

Q&A Temporary Emergency Scheme For Job Retention (NOW)

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Following the previously announced COVID-19 Emergency Support Packages, the government of Curaçao announced the definitive version of the Emergency Support Package on April 17, 2020. In this Q&A, the Employment & Benefits team of HBN Law & Tax addresses the most pressing questions regarding the measures of this Emergency Support Package.

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Q&A NOW

This week the Temporary Emergency Scheme For Job Retention (the “NOW-scheme”) entered into effect. In this Q&A we will broadly provide answers to the most frequently asked questions with regards to the NOW-scheme. It is noted that, in addition to the basic conditions, the NOW-scheme contains specific financial and tax requirements. For the sake of clarity, we will not discuss these aspects in detail. Should you have any further questions that are not discussed in this Q&A, please contact one of our employment law attorneys or one of our tax advisors.

WHAT IS THE NOW-SCHEME?

The objective of the NOW-scheme is to assist employers in the payment of the wage costs. The NOW-scheme enables employers to retain employees and enables them to continue paying said employees despite the fact that said employees are temporarily out of work. The NOW-scheme provides the employers with the possibility to receive a compensation which is proportionate to the decrease in their turnover.

WHAT IS THE SUBSTANTIVE NATURE OF THE NOW-SCHEME?

The (regulations of the) NOW-scheme are similar to the existing regulations as set forth in the National Decree on Health Insurance (*Landsverordening Ziekteverzekering*) and the National Decree on Accident Insurance (*Landsverordening Ongevallenverzekering*) as provided by SVB. Based on the aforementioned decrees, employers may request a compensation (from SVB) of the daily wages of the employees who are sick and/or incapacitated to work. By analogy with the BES-islands, the NOW-scheme uses a similar “pay out system” to the existing “pay out system” with regards to health insurance premiums (ZV) and accident insurance premiums (OV). By using such a similar system the NOW-scheme was, on a short term, made executable and practiceable. However, the NOW-scheme uses a lower and more flexible percentage which is determined on the basis of the expected decrease in turnover of the employer. Unlike the NOW-scheme in the Netherlands and the BES-islands, a sector approach is chosen for Curacao.

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I. ENTRY REQUIREMENTS

WHICH EMPLOYERS CAN REQUEST A SUBSIDY?

The NOW-scheme is for an employer who mainly exercises economic activities in the sector that appears on the sectors' list approved by the Minister of Economic Development, has one (1) or more employees registered at SVB and expects a decrease of at least 25% in his turnover which is the direct result of the corona virus and/or the measures related to it.

The sectors' list, as approved by the Minister of Economic Development, includes¹,

[\(https://www.fondodisosten.org/nl/sectoren-voor-de-now-regeling/\)](https://www.fondodisosten.org/nl/sectoren-voor-de-now-regeling/):

- Hotels, apartment rentals to tourists, travel agencies, restaurants en cafés;
- Rental companies; (except immovables);
- Transport en storage (except freight forwarders, shipbrokers, charterers en transshipment);
- Entertainment (except radio and television industry and lottery companies), attractions and cultural industries;

- Gym and other sport facilities (for example: diving schools);
- Cleaning companies, laundry and carwash companies;
- Surveillance and emergency services;
- Employment agencies and personnel consultancies;
- Gardening contractors and animal care;
- Barbershops and other personal (hygiene) services;
- Retail non-foods (except pharmacies, medical products, gas stations and required materials for animals);
- Retail foods (only alcoholic drinks, tobacco and ice cream);
- Trade (except supermarkets, trade of fuel and trade of pharmaceutical products);
- Construction industry;
- Installation companies;
- Manufacturing industry (except food products, paper, crude oil, products for cleaning and sanitization and medical products);
- Repair companies for consumer goods;
- Mining industry;

¹ The Minister of Economic Development may periodically, upon hearing the Curacao Chamber of Commerce, determine and lay down

(by ministerial regulation) which sectors are allowed to receive a subsidy under this scheme.

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- Healthcare (only medical labs, occupational and physio therapists and day nurseries);
- Estate agents and valuers.

FOR WHICH EMPLOYEES MAY A SUBSIDY BE REQUESTED?

An employer can apply for a subsidy for the wage costs of the employees who (i) are employed by the employer and (ii) are mandatorily insured by the employed persons' insurance scheme (SVB-wage). The NOW-scheme does not apply to employees with a zero-hours contract, trainees, shareholders who are not employed, sole proprietors, statutory directors of companies without employees and employees employed by a public limited company.

The employee must fall under the definition of "employee" as set forth in the National Decree on Health Insurance and the National Decree on Accident Insurance and said employee must be registered in the SVB registration file on February 28, 2020. Employees which fall outside the scope of the definition "employee" are for example domestic staff and employees employed by a public-law body.

Foreign employers with employees who are insured by the employed persons' insurance scheme in Curaçao can also request a subsidy based on the NOW-scheme. Employees who are covered by insurances outside of Curaçao (presumptively) do not fall under the scope of the NOW-scheme.

Does a statutory director also fall under the scope of the NOW-scheme?

Yes, a statutory director who was employed by the employer on July 15, 2019 also falls under the scope of the NOW-scheme. This does not apply to a director and major shareholder, who holds more than 50% of the shares in the legal entity and does not have any employees. The director and major shareholder can possibly rely on the Regulation of Temporary Assistance for Independent Employers.

Does the NOW-scheme only apply to employees with an employment contract for an indefinite period of time?

No, you can (as an employer) request a subsidy based on the NOW-scheme for employees (for example) with an employment contract for a definite period time as well.

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II. DECREASE IN TURNOVER

HOW IS THE DECREASE IN TURNOVER CALCULATED?

The decrease in turnover is the difference between the turnover in April 2019 and the expected turnover in April 2020. The turnover which is applied in such case is the turnover as set forth in the tax return.

Example

An employer had a monthly turnover of NAf. 80.000 in April 2019. From April 1, 2020 until April 30, 2020 the turnover decreases to NAf. 36.000 due to the corona virus and/or the measures related to it.

In such case the turnover is decreased with:

$$\text{NAf. 80.000} - \text{NAf. 36.000}$$

$$\text{NAf. 80.000}$$

Or: 0,55 = 55% decrease in turnover.

What is the definition of "turnover"?

"Turnover" is the turnover as stated in the turnover tax declaration. Only in exceptional cases it can be deviated from the calculation thereof and the deviation can take place only after a special appointed committee approves of it. This applies to companies which are established after April 1, 2019 and

have experienced an enormous increase in turnover in the past few months or are not subject to the turnover tax. A different reference period is/will be used for said companies.

III. WAGE BILL

WHAT IS A WAGE BILL?

The wage bill consists of the wages from which the health insurance / accident insurance premiums (employed persons' insurances) are paid, according to the SVB- wage. SVB is using the wage bill of February 2020. Therefore, the wages of all employees who were employed by the employer applicant in February 2020 and the wages of the statutory directors who were already employed before 15 July 2019 by the employer applicant are included in this wage bill.

Additional wage components are excluded from the wage bill.

Is the wage bill maximized?

For the calculation of the subsidy based on the NOW-scheme, a maximum of NAf. 5,781 (which is the SVB maximum of daily wages) of the wages (per employee) is taken into account. The rest is not taken into account when the amount of the subsidy is being determined.

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What should I do with the employees who earn more than the SVB maximum daily wages?

For employees who earn more than the maximum SVB daily wages (thus more than NAf. 5,781) per month, the employer is (for the part that exceeds the maximum daily wages) not obliged to pay out the majority on the basis of the NOW-scheme (although: this is stated on the application form). **Please note** that the NOW-scheme sets forth the conditions to determine whether an employer qualifies to receive a compensation under said scheme. Therefore, the employer's obligations as set forth in the Curacao Civil Code are not affected by the rules and regulations of the NOW-scheme.

It is advisable to first discuss any possible intended unilateral change with a specialist who can provide you with an advice in this regard and the employee.

Will I receive any compensation for the holiday allowance that I will be paying out soon?

The employer does not receive any additional compensation for the payment of the holiday allowance, which often takes place around this time of the year. It is advisable, as an employer, to enter into talks with your employees about said payment and to lay down in written the arrangements in this regard. We do

not suggest a unilateral suspension of payment of the holiday allowance as the initial step in these circumstances.

What to do with a sick employee for the purpose of the NOW-scheme?

An employer cannot receive compensation from SVB regarding sickness as well as the NOW-scheme. The employer can receive the regular benefits regarding sickness during the time an employee is ill and/or incapacitated to work during the period in which the NOW-scheme applies.

IV. SUBSIDY

WHAT IS THE AMOUNT OF THE COMPENSATION?

The amount of the subsidy is linked to the percentage of the decrease in turnover. As a maximum, 80% of the total wage bill will be paid out in case the turnover decreases by 100%. If the turnover decreases by less than 100%, then the amount of the subsidy will proportionately be set lower than 80%:

- 100% decrease in turnover: the subsidy will be 80% of the total wage bill;
- 50% decrease in turnover: the subsidy will be 40% of the total wage bill;

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- 25% decrease in turnover: the subsidy will be 20% of the total wage bill;
- <25% decrease in turnover: no subsidy.

Therefore, a decrease in turnover must be at least 25% per employer.

The total compensation can be calculated as follows:

$$S_{\max} = \text{maximum } 80\% \times A \times B,$$

whereby:

- A stands for: the expected decrease in the turnover of the employer in a month compared to the reference period put in percentage; and
- B stands for: the employer's total wage bill on February 28, 2020 as registered in the SVB Registration file, up to a maximum of NAf. 5,781.10 per month per employee.

Example

An employer faces a decrease in turnover of 90%. In such case, the employer will be entitled to a compensation of 72% on the total wage bill (80% of 90%). The employer will receive compensation of NAf. 3,600 for an employee with a gross monthly salary of NAf. 5,000.

What if the employer's wage bill has been increased as of February 28, 2020?

The SVB only uses the wage bill of February 2020. Therefore, the wages of all employees who were employed by the employer applicant in February 2020 are taken into account for the calculation of the total compensation. If the employer has employed more employees after February 2020, then the wages of said employees will in principle not be included in determining the total amount of the compensation based on the NOW-scheme.

IV. OBLIGATIONS EMPLOYERS

BASED ON THE NOW-SCHEME, WHICH OBLIGATIONS DOES AN EMPLOYER HAVE?

The employer's obligations are listed, among other things, in Article 6 of the NOW-scheme and are as follows:

- the employer is obliged to continue to pay the full wages of the employees during the period for which a subsidy has been granted;
- the employer is obliged not to change the terms of employment which apply to the employees to their detriment;

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- after the application, the employer is not allowed to submit a request for dismissal on commercial grounds during the period for which the subsidy has been granted, neither is he allowed to make use of compensations granted earlier during this period;
- the employer is obliged to use the subsidy exclusively for the payment of wage costs;
- the employer keeps records that are verifiable in such a way that all information relevant to the determination of the (amount of the) subsidy can be verified and, upon request, grants inspection of said records up to five (5) years after the (amount of the) subsidy has been determined;
- the employer must take care of all payroll tax and social security contributions, including employer contributions. This is a conceptual change compared to the Solidarity Package whereby employers are exempted from paying the employer's contribution of the AOV / AWW premiums (9.5%). This payment is compensated by a maximum contribution of 9.5% through a subsidy wage. Because it is linked to the expected decrease in turnover, this contribution can rise to 9.5%. Therefore, one can refer to it to as a maximum subsidy wage of 89.5% instead of the 80% mentioned above.
- the employer informs the Director immediately and in writing if other circumstances arise that may be relevant for a modify, withdraw or determine the (amount of the) subsidy;
- after the end of the period for which the subsidy has been granted, however no later than 31 September 2020, the employer will submit to SVB a copy of the turnover declaration for turnover tax for the period for which the subsidy was granted, a statement of payment of wages to the employees in the period for which the subsidy was granted and any other information which is considered relevant for SVB to be able to assess whether the subsidy has been used in accordance with the provisions of the NOW-scheme;
- the employer will cooperate in an investigation initiated by or on behalf of the supervising authority up to five years after the (amount of the) subsidy is determined, for example by providing the necessary information, data and documents.

What if I, as an employer, has already reduced my employee's wages before the application of the NOW-scheme?

It is possible that an employer has already reduced the employee's wages to 70% of the basic wages

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prior to the application of the NOW-scheme. The question then arises on whether the employer may use the reduced salary as the employee's salary for the application of the NOW-scheme or whether this is considered contrary to the rules and regulations of the NOW-scheme.

The NOW-scheme takes into account the employee's wages as stated in the SVB registration file on February 28, 2020. On the aforementioned date, the consequences of the corona crisis were not yet noticeable in Curaçao and therefore the majority of the employees were employed while receiving 100% of their wages.

The rules and regulations of the NOW-scheme may be violated if the employer receives a subsidy which is proportionate to the employee's wages on February 28, 2020, despite the fact that in the intervening period the employer was compelled to reduce the wages as a result of the corona crisis.

Moreover, during the application for the NOW-scheme, the employer may not (unilaterally) change the employees' terms of employment to their detriment. It is unlikely that, during an inspection, it will be accepted that the employer receives more than 80% subsidy for his employees due to the fact that the terms of employment have been amended prior to the application of the NOW-scheme.

Apart from that, a decrease in the wage bill between of February 28, 2020 and the application date will result in the fact that the employer will receive a lower amount of subsidy. This means that the employer will still have to return the subsidy if the wage bill was lower at the time. No fine will be levied on the amount that has been overpaid due to lack of intent and/or fault.

It is less likely that the employer will be obliged to retroactively pay out the employee's wages to 100% for the months before the application of the NOW-scheme. Prior to the NOW-scheme, the employer was free to act on the basis of the prevailing regulations at the time. Also, the decision pertaining to the NOW-scheme only sets forth the obligation to continue to pay full wages during the period for which a subsidy has been granted. In principle, this does cover the period before and after the subsidy is granted and must be assessed on the legal grounds outside the NOW-scheme. This is assessed on an individual basis.

Can I already submit a petition for collective dismissal for the period after the NOW-scheme?

Pursuant to Article 5 of the National Decree on termination of employment contracts, an employer must, as soon as he intends to lay off twenty-five (25) employees or more or more than 25% of the of

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employees in (one of his) business locations - insofar as this percentage does not result in five (5) or less than five (5) employees -, he must notify the Labor Department in Curacao (SOAW) at least two (2) months before the termination date of the employment contract.

The question then arises whether an employer can now submit the request for collective dismissal to the Labor Department for the period after the subsidy was granted based on the NOW-scheme?

In principle, it is not possible to submit such a request based on commercial grounds during the period in which the rules and regulations of the NOW-scheme apply. Dismissal requests, based on reasons other than the ones based on commercial grounds, may however be submitted or dealt with by the Labor Department.

Please note that it is possible to apply for a dismissal permit based on commercial grounds if the decision to lay off the employees is not the (direct) result of the corona virus and/or the measures related to it (i.e. halting aviation).

Are there no exceptions to this rule in the Netherlands? Are these exceptions also applicable to Curacao?

In the Netherlands the rule mentioned afore was the principle rule. However, in a letter of amendment the possibility was created for employers to submit an application for dismissal at the Employee Insurance Agency (UvW) in the Netherlands based on commercial grounds during the applicability of the NOW-scheme.

In such case, the employer will pay a "fine". This means that in case a request for dismissal is submitted, a correction will be implemented upon determining the amount of the subsidy based on the NOW-scheme. The wages of the employee, for whom the subsidy is requested, will increase with 50%. This notional wage is deducted from the total wage bill on which the amount of the subsidy is actually based.

In such case, it does not matter whether UvW grants the permit for dismissal or not. This means that companies in the Netherlands can nevertheless lay off employees on commercial grounds which can, in a way, lead to saving their wage bill. This option is used by employers in the Netherlands who expect that their company will continue to cut back employees after the corona crisis period also.

The aforementioned option does not apply on the BES-islands. The Labor Department on the BES-islands does not deal with requests for dismissal based on commercial

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grounds. As of now, the aforementioned rule also applies to Curacao, however, there is a possibility that this might change in the future.

V. OTHER MEASURES

CAN OTHER EMPLOYMENT LAW RELATED MEASURES BE TAKEN ALSO?

That depends on each individual measure. The NOW-scheme does not allow you to amend the terms of employment to the detriment of the employees.

Employees with an employment contract for an indefinite period of time may not be laid off. However, you are, as an employer, under no obligation to keep employees with an employment contract for a definite period of time under the NOW-scheme. You can also terminate the employment contract during the probation period without providing a reason for termination under this scheme.

Is it always necessary to submit a petition (for an extension) to receive financial aid based on the NOW-scheme?

No, this is not always necessary. There are cases whereby it may be (financially) more favorable for a company not to submit any petition (for an extension). In such case, it is

more favorable to request a (collective) permit to dismiss the employees or to take other employment law related measures. This can be the case if the employer expects a cut back of employees after the corona crisis period also. This, however, depends on each individual case.

Is an employer exempted from the rules and regulations set forth by the local employment laws when the NOW-scheme applies?

No, the employer is not exempted. The NOW-scheme is an emergency measure which is created for employers who are suffering a loss of turnover due to the corona crisis and said scheme sets forth the conditions to determine whether an employer qualifies to receive a compensation under said scheme. Therefore, the employer's obligations as set forth in the Curacao Civil Code and other local employment laws are not affected by the rules and regulations of the NOW-scheme.

Does this mean that the rules and regulations of the NOW-scheme and the Curacao Civil Code apply to me as an employer?

In principle, there are no major differences between both laws and regulations. An example of a difference between them is the payment of employees with higher wages than the SVB daily wages.

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Under the NOW-scheme, as an employer, you are not obliged to pay out the remaining part in full (although: this is stated on the application form of SVB). However, under the Curacao Civil Code you do have said obligation.

Nonetheless, the Curacao Civil Code provides a possibility for the employer to deviate from the aforementioned obligation if the employer and employee, in written, lay down the arrangements in this regard. This may take place under certain terms and conditions. If you wish, we can ofcourse inform you about these aspects.

What can I do if my company is not on the sectors' list?

In such case, it is not possible to request financial aid based on the NOW-scheme. If the application of the NOW-scheme is extended, then the sectors' list may be amended.

If, upon the extension of the application of the NOW-scheme, your company still does not qualify for financial aid, you can fall back on the local employment laws and/or the Curacao Civil Code. In such

case, arrangements can be made with the employees with regards to the obligation to continued payment of his/her wages. It is possible that a contingency clause has been added to your collective labor agreement which can be applied in such cases.

We can of course assist you in looking for the most advantageous options for you.

VI. INFORMATION

Should you have any further questions or if you wish to receive an advice for your company, then please do not hesitate to contact one of employment law attorneys or tax advisors. We will gladly assist you further.

For contact details we refer to the next page.



Further information

In case you require any assistance, please do not hesitate to contact one of our labor law specialists or tax advisors.

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