



**EXPLANATION DBA ACT & MODEL AGREEMENTS  
ROBERT WALTERS**

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**With effect from 1 May 2016, the Employment Status Declaration (*Verklaring Arbeidsrelatie* or 'VAR') disappears and the Assessment of Employment Relationships (Deregulation) Act ('Deregulation Act' or 'DBA Act') (*Wet Deregulering Beoordeling Arbeidsrelaties* or 'Wet DBA') enters into force. What does this mean to you as a client of Robert Walters?**

### **1. Deregulation Act: model agreement replaces 'VAR'**

Under the Deregulation Act, the Tax and Customs Administration of the Netherlands assesses whether there exists an employer-employee relationship or a 'deemed employer-employee relationship' (*fictieve dienstbetrekking*) between the client and the interim manager or between the intermediary and the interim manager. The Tax and Customs Administration may perform this assessment at two points of time:

*In advance by means of model agreements.*

By means of an approved model agreement it is possible to obtain certainty that no payroll tax and social insurance contributions need to be deducted from the remuneration received by the interim manager. For this reason, Robert Walters has had model agreements drawn up and has submitted them to the Tax and Customs Administration for approval.

*In retrospect by means of spot checks and/or inspections at the client*

The model agreement is assessed subject to the condition that work is actually carried out according to the arrangements laid down in the model agreement. During spot checks and/or regular inspections, the Tax and Customs Administration may verify in retrospect whether the arrangements have been complied with.

### **2. Assessment in advance: model agreements**

Robert Walters uses two different types of model agreement: the 'agency work model' (*model tussenkomst*) and the 'intermediary services model' (*model bemiddeling*).

In the case of 'intermediary services' (*bemiddeling*), the interim manager, Robert Walters, and our client enter into a three-party agreement. In this agreement you are our client and the interim manager's client at the same time.

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In the case of 'agency work' (*tussenkomst*), the interim manager concludes an agreement with Robert Walters. Under this agreement, an interim manager works at our client. In this type of agreement, Robert Walters is the client of the interim manager. In addition, we conclude an agreement with you in which we lay down the terms and conditions under which the interim manager works for you. In the case of 'agency work', only the agreement between Robert Walters and the interim manager is submitted for assessment to the Tax and Customs Administration. Next, the arrangements Robert Walters makes with you as a client reflect the arrangements made with the interim manager.

## **2.1 Contents of the assessment of the employer-employee relationship or the deemed employer-employee relationship**

For both types of model agreement, the Tax and Customs Administration assesses whether there is an employer-employee relationship – i.e. an employment relationship based on a contract of employment – or a 'deemed employer-employee relationship' (*fictieve dienstbetrekking*) – i.e. a relationship not based on a contract of employment but deemed equivalent to an employer-employee relationship for the purposes of payroll taxes and social insurance contributions – between the client and the interim manager.

### *Employer-employee relationship*

An employer-employee relationship exists if all three conditions set out below are met:

1. work: the interim manager must perform the work or provide the services personally (and is not free to send a substitute to perform the work or provide the services);
2. right to supervision, direction or control (SDC): the client may give directions and instructions about the manner in which the interim manager implements the assignment and the interim manager is under an obligation to follow these;
3. remuneration: the interim manager receives remuneration for his work.

Only if all three conditions are met, is there an employer-employee relationship. So please note that if one of these three conditions is *not* satisfied, there is no employer-employee relationship.

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### *Deemed employer-employee relationship*

If there is no employer-employee relationship, there can be a 'deemed employer-employee relationship' (*fictieve dienstbetrekking*). In that case, the client or the intermediary is also obliged to deduct payroll tax and social insurance contributions. In the case of 'agency work' (*tussenkomst*) or 'intermediary services' (*bemiddeling*), the deemed employer-employee relationship may be excluded. For this it is required that the interim manager provides his or her services as a self-employed individual.

This is why the model agreement includes a number of additional arrangements that are indicative of the interim manager's self-employment status.

## **2.2 Contents of the model agreements used by Robert Walters**

To prevent any assessment that there is an employer-employee relationship or a deemed employer-employee relationship, the agreement includes the following provisions and information:

- a. The interim manager is free to engage a third party to replace him or her. The client cannot exercise any influence on the choice of this substitute, but may set objective quality requirements (driving licence, diploma, command of a foreign language, etc.).
  - b. The work performed is not subject to SDC (*gezagsverhouding*) (i.e. the right to supervision, direction or control by anyone): the client may give directions only with respect to the results of the assignment and not with respect to the manner in which these results are achieved.
  - c. The interim manager is liable for any loss or damage that may be suffered and bears the risk of bad debts (i.e. if the client does not pay, the interim manager receives no remuneration).
  - d. The interim manager may also work for other clients as long as this work does not prejudice the interim assignment.
  - e. A clause stating whether the interim manager receives any operational tools from Robert Walters and/or the client and, if so, that the costs relating to the use thereof are to be borne by the interim manager.
  - f. The registration of the interim manager at the Chamber of Commerce.
  - g. The VAT number of the interim manager.
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*No SDC and right to send a substitute*

Strictly speaking, it is not necessary that both arrangement (a) and arrangement (b) be included in the model agreement, because if just one of the three elements of an employer-employee relationship is lacking, this already justifies the conclusion that there is no employer-employee relationship. In our experience, however, the tax authorities may easily conclude that there is SDC if they carry out a check on a business that engages the services of both employees and independent contractors. We will address this issue in further detail in paragraph 3 below. In order to obtain the highest level of certainty for both our clients and Robert Walters itself, Robert Walters has opted to include both arrangements referred to under (a) and (b) in the model agreements.

The concept of 'sending a substitute' (where the interim manager is free to engage a third party to replace him or her) might be something you need to get acquainted with. You did after all select that specific interim professional, and then the interim manager might send another interim manager to do the assignment for him. When the right to send a substitute is applicable, it is the interim manager who decides by who and when he has himself replaced. You can only set objective criteria before the start of the assignment.

It is our experience that sending a substitute does not occur that often in reality. After all, what would be the benefit for the interim manager to have himself replaced while being responsible for the quality of the work and the deliverables for the client? But if the need for replacement is there, then the interim manager is allowed to send it. That is the agreement you have made, and it could also work to your advantage that the interim manager can send a replacement when he unexpectedly is not able to fulfil the assignment. When the replacement does not meet the agreed quality and deliverables, you can address the issues towards the interim manager. When these issues are not solved, the contract can be terminated and you can search for another interim manager.

Before the start of the assignment, we will discuss with you the conditions under which the interim manager is to implement the interim assignment. Where the right to send a substitute or the absence of SDC is effectively impossible, a model

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agreement that excludes this element will be drawn up. Prior consultation about this issue makes it clear for all parties what the expectations are and Robert Walters may then lay down the arrangements in the appropriate version of the model agreement.

And in the exceptional situation that both arrangement (a) and (b) cannot be made, we will always find an adequate solution to enable you to go ahead with the desired candidate.

**3. Assessment in retrospect: certainty subject to the condition of actual compliance**

Only if the parties actually comply with the arrangements in the agreement, do the parties have assurance that payroll tax and social insurance contributions do not have to be deducted. If it is agreed that the interim manager is free to engage a third party to replace him or her, this must be permitted in practice by Robert Walters and the client. The same applies to the arrangement that the client may give directions only with respect to the result of the assignment and not with respect to the manner in which the interim manager achieves that result. This, too, must be adhered to in practice.

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### *Risk of SDC*

It is therefore important that the parties comply with the arrangements in the agreement and do not impose any additional obligations on the interim manager. This means, *inter alia*, that in practice, the interim manager should be able to provide his or her services within your business in a manner that is visibly different from the manner in which an employee performs his work within your business, because if the work conditions of employees and the interim manager resemble each other too closely, the conclusion may be drawn that there is a formal relationship that is subject to SDC. Even though you do not give any instructions about how the assignment is to be implemented substantively, you do stipulate the formal parameters under which the interim manager has to work and/or is treated.

For this reason, the Tax and Customs Administration focuses not only on compliance with the arrangements laid down in the model agreement, but also on a number of other factual circumstances.

This assessment takes account of the following factors, *inter alia*:

- Whether Robert Walters or the client gives directions to the interim manager, for example, about representativeness, dealing with clients and/or wearing industrial or occupational clothing.
- Whether Robert Walters or the client holds performance or assessment interviews (or both) with the interim manager.
- Whether Robert Walters or the client handles any complaints about the interim manager or the latter's work.
- Whether the interim manager is paid during illness and/or holiday periods.
- Whether the interim manager is obliged to participate in all regular progress meetings without this participation being necessary for the results of the assignment.
- Whether all internal rules and rules of conduct also apply to the interim manager.

Because the difference between an employee and an independent contractor is not always clear to an outsider in practice, the presence of SDC (*gezagsverhouding*) is often the subject of debate and legal proceedings. We seek to prevent this debate as much as possible by means of the arrangements in the model agreements, but it

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should be borne in mind that including and excluding all possible circumstances is impossible. This is why we will consult with you in advance and, in addition, this is why the possibility of sending a substitute has been emphasized in our model agreements.

#### **4. What will change for you as a client?**

Strictly speaking, nothing changes. Until 1 May 2016, the assessment whether there was an employer-employee relationship was very much the same. In practice, however, in granting the Employment Status Declaration ('VAR'), the Tax and Customs Administration primarily assessed the self-employment status of the interim manager. The elements of SDC and the right to send a substitute were hardly ever assessed, for which reason, the contractual provisions on these issues were always relatively brief. Under the Deregulation Act, the elements of SDC and the right to send a substitute are in fact properly assessed. So the greatest change for you as a client is that we put more emphasis in the new agreements on the lack of SDC and the possibility of sending a substitute for the interim manager. We do this by describing how the interim assignment is to be implemented in practice as detailed as possible for all parties, leaving less room for interpretation.

If all parties comply with the arrangements in the agreements, then the model agreement will offer you as a client the same level of certainty as the VAR did until 1 May 2016.

The model agreements drawn up by Robert Walters have been discussed during a face to face conversation with the Tax and Custom Administration. They have confirmed that our model agreements are being assessed with the highest priority. We expect to have approval on our model agreements on a short notice and that is why our draft versions provide a high level of certainty as of the 1<sup>st</sup> of May 2016. Multiple clients already use Robert Walters' model agreements for new interim managers, but have also rerouted their existing population of interim managers to our model agreements.

Once we have received the approval required, we will immediately inform you about that.

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With this explanation, we hope to give you more clarity on the changes brought about by the Deregulation Act. Should you have any questions, we are pleased to discuss them with you. Please contact Ewout van de Bult on (0) 20 644 4655 or [Ewout.vandebult@robertwalters.com](mailto:Ewout.vandebult@robertwalters.com).

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