

three important topics to include in your employment contract under Dutch, US and UK law

by priscilla de leede, mary edenfield and ed belam

You have a company with which you are doing business in the Netherlands, the United States and/or the United Kingdom. What are the three most important topics to include in your employment contracts under Dutch, American and English law regarding the termination of the contract?

From Dutch law perspective

1. Duration and termination of the employment contract

An employment contract may be entered into for a fixed term or for an indefinite period. If no fixed duration is agreed upon, the contract is considered to be for an indefinite period.

Please note that multiple consecutive fixed-term contracts may automatically turn into a permanent contract (“chain of employment contracts”) after a certain period of time and/or a certain number of contracts.

The fixed term employment contract ends automatically on the final date as mentioned in this contract. In principle, it is not possible to terminate such a contract prior to the agreed time, unless (1) this is explicitly agreed upon in the contract or (2) the contract is terminated with mutual consent. Therefore, we advise to also - alongside the final date of the contract - include a so-called premature termination clause. If you include a such a clause, the same rules for termination apply as in the event of a termination of a permanent employment contract. This means that a reasonable dismissal ground and prior approval from the court (in case of personal reasons, such as underperformance) or the Employment Insurance Agency (in case of financial/economic reasons or long-term illness) is required.

2. Notice period

When terminating an employment contract, a notice period needs to be taken into account to determine the termination date. Under Dutch law, the notice period for the employer is based on the length of the employment:

- less than 5 years = one month’s notice;
- 5 years or more, but less than 10 years = two months’ notice;
- 10 years or more, but less than 15 years = three months’ notice;
- 15 years or more = four months’ notice.

The statutory notice period for an employee is one month. However, under certain conditions parties may also agree upon a different notice period in the employment contract.

3. Post-termination restrictions

The employee may be restricted to work or operate for business competitors and to take over clients after termination of the employment contract. For this reason, a non-competition and non-solicitation clause can be

included in the employment contract, in addition to a confidentiality clause). In order to be valid, the non-competition and business relations clause has to meet the following requirements:

- must be in writing; and
- must be agreed upon with an adult.

It is not allowed to include a non-competition and non-solicitation clause in a fixed-term employment contract, unless (a) this clause stipulates your well-founded substantial business interests requiring such a clause to protect these interests and (b) why this specifically applies to the position of the employee involved. Furthermore, a court may assess whether the clause is reasonable, thus whether the duration, territory and activities to which the clause applies are sufficiently specified.

Last but not least: Do not forget to include a penalty clause linked to the violation of these post-termination restrictions!

From US law perspective

1. Termination

The contract should give the employer the ability to terminate employment immediately or on an expedited basis for cause. The contract should specify the conduct or other issues that will permit the employer to terminate for cause, as well as any notice requirements and whether the employee will have an opportunity to cure the issue before termination becomes final.

The contract should specify how an employer may terminate employment without cause. This is needed in case there are concerns with the employee's performance or conduct that do not meet the requirements for termination for cause, and to give the employer flexibility to respond to changing business needs. The contract should specify the amount of notice required (typically sixty or ninety days), and whether the employer has the option of providing pay in lieu of all or part of the notice period.

The contract should also address any requirements that apply if the employee wishes to resign, such as the amount of notice that is required and whether and under what circumstances the employer may terminate the employment before the end of the notice period.

2. Post-termination restrictions

Employers may wish to restrict an employee from starting a competing business or working for a competitor, and from soliciting customers or employees, during employment and for a period of time after employment ends. Applicable law varies from state to state, and state law should always be consulted. Generally such restrictions must be reasonable with respect to the length of time they remain in effect and the geographical area that is included. If the employee will have access to confidential information, the contract should include confidentiality and non-disclosure requirements that survive the termination of the contract. The contract should specify that the employer is entitled to injunctive relief for violations of these requirements, in addition to damages and all other available remedies.

3. Dispute Resolution

Employers may wish to require use of alternative dispute resolution (such as arbitration or mediation) in the event of a dispute, in lieu of litigation. Such provisions should specify how the arbitrator or mediator will be selected, the rules and procedures that will be followed (for example, the rules and procedures of a particular alternative dispute resolution organization), how the costs will be allocated, and whether the outcome will be binding. The contract should specify which state's laws will apply to the interpretation and enforcement of the contract. In addition, the contract should specify the venue for any proceedings.



Important to keep in mind: Since in the U.S., many aspects of the employment relationship are regulated at the state level, there may be different considerations depending on the state or states involved, and state law should always be taken into consideration.

From UK law perspective

All employers are required to give all employees certain key information (name of the employer, salary, job title, place of work, etc) in writing at the start of their employment. Typically however, employees will be asked to sign employment contracts which go much further than the minimum statutory requirements.

1. Termination

A well drafted employment contract should contain each of the following provisions relating to termination:

- a basic contractual notice period depending on the length of the employment:
 - between one month and 2 years: at least one week's notice;
 - between 2 and 12 years: one week's notice for each year of service;
 - 12 years or more: 12 weeks' notice.
- a pay-in-lieu-of-notice provision;
- an express garden leave provision; and
- a summary dismissal / termination for 'cause' provision.

2. Post-termination restrictions

Post-termination restrictions are a key business protection provision in all well drafted employment contracts for senior employees and directors. The law which governs them, however, is complex. Post-termination restrictions will be enforceable as long as they go no further (in scope of duration) than is reasonably necessary to protect the legitimate business interests of the employer. If any clause is deemed to go further than that, then a court will not re-write it and will not enforce it. To stand the best chance of being enforceable they need to be

well drafted and tailored to the individual's role and seniority, as well as to the nature of the employer's business and the industry they work in.

Typically they are stated to last between 3 and 12 months for a senior employee or director and typically they tend to cover:

- competition;
- soliciting and working with customers and prospective customers;
- poaching and employing key employees; and
- forbidding any interference with the employer's key suppliers.

If the restrictions are enforceable, employees do not have to be paid a salary whilst they are in force.

3. Confidential Information and Return of Property

A well drafted employment contract for any level of employee will contain a clause dealing with confidential information. This would principally cover what an employee can (and cannot) do with an employer's confidential information, but should also cover the return of any such confidential information on termination of employment.

Conclusion and advice

When doing business abroad in the Netherlands, the United States and/or the United Kingdom, it might be advisable to include clauses in your employment contract regarding the termination of the contract such as a (premature) termination clause, a notice period, post-termination restrictions and a clause regarding (alternative) dispute resolution.

If you need any help with drafting employment contracts under Dutch, American or English law or if you have any questions related to (the clauses to include in) employment contracts, please contact Priscilla de Leede (NL), Mary Edenfield (US) or Ed Belam (UK). 



Priscilla de Leede advises national and international entrepreneurs and organizations in disputes concerning personnel, employee participation, and social security. She is a member of the employment law and dismissal group at Russell Advocaten.



Mary Edenfield is a shareholder at Mateer Harbert, P.A. She practices in the areas of health care, labor & employment, and technology law.



Ed Belam is an associate in the employment team at Marriott Harrison and he advises on all aspects of employment law. He has a particular interest in helping businesses understand what employment rights, liabilities and obligations they are taking on when buying a company or property.