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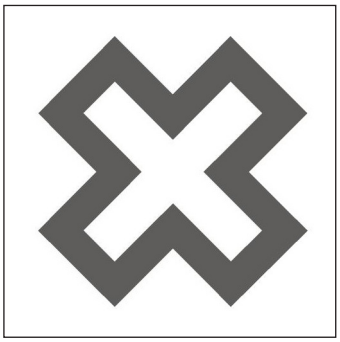
newsletter
labour and employment law
WARDYŃSKI & PARTNERS
10-12/2017

I Changes in law

The minimum wage increases as of 1 January 2018

As of 1 January 2018, the gross minimum wage increases to PLN 2,100 and the gross minimum hourly rate for work performed under a civil-law contract increases to PLN 13.70.



Amendment to the Act on Foreigners

The 12 February 2018 will see the entry into force, except for certain exceptions, of an Amendment to the Act on Foreigners. It complements the Amendment to the Act on Employment Promotion and Labor Market Institutions that took effect on 1 January 2018.

The new legislation adjusts Polish law to EU regulations and provides that foreigners from outside the European Union will be able to obtain a temporary residence permit in Poland when they are part of an intra-enterprise transfer from another (non-EU) country. The maximum intra-enterprise transfer period will be three years for managers and specialists, and one year for interns. After this time, these individuals will have to leave Poland unless they receive a residence permit on a different basis, in accordance with the EU or national regulations.

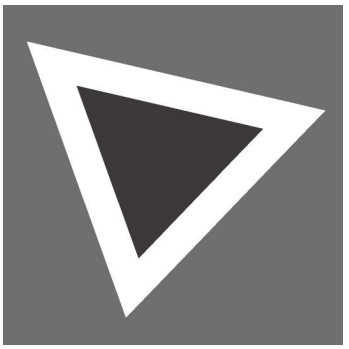
In order to benefit from the transfer, employees will have to have worked within the same enterprise or the same group of companies for at least 12 months in the case of managers and specialists, and for at least six months in the case of interns.

The bill provides that family members of employees transferred to Poland as part of the transfer of their enterprise will be able to join these employees immediately. They will also be given access to the Polish labor market.

In addition, the change will comprise the possibility of employees transferred within their enterprise to use short-term and long-term mobility inside the European Union, within the same enterprise or the same group of enterprises.

The Act also provides for the possibility of establishing limits for temporary residence permits that may be granted

to foreigners in a given calendar year - for purposes related to their work in Poland.



The Act further stipulates that, henceforth, foreigners applying for a long-term EU residency in Poland will have to demonstrate their knowledge of the Polish language at least at intermediate level. Children under 16 will be exempt from this obligation.

Provisions have also been introduced to streamline the procedure for returning and transferring foreigners out of Poland.

The amendment was published in the Journal of Laws of 12 January 2018, item 107.

II Work in progress...

Abolition of a limit on social insurance premiums

The Amendment of the Act on the Social Insurance System and Certain Other Acts, adopted by the Lower House on December 15, 2017 (Lower House Paper no. 1974), which provides for the abolition of the limit above which the highest earners do not pay contributions to the retirement and disability insurance plans was – at the President's request – handed over to the Constitutional Tribunal. The President objected to the manner the amendment had been proceeded.

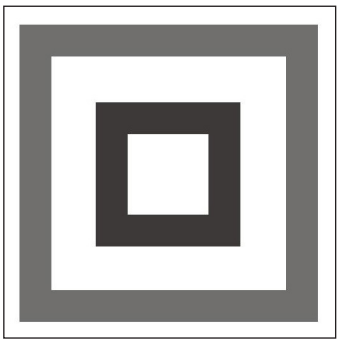
At present, the annual basis for calculating contributions to the retirement and disability insurance plans in a given calendar year cannot be higher than the amount corresponding to 30 times the forecasted average remuneration in the economy in that year. In 2018, this amount is PLN 133,290.

According to the proposed regulation, as of January 1, 2019, retirement and disability insurance contributions would be calculated based on the total income.

A legislative proposal to settle the status of whistleblowers and the obligation to introduce anti-corruption procedures

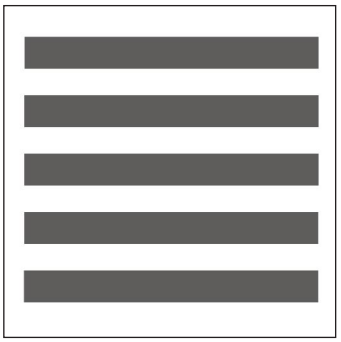
The draft Act on Transparency in Public Life – which is to replace the Act on Restricting Business Activities by Persons Performing Public Functions, the Act on Lobbying and the Act on Access to Public Information – is undergoing the assessment stage.

Among other changes, the draft provides for regulations concerning so-called "whistleblowers". Under the draft, the status of a whistleblower may be granted by the prosecutor to a person reporting reliable information about a suspected offense belonging to the catalog of offenses specified in the draft, which relate to the institution or enterprise where or for which the whistleblower works. Under the draft, the status of a whistleblower will be grantable not only to employees, but also to natural persons who perform their profession to their own account or conduct business activities as part of their occupation, and to entrepreneurs. The catalog of offenses reportable by whistleblowers includes bribery, paid protection, abuse of power by a functionary for financial or personal gain, participation in an organized criminal group, counterfeiting large invoices, fraud, causing damage to the economy, bribery in a managerial position, credit fraud, money laundering, thwarting or reducing the satisfaction of a creditor or injuring a creditor, eliminating business records, disrupting a public tender and disseminating false information in securities trading.



Obtaining whistleblower status is tied to the protection of the permanence of the legal relationship on the basis of which a whistleblower renders work. In the case of a contract of employment – the employer cannot terminate it or modify its terms without consent of the prosecutor. A violation of this protection is connected with the whistleblower's right to receive severance pay in the amount equal to two-year remuneration. In the case of whistleblowers working on a different basis, termination of the contract without consent of the prosecutor gives the whistleblower grounds for claiming damages in the amount equal to total remuneration for the entire period for which the contract was concluded.

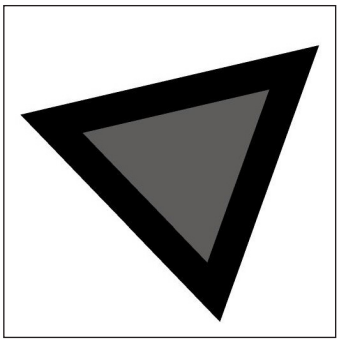
In addition, the draft provides that, within the framework of the protection, the whistleblower can claim from the State Treasury reimbursement of the costs of legal representation in connection with incurring negative effects of reporting credible information. In the event of conviction of the perpetrator, the court will be able to rule on an extra amount granted to the whistleblower or to his enterprise.



The draft also assumes imposing on some entrepreneurs new obligations in the field of counteracting corrupt practices. Entities being at least a medium-sized enterprise within the meaning of the Act of 2 July 2004 on the Freedom of Economic Activity would be required to apply internal anti-corruption procedures to prevent so-called corruption crimes by persons who act on behalf of the given entity or to its benefit. These procedures would include organizational, personnel and technical measures aimed at counteracting the creation of an environment conducive to corruption crimes. The main point is to prevent the

creation of mechanisms for financing material and personal benefits, for example with the use of enterprise assets. The non-implementation of appropriate procedures as well as pretence or ineffectiveness of procedures that are implemented is to involve a financial penalty for the entrepreneur in the amount ranging from PLN 10,000 to PLN 10,000,000.

Prohibition on Sunday trading



Parliament has approved a law that, in its first stage, will restrict and then from 2020, basically, prohibit trading on Sundays. It is now awaiting the President's signature. (Lower House Bill No. 870). Current progress suggests that:

- from 1 March 2018, stores will open only on the first and last Sunday of the month and the two Sundays before Christmas and on the Sunday before Easter,
- in 2019 trading will be allowed every last Sunday of the month, the Sunday preceding Easter and the two Sundays before Christmas,
- from 2020, trading will be allowed only on the above pre-Christmas and Easter Sundays and on the last Sunday in January, April, June and August.

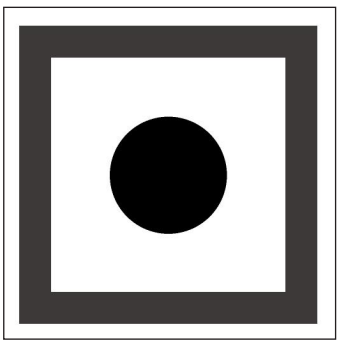
Moreover, shop opening times will also be limited on 24 December and on Easter eve Saturday, when trading will be allowed until 14:00. The draft also restricts trade-related activities carried out on Sundays, including the warehousing and inventory of goods, but allows a number of exceptions. One amendment adopted by the Lower House excluded online sales from the Sunday trading prohibition, which previously had been the subject of a dispute.

The list of entities excluded from the Sunday trading prohibition also includes bakeries, pastry shops and ice-cream parlours, pharmacies, florists, shops selling souvenirs and religious paraphernalia, newspaper kiosks, stands at cemetery gates, refuelling stations and train stations. Moreover, the prohibition will not extend to agro-food wholesale markets.

Under the new law, the penalty for breaking the Sunday trading prohibition will be a fine ranging from PLN 1,000 to PLN 100,000, and even a limitation of freedom for persistent violations.

Amendment of the Trade Unions Act

After its first reading in the Lower House, a draft amendment to the Trade Unions Act was submitted for assessment to the Parliamentary Labour and Social Policy Committee (Lower House Paper no. 1933). The draft provisions are a consequence of a ruling of the Constitutional Tribunal dated 2 June 2015 (K 1/13) on the freedom to create and join trade unions, as well as a ruling of the Constitutional Tribunal dated 13 May 2008 (P 50/07) in which a provision on criminal liability for management of activities inconsistent with the Act was deemed overly general.



The draft implements guidelines of the Constitutional Tribunal granting the ability to establish new and to join existing trade unions to persons working on the basis of contracts other than employment contracts, in particular, those employed under civil-law contracts, including sole proprietors. The granting of coalition rights to such persons depends on the fulfilment of additional conditions:

- not employing other people;
- not bearing the economic risk associated with the performance of a given job;
- having professional interests related to the performance of work, which can be subject to collective protection.

The draft states that union members who work under civil-law contracts can seek equal treatment in employment claims from an employing entity, i.e. they can also claim damages in the amount of at least minimum remuneration for work at a labour court. These persons would also have the right to be remunerated for time spent on participating in ad hoc union activities.

The draft also foresees other changes, for example, concerning the representative nature of a trade union, information on the number of members of a local trade union organization, the consultation procedure in case of transfer of a workplace or its part to a new employer as well as reconciliation of in-house regulations. It also specifies a trade union's right of access to information necessary to conduct union activities.

The draft provides for a six-month *vacatio legis*.

Camera surveillance of lecture halls has violated the right of lecturers to privacy - ECHR judgment dated 28 November 2017 in the case of Antović and Mirković v. Montenegro (complaint No. 70838/13).

Two Montenegrin citizens, lecturers at the mathematics department of a local university, have brought a complaint to the Court. In 2011, surveillance cameras were installed at the university to protect the safety of property and people. Cameras also appeared in lecture halls where the applicants were conducting classes. The applicants argued before the Court that permanent electronic surveillance in lecture halls violated their right to respect for private life under Article 8 of the Convention, because they had no effective control over information collected in this way. Also, the introduction of such a measure was against the law.

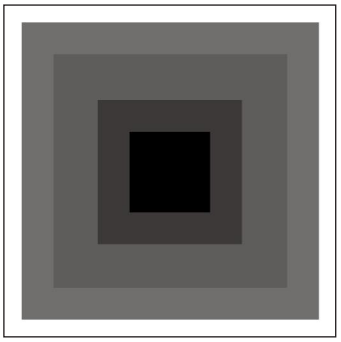
In justification of its judgment, the Court pointed out that a lecture hall is not only a sensu stricte work place for lecturers, but also a place where they interact with students, where interpersonal relations are established and where an individual can further personal and social identity. In the Court's opinion, the use of camera surveillance at the workplace is gross interference with an employee's private life. For compliance with Article 8 of the Convention any such interference can only be justified under Article 8 if it complies with the law, pursues one or more legitimate aims to which that Article refers and is necessary in a democratic society in order to achieve any such aim. Domestic courts should examine the issue of the acts being in accordance with the law and properly weigh arguments of an interested party in terms of the violation of its right to privacy under Article 8 of the Convention, especially given the aims and need for such an invasive privacy restricting action as permanent security surveillance.

Meanwhile, the domestic courts that examined the case did not address these issues, thereby recognizing that the applicants' case did not concern privacy at all. A different opinion was presented by the national office for the protection of personal information, which pointed to the lack of compliance of the challenged measures with national law.

Supreme Court ruling dated October 12, 2017, II PK 269/16

An employer who has been in a difficult economic situation for a long time and who has sought to agree with trade unions on replacing current remuneration regulations in order to reduce costs of his enterprise facing bankruptcy does not abuse his right when abrogating current

regulations. This is also the case when receiving a joint negative opinion from trade unions at an enterprise that is devoid of any realistic proposals for adapting remuneration regulations to the altered reality of enterprise operations.

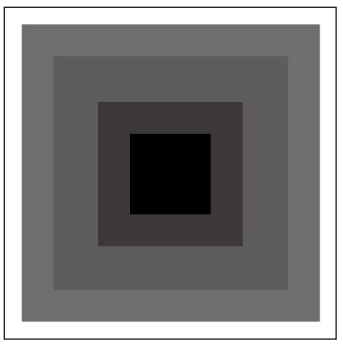


The claimants demanded recognition of ineffectiveness of an employer's termination of work and pay conditions and reinstatement of previous conditions by citing the employer's alleged unlawful abrogation of remuneration and bonus regulations. Indeed, in view of a difficult economic situation, the employer decided to abrogate binding employment regulations, including remuneration regulations and detailed tasks related to bonus regulations, despite the uniform negative position of all trade unions operating at his enterprise. In place of the abrogated regulations, the employer unilaterally introduced remuneration guidelines.

Courts examining the case in both instances found that the framework remuneration guidelines unilaterally introduced by the employer despite the negative position of trade unions are not legally binding, and the defendant needs to apply remuneration regulations. However, the Supreme Court recognised the defendant company's cassation appeal, overturned the appealed judgment and remitted the case to a second-instance court for its re-examination.

The Supreme Court referred to discrepancies in literature on the legal nature of remuneration regulations and to a Constitutional Tribunal ruling of 18 November 2002 (K 37/01) on the nature of a collective labour agreement. It decided that the granted attribute of "perpetuity" to remuneration regulations violated Article 20 of the Constitution of the Republic of Poland (by excluding the possibility of unilateral repeal of an agreement in connection with a significant and prolonged change in business conditions) and Article 59.2 of the Constitution of the Republic of Poland (by restricting the principle of voluntary negotiations and violating the principle of equality of parties in negotiations). The Supreme Court also took into account, given case facts, that the remuneration regulations abrogated by the employer were introduced unilaterally, which, according to the Supreme Court, also supported the admissibility of their unilateral abrogation due to the need to implement a restructuring program at an enterprise facing bankruptcy. An additional argument here is that the trade unions, when presenting a negative position on the proposed changes to remuneration terms, did not put forward any realistic proposals to adjust the employer's remuneration policy to the realities of further enterprise functioning.

Supreme Court ruling dated October 5, 2017, I PK 270/16



Expiry of an excessively long period (e.g. one year) between consultation of trade union on intent to terminate an employment contract and the date of contract termination implies that failure to renew consultations with the union violates the procedure of consulting intent to terminate an employment contract with a trade union representative.

The employer in this case consulted intent to terminate the claimant's employment contract with trade union management, which stated that the nature, type and substance of allegations do not justify this termination. The claimant was on sick leave during consultations. While on leave (for 15 months), the claimant joined another trade union. After her return, the employer terminated her employment contract with a three-month notice, but without consulting the trade union again as required under Labour Code Article 38.

The Supreme Court found that even if reasons for employment contract termination still applied, the length of time since previous consultations was a violation of Labour Code Article 38.1 in connection with Labour Code Article 45.1. It stressed, however, that the exact definition of how much elapsed time justifies renewal of consultations is not possible and depends on the circumstances of a particular case.

The Supreme Court decided that after one year from initial consultation with the union the defendant employer should have given the trade unions at his enterprise five days to state whether the claimant was a member of a given union, and then resume consultation of intent to terminate the contract with the new union that the claimant joined. The Supreme Court pointed out that the right to choose and change a trade union should not be abused solely in order to win a court case. However, in these case circumstances, there was no violation of Labour Code Article 8 as claimed in the cassation appeal. The change of trade union could not have been a surprise for the employer, since it preceded termination of the employment contract by more than six months.

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