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## ***Activation Measures in Social Security: Lessons from the Dutch Case***

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## **ACTIVATION MEASURES IN SOCIAL SECURITY: LESSONS FROM THE DUTCH CASE**

**Frans Pennings\***

Dutch social security has undergone important changes since the 1990s, in that the focus shifted from predominantly compensating the loss of income into giving incentives for claimants and benefits recipients to stay in or get back to work. While still providing a relatively high level of benefit if there is no chance to work (to the full extent), the legislature has been quite creative in adopting conditions that stimulate persons to do their best to be in work. For this purpose, this is interesting for an American audience, since the USA system is far less generous out of fear that persons will not do enough to take care of themselves, while also leaving those who cannot earn a sufficient income alone. A combination of activating conditions and a good safety net is, therefore, an interesting alternative.

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## I. INTRODUCTION

During the 1990s, Dutch policy makers became conscious that employers were using the Social Security Acts in ways the legislature did not intend.<sup>1</sup> One improper use by employers of the Social Security Acts during this time involved employers sending adverse employees home for being sick; this was the cost effective solution because the sickness benefit fund would reimburse the wage costs lost by the employer.<sup>2</sup> Because of this, adverse employees would feel “sick” when they were actually stressed so they could be sent home instead of providing the employee with other ways to relieve their stress. However, employers had no financial incentives to assist their employees and solve the conflict because the Sickness Benefit Act covered the employees’ wages.<sup>3</sup> Therefore, the employee remained in the picture under the presumption that the employee was sick. Eventually, such employees could be considered disabled. This was referred to as “activation,” meaning that individuals should be activated in order to make as little use of the benefit that was possible by motivating individuals to take responsibility for themselves.<sup>4</sup>

Another improper use by employers of the Social Security Acts had to do with over providing disability benefits to employees than was intended by the legislature.<sup>5</sup> During the 1970s and 1980s, the mass redundancies in Dutch workplaces was a problem so, in an attempt to resolve this issue, a considerable number of employees who would have been terminated were instead provided disability benefits.<sup>6</sup> Of course, such workers had to be disabled to some extent, but in practice they received full benefits even in cases where the employee only had a minor degree of disability.<sup>7</sup> Access to benefits was very easy because often the

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1. See generally *Belang en beleid: Naar een verantwoorde uitvoering van de werknemersverzekeringen*, (Sdu Uitgeverij Plantijnstraat, Den Haag, 1994) (explaining the distribution of responsibilities of benefit administration).

2. Sabine Geurts et al., *Curing the Dutch Disease? Sickness Absence and Work Disability in the Netherlands*, 53 INT’L SOC. SEC. REV. 79, 80 (2000).

3. Frans Pennings & Paul M. Secunda, *Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experiences*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 348 (2015).

4. *Id.*

5. *Id.*

6. *Id.*

7. Duncan McVicar et al., *Four Decade of Disability Benefit Policies and the Rise and Fall of Disability Reciprocity Rates in Five OECD Countries* (September 2, 2016), <https://www.human.cornell.edu/sites/default/files/PAM/people/nrz2/The-rise-and-fall->

assessing doctors of the benefit administration made the decision based off of the employee's file.

These improper uses of the system by employers illustrate how the benefit system was carrying the costs of these employers decisions in some aspects. Of course, the government tried to change the rules, lower benefits, put fines on abuse; however, employers continued to request claims from the benefit system.<sup>8</sup> Thus, this problem needed to be approached differently. First, it would be better to re-arrange the responsibilities in the total system<sup>9</sup> and, second, employees should be incentivized to reduce the risk of becoming sick or disabled.<sup>10</sup> Before the benefit administration, employer and employee associations did not have the proper incentives to reduce claims by employees and employers to the benefit system, so such associations were removed from the benefit administration.<sup>11</sup>

There was a period of time when some believed that private insurance companies should administer some acts like disability and sickness, however, the government continued to supervise the benefits system under the control of the Minister of Social Affairs.<sup>12</sup> An essential element of the benefit system is to assess employees' incapacity for work, which is a significant factor in keeping the system public to maintain public responsibility.<sup>13</sup> One reason the benefits system cannot be privatized is because private companies wish to reduce benefit costs, thus, they have a conflict of interest.<sup>14</sup> Therefore, the *Uitvoeringsinstituut werknemersverzekeringen* (UWV), the benefit administration

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of-disability-recipient-rates-in-five-OECD-countries\_v11-clean.pdf  
[<https://perma.cc/F8T9-F5WY>].

8. SICKNESS AND DISABILITY SCHEMES IN THE NETHERLANDS 5 (Nov. 2007) <http://www.oecd.org/social/soc/41429917.pdf> [<https://perma.cc/FR64-WHHY>].

9. See VERANTWOORDELIJKHEIDSVERDELING SOCIALE ZEKERHEID: TERREINVERKENNENDE STUDIE OVER DE VERDELING VAN VERANTWOORDELIJKHEDEN OP HET TERREIN VAN DE SOCIALE ZEKERHEID (Sociaal-Economische Raad, Jan. 1994). The Social Economic Council is a tripartite (i.e. consisting of representatives of employers and employees organizations and independent experts appointed by the minister of social affairs) with the task (inter alia) to advise the government on socioeconomic issues.

10. See generally *Belang en beleid*, *supra* note 1.

11. See Wet structuur uitvoeringsorganisatie werk en inkomen 29 november 2001, Stb. 2001, 624 (Neth.).

12. Pennings & Secunda, *supra* note 3, at 349.

13. See generally P.S. Fluit, *Verzekeringen van solidariteit*, (Deventer: Kluwer, 2001); see also FRANS PENNING, DUTCH SOCIAL SECURITY LAW IN AN INTERNATIONAL CONTEXT (Kluwer L. Int'l, 2002) (providing a general overview of the system).

14. Pennings & Secunda, *supra* note 3, at 349.

employees' scheme, was established.<sup>15</sup> The UWV is a national organization that administers the disability, sickness, and unemployment benefit packages, as well as other benefits.<sup>16</sup>

Thus, the conditions for benefits are still governed by the law and the rights of the beneficiaries are not changed in comparison to the previous situation. Instead, the way the responsibilities are organized varies according to the type of benefit.

## II. PROTECTION IN CASE OF SICKNESS

The new approach materialized when a statutory obligation for employers to pay wages during an employee's illness was introduced. In 1994, a new rule was introduced that employers had to pay sick employees for the first six weeks of their illness.<sup>17</sup> Small employers, which are defined to have less than fifteen employees, had to pay sick employees for the first two weeks of their illness.<sup>18</sup> The new act was passed to incentivize employers to follow up with employees and determine whether ill employees were rightfully absent because employers would be responsible for income provisions.<sup>19</sup> Additionally, employers were expected to reduce risks of injury and sickness caused by dangerous conditions in the workplace.<sup>20</sup> Particularly, the construction industry had to take further measures to reduce the number of risks in the workplace.<sup>21</sup> Although there were already acts that required preventive measures, the new provisions motivated employers to take further action to prevent injuries, accidents, and illnesses.

Despite the uncertainty of whether the sickness act had the desired effect, two years later the employers' responsibility to pay wages was nevertheless extended from six weeks to fifty-two weeks.<sup>22</sup> The extension was created through an amendment of

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15. See *Historie, structuur, huisvesting, medewerkers en Cao UWV*, <https://www.uwv.nl/overuwv/wat-is-uwv/organisatie/detail/historie-structuur-husvesting-medewerkers> [<https://perma.cc/85VN-L38Z>] (last visited Nov. 15, 2017).

16. Wet structuur uitvoeringsorganisatie werk en inkomen, *supra* note 11.

17. Pennings, *supra* note 13, at 12.

18. Pennings & Secunda, *supra* note 3, at 360.

19. *Id.*

20. *Id.*

21. *Id.* at 360-61. For instance, measures that could be taken to enforce the rules more strongly include: wearing a helmet, enforced shoes, and protection barriers when employees were working on high-level sites. Additionally, a policy to avoid sickness due to stress or conflicts at work could contribute to lower costs.

22. Wet uitbreiding loonbetalingsplicht bij ziekte 8 februari 1996, Stb. 1996,

the Civil Code in order to provide sick employees 70% of wages for up to fifty-two weeks.<sup>23</sup> In collective agreements, the parties often provided that this statutory minimum was to be supplemented to make up for the full wage.<sup>24</sup> How this was done varied from agreement to agreement.

The privatization of the Sickness Benefits Act has to do with substituting the right to sickness benefit with the employer's obligation to pay employees sick pay.<sup>25</sup> However, this does not really privatize benefits because the act defines what the employers' obligations are and the rights of employees.<sup>26</sup> The Civil Code has strict rules, however, the employer is entirely responsible for the costs and may supplement these laws with additional rules in order to realize his responsibilities.<sup>27</sup> The employers must comply with the statutory obligations and are subject to rulings in court.

Employers are able to, but not required, purchase private insurance to cover risks. In order to allow a smooth introduction of the act and to gain a new, vast market, the joint insurance companies decided that when employers bought insurance they would not assess the health conditions of the employees, as this insurance covers all employees, so the employer does not choose specific employees the employer wants insured.<sup>28</sup> When the risk was only six weeks, employers often bore the risks themselves, but upon the introduction of the fifty-two-week period, they bought insurance on a higher scale.<sup>29</sup> In the insurance rules, employers often still bear risks, such as during the first six weeks of employee sick leave, or when the employee is absent for longer than is covered in the benefits scheme, (stop loss insurance).<sup>30</sup>

The Sickness Benefits Act is still in effect and applies to

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23. Pennings & Secunda, *supra* note 3, at 361.

24. See W.J.P.M. FASE ET AL., *SOCIALE ZEKERHEID: PRIVAAT OF PUBLIEK?* (Deventer: Kluwer, 1994).

25. ULRICH BECKER, FRANS PENNING, & TINEKE DIJKHOFF, *INTERNATIONAL STANDARD-SETTING AND INNOVATIONS IN SOCIAL SECURITY* 445 (Alan C. Neal et al. eds., Wolters Kluwer, 2013)..

26. *Id.* at 381.

27. Art. 7:629 BW (Neth.).

28. ADVIES INZAKE KABINETSVOORNEMENS ZW, AAW EN WAO (Sociaal-Economische Raad, Apr. 1995).

29. T.J. VEERMAN & J.J.M. BESSELING, *PRIKKELS EN PRIVATISERING: INTEGRERENDE RAPPORTAGE EVALUATIE WETGEVING ROND ZIEKTEVERZUIM, WAO EN REÏNTEGRATIE* 27 (2001).

30. Pennings & Secunda, *supra* note 3, at 362.

persons who do not have an employer.<sup>31</sup> An example of the first group are flexible workers, the other group is the unemployed.<sup>32</sup> This Act provides a safety net for unemployed and flexible workers. The 1997 Act on Medical Examinations allows employers to employ individuals who have a higher risk of becoming ill because the act restricted medical examinations in recruitment procedures.<sup>33</sup> Unless the particular job requires specific health requirements, it prohibits medical examinations as a standard practice.<sup>34</sup> This Act's purpose was to diminish the chance that chronically ill individuals will never get work.

Not only did the benefit rules change, an amendment to the Law on Conditions at the Workplace forced employers to improve working conditions.<sup>35</sup> One would presume that accidents at work would be reduced with better working conditions. Furthermore, employers have to develop a solution to lower sickness at work.<sup>36</sup> Because of this, employers must determine all potential situations that endanger the health and safety of the employees.<sup>37</sup>

The government did not find that employers obligation to continue to pay sick employees their wages was a sufficient reintegration effort.<sup>38</sup> This was because private insurance reimbursed the employer's obligation to pay wages.<sup>39</sup> Furthermore, employers' version of reintegration measures would be expensive or bothersome than actually paying the wages of a sick employee.<sup>40</sup> For these reasons, the Gatekeepers Act came into effect.<sup>41</sup>

The purpose of the Gatekeepers Act's was to limit employers'

31. Art. 18:1 WTZ (Neth.).

32. Unemployed persons are also covered for sickness, even though that may not lead to a different income, since they may be disqualified for unemployment benefit during sickness. In addition, in case of long-term sickness, when they are not be able to work again full-time, these persons may qualify for disability benefits. These benefits are financed by contributions paid to the sickness and disability funds.

33. Art. 3-5:1 WMK (Neth.).

34. See E.L. de Vos et al., *Evaluatie: Wet op de medische keuringen*, DEN HAAG: ZON MW, June 2001.

35. Pennings & Secunda, *supra* note 3, at 362-63.

36. Verdrag betreffende arbeidsveiligheid, gezondheid, en het arbeidsmilieu; Genève, 3 juni 1981 *Trb.* 1981, 4:1 (Neth.).

37. Verdrag betreffende arbeidsveiligheid, gezondheid, en het arbeidsmilieu; Genève, 3 juni 1981 *Trb.* 1981, 5 (Neth.).

38. *Parliamentary Papers II* 2000-2001, 27.678, nr. 3, (Explanatory Memorandum to *Wet Verbetering poortwachter*).

39. Pennings & Secunda, *supra* note 3, at 363.

40. *Id.*

41. *Wet Verbetering Poortwachter* 29 november 2001, Stb. 2001, 628 (Neth.).



ability to access to the Disability Benefits Act.<sup>42</sup> The Gatekeepers Act requires both employers and sick employees to take on reintegration efforts if an employee's illness is projected to last for a long period of time.<sup>43</sup> When an employee expects to be sick for more than six weeks, the employer and the employee are obligated to make a plan for reintegration back into the workplace.<sup>44</sup> For example, such a plan might involve adjusting an employee's impairments in the workplace or by offering additional training or other jobs in the workplace. Moreover, the employer and employee must regularly meet to determine if such reintegration methods are successful and if such reintegration plans have to be adjusted.<sup>45</sup> Both the employee and the employer can force the other party to cooperate;<sup>46</sup> if it becomes necessary, they can legally enforce cooperation.<sup>47</sup>

The benefits administration, the UWV, may determine whether an employer's reintegration efforts are satisfactory three months before the employee may apply for disability benefits.<sup>48</sup> To show that the activities have been sufficient, the employee must provide a report on what reintegration activities occurred.<sup>49</sup> When an employer's actions are found to be unsatisfactory by the benefit administration, the employer is obligated to pay the employee's wages for a maximum of twelve months.<sup>50</sup> Altogether, the employer may have to pay wages for a total of three years.<sup>51</sup> However, when the employee has not cooperated satisfactorily, such employee may be refused disability benefits for a certain period regulated by the Disability Benefits Act.<sup>52</sup>

A disadvantage of organizing social protection at a lower level is that it is difficult to have thorough research due to low reporting rates on actual payment to sick employees by their employers. Strict labor law and dismissal law narrow the ability to get out of the employers obligations.<sup>53</sup> In the previously mentioned Act on Medical Examinations during recruitment, this Act was suppose

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42. *See generally* Art. 7:629 WGA (Neth.).

43. Art. 658a para. 5 BW (Neth.).

44. Pennings & Secunda, *supra* note 3, at 363.

45. *Id.*

46. Art. 4.1:30 para. 2 BW (Neth.); Art. 658a para. 2 BW (Neth.).

47. Art. 7:658b BW (Neth.).

48. *See* Pennings & Secunda, *supra* note 3, at 364.

49. *Id.*

50. Art. 7:629(11) BW (Neth.).

51. *See* Art. 7:629 BW (Neth.).

52. Art. 4.1:30 para. 1 WGA (Neth.).

53. Pennings & Secunda, *supra* note 3, at 364.

to lower risk selection. Another example of a law that reduces risks to employers is the dismissal law (laid down in the Civil Code) that contains the rule that an employee cannot be terminated within the first two years of sickness.<sup>54</sup> Employers still can lower their risks by selecting employees carefully and terminating employees who fall ill during the period that they have reported recovery.<sup>55</sup> How often this actually happens in the workplace is too difficult to research. If an employer's behavior becomes discriminatory, the law prohibits employers from discriminating against disabled persons.<sup>56</sup> However, in practice, it is difficult to prove that in a particular situation the discriminatory nature of an employer's behavior was grounded on disability.<sup>57</sup> Furthermore, employers often would offer employees contracts for a specified period of time rather than an indefinite period so that the employer would not risk the possibility of paying sick employees' wages.<sup>58</sup> Employers could also use temporary work agencies.<sup>59</sup>

After the Gatekeepers Act was enacted, larger employers formed in house plans using ill employees in other work capacities within the workplace.<sup>60</sup> The benefit administration obligates many employers to pay sick employees for an extended period of after the first two years because the benefit administration does not find this to be enough of reintegration for sick employees.<sup>61</sup>

In any case, as we can conclude, this new system strictly encourages employers and their ill employees to make reintegration plans for the ill employees back into the workplace as there are severe consequences when they are negligent.<sup>62</sup> Reintegration is most successful while an employee is still employed, this happens during the first two years of sickness because employers are prohibited from terminating such sick employees;<sup>63</sup> this is a cornerstone of present day Dutch social

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54. Art. 7:670 para. 1 BW (Neth.).

55. Art. 7:670b para. 3 BW (Neth.).

56. See Wet gehijke behandeling op grond van handicap of chronische ziekte 3 april 2003, Stb. 2003, 206 (Neth.).

57. Pennings & Secunda, *supra* note 3, at 364-65.

58. *Id.*

59. *Id.* at 365.

60. See F.A. Reijenga et al., *Onderzoek evaluatie wet verbetering poortwachter*, (Astri, 2006).

61. *Id.* at 15.

62. *Id.* at 45-46.

63. Art. 7:629 para. 1 BW (Neth.).

security policy because activation is very important.<sup>64</sup>

In all, as we have seen above, the employers have been made fully responsible for sick pay, for up to a period of two years.<sup>65</sup> The minimum rules are provided in the Civil Code, from which no exception is possible.<sup>66</sup>

### III. THE NEW DISABILITY BENEFITS ACT OF 2004

Since the Disability Benefit Act (WAO) continued to have problems with high numbers of new entrants and only few beneficiaries leaving the benefit scheme,<sup>67</sup> a new structural approach was followed in the new Disability Benefits Act of 2004.<sup>68</sup> In this approach, the priority of work above benefit was stressed so the WAO introduced new benefit opportunities.<sup>69</sup>

The WAO makes a distinction between groups of claimants: (A) who are permanently disabled to at least 80%; and (B) who are either not permanently disabled, or who are permanently disabled to a lesser extent than 80%.<sup>70</sup> The former group (Group A) deserves, in the view of the legislature, a generous disability benefit because measures to help them to get back to work are more difficult and pursued less than reintegration efforts in Group B.<sup>71</sup> In this case, permanently disabled employees (Group A) receive 75% of their former wage as a benefit.<sup>72</sup> Those who are permanently disabled by at least 80% incapacity are entitled to the benefit for the permanently disabled.<sup>73</sup>

The second group (Group B) is subject to conditions and rules meant to reinforce their activation back into work.<sup>74</sup> In order for members of Group B to be eligible for disability benefits, employees must be disabled exceeding a 35% rate of incapacity.<sup>75</sup> Members of Group B receive a wage-related benefit if they can

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64. See BECKER ET AL., *supra* note 25, at 443-56.

65. Art. 7:629 para. 1 BW (Neth.).

66. Art. 7:629 para. 9 BW (Neth.).

67. B. Cuelenaere et al., *Onderzoek evaluatie wia*, 46-48 (2011).

68. *Id.*

69. See BAREND BARENTSEN, *ARBEIDSONGESCHIKTHEIRD: AANSPRAKELIJKHEID, BESCHMERING EN COMPENSATIE* (2003).

70. Pennings & Secunda, *supra* note 3, at 354.

71. *Id.* at 355.

72. Art. 6.2:51 WIA (Neth.).

73. Besluit Van 8 Juli 2000, Stb 2000 (Neth.).

74. Art. 29 BW (Neth.).

75. Pennings & Secunda, *supra* note 3, at 355.

satisfy conditions relating to their employment history.<sup>76</sup> The benefit's duration is directly reflected in the group member's employment history.<sup>77</sup> The rules for entitlement and duration are outlined in the Unemployment Benefits Act, which is discussed below.<sup>78</sup>

Group B claimants are entitled to up to 70% of their previous wages.<sup>79</sup> When the right to this benefit has expired, or when the claimant is not entitled to this benefit due to an insufficient work history, a wage supplement benefit is payable, only if the claimant earns an income of at least half their residual earning capacity.<sup>80</sup> This is a provision, until this amendment, was not been found in disability schemes.<sup>81</sup> Thus, if a person has an earning capacity of 1,000 euro per month, they must earn at least 500 euro per month in order to remain eligible for the wage supplement. This rule was designed to incentivize remaining in the work force or returning to the workforce after being absent due to illness or disability.<sup>82</sup>

Wages are supplemented within 70% of the difference between an employee's previous earnings and their earning capacity.<sup>83</sup> For example, if a person earned 2,000 euro a month and is now only able to earn 1,000 euro, the wage supplement is 700 euro. This amount is payable, regardless of how much she earns, up to 1,000 euro, the residual earnings capacity,<sup>84</sup> incentivizing employees to take up as much work as they can. In other words, it is attractive to work as much as possible, since income is not deducted from the benefit received.

Alternatively, claimants who, upon the expiration of his or her wage-related benefit, do not earn at least 50% of his or her remaining earning capacity after disability, are eligible for a lower benefit, which, in the case of full disability, is 70% of the statutory minimum wage.<sup>85</sup> In cases of partial disability, the benefit allocation depends on the employee's incapacity rate.<sup>86</sup>

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76. Art. 59 WIA (Neth.).

77. Art. 61 BW (Neth.).

78. Art. 2:1 BW (Neth.).

79. Art. 1.6:15 BW (Neth.).

80. Art. 7.2:59 BW (Neth.).

81. *Id.*

82. *Parliamentary Papers II* 2004-2005, 30.034, nr. 8, (Brief to *Minister van Sociale Zaken en Werkgelegenheid*).

83. Art. 59-101 WIA (Neth.).

84. Art. 56 WIA (Neth.).

85. Art. 59 WIA (Neth.).

86. Art. 62 WIA (Neth.).

Persons who are incapacitated by a physical disability to a level of less than 35% are not eligible for benefit.<sup>87</sup> It was the view of the legislature that their incapacity rate is so low that they should be able to find work suitable for their level of ability.<sup>88</sup>

Thus, there is now a consistent approach, elaborated in specific and unique new rules for each scheme, aimed at reducing the number of sickness and disability claims.<sup>89</sup> Under this approach, when an employee is sick or disabled, employers and employees must do everything possible to assist the employee in returning to work or remaining at work. The hope is that most employees could work in a modified capacity until they return to full health if necessary.<sup>90</sup> If after two years, the employee is not able to earn at least 65% of what her income was before she became sick, the disability benefit scheme encourages her to keep working in her current capacity or seek work that could allow her to collect a greater portion of the benefit scheme.<sup>91</sup> From evaluations of this program, it appears that the number of new entrants for benefits has been much lower than under the old Disability Act, although whether those who are disqualified actually find work is not so clear.<sup>92</sup> The Act is still rather young, so there are not clear research results yet available.<sup>93</sup>

Employers may choose to opt out of the disability scheme, but are not obligated to do so.<sup>94</sup> If an employer chooses to opt out of the disability scheme, it is limited to exemption from paying contributions to the scheme; for this reason, the term 'own risk bearer' is used to describe employers.<sup>95</sup> Instead of paying major contributions, in this scheme, the employer bears the financial risks of the disability benefits for the partially disabled for the first ten years of disability.<sup>96</sup> The Public Benefit Administration still holds the power to grant or terminate an employee's right to

87. Art. 61-62 WIA (Neth.).

88. *Parliamentary Papers II*, 2004-2005, 30.034, nr. 3, (Explanatory Memorandum to *Wet werk en inkomen naar arbeidsvermogen*).

89. *Id.*

90. *Id.*

91. Art. 23 para. 1 WIA (Neth.); Art. 54 WIA (Neth.); *Parliamentary Papers II*, 2004-2005, 30.034, nr. 3, (Explanatory Memorandum to *Wet werk en inkomen naar arbeidsvermogen*).

92. See Cuelenaere et al., *supra* note 66.

93. WIA (Neth.) (Enacted Nov. 10, 2005).

94. Art. 85 para. 1 WIA (Neth.).

95. Pennings & Secunda, *supra* note 3, at 357.

96. *Parliamentary Papers II*, 2004-2005, 30.034, nr. 3, (Explanatory Memorandum to *Wet werk en inkomen naar arbeidsvermogen*).

a benefit, and employers and employees alike remain bound by statutory rules regarding benefits.<sup>97</sup> Since the employer pays the benefit, the employer has the advantage of paying lower contributions.<sup>98</sup> After the first ten years of benefit payment to an employee, the benefit administration takes over the costs of the benefits paid to that employee.<sup>99</sup> To supplement the costs, an employer may purchase private insurance to cover the costs of those first ten years of benefits.<sup>100</sup> Usually, employers buy private insurance when they decide to opt out of the benefits scheme, and bear the risk on their own.<sup>101</sup> These insurance policies are often adjusted to the individual enterprise concerned, and little is known to outsiders on the conditions, price and use.<sup>102</sup> Employers who bear their own risk are responsible for reintegration activities of the employees for whom they bear the risk.<sup>103</sup> Thus, they can influence their risk and if they succeed in getting a person back to work, they have the ‘profit’ of this work.

Remarkably, risk bearers have the statutory power to impose a sanction, i.e., to reduce benefits in level during a certain period, if the beneficiary does not sufficiently cooperate in the reintegration activities.<sup>104</sup> Since the reintegration measure is an element of public law, the employer is seen as a body of public law, and subject to the rules of the General Act on Administrative Law.<sup>105</sup> This causes a rather strange effect, because these powers fit in a system whereby the employer administers (partly) an act of administrative law. This means that the system for motivating decisions and the possibilities of asking for review and appeal to the administrative court also apply (even though generally private law (labor law) is applicable to the relationship between employer and employee).<sup>106</sup>

In conclusion, disability benefits provide financial incentives for beneficiaries and employees to return to work. Although, employers are not directly involved in providing such incentives (except when a claim is made), they can be involved if they decide

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97. See Frans Penning, *Kunnen Eigenrisicodragers wel hun eigen risico beïnvloeden?*, TIJDSCHRIFT RECHT EN ARDEID (May 20, 2014).

98. *Id.*

99. *Id.*

100. See generally Cuelenaere et al., *supra* note 66.

101. *Id.* at 69.

102. Pennings & Secunda, *supra* note 3, at 357.

103. Art. 27 WIA (Neth.).

104. Art. 89 WIA (Neth.).

105. See generally Art. 101-19 WIA (Neth.).

106. See generally Art. 109-12 WIA (Neth.).

to bear their own risk. In such cases, a safeguard remains because the Public Benefits Administration continues to hold decision making power.

#### IV. DUTCH UNEMPLOYMENT BENEFITS

The current Unemployment Benefits Act was adopted in 1986.<sup>107</sup> It provides claimants, who lose at least five working hours per week with an unemployment benefit.<sup>108</sup> This way, claimants do not have to be totally out of work in order to be considered unemployed.<sup>109</sup>

In order to be collect this particular benefit, a claimant must satisfy the following entitlement conditions: she has to be an employee; she has to show that she has worked a certain period; she has to be unemployed, which means that she must suffer a relevant loss of working hours; she must no longer be entitled to a wage for the hours in which she does not work; she must be available for work; and there must be no grounds for exclusion.<sup>110</sup>

In order to satisfy the conditions on previous employment, the claimant must have worked at least one hour a week for twenty-six of the thirty-six weeks immediately preceding her first day of unemployment.<sup>111</sup> If the claimant was ill during this period of reference, the period is prolonged by the length of the period of illness.<sup>112</sup>

If one satisfies this condition, they may collect benefits for three months.<sup>113</sup> In order to receive an extended benefit, additional conditions must be satisfied.<sup>114</sup> These additional conditions require that in each of the four calendar years out of the five calendar years immediately preceding the beginning of a period of unemployment, the claimant received wages over at least 208 hours.<sup>115</sup> If this is the case, any year in which 208 hours are worked leads to an extra benefit month insofar as the number is more than three, with a maximum of thirty-eight months.<sup>116</sup>

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107. *See* UWV (Neth.).

108. Art. 16 UWV (Neth.).

109. Pennings, *supra* note 13 at 134.

110. Art. 16-17 UWV (Neth.).

111. Art. 17 UWV (Neth.).

112. *Id.*

113. Art. 42 UWV (Neth.).

114. *Id.*

115. *Id.*

116. *Id.*

Basically, this means one year of work is worth one benefit month. However, the law was changed in June 2014, and the maximum period was reduced to 24 months beginning in 2015. Since the government wants to encourage persons more to find work and also to reduce expenditure.<sup>117</sup>

The Act imposes an obligation, not merely discretionary power, on the benefit administration to sanction the beneficiary if she does not satisfy her obligations as defined under the Law.<sup>118</sup> Until this Law came into force in 2006, the benefit administration had only discretionary powers to impose sanctions.<sup>119</sup>

During the first two months, the benefit, in case of full unemployment, is 75% of the daily wage.<sup>120</sup> After the initial, two month period, the level drops to 70% of an employee's daily wage.<sup>121</sup> An employee whose benefit falls below the applicable subsistence income, may be eligible for a supplement under the Supplements Act.<sup>122</sup> When the right to benefit has ended, employees who have become unemployed after they have reached the age of fifty (together with their spouse if any) may, subject to certain conditions, claim a benefit under the Income Provision for Older and Partially Disabled Unemployed Employees.<sup>123</sup> One of those conditions is that the household income is below the relevant subsistence minimum.<sup>124</sup> Employees younger than fifty at the time they became unemployed may claim a benefit under the terms of the Public Assistance Act, in which case they have to satisfy a means test on income and capital.<sup>125</sup>

The claimant of the unemployment benefit is obliged to notify the UWV at its request or on his or her own initiative immediately of all facts and circumstances that, in all fairness, could affect his or her entitlement to benefit, the assertion of his or her entitlement to benefit, the level or duration of the benefit or the benefit amount paid to the employee.<sup>126</sup> Violation of this broadly formulated obligation is punishable by an administrative fine of

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117. *See Important Changes in Dutch Law Taking Effect as of January 1, 2015*, KERKMAN L. (2014).

118. Art. 27 UWV (Neth.).

119. *See F.J.L. PENNINGS & A. C. DAMSTEEGT, DE WERKLOOSHEIDSWET* (Kluwer: Deventer 2009).

120. Art. 45 UWV (Neth.).

121. Art. 47 UWV (Neth.).

122. Art. 2 Toeslagenwet (Neth.).

123. Art. 2 WIA (Neth.).

124. Art. 5 WIA (Neth.).

125. Art. 19-21 WIA (Neth.).

126. Art. 25 WIA (Neth.).



up to 2,269 euros.<sup>127</sup>

Unemployment benefits can be reduced or withdrawn if a person is considered to have become culpably unemployed because of an urgent reason and s/he can be blamed for this situation.<sup>128</sup> Grounds for such dismissal and culpable unemployment may include theft from the employer or violence against the employer and fellow employees, as a few examples.<sup>129</sup> The list is not exhaustive, but in any case, it is clear that the behavior must be serious.

In addition, the employee can be culpably unemployed if the employee requests that the employment relationship be terminated.<sup>130</sup> At the same time, continuation would not have resulted in such difficulties for the employee that this continuation could not, in all fairness, have been demanded of the employee.<sup>131</sup> This ground makes clear that in cases where the employee takes the initiative to end an employment relationship, s/he is culpably unemployed and benefits will be refused completely.<sup>132</sup>

To conclude, if the employer took the initiative to terminate the unemployment relationship, the employee is safe, i.e. this has no effects on the benefit rights.<sup>133</sup> This approach was adopted in 2006 in order to allow for mobility of workers.<sup>134</sup> Before employees had to fight their dismissal, as it was considered that otherwise they had caused more costs than necessary, which was a ground for refusal or reduction of benefit.<sup>135</sup> If an employee is culpably unemployed, the UWV has to refuse unemployment benefits permanently and totally.<sup>136</sup>

Not only in case of culpable unemployment does the *Werkloosheidswet* provide for which measure needs to be taken; the same applies if the claimant does not prevent becoming or staying unemployed as a result of neglecting to accept suitable work or for failing to obtain or to keep suitable work through his

127. Art. 27 UWV (Neth).

128. Art. 27 UWV (Neth.); Art. 24 UWV (Neth.).

129. Art. 24 UWV (Neth.); Art 678 BW (Neth).

130. Art. 24 UWV (Neth.).

131. *Id.*

132. *Id.*

133. *Id.*

134. See Pennings & Damsteegt, *supra* note 119.

135. Art. 22 UWV (Neth.); Art. 24 UWV (Neth.).

136. Art. 22 UWV (Neth.).

own fault.<sup>137</sup> Suitable work is all work that is appropriate given the employee's strength and competence, unless acceptance may not be demanded of him or her for reasons of a physical, mental or social nature.<sup>138</sup>

If an employee neglects to accept suitable work or if he fails to obtain suitable work through his own fault, and remains unemployed because of his neglect, the benefit must permanently be refused over the number of hours for which the entitlement to benefit would have ended if the employee would have accepted or obtained the work in question.<sup>139</sup> The Act also obliges the claimant to actively apply for work and not to impose requirements on work, which make it difficult to find suitable employment.<sup>140</sup> Additionally, claimants are obliged to cooperate in pursuing education or training, that may be considered necessary for his employment or in other activities, which are beneficial to his reintegration.<sup>141</sup>

In addition to the previously mentioned obligations, the UWV calls for obligations of the employee, which are designed to make the administration of unemployment benefits easier.<sup>142</sup> These obligations concern actions or omissions by the employee resulting in delaying, hampering or hindering the UWV's work.<sup>143</sup> Some administrative obligations must be met within a specific period of time.<sup>144</sup> These concerns include notification of unemployment, submission of a request for benefit, registration as a job-seeker, and extension of that registration.<sup>145</sup> A worksheet is a form listing of, among other things, questions on work done, and income received.<sup>146</sup>

The Unemployment Benefit Act seeks to promote reintegration of persons in work or to prevent employees from claiming higher thresholds by reducing benefit levels and duration. This provision makes it possible for employees to receive unemployment benefits in cases of partial

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137. Art. 24 UWV (Neth.).

138. *Id.*

139. Art. 27 UWV (Neth.).

140. Art. 24 UWV (Neth.).

141. Art. 26 UWV (Neth.).

142. *See* Art. 24 UWV (Neth.).

143. Art. 24 UWV (Neth.); Art. 30 UWV (Neth.).

144. Art. 26 UWV (Neth.).

145. *Id.*

146. Art. 6 UWV (Neth.); Art. 25 UWI (Neth.).

unemployment.<sup>147</sup>

In 2013 the government asked for advice from the Social Economic Council on how to involve employers and trade unions more in administration of unemployment benefits.<sup>148</sup> This could be done if employers and employees are equally responsible for the financing of the scheme.<sup>149</sup> In that case the employers receive the full advantage of an active policy of preventing unemployment and helping the unemployed back to back. This is more difficult to reach than in case of sickness, since unemployment can occur in waves, therefore, is difficult to finance and handle.<sup>150</sup> Still, it is expected that the solution lies in the labor market.<sup>151</sup>

## V. HEALTH CARE SCHEME

Until 2006, the health care system was a dual system, meaning only employees were covered, so long as they earned a low enough wage, by the compulsory Law on Health Care; others could buy voluntary insurance.<sup>152</sup> This dual system was criticized because of the differences between the voluntary system and the public system, often resulting in more generous conditions for private insurance and a lack of compulsory insurance for everybody else.<sup>153</sup> This old system was replaced in 2005 by the Care Insurance Act.<sup>154</sup> The new Act obligates all residents of the Netherlands to take out private health care insurance.<sup>155</sup>

This new Act was implemented because the new mechanisms within the act were deemed necessary for the legislature to regain control over health care expenses.<sup>156</sup> The costs for medical care

147. Art. 17 UWV (Neth.).

148. *Prospects for a Socially Responsible and Enterprising County: Emerging from the Crisis and Getting Back to Work on the Way to 2020*, STICHTING VAN DE ARBEID (Apr. 11, 2013); SER, WERKLOOSHEID BEPERKEN, VOORKOMEN EN GOED VERZEKEREN (Feb. 2015).

149. *Prospects for a Socially Responsible and Enterprising County: Emerging from the Crisis and Getting Back to Work on the Way to 2020*, *supra* note 148.

150. *See Prospects for a Socially Responsible and Enterprising County: Emerging from the Crisis and Getting Back to Work on the Way to 2020*, *supra* note 148; *see also* WERKLOOSHEID BEPERKEN, VOORKOMEN EN GOED VERZEKEREN, *supra* note 148.

151. *See id.*

152. Wynand P.M.M. van de Ven & Frederik T. Schut, *Universal Mandatory Health Insurance In the Netherlands: A Model for the United States?*, 27 HEALTH AFFAIRS 771, 772 (2008).

153. *Id.* at 772-73.

154. *See* ZVW (Neth.).

155. *See id.*

156. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory

had been rising for several years, due to the aging of the population and rapid medical-technological developments, which brought new expensive tools, machines, and treatment methods, and the costs were expected to grow even further.<sup>157</sup>

Economic approaches have become very influential in Dutch health care.<sup>158</sup> The new act was designed to create a system of controlled competition between insurance companies; in this respect there is a large difference from the old version of the law, which was much more centrally regulated by the State.<sup>159</sup>

The new Act was designed to ensure that insurance companies, care providers, and the insured, are encouraged to organize and use health care more efficiently.<sup>160</sup> For this purpose, the Act requires each insured person (i.e., each resident) to choose a care insurance company from which he or she buys insurance.<sup>161</sup> The hope is, that as a result of the competition between insurance companies, the companies will focus more on the preferences of the insured.<sup>162</sup> Insurance companies will also be required to make the ability to buy care from care providers more efficient, otherwise, the contributions for which insurance companies will have to pay will be too high (or the losses will become too great).<sup>163</sup>

In addition to this competition element, the Act also contains important solidarity elements. All residents are compulsorily insured, and insurance companies are required to provide all applicants with insurance, regardless of their personal characteristics and medical history, under the same conditions of the insurance they offer.<sup>164</sup> The Act also guarantees that an insurance company can charge differently for basic insurance packages (i.e., the insurance regulated by the Act).<sup>165</sup> In the Act, basic insurance packages are defined, outlining specifically, what

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Memorandum to *Van Toelichting*).

157. *Id.*

158. *See Id.*

159. *Id.*

160. *See* Art. 2 ZVW (Neth.).

161. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory Memorandum to *Van Toelichting*).

162. *Id.*

163. *Id.*

164. Art. 17 ZVW (Neth.); Art. 4 WBP (Neth.).

165. *See generally* *Waarvoor ben ik Verzekerd via het Basispakket van de Zorgverzekering*, Rijksoverheid, <https://www.rijksoverheid.nl/onderwerpen/zorgverzekering/vraag-en-antwoord/wat-zit-in-get-basispakket-van-de-zorgverzekering> [<https://perma.cc/QFY6-TT99>] (last visited 30 Sept. 2017).

care must be available and under certain conditions.<sup>166</sup> Examples of care that is available include: medical care by general practitioners, medical specialists and midwives; stays in hospitals; medicines; specialist medical mental health care, including treatment by a psychiatrist; basic mental health care, including primary care psychologist and an Internet treatment process; tools for treatment, care, rehabilitation, nursing or a specific limitation; physiotherapy to eighteen years; limited physical therapy and exercise therapy from the twenty-first treatment for certain chronic diseases; pelvic physiotherapy for urinary incontinence until the ninth treatment; speech therapy and occupational therapy; dental care (control and treatment) for children up to eighteen years; dental surgical care (surgery) and dentures; patient transport; maternity care; up to three hours of treatment dietary advice.<sup>167</sup> The law also covers fees associated with up to three IVF treatments.<sup>168</sup> Dyslexia care is also covered through the act.<sup>169</sup> Finally the act provides coverage, allowing for participation in smoking cessation programs.<sup>170</sup>

Insurance companies decide how health insurance plans are implemented.<sup>171</sup> One of these choices that the insurance company may decide is whether the costs are reimbursed or if care providers are paid by the company directly.<sup>172</sup> Another choice the insurance company may decide is whether a risk borne by the insured person, in addition to the statutory risk, may lead to contribution reductions or not.<sup>173</sup> In view of these choices, insurance companies can compete with other insurance

166. Art. 25 ZVW (Neth.).

167. See generally *Waarvoor ben ik Verzekerd via het Basispakket van de Zorgverzekering*, Rijksoverheid, <https://www.rijksoverheid.nl/onderwerpen/zorgverzekering/vraag-en-antwoord/wat-zit-in-get-basispakket-van-de-zorgverzekering> [<https://perma.cc/6DGR-5EGW>] (last visited 30 Sept. 2017).

168. *Nieuw IVF-beleid Levert Besparigen en Betere Zorg*, Zorginstituut Nederland (Sept. 3 2017), <https://www.zorginstituutnederland.nl/actueel/nieuws/2017/03/09/nieuw-ivf-beleid-levert-besparingen-en-betere-zorg> [<https://perma.cc/J4BF-AG6D>].

169. *Een Verzekerde kan Onder Voorwaarden in Aanmerking Komen Voor Hulpmiddelen om Informatie tot zich te nemen*, Zorginstituut Nederland <https://www.zorginstituutnederland.nl/Verzekerde+zorg/hulpmiddelen-voor-informatievoorziening> [<https://perma.cc/2T69-59YD>] (last visited 3 Nov. 2017).

170. *Zorg Bij Stoppen met Roken nu al in Basispakket*, Zorginstituut Nederland (7 Feb. 2008), <https://www.zorginstituutnederland.nl/actueel/nieuws/2008/07/02/zorg-bij-stoppen-met-roken-nu-al-in-basispakket> [<https://perma.cc/TW3E-74WY>].

171. Pennings & Secunda, *supra* note 3, at 367.

172. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory Memorandum to *Van Toelichting*).

173. *Id.*

companies and can profit from their insurance schemes.<sup>174</sup>

Under the act there are no insured persons, there are individuals who have the obligation to buy insurance from an insurance company.<sup>175</sup> If an individual does not buy their insurance, that individual is not insured. When a person does not have insurance, they can be fined for not being insured.<sup>176</sup>

A person's insurance begins the day that the company receives the application for insurance; it can have a retroactive effect with a maximum of four months after the insured needed to have insurance.<sup>177</sup> It is unconventional for insurance companies to have this retroactive effect, however, the justification for it is to guarantee that there is always insurance coverage for persons who later decide to purchase insurance coverage or for individuals who switch insurance companies at the end of the year.<sup>178</sup>

Every year, insured individuals may terminate their insurance contract with their insurance company.<sup>179</sup> The reason being to make it more accessible for individuals to switch insurance companies.<sup>180</sup> When someone switches insurance companies, companies must accept all new applications no matter what the applicant's risk profile is.<sup>181</sup> Thus, those who are identified as a 'bad risk' may also change companies.

Aside from the statutory insurance products, health care companies may offer supplementary insurance, which includes provisions and services not in the basic insurance plan.<sup>182</sup> Supplementary insurance is not mandatory, however it is more attractive for the companies because it is usually more profitable than the statutory insurances.<sup>183</sup> Insurance companies are allowed to refuse applicants for supplementary insurance.<sup>184</sup> For supplementary insurance, many companies require that the basic insurance is also accepted from their company, so that selection of the supplementary insurance may allow for the possibility of

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174. Pennings & Secunda, *supra* note 3, at 368.

175. Art. 1 ZVW (Neth.); Art. 2 ZVW (Neth.).

176. Pennings & Secunda, *supra* note 3, at 368.

177. *See* ZVW (Neth.).

178. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory Memorandum to *Van Toelichting*).

179. Pennings & Secunda, *supra* note 3, at 368.

180. *Id.*

181. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory Memorandum to *Van Toelichting*).

182. Pennings & Secunda, *supra* note 3, at 368.

183. *Id.* at 368-369.

184. *Id.* at 369.

moving to another insurance company.<sup>185</sup>

As we have already seen, insured individuals have to pay the contribution of the chosen insurance contract; this contribution shall be the same for all individuals who have purchased the same insurance plan.<sup>186</sup> Contribution rates cannot be different whether for risk level and for age; however, the contribution rates may vary between companies.<sup>187</sup> The contribution rate does not depend on income because it is flat-rate.<sup>188</sup> The contribution can, however, be lower if one has opted to carry higher risk themselves (up to 500 euro a year), which is in addition to the compulsory statutory own risk carried by the insured (385 euro a year).<sup>189</sup>

A collective contract can be provided for certain groups by some insurance companies.<sup>190</sup> Collective contracts may be used “for groups such as members of a football club, trade union, an association of patients, or employees of a particular enterprise; there is no limit to the type of group with which an insurance company can make an agreement.”<sup>191</sup> Individuals who are under eighteen years old do not have to pay contributions; individuals with a low income may receive compensation for paying the contribution that is paid by the Tax Office.<sup>192</sup>

Employers must contribute, based on wages, to a risk equalization fund.<sup>193</sup> A risk equalization fund repays an insurance company for higher than average risk individuals.<sup>194</sup> The purpose of this fund was to lower the risk of insurance companies discouraging high risk individuals from buying insurance, like those who are chronically sick.<sup>195</sup> This does not motivate insurance companies to be efficient when purchasing

185. Margreet Reitsma-van Rooijen, *Aanvullende zorgverzekering zonder basisverzekering niet altijd mogelijk*, NIVEL (12 Dec. 2012), <http://www.nivel.nl/nieuws/aanvullende-zorgverzekering-zonder-basisverzekering-niet-altijd-mogelijk-3> [<https://perma.cc/DPX2-BZ4V>].

186. Art. 17 ZVW (Neth.).

187. Pennings & Secunda, *supra* note 3, at 369.

188. *Id.*

189. *Wat is het eigen risico van mijn zorgverzekering en wanneer betaal ik dit?*, <https://www.rijksoverheid.nl/onderwerpen/zorgverzekering/vraag-en-antwoord/eigen-risico-zorgverzekering> [<https://perma.cc/3WXL-SVXD>] (last visited 21 Dec. 2017).

190. Pennings & Secunda, *supra* note 3, at 369.

191. *Id.*

192. *Id.* at 368.

193. *Id.* at 369.

194. *Id.*

195. *Parliamentary Papers II*, 2003-2004, 29.763, nr. 3, (Explanatory Memorandum to *Van Toelichting*).

care because they are repaid.<sup>196</sup> Due to this reason, the equalization will take place *ex ante* only or based on clients' specific characteristics.<sup>197</sup>

The contents of the health care to be provided are still defined by statutory rules, but the administration of the health benefits is by private organizations.<sup>198</sup> Therefore, this system balances being cooperative and being profitable. The purpose of this system is to make the system more efficient, with market instruments, while providing affordable and adequate health care for all residents.<sup>199</sup>

## VI. CONCLUSIONS REGARDING ACTIVISM IN THE DUTCH BENEFIT SYSTEM

In this description of the Dutch system, we have not described all benefits (e.g., family benefits and survivor benefits are not mentioned), but a major part. Sickness and disability benefits have been refocused in the past decade to encourage persons to stay or reintegrate into work.<sup>200</sup> For sickness benefits this has been done by giving the full responsibility to the employer (though carefully defining the statutory framework for the powers and obligations of the employer).<sup>201</sup> Although employees certainly feel the effects of this change and have clear obligations for cooperating in re-integration themselves, the major focus is on the employer, who no longer benefits from the solidarity of other employers that was previously organized in the Sickness Benefits Act.<sup>202</sup>

With disability, the focus is more on the employees. They are encouraged, after the wage-related period, by financial instruments to take up work.<sup>203</sup> These persons will first have had a period during which they and their employer had to undertake re-integration activities.<sup>204</sup> After this, the employee can, as long as there is an employment relationship, require the employer to undertake reintegration activities, and this may cause the

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196. Pennings & Secunda, *supra* note 3, at 370.

197. *Id.*

198. *See generally* ZVW (Neth.).

199. *See* Pennings & Secunda, *supra* note 3, at 370.

200. *See* Part II.

201. *Id.*

202. *Id.*

203. *See* Part III.

204. *Id.*



employer to feel the effects of the Disability Act.<sup>205</sup> As a result of this system, disabled persons with better chances on the labor market receive a higher benefit.<sup>206</sup> Thus, the system does not merely respond to differences in disability, but other factors, such as having a (cooperative) employer, having a network, being 'employable', being motivated and sufficiently qualified, play an important role.<sup>207</sup>

Unemployment benefits have also undergone an important change in terms of prevention. Since 2006, after a decision of the employer to dismiss an employee, the latter is admitted to the benefit system if the others conditions are fulfilled. Here, the benefit system is used to serve as "oil for the labour market,"<sup>208</sup> workers should be encouraged to go where they are needed, and may make use of the benefit in the intermediary period.<sup>209</sup> Currently, the Government asked the Social-Economic Council to investigate whether incentives, like for sick pay, can be introduced as well for employers to keep their employees fit for work ('employable') during their employment relationship, so that they can more easily find a job when they are dismissed.<sup>210</sup> In case of unemployment, it is more difficult to impose measures on employers dismissing employees, since these include also enterprises with economic problems.

With respect to the Health Care Insurance Act, one must first acknowledge that solidarity has increased, since, until this Act, only employees up to a certain wage were compulsorily insured. The present system covers all residents.<sup>211</sup> Since the companies compete with each other, it is not a solidarity system as such.<sup>212</sup> However, the government keeps a strict control on maximum contributions and rises in contributions.<sup>213</sup> By having lower contributions for those who accept their own high risks, making special insurance products for those with academic degrees, and through means of special supplementary insurances, companies try to select more attractive clients.<sup>214</sup>

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205. *Id.*

206. *Id.*

207. *Id.*

208. *See* Part IV.

209. *Id.*

210. *Id.*

211. *See* Part V.

212. *Id.*

213. *Id.*

214. *Id.*

The prohibition of risk selection (even in the case of a new choice for a company) and the obligation to ask for the same contributions of all buyers of the same insurance product are also important elements of solidarity. Furthermore, the obligation of the employer to pay a wage-related contribution and the risk equalization fund achieves solidarity, this time between the companies, as they share responsibility for the heavy risks.<sup>215</sup> Here we see a tension, however, since the question is whether it hinders effective working of the insurance market, as such a fund does not fit well with profit-making companies.

Thus the approach does not lie in continuously changing the rules, or applying the rules more strictly or less strictly in order to be more efficient and to save money, because the actors in society will try to shift their costs to the collective funds if there is such a responsibility. This must not be seen as an immoral behaviour, but as a rational approach, at least at an individual level, so also a rational response is required.

Such rational response can lie at putting the responsibilities at the lowest level, with those who are directly concerned. Thus, they will organize an adequate approach. This can be different from benefit to benefit: i.e. the approach in case of sickness differs from unemployment, disability and health care.

It is important that the employees are not negatively affected and that thus, for instance in the case of sickness, the way of assessing sickness, the level and duration of sick pay, the grounds for exclusion and sanction and the exceptions to the obligation to pay sick pay are strictly defined. In addition, labor law should not allow escape routes (such as dismissal), and there has to be a quick and accessible court system. If this exists, the system does not deprive employees from their rights, but it encourages employers to do much more to prevent sickness and help people back to work. In this respect, the outcome is overall positive: it does not rely on public finances and people find work that they can still do. There may still be problems in some areas, especially in case of persons who are often ill which may be dismissed in periods of recovery. There is also a tendency that employers evade permanent employment contracts and prefer short-term contacts of temporary agency workers instead.<sup>216</sup> The government has now

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215. *Id.*

216. A.R. HOUWELING, M.J.M.T. KEULAERDS, & P. KRUIT, VAAN – VVA EVALUATIEONDERZOEK WWZ 2016, (Den Haag, 2016), <http://njb.nl/Uploads/2016/7/vaan-vva-evaluatieonderzoek-wwz-2016.pdf> [<https://perma.cc/Q4YA-FCWA>].

introduced a system where employers have to pay a higher contribution for sick pay if their former employees become sick or disabled.<sup>217</sup> In this way it is hoped that the share of flexible work is reduced.

The last example shows that the system will never be perfect. It is also quite uncertain whether it can be exported to other countries, as systems vary immensely and also the system of labour law is decisive for the success, which system may be different from country to country. The last issue is that detailed data on the income effects, on people back to work, on the quality of work etc. etc. are missing. Still, I hope that the development in the Netherlands is useful for discussion on how a system can be shaped in terms of distributing responsibilities and thus influencing costs while basically leaving the rights of the claimants intact.

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217. *Ziek uit dienst en de Wet bezava*, UWV, <https://www.uwv.nl/overuwv/pers/nieuwsberichten/2017/ziek-uit-dienst-en-de-wet-bezava.aspx> [<https://perma.cc/J7GP-RSR7>] (last visited 27 Oct. 2017).