FNV
Hertogswetering 159
Postbus 9208
3506 GE Utrecht
T 088 368 0 368

CNV
Tiberdreef 4
Postbus 2475
3500 GL Utrecht
T 030 751 11 00

VCP
Bezuidenhoutseweg 60
Postbus 90525
2509 LM 's-Gravenhage
T 070 349 97 40

Convention 121 Employment Injury Benefits

Additional Comments by FNV, CNV and VCP to the 2021 Dutch Government Reports

In light of the Dutch Government's (too) late presentation of its reports to the ILO last year, we understand that the experts of CEACR will only read and analyse the reports this year (2022), including the comments of the trade unions. Since last year a lot has happened in Dutch politics: a new government has started and a new coalition agreement was presented, and then the Ukraine war came up and a severe (energy) crisis came over us. For that reason we think some additional comments to the former report from the main 3 Dutch trade unions are relevant here to reemphasize our position regarding the (non) implementation of C121 in the Netherlands and the urgency to act upon this, given as well the increasing poverty problems that come up now due to the double digit inflation. To be clear these comments do not replace our previous comments from 2021, but are a mere further emphasis and clarification in the light of the present political developments.

Antecedents

In this document we have thought it to be useful to again list the points in which the Dutch government is failing in its duty to protect in accordance with Convention 121 those incapacitated employees who are unable to work. The Convention guarantees a certain level of protection, but the current legislation by means of the Dutch WIA-Act ("Work and Income according to Capacity for Work"-Act, the law in which rules are laid down regarding incapacity for work) does not comply with this requirement.

The Committee of Experts has asked the government of the Netherlands in its Direct Request what measures it has taken to bring the WIA-Act into line with the Convention. The previous' government's response was disappointing. It indicated that it was up to the next government to take measures. But the new coalition agreement again does not include a lowering of the entry threshold from 35% to 15%, nor does it include other measures to improve the WIA and bring this law into line with Convention 121. The government has only indicated that it wants to diminish the most distressing consequences of the law, but nothing concrete has been mentioned, not even a timeline, while at the same time there are increasing budgetary restrictions that would stand in the way of changes. To date, the WIA-Act has still not been brought into line with the Convention as was already observed by the Committee of Experts in 2010 and 2011.

The WIA-Act

The WIA consists of two parts, namely 1. the so-called wage-related phase (with an IVA benefit or a WGA benefit) and 2. After the wage-related phase of the WGA benefit, the benefit consists of a follow-up benefit or a supplementary benefit.

Ad1: In the wage-related phase someone is eligible for an IVA benefit if they are 80 – 100% incapacitated for work and if they are fully and permanently disabled. The amount of the IVA benefit is 75% related to the former income and can continue until the state pension age. The WGA benefit is 70% of the former income, with the duration of the benefit depending on the length of the past employment, just as with regular unemployment benefit. Someone must have worked for at least 26 weeks in the past 36 weeks to be eligible for a minimum wage-related WGA benefit, namely 3 months. For a longer period, someone must have worked for four years in the past 5 years, with the maximum period currently being 24 months. Only if someone is not eligible for a WIA benefit, for example because a disability percentage of less than 35% has been established,

FNV
Hertogswetering 159
Postbus 9208
3506 GE Utrecht
T 088 368 0 368

CNV
Tiberdreef 4
Postbus 2475
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VCP
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someone may be eligible for a regular unemployment benefit and after that possibly social assistance benefit at the social minimum level, but this depends on if someone is already eligible for it since there are strict admission requirements.

Ad2: After the wage-related phase of the WGA benefit, the benefit consists of a follow-up benefit or a supplementary benefit. For which benefit someone is eligible depends on whether someone uses their residual earning capacity of 50%. When determining the disability percentage, it is also determined what a person's residual earning capacity is (what someone can still earn with the limitations he or she has). If 50% of the residual earning capacity is used, someone is entitled to a supplementary benefit that is wage-related and supplements the income. If someone fails to utilize 50% of the residual earning capacity, a follow-up benefit is applied. The follow-up benefit is a percentage of the statutory minimum wage, see below. Both the follow-up benefit and the wage supplement benefit can continue until the state pension age.

The follow-up benefit is only a percentage of the statutory minimum wage. This comes down to the following:

In the event of incapacity for work between	Pay out percentage of min wage:	Amount (based on statutory minimum monthly wage of € 1.756,20)
65-80%	50,75%	€ 891,27
55-65%	42%	€ 737,60
45-55%	35%	€ 614,67
35-45%	28%	€ 491,74

In the Netherlands, when the WAO-Act was introduced in 1967, employment injury insurance was merged with the general invalidity scheme. In 2006, the WAO was replaced by the WIA-Act. This law makes a distinction between fully and permanently disabled persons (IVA), fully disabled persons and partially disabled persons. Like its predecessor, the WIA-Act also makes no distinction between accidents at work and general invalidity, it covers both risks.

Furthermore, with the introduction of the WIA Act, the duration of the wage-related benefit depends on the employment history, as is also the case with the Unemployment Act.

In addition, the lower limit of 15%, as applicable under the WAO-Act, was raised to 35%.

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VCP
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On a number of points, the WIA-Act violates Convention 121 despite being ratified by the Dutch government. This has now been brought to your attention several times by the joint trade unions in the Netherlands and has also been noted as such by the observations of the Committee of Experts.

We will elaborate below on a number of these violations.

The entry threshold of 35% incapacity is too high

To be eligible for a WIA-benefit, the employee must be at least 35% unfit for work. This is completely in violation of Article 14, paragraph 4 of the Convention 121, as this group of incapacitated workers between 0 and 35% is left out in the cold without a compensatory benefit for incapacity for work.

The Committee of Experts had already noted that this 35% threshold is too high and contrary to the Convention. Article 14 of the Convention lists a range of degrees of loss of earning capacity and the corresponding forms of compensation. Paragraph 4 gives the right to a lump sum payment in the event of a non-substantial partial loss of earning capacity. The Committee noted that the WIA-Act does not provide for a lump-sum benefit and no benefit for people with a disability below 35%. This group is excluded from protection against accidents at work, which is contrary to the Convention. The possibility of claiming unemployment benefit or social assistance benefit is not relevant under the framework of the Convention.

FNV, VCP and CNV have been arguing for years for a lowering of the entry treshold in the WIA-Act from 35% to 15%. When the WIA was introduced in 2006, replacing the WAO, it was assumed that the group of '35-minus' (less than 35% incapacitated for work) could continue to be employed by the same employer. When the barrier to entry was raised from 15% to 35%, employers-organisations had promised to keep this group of employees in service or to actually hire them. So the employee would remain employed as much as possible with his own employer and, if this were not reasonably possible, with another employer. For this reason, the lower limit for access to the WIA had been raised from 15% (WAO) to 35% (WIA) and this was then acceptable for the trade unions. In practice however, the loss of employability of the employee often proves to be too great an obstacle for the individual employer. As a result, these employees often become unemployed and after a while, in this case within two years, they are (structurally) dependent on (very low) social assistance benefits, if at all eligible for it due to additional demands on income and assets at household level. This concerns a substantial group of people who now fall outside the income protection that the WIA-Act should offer. The group of '35-minus' currently concerns about 66.000 people[1]. This concerns employees who relatively often have an income of up to 1.5 times the statutory minimum wage. Especially employees with a low wage and low education, with relatively many limitations, are declared '35-minus'. Of these 66.000 only 20% eventually ends up in the WIA (by means of renewed sickness and disability examinations)

Employees who are assessed as less than 35% occupationally disabled are not entitled to an occupational disability insurance (as defined by the WIA-Act). As mentioned above, when the WIA was introduced, it was thought that the '35-minus' would not require such a specific disability benefit as income support because they

[1] UWV Monitor, on employment rate of people with disabilities; 2021:
Determining the size of the present amount of '35-minus' is somewhat difficult. The '35-minus' do not receive disability insurance and the UWV does not keep a register of this group. It has been decided to consider everyone who became classified as '35-minus' in the past five years as a present amount, with the exception of those who had a WIA benefit in 2020 after all.

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CNV
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VCP
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were assumed to be largely at work and have a decent income. In practice, it now appears that only less than half of this group is employed. It should be noted that, according to the definition of 'at work' that applies in the Netherlands, this is already applicable when you work for at least 1 month in a calendar year. It was also wrongly assumed at the time that the group of '35-minus' would have only minor limitations due to their disabilities, however in practice the system of analysis of loss of earning capacity has resulted in '35-minus' with substantial or even severe limitations. The loss of labor productivity and employability of the employee often proves to be too great a burden for individual employers, as a result of which these employees often become and remain unemployed and are structurally dependent on social assistance benefits.

For the above reasons, trade unions are arguing jointly with employers and crown members (representatives of the government) in the Social and Economic Council (SER), for a threshold reduction to 15%. This way more employees are offered income protection with a regime that takes into account the limitations of the employee. In additions to this there is broad support in society for lowering the threshold to entry. In practice it is clear that the reasons that substantiated the introduction of the WIA-Act in 2006, and as a consequence the raise of the threshold from 15% to 35%, are obsolete. This has caused problems for a large amount of workers. Still despite all these arguments, the new government has again not included a threshold reduction in the recent coalition agreement and so the problems will again not be solved. Despite the clear statement by the ILO experts already in 2011:

"The WIA Act does not include lump-sum benefits and does not pay any benefit at all for incapacity below 35 per cent. Thus, persons with less than 35 per cent incapacity are excluded from protection against employment injury, which is contrary to the Convention. "

The WIA-Act offers decreasing protection to employees who are unable to work

On top of the previous flaws, the protection provided by the WIA-ACT has been stripped down further in recent years. For example, the number of positions and jobs that can be selected to determine the percentage of incapacity for work has steadily decreased, so that someone is more likely to be excluded from a WIA benefit or to qualify for a lower benefit.

The wage-related phase of the benefit is also considerably limited due to cuts in unemployment benefits. The wage-related phase of the WIA benefit is linked to the duration of an unemployment benefit (WW) and has been equated. Previously, this period was 38 months, but in 2016 it has been reduced to 24 months.

Deduction of income of an IVA-beneficiary is contrary to the Convention 121

If an IVA-beneficiary (fully and permanently incapacitated for work) acquires own income, these earnings are deducted from his/her benefit. However, this is completely contrary to the Convention as this does not allow for a reduction of the benefit with income acquired.

It should be noted that the WIA-Act even prescribes that if an IVA-beneficiary earns more than 20% in income for more than a year, he or she will lose his/her IVA-benefit and will henceforth be covered by the partial disability insurance or have lost his benefit completely (in the case of income of more than 65%).

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Setting conditions for the right to a wage-related (follow-up) benefit is contrary to Convention 121

In the case of full or partial incapacity for work: access to the wage-related benefit and the duration depend on the employment history. This is contrary to Article 9(2) of the Convention, which stipulates that there may be no conditions whatsoever for entitlement to disability benefit.

In addition, the length of the period of a wage-related benefit is reduced by any previously received Unemployment Benefit. This may be the case if someone becomes incapacitated for work due to unemployment benefits.

At the end of the wage-related phase of the benefit, someone is eligible for a wage supplement or for a follow-up benefit. The benefit for which someone is eligible depends on whether someone is fully or partially incapacitated for work and whether someone is working and whether this amounts to at least 50% of their residual earning capacity. The requirement of residual earning capacity as a condition is contrary to the basic philosophy of the Convention, which guarantees benefits at the prescribed level without regard to residual earning capacity and any income earned by the worker.

So the imposition of such restrictive conditions is contrary to Convention 121, which does not allow the employment injury benefit to be influenced by the duration of the work performed.

Setting conditions for the retention of the benefit is contrary to Article 22 of the Convention 121.

In order to remain eligible for a benefit once awarded, the employee must meet various conditions, such as the obligation to register as a jobseeker, cooperate with reintegration, apply for jobs to a sufficient extent, cooperate in re-examinations, be required to accept suitable work, and so on.

Failure to properly comply with these obligations will result in the worker losing part or all of his benefits and, in addition, may result in the imposition of a fine. The Committee already informed earlier that the nature and extent of these conditions goes far beyond the restrictions permitted under article 22, paragraph 1, of the Convention 121.

Meeting the residual earning capacity

If the partially occupationally disabled employee (initially) works sufficiently to be eligible for a salary supplement, he or she still runs the risk of losing this wage-related benefit. This is the case, for example, if the employee works temporary through an employment agency or on the basis of a zero hours contract and makes fewer hours in a certain month, or no longer works at least 50% of the residual earning capacity and so this results in his/her income falling back to part of the minimum wage. So this employee therefore has no subsistence security with regard to his/her income.

Working at least 50% of the residual earning capacity as a condition for retaining a wage-related benefit, is completely in conflict with Convention 121. The Convention does not allow the right to benefits to be subject to an obligation to make use of the residual earning capacity. The Committee of Experts has therefore already

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Hertogswetering 159
Postbus 9208
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VCP
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requested the Dutch government in 2011 to harmonize the regime of obligations and sanctions with regard to the subsequent benefit imposed by the WIA- Act with Article 22 of the Convention.

The amount of the benefit after completion of the wage-related phase is contrary to the Convention

No further requirements are set for the employee who is completely incapacitated for work (80-100%) and after completion of the wage-related phase the employee will also receive a wage-related wage supplement benefit. The amount of this meets the requirements of the Convention, namely 70 to 75% of the last earned salary.

However this is different for the employee who has been found to be between 35 and 80% incapacitated for work. The amount of the benefit after completion of the wage-related phase depends on the residual earning capacity and whether the employee has a job or not, and also depends on the size of his income. If the employee cannot find work, he or she will fall back on the follow-up benefit.

Article 14, paragraph 3 of the Convention requires that the partial incapacity benefit should be an appropriate part of the total incapacity benefit, but the practice here is that the continuation benefit is a lump-sum benefit and which is based on the minimum wage and therefore not as a percentage of the last earned wage.

When people do not manage to use their residual earning capacity, they fall back on an income that is well below the social minimum. This is already the case after a period of two years. The disproportionately low level of the follow-up benefit after completion of the wage-related phase is at odds with the objective of Article 14 paragraph 5 of the Convention, since this group of workers must apply for supplementary social assistance (with the accompanying obligations) in order to be able to achieve some subsistence income. Noting that a majority are not even eligible for Social Assistance since this is also based on tests for family income and assets.

The basis of the Employment Injury Benefits Convention is the prevention of social assistance for victims of accidents at work and the guarantee of a decent income.

The difference in income protection between partially disabled and fully disabled is not in line with Article 14 of the Convention.

Even if in theory someone should be able to earn their residual earning capacity, in practice there can be several explicable reasons why it does not work. Many employees encounter the problem that they are not hired by employers because, for example, employers are reluctant to hire someone because of the fear of illness and disability, employers are afraid that the labor productivity is lower or that someone is physically and/or mentally unable to will be to work those hours in practice.

In summary we observe that the observations of the CEACR done in 2010 and 2011 are still valid, unfortunately we do not see any amendments of improvements coming from the Dutch government as a follow up to this. This leads to a very painful situation of many (partially) disabled workers, who under the measures of the WIA-Act are confronted with an increasing poverty.

For more background information please refer tot the additional document 'Hardheden in de WIA' that was presented this April 2022 by the three unions FNV, CNV and VCP to the Dutch Parliament. Unfortunately it is

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only available in Dutch, since we did not have the means to make a proper translation. We do think it is very informative to read it in order to get a good idea of the hardships caused by the WIA-act, so a translation by the ILO would be worthwhile.