May 2020?

If a company's wage sums for the months of March, April and May were lower than the wage sum for the month of January 2020, the subsidy granted will be lower, in the sense that for each euro that the wage sum is lower, the subsidy payable will be 90 cents lower.

What is the “ontslagboete”?

If during the period in which a turnover loss is recorded an employer applies to the UWV for permission to lay off staff for economic reasons, the subsidy grant will be reduced. This reduction is the “ontslagboete” (fine for dismissals). The UWV will first determine the wage amounts for January 2020 for those employees in respect of whom applications for dismissals have been filed. These salaries are then increased by 50% (i.e. multiplication factor of 1.5) The aggregate amount is then raised by the fixed 30% surcharge (multiplication factor of 1.3), whereupon the result is multiplied by 3, as the subsidy related to a three-month period. That result is then multiplied by 0.9 (the maximum 90% subsidy), whereupon the resulting amount is deducted from the subsidy amount.

Do the wages of sick employees also count towards the calculation of the NOW subsidy?

Yes, all wages paid under the social security regime of the Netherlands are included, irrespective of whether an employee is sick. Obviously, this is subject to the condition that payment of wages continues during sickness.

How are a group's wage sums calculated?

Contrary to the calculation of the turnover loss, the group of which an employer forms part is not a factor in determining the wage sum. **Wage sums are calculated at the employer level.**

Applications for the NOW compensation are filed and handled on the basis of the withholding tax numbers submitted, so not for an entire group of companies. The NOW compensation subsequently is paid only to the employer whose withholding tax number was used to file the application. It follows that the group is not entitled to the NOW compensation - the separate employer making the application is.

III COMPENSATION

What is the amount of the compensation towards wages?

The amount of compensation granted towards wage costs depends on the turnover loss and is calculated by multiplying the loss percentage by 0.9. This would give the following results:

- If the turnover loss is 100%, the compensation will be 90% of the employer's full wage sum
- If the turnover loss is 50%, the compensation will be 45% of the employer's full wage sum
- If the turnover loss is 25%, the compensation will be 22.5% of the employer's full wage sum

Is there a difference between the calculation of the advance grant and the calculation of the definitive compensation?

Yes. The advance grant is calculated according to a different formula than the definitive compensation, as will be clear from the following examples:

Advance NOW grant

Percentage of		Wage sum as	3 (months)	1.3 (fixed	30%	0.9 (fixed
expected	X	reported for January	X	surcharge)		correction
turnover loss		2020				factor)

Definitive grant NOW compensation (part I):

Percentage of	X	Wage sums as reported for 1 March-	X	1.3 (fixed	30%	X	0.9 (fixed
actual turnover loss		31 May 2020 period		surcharge)			correction factor)

If in the 1 March to 31 May 2020 period the wage sum has decreased in relation to the wage sum for January 2020, the definitive NOW compensation may be lower than the advance granted. In that event, the employer will be required to repay part of the advance granted.

If in the 1 March to 31 May 2020 period the wage sum has increased in relation to the wage sum for January 2020, there will be no additional compensation. In that event, the definitive NOW compensation will not exceed the advance granted, subject to any retroactive corrections.

IV EMPLOYER OBLIGATIONS

What are the employer's obligations on applying for the NOW subsidy?

The employer's obligations are listed in Article 13 of the NOW scheme:

- a) The employer is expected to make every effort to keep the wage sum as equal as possible
- b) The employer may not request permission from the UWV to give notice of termination of employment contracts for economic reasons in the period between 18 March and 31 May 2020
- c) The employer is obliged to use the subsidy exclusively for payment of any wage costs due
- d) The employer is obliged to inform the works council, employee representative body or the employees in the absence of such body, that compensation has been granted
- e) The employer is obliged to keep auditable records to such extent that all data relevant for determining the subsidy can be reviewed and will allow, if so requested, inspection of these records for up to five years after the date of determination of the subsidy
- f) The employer must do his payroll tax return at the prescribed moments in accordance with the Wages and Salaries Tax Act 1964 [*Wet op de loonbelasting 1964*]
- g) The employer must notify the Minister without delay if any circumstances occur that may affect any decision to modify, revoke or determine the subsidy
- h) After the period over which the subsidy has been granted, the employer must submit a definitive statement of the turnover loss, plus an auditor's opinion
- i) For up to five years after the date of determination of the subsidy, the employer will assist in any investigation instituted by or on behalf of the Minister, for instance by providing the information, data and documents requested.

What does "make every effort to keep the wage sum as equal as possible" mean exactly?

This expresses the obligation on the employer's part to make every effort to sustain employment by continuing the contracts of his staff and continuing to pay their wages (and those of on-call workers).

So the employer is obliged to continue to pay the wages of on-call workers. What hours does he need to take into account?

The NOW scheme provides for compensation of the wage costs if employers pay more wages to on-call workers than they are required to pay by law. This is an incentive for the employer to continue to pay wages even if there is no statutory obligation to do so.

The wage sum used for the purpose of determining the NOW subsidy does incorporate the wages paid to employees with flexible contracts. This gives the employer the option to continue to pay wages to flexible employees at the level of their average January 2020 wages. These wages will then be counted towards the subsidy to be granted.

What if the wage sum for the period of March-April-May 2020 decreases in relation to the wage sum for the reference period (essentially January 2020) despite the employer's best efforts to keep them equal?

A decrease in the wage sum will have the consequence that the amount of the definitive subsidy the employer may claim will be lower, in the sense that the subsidy will be 90 eurocents lower for every euro that the wage sum decreases.

What are the consequences for applications for dismissals on economic grounds filed before 18 March 2020?

When applying for the NOW subsidy, the employer is expected to commit to not applying to the UWV for permission to lay off staff on economic grounds for the duration of the period during which he is granted compensation.

More specifically, the employer may not apply for such permission between 18 March 2020 and 31 May 2020. This temporary prohibition does not apply to applications filed with the UWV between 1 March and 17 March 2020. Applications filed between these two dates need not be withdrawn.

What is the sanction on violating the prohibition against applying for permission to the UWV to lay off staff on economic grounds between 18 March 2020 and 31 May 2020?

If an employer does apply to the UWV for permission to lay off staff on economic grounds and he fails to withdraw such application or is late to do so, the UWV will apply a correction to the determination of the definitive subsidy.

It will first determine the wage amounts for January 2020 for those employees in respect of whom applications for dismissals have been filed. These salaries are then increased by 50% (i.e. multiplication factor of 1.5) The aggregate amount is then raised by the fixed 30% surcharge (multiplication factor of 1.3), whereupon the result is multiplied by 3, as the subsidy related to a three-month period. That result is then multiplied by 0.9 (the maximum 90% subsidy), whereupon the resulting amount is deducted from the subsidy amount.

Please note Since the NOW scheme was amended on 3 April 2020, the determination of the subsidy deduction no longer takes into account the turnover loss percentage, which has the consequence that the deduction can be substantial.

V PROCEDURE

When and where can the NOW compensation be applied?

Employers can apply for the compensation to the UWV.

The scheme was opened up on 6 April 2020. The scheme will apply through 31 May 2020.

The government will decide before 1 June 2020 whether the NOW scheme will be extended and, if so, subject to what conditions it will do so.

What is the procedure for applying for an advance grant under the NOW scheme?

We recommend that employers work closely with their auditors and/or tax advisers, if available, because the NOW scheme takes recourse to terms and notions from accounting and reporting rules.

The subsidy is applied for on the basis of the wage sums for the months of March, April and May 2020 due to a turnover loss in excess of 20% over a period of three (3) consecutive months between 1 March and 31 July 2020. This allows for some movement in the period over which the turnover loss is to be measured if an employer expects the turnover loss to be slow to manifest itself.

The expected turnover in the selected period of three (3) months will be compared with the total turnover for 2019, divided by four, meaning that the two figures relate to a three-month period. The comparison of the two figures allows for a calculation of the turnover loss in percentages. If applications are applied for several withholding tax numbers, because they are filed by a group of companies, for example, all forms must state the same turnover loss percentage and be based on the same measuring period.

If applications are filed under the “operating entity regime”, consideration must be had of the additional obligations as listed above under the heading “Turnover loss”.

What happens after the application for the advance grant has been filed?

The UWV must issue its decision within a 13-week period of receipt of the full application, but the UWV strives to pay out (the first instalment of) the advance grant within two to four weeks. That is subject to the application being fully substantiated.

If the application is successful, the UWV will grant an advance of 80% of the subsidy as calculated on the basis of the information about the expected turnover loss provided with the application.

The UWV will derive data about the wage sum from its benefit entitlement database, taking January 2020 as its reference month.

The advance grant will be paid out in three instalments. The UWV has indicated that it will strive to pay out the first instalment of the advance grant within two to four weeks.

Will the NOW procedure be complete once the application for the advance grant has been filed and the advance grant has been paid?

No. As the NOW is a subsidy scheme, additional steps need to be taken. Within 24 weeks of the end of the period over which the NOW subsidy has been granted, the employer must apply for the definitive determination of the subsidy, which - in principle - requires an auditor's opinion. At this moment, it is not clear above which cap such auditor's opinion will be required. The government's answer is not expected before the end of April 2020.

Within 52 weeks of receipt of the application for that purpose, the UWV will determine the definitive subsidy, which means it will determine whether an additional payment follows or, if the turnover loss turns out lower than expected or if the wage sum is lower, part of the grant will be reclaimed. As noted, if the wage sum for the months of March, April and May 2020 has increased in relation to the wage sum for January 2020, the subsidy will not be increased. It follows that a higher wage sum does not result in an additional payment.

Public access to data

As a closing remark, we would like to add that all applications for the NOW subsidy entail that applicants consent to their data possibly being made public. The NOW subsidy is paid from public funds. The Government Information (Public Access) Act [*Wet openbaarheid bestuur* - "Wob"] provides that people can request information about administrative affairs, including NOW subsidies. The NOW scheme therefore stipulates that applicants consent to their information as provided to the UWV during the application possibly being made public, which also applies to data from the subsidy file.

The government has included this stipulation to avoid needless administrative expenses in the event of requests made under the Wob. Please note that the consent only relates to a number of data that are mostly of relevance to promote transparency about the expenditure of public funds. The data possibly made public does not include confidential or sensitive information.

The Minister has requested that, from the end of June 2020, the UWV publish on its website the names of applicants for the NOW subsidy, as well as the advances granted and subsidies determined.

CHAPTER 3 - NOW 2.0

On 20 May 2020, the Minister of Social Affairs and Employment announced the framework for the extension of the NOW scheme: NOW 2.0. The purpose of the NOW scheme has not changed - employers who suffer a turnover loss of at least 20% should be enabled to keep as many employees on the payroll.

It is expected that from 6 July 2020, employers will be able to apply to the UWV for grants to cover their wage sums for the months of June, July and August 2020. Applications are open to employers that applied for subsidies in the first period already, but also to employers that have not filed any applications before.

The system on the basis of which subsidies will be granted under NOW 2.0 is largely the same as that applied under NOW 1.0, but some differences do apply:

- **Fixed surcharge:** The fixed surcharge on top of the wage sum will be increased to 40% (up from 30%). The purpose of this increase is for the subsidy to help applicants pay costs other than just the wage sum as well.
- **Wage sum reference month:** The reference month for determining the wage sum will be March 2020. **Fine for dismissals:** If an employer seeks permission to dismiss 20 or more employees for economic reasons under the Collective Redundancy (Notification) Act [*Wet Melding Collectief Ontslag*], a 5% reduction will be applied to the eventual subsidy amount, unless the employer and the relevant trade unions (or, in the absence thereof, another body representing the employees) reach agreement on the dismissal applications, or, if no agreement is reached, the parties have sought mediation by a committee to be formed by the Labour Foundation [*Stichting van de Arbeid*].
- **Bonuses. Profit distributions. Share Buybacks.** No company that applies for a grant under NOW is allowed to distribute profits to shareholders, pay bonuses (including profit distributions) to the board and directors, or buy back shares for the year 2020 up to and including the day of the shareholders' meeting in 2021 at which the annual accounts are adopted. This obligation applies only to companies that receive grants for which the submission of auditor's opinions is required.
- **Obligation to make efforts to train or retrain staff:** Employers will be obliged to make efforts to stimulate their staff to train or retrain themselves. To support employers in this endeavour, the Dutch government has set up a supplementary crisis training policy titled *NL leert door*. The details are yet to be filled in.

The text of the NOW 2.0 scheme is expected to be published in June 2020. Following publication, we will amend this Q&A accordingly and provide additional information.