

PUBLIC-PRIVATE COOPERATION

Dealing with sham constructions and furthering compliance
of collective agreements in The Netherlands

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Several channels and legal grounds for workers to report wrongdoing, e.g.:

- House for Whistleblowers Act
- Sectoral legislation (e.g. social legislation within the competence of the Labour Inspectorate)

Whistleblower

- No legal definition
- Reporting to trade unions is not considered to be whistleblowing
- Reporting about work-related crime, only affecting the workers in the company, normally is not called whistleblowing

CONSIDERATIONS

- Investigating sham constructions is time-consuming
- Records are hard to come by, especially when foreign (operational) management is involved
- Statements of workers are essential for furnishing of proof
- Workers are often reluctant to make an incriminating statement: afraid to lose the job or satisfied with the wages
- For workers the barrier to inform trade unions is rather low
- Cooperation between the Labour Inspectorate and social partners is very important, as is cross-border cooperation

APPROACH

- A. Social partners inform the Labour Inspectorate; the Inspectorate carries out an investigation.
- B. Social partners (mostly the trade union FNV, having a team Enforcement and Compliance) ask the Labour Inspectorate to investigate a suspected evasion of a collective agreement. The results of this investigation they can use to force compliance in a civil action.

LEGAL BASIS approach A. ('Waadi')

A posted worker is entitled to the same terms of employment as the workers doing the same work in the same company with respect to the wages and collective agreement provisions. If the results of an investigation by the Labour Inspectorate show that a company does not comply with the provisions related to the posting of workers, the Labour Inspectorate sends its report to the trade unions. This report does not contain personal data.

LEGAL BASIS approach B. ('Wet AVV')

At request of one or more social partners, provisions of a sectoral collective agreement can be declared generally binding by the Minister of Social Affairs and Employment. If a social partner has the suspicion that a company does not comply with one or more of these provisions, it can ask the Minister to investigate this. The aim of this request must be a legal action against this company, implying a request for nullification of the deviating provisions. The Minister provides the requester with a report, containing the results of the investigation. This report does not contain personal data.

MOST PROBLEMATIC SECTORS

- Transport (hypermobile workers; several states involved)
- Construction
- Agriculture
- Hotel, restaurant and catering
- Food processing
- Cleaning
- Massage & beauty

METHOD OF WORKING TRADE UNIONS

- Cross-border cooperation between trade unions
- Unravel structure, flow of money, clients
- Win the confidence of the workers
- Approach competent authorities for investigation and prosecution
 - in the countries involved
 - in case of human trafficking, involving exploitation for economic purposes, also Europol
- Put clients in the pillory
- Hold clients liable for harm victims ⇒ post-payments

RESULTS APPROACH B. (until April 2018)

Results from 2014 until April 2018	Number	Effect
Civil procedures - Lost on appeal - Cases won - Being tried - Settlement after summons - Bankrupt after summons	29 1 7 12 7 2	- Wages (Dutch) hirer of staff applied; - Post-payment by the clients; - Sham construction contracting terminated; - Bankruptcy and withdrawel of Euro licences in road transport.
Settlement after discussion	10	- Wages hirer of staff applied; - Workers in the pay of (Dutch) employer - Sham construction contracting terminated; - Settled for about 2 million of euros with employers and hirers.
Under consideration	38	- No effect being known.
No results	12	- No wrongdoing found among other things.
Requester holds employer liable	5	- € 61.301 claimed; € 34.241 paid.
Total	94	