Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

# Employment 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

**Dutch Caribbean: Law & Practice**

Molly Steward, Michael Bonapart and Arndt van Hoof
Soliana Bonapart & Aardenburg

# DUTCH CARIBBEAN


## Law and Practice

**Contributed by:**
Molly Steward, Michael Bonapart and Arndt van Hoof
**Soliana Bonapart & Aardenburg**

## Contents

**Soliana Bonapart & Aardenburg** is a firm of trusted advisers who build lasting relationships with clients, taking a healthy interest in people and their motivations. The firm maintains solid local ties, but also serves clients from all parts of the world in the private and public sectors. Soliana Bonapart & Aardenburg is associated with Globalaw, a worldwide network of independent law firms and with the Dutch Business Lawyers Abroad, an association of Dutch business lawyers working across the globe.

## Authors

**Molly Steward** joined Soliana Bonapart & Aardenburg as a partner in 2019, after working as an attorney and partner at the law firm Van Eps Kunneman Van Doorne. Since joining the legal profession in 1987, Molly has been focusing on a general law practice, with a specialisation in employment law. She offers comprehensive knowledge and expertise, and represents the interests of a wide variety of businesses and individuals in labour and employment issues, in and out of the courtroom. Molly is also a lecturer in labour law at the University of Curaçao, and speaks Dutch, English, Spanish and Papiamento.

**Arndt van Hoof** was previously a lawyer in the Netherlands in a general (civil) practice. At Soliana Bonapart & Aardenburg, he focuses on civil law, with an emphasis on obligations (contract) law, commercial transport and insurance, rent and labour law. Arndt has vast experience as a litigator in these practice areas and is known for his hands-on approach. He studied Dutch Law at the University of Maastricht and completed the Grotius specialisation course on Transport Law in 2011. He speaks English and Dutch.

**Michael Bonapart** is a lawyer and managing partner at Soliana Bonapart & Aardenburg. His practice areas include civil law, administrative law, insurance law, agency and distribution agreements, labour law, litigation and corporate law. Michael is known for his strategic and analytical mind, and has proven himself time and time again as a strong litigator. He studied Dutch Law at the University of Amsterdam, and speaks Dutch, English and Papiamento.

Soliana Bonapart & Aardenburg
Attorneys at law

Pietermaai 23
P.O. Box 113
Willemstad
Curaçao

Tel: +599 9 461 3833
Fax: +599 9 461 7662 / 465 2890
Email: stewardm@sba-advocaten.com
Web: www.sba-advocaten.com

Soliana Bonapart & Aardenburg
Advocaten / Attorneys at Law

## 1. Employment Terms

### 1.1 Employee Status

In the Dutch Caribbean, no distinction is made between blue-collar and white-collar workers. However, there is a distinction between workers who fall under the scope of the relevant National Labour Ordinance 2000 and those who do not. The distinction is based on the income of the employee, as this ordinance has a threshold income that is related to the day wages as defined in the National Ordinance on Sickness Insurance.

The National Labour Ordinance 2000 makes a distinction between schedule workers and non-schedule workers. This distinction is important as different rules apply in respect of working hours, rest time and overtime, for example.

Schedule workers are workers whose work is performed according to a periodic work schedule at various times, which are necessary in view of the nature of the business. As a result, the working hours fall in part or in whole prior to 7am and after 8pm, thereby outside normal business hours. Non-schedule workers perform their work within the normal business hours of between 7am and 8pm.

If an employee (schedule worker or non-schedule worker) performs work outside of the aforementioned hours, these hours are considered overtime and the employee will consequently be entitled to an overtime allowance, as stipulated by law.

### 1.2 Employment Contracts

In principle, the terms on which employment contracts are entered into are based on the contractual freedom between parties, although in general the type of contract is determined by the employer's business needs. The contractual freedom is limited by the rules of public order and the mandatory stipulations in employment laws and regulations.

Under the labour and employment laws, an employment contract is not required to be in written form. However, the written form is mandatory for some provisions in the employment contract, such as a trial period or a non-competition clause.

In the event of verbal agreements where work is performed by a person for payment, the law assumes the presumption of the existence of an employment agreement if one of the following criteria is met:

- if the work has been performed on a weekly basis for at least eight hours per week for three consecutive months; or
- if the work has been performed on a monthly basis for at least 35 hours per week for three consecutive months.

In the Dutch Caribbean, there are different types of employment contracts, with the main ones being the employment contract for a definite period of time (fixed period) or the employment contract for an indefinite period of time. Further distinctions can be made within this main category, such as part-time or full-time employment contracts, or on-call contracts. The importance of this distinction is the degree of protection for the employee in case of the termination of the employment contract.

Employment contracts entered into for a fixed period of time terminate by operation of law; however, the law places restrictions on the use of this type of employment contract, in order to protect the interests of the employees. These contracts are converted into contracts for an indefinite period of time in the following cases:

- if the duration of two consecutive employment agreements (ie, with a period of interruption of less than three months) for a fixed period of time summed up together exceeds 36 months, the last employment contract – although entered into for a fixed period of time – shall be automatically converted by law into an employment agreement for an indefinite period of time; or
- in the event of three consecutive fixed period contracts (meaning a period of interruption of less than three months) within 36 months, the fourth employment agreement – if entered into for a fixed period of time – shall be automatically converted by law into an employment agreement for an indefinite period of time.

The relationship between a temporary worker and the employment agency is also considered an employment agreement with specific rules.

### 1.3 Working Hours

If the employee falls under the stipulations of the National Labour Ordinance 2000, the following maximum working hours apply:

- for non-schedule workers, 40 hours per week; or
- for schedule workers, 45 hours per week.

If the National Labour Ordinance does not apply, the employer and the employee can contract the amount of working hours freely, provided the working hours agreed upon are reasonable in the specific circumstances.

### 1.4 Compensation

Minimum wages differ for each island of the former Netherlands Antilles and for each type of salary agreed upon – eg, hourly, weekly, bi-weekly or monthly wages. The minimum wages are also distinguished per age group. Furthermore, these minimum wages are usually established anew on January 1st of each year.

In the Dutch Caribbean, there are no specific laws or regulations concerning a 13th month, bonuses or holiday allowances. These wage components are freely negotiable between the employer and the employee.

When an employee works overtime and their employment contract falls under the scope of the National Labour Ordinance 2000, the following compensation rules will apply:

- if the employee exceeds the maximum number of hours, the additional hours will be compensated at 150% of the regular hourly wage;
- if the employee works during their break, they will be compensated at 150% of their regular hourly wage;
- if the employee is a schedule worker and has to work on a hal-day that should be free according to their schedule, the employee will receive compensation of 175% of their regular hourly wage;
- if the employee has to work on their day of rest, they will receive compensation of 200% of their regular hourly wage;
- if the employee has to work on a public holiday, they will receive compensation of 250% of their regular hourly wage; and
- schedule workers who perform overtime in combination with night duty will receive 175% of their regular hourly wage.

Any modifications to these compensation rates, specifically reductions, can only be made through a collective labour agreement.

Employer and employee can agree in writing that overtime will be partly or wholly compensated in time back instead of being compensated in money, in proportion to the above-mentioned compensation percentages.

Different rules apply to hotels, restaurants and casinos.

## 1.5 Other Employment Terms

### Vacation

Pursuant to the Vacation Regulation, an employee is entitled to a minimum number of days of vacation per year, equal to three times the number of agreed-upon workdays per week.

Therefore, if an employee works four days a week, they are entitled to a minimum of 12 paid days of vacation. However, if an employee works six days per week, they are entitled to a minimum of 15 days of vacation, according to the minimum rule contained in the Vacation Regulation.

During the vacation, the employer has to continue paying the employee's wages.

### Maternity Leave

Female employees are entitled to fully paid maternity leave, which differs for each island, as follows:

- Aruba – the maternity leave is 12 weeks, four to six weeks of which may be taken prior to the due date of the child and the balance after the birth of the child;
- Bonaire, Saint Eustatius and Saba – the maternity leave is 16 weeks, which may be divided into six weeks prior to the due date of the child and ten weeks after the birth of the child;
- Curaçao – the maternity leave is at least 14 weeks, two to six weeks of which may be taken prior to the due date of the child and at least eight up to a maximum of 12 weeks after the birth of the child; and
- Saint Maarten – four to six weeks of maternity leave may be taken prior to the due date of the child and at least six weeks up to a maximum of eight weeks after the birth of the child.

The stipulations concerning maternity leave are mandatory.

## 2. Restrictive Covenants

### 2.1 Non-competes

In the Dutch Caribbean (except for Aruba), non-competition clauses are void by law. This only concerns non-competition clauses that apply after the termination of the employment relationship.

During the employment relationship, it can be agreed that the employee shall not perform any (additional) activities for third parties during their employment.

### 2.2 Non-solicits

A non-solicitation clause that applies after the employment relationship has been terminated shall generally be considered equal to a non-competition clause in the Dutch Caribbean (except for Aruba).

This will be the case if such clause limits the employee's endeavours to pursue another employment.

## 3. Data Privacy

### 3.1 Data Privacy Law and Employment

#### Data Privacy Law

An employer has the right to monitor an employee's work performance and to use the employee's data for that purpose because there is a relationship of authority between them.

However, the employer is bound by the following conditions to protect the employee's right to privacy:

- there must be a legitimate purpose for collecting the data, which means that there must be a clear description in advance of the specific objective and the manner in which this objective will be pursued;
- the use of the data must be in proportion to the objective pursued, whereby the use of the data is limited to only such data that is strictly necessary (the proportionality requirement); and
- there must be transparency – this means that the employee must also be informed that a certain method will be applied to collect and control the data, and informed of the objective of the use of the collected personal data.

In short, the collection and use of the employee's personal data should not be at the expense of the privacy of the employee.

## 4. Foreign Workers

### 4.1 Limitations on Foreign Workers

A foreign employee is not allowed to perform work without a work permit. An employer is prohibited by law from allowing a foreign employee to perform work if the employee does not have a valid work permit.

A foreign employee is also required to obtain a residence permit.

### 4.2 Registration Requirements for Foreign Workers

Once a residence permit and a work permit are obtained, no further specific registration requirements are necessary other than the registration with the tax inspector for wage tax purposes and for the payment of applicable social premiums.

Additional permits are required for specific professions, such as medical doctors and their assistants, and pharmacists and their assistants.

## 5. New Work

### 5.1 Mobile Work

Mobile work is not regulated by law and depends on the individual employer.

### 5.2 Sabbaticals

Some employers have provisions in their employment manuals or employment conditions with respect to sabbaticals. Under Curaçao law, this is not regulated.

### 5.3 Other New Manifestations

There is no applicable information in this jurisdiction.

## 6. Collective Relations

### 6.1 Unions

A union can represent the interests of individual employees or of a group of employees within a community or within a business sector. A union can also negotiate on behalf of the employees of a company with respect to a collective labour agreement, but has to be considered a representative for the majority of employees in order to do so.

If it has been established, on the basis of a referendum, that the union in question is representing the majority of the employees, the employer is obliged to enter into negotiations with this union with respect to the collective labour agreement.

#### Recent Changes

On 3 June 2023, an interesting case was published concerning the enforcement of a clause laid down in a collective labour agreement which had already expired.

The party demanding enforcement was a newly formed employees' union. The new union was not a party to the collective agreement they sought to enforce, and therefore there was a question as to whether the new union's claim could be admitted in court.

Another legal issue which had to be addressed was whether an employees' organisation (thus an employees' union) is still entitled to demand fulfilment of obligations arising from a collective labour agreement after it has expired.

It was concluded by the Supreme Court in the Hague that in the case of a collective labour agreement, parties to this agreement, based on the legal system, still have an interest in ensuring that the employment conditions created by such collective labour agreement are duly complied with by the employer vis-à-vis the individual employees unless the parties agree otherwise.

Legally, the right to demand enforcement of the stipulations laid down in the collective labour agreement is contingent on one's status as a party to the collective labour agreement or as a member of an employees' association that is party to the collective labour agreement and pursuant to the content of the respective agreement.

As a result, the binding effect of the provisions of the collective labour agreement applicable when both the employer and the employee are bound by it persists even after the agreement's stipulated duration has lapsed.

With respect to the question of whether the new union, which was not a party to the collective labour agreement, could enforce the stipulations of the expired collective labour agreement, it was concluded that this union was not a party

to the collective labour agreement and therefore not entitled to demand enforcement.

The issue was an interesting one in view of the legal position of an employees' union, where the purpose of such association is to safeguard the interests of its members (employees).

### 6.2 Employee Representative Bodies

In the Dutch Caribbean, the only employee representative body is a union.

The legal entity of such an employee association must have full legal capacity, and its by-laws have to explicitly stipulate that the association has the authority to enter into a collective labour agreement/collective bargaining agreement.

### 6.3 Collective Bargaining Agreements

The law describes a collective bargaining agreement as the contract entered into by one or more employers, or one or more employers' associations with full legal capacity, which mainly or exclusively regulates employment conditions in employment contracts.

A collective bargaining agreement cannot be entered into for a period longer than five years, although it can be extended. Any such extension should be in such manner that the parties are never bound to each other for longer than five consecutive years, commencing from the time the extension is agreed upon.

Unless otherwise stipulated in the collective bargaining agreement, the employer – who is bound by that collective bargaining agreement – is obliged during the term of that collective bargaining agreement to comply with its provisions regarding employment conditions, and also with those employment contracts as referred to in the collective labour agreement, entered into with employees who are not bound by that collective labour agreement.

## 7. Termination

### 7.1 Grounds for Termination

To terminate an employment agreement, the employer must a priori have justifiable grounds. An employment agreement can be terminated in one of the following ways:

- by giving notice – in order to terminate an employment agreement with an employee by giving notice, the employer has to obtain the prior consent of the Department of Labour Affairs;
- by mutual consent between the employer and the employee;
- by dissolution of the employment agreement by the court upon request of either the employer or the employee; or
- for urgent reasons – an urgent reason for the employer to dismiss an employee shall be any reason based on such actions or behaviour of the employee due to which the employer cannot reasonably be required to continue the employment relationship; the law gives the following examples of such behaviour:
  - (a) deception of the employer by the employee;
  - (b) when the employee lacks the ability to perform the contractual duties;
  - (c) when the employee continues with drunken or other debauched behaviour, despite warnings; or
  - (d) if the employee is guilty of theft, embezzlement, deception or other crimes.

Urgent reasons for the employee include the following:

(a) when the employer mistreats, grossly insults or seriously threatens the employee, their family members or housemates, or permits such acts to be committed by a housemate or subordinates; or
(b) when the employer does not pay the wages on the contractual payment date.

### Collective Dismissal

An employer who intends to dismiss 25 employees, or more than 25% of the total number of employees in a company, provided this does not result in five or fewer employees, has to notify the Department of Labour at least two months prior to the termination of the employment agreements.

Within eight days of notifying the Department of Labour, the employer has to send the Department of Labour a redundancy plan for assessment.

## 7.2 Notice Periods

If the employment agreement is being terminated by giving notice, the following notice periods have to be taken into account by the employer, depending on the years of service:

- if the employment lasted less than five years – one months' notice;
- if the employment lasted longer than five years but less than ten years – two months' notice;
- if the employment lasted longer than ten years but less than 15 years – three months' notice; or
- if the employment lasted more than 15 years – four months' notice.

The notice periods that the employer has to take into account can only be shortened by way of a collective bargaining agreement. Extension of the notice period for the employer, however, can be done through a written agreement.

The employee has a notice period of one month regardless of the duration of the employment relationship.

Deviation from the notice period that the employee has to take into account is allowed through a written agreement; if the deviation consists of a prolongation of the notice period that the employee has to take into account then the notice period of the employer should at least be twice that of the employee.

If the notice period for the employee is extended, such extended notice period may not exceed six months.

### Severance

The only severance payment the law provides for is the so-called cessantia payment, which an employee is only entitled to if the reason for the termination of the employment agreement cannot be attributed to the employee. The cessantia payment is a minimum severance payment based on the years of service, and is calculated as follows:

- up to and including the tenth full year of service – one week's salary per year of service;
- for 11 to 20 full years of service – one and a quarter week's salary per year of service; and
- for each year after 20 years of service – two weeks' salary per year of service.

If the employer or the employee requests the court to dissolve the employment agreement, the court can award the employee a severance compensation based on fairness, taking all circumstances into account.

### 7.3 Dismissal for (Serious) Cause

A summary dismissal can only take place for urgent reasons. The urgent reason has to constitute an urgent reason objectively (thus for any other reasonable employer) as well as subjectively (thus for this specific employer).

Furthermore, the urgent reason and the immediate termination of the relationship in connection therewith must be notified to the employee forthwith.

If all formal and material criteria are met, this will lead to a legal dismissal.

### 7.4 Termination Agreements

Termination agreements are permissible.

An employer and an employee can always terminate an employment relationship by mutual consent. There are no legal requirements for such termination, other than that the employer must make sure that the employee actually agrees to terminate the employment relationship and understands the consequences of such termination.

The employer may not assume too quickly that the employee wishes to terminate their employment. In that respect, the employer should require an unambiguous statement from the employee concerning their consent to the termination of their employment contract.

Although no specific form is required for such termination agreement, the agreement is usually drawn up in writing in order to avoid any ambiguity with respect to the conditions of the termination. The written form is mandatory if the termination agreement is meant to be considered a settlement agreement in which parties also release each other from any obligations arising from the employment relationship and grant each other discharge.

### 7.5 Protected Categories of Employee

There are certain categories of employees where the protection against dismissal by giving notice is granted based on the employee belonging to such category, as follows:

- employees who are ill are protected against a termination of their employment by giving notice during the first year of illness;
- female employees who are pregnant are protected against dismissal based on the fact that they are pregnant;
- an employee who is prevented from performing their contractual work because they are complying with an obligation imposed on them by law, or arising from a commitment made by them to the government, with regard to the country's defence or to protect the public order is protected; and
- an employee who is a member of a union or who is involved with the activities on behalf of the union is protected.

These categories of employees are only protected insofar as the reason for dismissal is connected to the specific category. In all other cases, the normal rules and procedures for the termination of an employment agreement remain applicable.

## 8. Disputes

### 8.1 Wrongful Dismissal

Depending on the reason given for the dismissal and the manner in which the employment agreement was terminated, an employee has the following options.

- If the employment agreement was terminated with immediate effect due to an urgent reason, the employee can invoke the nullity of the dismissal and the employer shall have to prove the existence of such urgent reasons and that all formal requirements for such dismissal were met. If the employer does not succeed in providing this proof, then the dismissal will be considered null and void – the employment relationship will not have terminated and the employer shall have to continue payment of the employee's wages, including a penalty for late payment and the legal interest.
- If the employer terminates the employment agreement by giving notice without the prior consent of the Department of Labour, the employee can invoke the nullity of the termination, in which case the employment relationship will not have terminated and the employer shall have to continue payment of the employee's wages, including a penalty for late payment and the legal interest.
- If the employee considers the termination of their contract to be manifestly unreasonable, they can request the court to grant them fair compensation for damages suffered, and the court can be requested to reinstate the employment relationship.
- If the employer did not comply with the rules and regulations in respect of the termination by giving notice, the employee can choose between claiming an indemnification or full damage compensation, and the court can be requested to reinstate the employment relationship.

### 8.2 Anti-discrimination

Based on the Curaçao Civil Code, an employer is not permitted to make a distinction between men and women in the following scenarios, under penalty of nullity:

- when entering into the employment agreement;
- in the provision of education to the employee;
- in the terms of employment;
- in the event of job promotion; or
- when terminating employment contracts.

On the other islands of the Dutch Caribbean, based on the principle of a good employer, an employer in the same circumstances is obliged to treat their employees equally. Furthermore, the non-discrimination provisions pursuant to the European Convention on Human Rights are applicable in the Dutch Caribbean.

If an employee believes they have been discriminated against, the burden of proof of such discrimination lies with the employee.

### 8.3 Digitalisation

Most employers are looking at the conversion of certain work processes by using digital technology. However, giving the costs connected with digitalisation, small businesses in general will not invest heavily in digitalisation, contrary to large(r) organisations.

Digitalisation therefore depends on the decision of the individual employer.

## 9. Dispute Resolution

### 9.1 Litigation

Disputes between an employer and an employee are brought before the competent Court of First Instance of the relevant jurisdiction. The procedure may be initiated by either the employer or the employee.

With the exception of the procedure in which the dissolution of the employment agreement

is requested, the decision of the Court of First Instance can be appealed, to the joint Court of Justice of Aruba, Curaçao, Saint Maarten and of Bonaire, Saint Eustatius and Saba. Ultimately, this decision can also be appealed to the highest instance, which is the Supreme Court in The Hague in the Netherlands.

No professional legal representation is required in proceedings in front of the Court of First Instance; the parties can argue their case in person. In appellate proceedings before the joint Court, legal representation from an attorney in law is required. In the event of appeal proceedings before the Supreme Court, representation by lawyers specially trained for these proceedings is required.

### 9.2 Alternative Dispute Resolution

In employment disputes and disputes concerning a collective bargaining agreement, arbitration may be used as an alternative procedure.

However, arbitration is not a common procedure in connection with such disputes. To initiate an arbitration procedure, the parties have to agree on that prior to initiating the arbitration. The procedure to reach an agreement is likely to take time and is also very costly.

### 9.3 Costs

Attorney's fees are, in general, not part of the fees that are awarded in legal proceedings on employment matters. In general, each party has to pay its own attorney's fees, irrespective of the outcome of the court proceedings.

The court can award certain procedural costs to the party that has successfully argued its standpoint but those costs are based on a fixed rate related to the monetary interest of the case and the procedural actions taken.

In exceptional cases, the court may award the full attorney's fees.

## CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com