newsletter
labour and employment law
WARDYŃSKI & PARTNERS
07-09/2017

I Changes in law

Protection of employees' claims in the event of the employer's insolvency

On 5 September 2017, an amendment came into force to the Act on the Protection of Employees' Claims in the Event of the Employer's Insolvency and to the Act on Court Costs in Civil Cases. The amendment's objectives are to ensure fuller protection of employees' claims, and, in particular, hastening financial assistance to employees deprived of jobs and providing them with any other benefits they may be entitled to with regard to the employer's insolvency.

One important change is the definition of the actual cessation of business, which would allow payments of advances for employees' future benefits. Under the definition, three conditions must be met jointly for an actual cessation of business to occur:

- the employer has not carried on any business or obtained any income from it (excluding a suspension of commercial activity as disclosed in appropriate registers or in the Central Register and Information on Business Activity (CEIDG)),
- the employer has not been present at the registered office or places of business, despite an entry existing in the appropriate registers or the CEIDG, or the deletion of the registered office/place of business from the appropriate registers or CEIDG ex officio,
- the employer has not performed duties related to employees' rights,

- all for more than two months.

The date of the actual cessation of the employer's commercial activity, pursuant to the new legislation, is the date immediately following the end of the above period.

As announced beforehand, the reference periods that give an entitlement to benefits from the Guaranteed Employment Benefits Fund have been extended from 9 to 12 months.

Another important amendment is the extension of the definition of employee as used in protecting employees' claims to also include family members who work together in the business of a self-employed person.

The amendment also introduced the possibility to receive an equivalent for unused leave in the calendar year of the cessation of the employment, and in the year directly preceding that year, if the cessation of the employment occurred within 12 months preceding the date of the insolvency, or within 4 months following that date.

What is more, the amendment has clarified certain provisions of the Act by establishing, among others, that the average monthly wage that constitutes the base for calculating employees' benefits would be that in force on the date of submitting a schedule or an application to the speaker of a province.

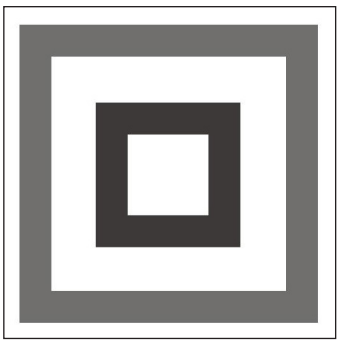
New guidelines for interpreting the protection given to employees' personal data

On 8 June 2017, the Working Party on the Protection of Individuals with regard to the processing of Personal Data, established under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to processing of personal data and on the free movement of such data – "Art. 29 Working Party", issued opinion 2/2017 on processing personal data at work, in particular with regard to new technologies at the workplace. The opinion complements the previous Opinion 8/2001 of 13 September 2001 on the processing of personal data in the employment context and the Working Document of 29 May 2002 on the surveillance of electronic communications in the workplace. The Art. 29 Working Party's opinions are not binding, but its position is seen as important in interpreting personal data protection issues.

In its new guidelines, the Art. 29 Working Party maintained its position that employers should always be mindful of the fundamental rules of data protection, irrespective of the technology used. It also reiterated that monitoring may take place, if employees have been notified in advance and that consent should not constitute a legal basis for processing employees' personal data. Moreover, employee's personal data may sometimes be processed if the processing is necessary to perform a contract or is essential for the employer's legitimate interests, and is also proportionate. It was stressed that the processing of personal data at work should be minimally intrusive.

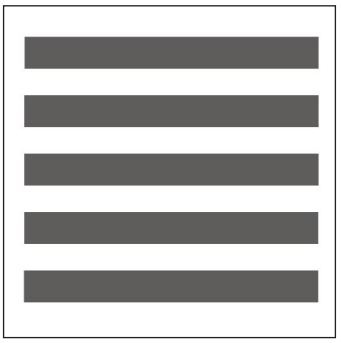
II Work in progress...

Draft changes to the Labour Law following the entry into force of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)



On 14 September 2017 the Ministry of Digital Affairs referred for public consultation and acceptance draft legislation implementing data protection regulations, which will replace the current regulations on data protection on 25 May 2018 in connection with the entry into force of the General Data Protection Regulation. The draft lists the personal data that an employer is to acquire from a job applicant and employee. Additionally, with the employee's consent, the employer may also process other employee's personal data, including biometric data. Processing of data concerning addictions, health, sex life or sexual orientation of an employee would be unacceptable even with the employee's consent. The draft also envisages that an employer may monitor employees to ensure employee security, property protection and confidentiality of information. However, this should not be used to control an employee's work. According to the draft, the employer should inform employees about use of monitoring at least 14 days in advance.

Rules for examining criminal records of candidates applying for jobs in the financial sector

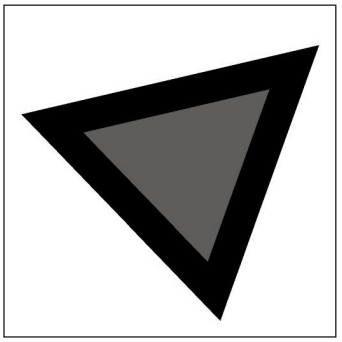


The Council of Ministers is working on entitling firms in the financial sector and those providing services to them to review the criminal records of candidates seeking jobs with them. Currently, an employer may request such information, only if the law requires it, and there are no such requirements in place regarding financial sector firms.

The bill would entitle such firms and those performing directly related activities for the financial firms (e.g. outsourcers, agents) to request an appropriate document from the National Criminal Register (KRK) certifying whether the job candidate has been convicted in a final ruling of any intentional crime as specified under the bill. A list of those crimes includes those against documents, property, information, the credibility of documents, commercial traffic, money and securities trading, as well as other crimes governed by criminal provisions of specific acts regarding the business of financial sector firms.

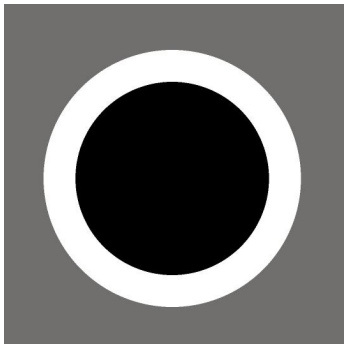
Employers will have to bear the cost of documents issued by the KRK.

III From the courtroom



Requesting information from an employee on additional employment–Supreme Court rulings dated 11 January 2017 (I PK 25/16) and 19 January 2017 (I PK 33/16)

In a ruling of 19 January 2017 the Supreme Court found that, based on Article 22[1] § 2 of the Labour Code in conjunction with its Article 22[1] § 1 pt 6, an employer has the right to request information from an employee on that employee's employment record, including during working for that employer. This information may also include details of any new employment undertaken, its cessation and associated reasons and is not necessarily limited to employment contracts but may also include any work under civil law contracts. The Supreme Court also held that an employer who has a justified interest may oblige an employee to inform the employer of any intention to undertake additional professional activity, and failure to meet this obligation could even constitute grounds for terminating the employment contract without notice.



A court must consider social solidarity when assessing the legal nature of a contract between parties – Supreme Court – Labour, Social Security and Public Affairs Chamber ruling dated 2 June 2017, III UK 147/16

The ruling was delivered because of an appeal of a payer of social security contributions against a decision of the Social Insurance Institution (ZUS) finding specific task contracts concluded by the payer as contracts for provision of services and subsequently the payer's appeal against a District Court ruling upholding the ZUS decision.

The payer, an institution involved in popularising and promoting theatre, film, music and fine arts, had concluded a number of specific task contracts. The contracts covered preparing and performing musical works at specific performances, preparing scenarios and holding specific concerts, preparing and performing concerts as a part of a festival organised by the payer, as well as performing specific acting parts, arranging music and preparing background music for kindergarten concerts.

On hearing the payer's appeal against the ZUS decision, courts of both instances, as well as the Supreme Court found that the contracts in question were not, in fact, specific task contracts but contracts for the provision of services. The Supreme Court concurred with the interpretation of the Supreme Court's ruling of 10 January 2017, III UK 53/16, which was delivered as a result of an appeal submitted by the same payer and concerned similar issues,

namely it referred to the need for particular tasks to be identified in contracts between parties – something that was missing, in the Court's opinion, from the subject contracts.

In its ruling of 2 June 2017, when assessing the legal nature of the contracts, the Supreme Court invoked the principle of social solidarity, pointing out that in view of it paid employment in principle creates an insurance obligation, if the person does not have any other grounds for a social security entitlement. Any exclusion from the social security system should be considered as an exception to the rule and should be subject to a careful interpretation. The Supreme Court also emphasised that every entity that organises frequent cultural events should seek to ensure that contractors are afforded social security protection, which should particularly apply to public and local authority bodies. In the Court's opinion, this approach would constitute a good example to other organisations involved with similar activities.

An employee must receive prior notice of any monitoring of computers – Grand Chamber of the European Court of Human Rights ruling dated 5 September 2017, case 61496/08, Barbulescu vs. Romania

The ruling confirms that any monitoring of how employees use company computers may constitute a violation of employees' privacy and that the supervision by the employer must be justified and proportionate as to its objectives. The ruling also confirmed that the employer should notify employees ofthe extent and measures undertaken prior to commencing any monitoring.

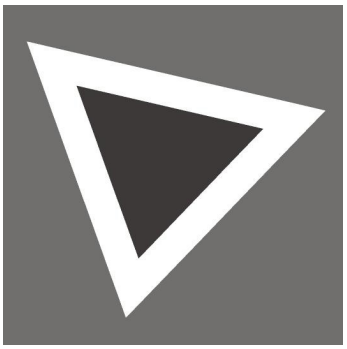
According to the facts of the case, an employee set up a Yahoo Messenger account at the employer's request in order to communicate with the employer's clients. The employee was also instructed that the use of internet, telephone and company e-mail for private purposes was not allowed. Nevertheless, he used the account to contact his fiancé and his brother, among others, during working hours, which resulted in his dismissal.

Initially, in the ruling of Section IV of the European Court of Human Rights dated 12 January 2016 (under the same case number), the Court held that in monitoring messages sent by the employee from an account set up at the employer's request, the employer did not violate the employee's right to privacy. The fact that the employee had been notified that use of the internet for private purposes was banned was sufficient to find that the employee's right to privacy was not violated, and therefore in monitoring the communications sent using the company's equipment, the employer was well-founded in his conviction that the communications were only work-related.

As a result of the applicant's appeal, on 5 September 2017, the Great Chamber of the European Court of Human Rights held, however, that the employee's privacy had been violated, though it did not award any compensation, stating that the finding of a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms constituted sufficient satisfaction in itself.

Termination of employees' conditions of work or remuneration may entail the need for a collective redundancies procedure – judgment of the Court of Justice of the EU, dated 21 September 2017 in M Ciupa and others v. the Municipal Hospital in Łódź, C-429/16

As a result of a request for a preliminary ruling from the Regional Court in Łódź. the Court of Justice found that significant changes to essential elements of an employment contract made unilaterally by an employer for reasons not related to the individual employee and to the detriment of that employee constitute a „redundancy" within the meaning of Article 1 par. 1 first subparagraph a) of Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies. It is for a domestic court to assess whether, in the circumstances of the case, the termination of conditions of employment has this nature. Whereas if the termination of employment conditions for reasons not related to the employee results in the termination of the employment contract, such termination must be taken into account when calculating the total number of redundancies, which require the implementation of a collective redundancy procedure.



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