newsletter
labour and employment law
WARDYŃSKI & PARTNERS
1-3/2018

I Changes in law

Personal data in electronic form, cashless payment of remuneration and shortened period for storing employee documentation

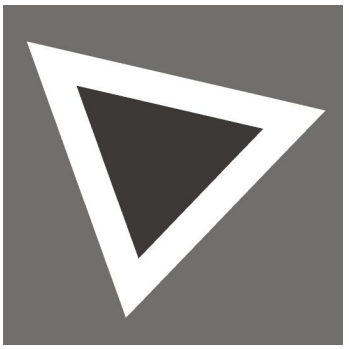
On 5 February 2018, the President signed the Act dated 10 January 2018 on changes to certain laws in connection with a shortened period for storing employee files and their digitization (Journal of Laws, 2018, pos. 357). It will enter into force on 1 January 2019 (with exceptions pertaining to entrepreneurs conducting business in the form of personal document and payroll storage for employers). The law introduces long-awaited changes to documentation on matters relating to employment and personal files of employees, namely:

- it shortens the mandatory period to store this documentation upon cessation of employment from the current 50 years to 10 years (with the exception of specific regulations; the storage period for documentation of employees whose employment commenced prior to 31 December 1998 will continue to be 50 years, whereas that for staff whose employment commenced after that date, but prior to 1 January 2019, will be 10 years if the employer files so-called information reports to ZUS),
- it enables the maintenance and storage of employee documentation in electronic form.

An employer will be able to alter the form in which employee documentation is maintained or stored. A change of documentation from paper to electronic form will require a digital copy (e.g. scan) of documentation and confirmation of its consistency with a hardcopy through a digital qualified electronic signature or qualified electronic stamp of an employer. In turn, a change of form from electronic to hardcopy will take place through a printout and signature of an employee or its authorized person confirming consistency of a printout with an electronic document.

In the event of a change of documentation form, an employer will be required to inform former and present employees of the ability to collect employee documentation in previous form. Moreover, the law stipulates that an employer will be required, together with the issue of a work

certificate, to provide an employee information on the period of employee documentation storage, ability of an employee to collect employee documentation after its storage period and the destruction of such documentation if not collected.



The law obligates employers to issue copies of entire or partial employee documentation upon request of an employee or former employee and, in the event of death, upon demand of authorized family members.

The law stipulates that, in principle, remuneration will be paid to an employee in the form of transfer and differently only upon request.

II Ongoing work on ...

Draft Labour Code and Collective Labour Law Code

On 14 March 2018, the Labour Law Codification Commission adopted a resolution on acceptance of the Labour Code and Collective Labour Law Code. It is worth noting that the Labour Law Codification Commission has worked since September 2016 on the basis of an executive regulation of the Council of Ministers. The Commission includes academics in and practitioners of labour law (nominated by the government as well as representative trade unions and employer organizations).

Codification Commission proposals offer a series of novel solutions, among others, with regard to grounds for employment, work time and holiday leave.

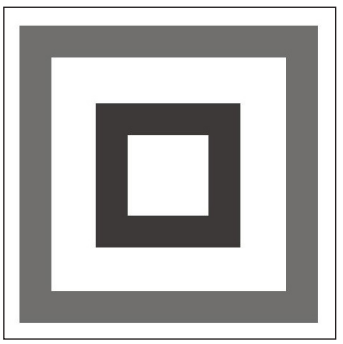
Draft codes nevertheless are not draft laws and are currently the subject of ministerial work. Time will tell whether and in what form proposals of the Codification Commission will be accepted for further work.

Changes to the protection of an enterprise secret

In connection with a 8 June 2018 deadline to implement directives of the European Parliament and Council (EU) 2016/943 dated 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, a draft amendment has emerged of the Countering of Unfair Competition Act and certain other laws. It envisions, among others, a new definition of enterprise secret in order to adapt it to directive requirements.

As for employee relations, a key change is repeal of the statutory obligation to observe an enterprise secret for a period of three years from the date of cessation unemployment (presently art. 11 sec. 2 CUCA). The proposed changes mean that protecting business secrets from disclosure by past employees will, in principle, mean having to contract, in advance, confidentiality that is to apply after employment ends.

Employee Capital Plans (PPK)



Agreements and consultations are underway on the Employee Capital Plan Act (no. UD321 on a list of government work). The draft aims to introduce PPKs whose purpose would be systematic savings for pay-out to an employee after the age of 60. In principle, hiring entities would be obligated to conclude PPK management contracts with selected financial institutions and to pay contributions to such institutions. Funds in an PPK would be invested in investment funds (at a statutorily set fee).

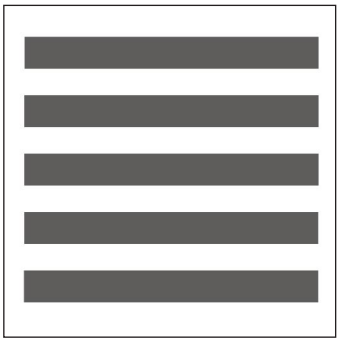
Payments into an PPK would be financed by the hiring entity (min. 1.5% of basic social insurance contributions) and employed person (2% – 4% of remuneration). Upon fulfilment of additional conditions, an annual supplement from public funds can be expected. And employed person and therefore is able to resign from participation in an PPK.

Funds within an PPK would have a private law nature, including the right to inheritance.

Entities with Employee Retirement Programs within the meaning of presently binding regulations and which make basic payments of at least 3.5% of remuneration would be exempt from PPK.

The draft provides for new duties to be applied from 1 January 2019 toward entities employing at least 250 persons and would cover smaller entities gradually until 1 July 2020.

Amendment of the Employee Retirement Programs Act (PPE)



Draft changes to the Employee Retirement Programs Act dated 20 April 2004 (Journal of Laws, 2016, pos. 1449) stem from a deadline on 21 May 2018 to implement a directive of the European Parliament and Council, 2014/50/EU dated 16 April 2014 on minimum requirements for enhancing worker mobility between Member

States by improving the acquisition and preservation of supplementary pension rights.

The draft changes provide, among others, for specification of a 3-year maximum waiting period for the right to join a PPE and an expansion of notification duties of employers maintaining PPEs toward their members, together with notification obligations of program managers toward employers with such programs. Employers maintaining PPEs would have until the end of 2018 to adapt enterprise agreements to new requirements.

The draft is at the stage of governmental work (draft no. UC 107).

III From the courtroom

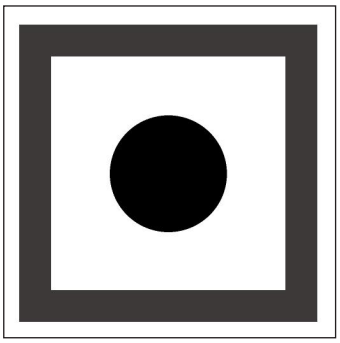
The processing of personal data in violation of an authorization granted by an employer may constitute a justified reason to terminate an employment contract (Supreme Court ruling dated 4 April 2017, II PK 37/16)

The case concerned termination of employment contract with a ZUS employee due to a gross breach of basic work duties. The charges concerned a breach of personal data collected by ZUS in the form of information drawn from the account of a specific payer as well as actions undertaken during work hours for the benefit of a payer for whom the employee worked on the basis of a contract of mandate with unjustified use of ZUS resources and equipment. The ZUS employee used her access to the ZUS database to verify the propriety of documentation that she furnished to ZUS in the name of her client.

The employee appealed her employment termination. A first instance court dismissed a lawsuit by finding that the claimant breached the scope of her authorization to process personal data. Proper use of data resources is a fundamental obligation of all ZUS employees. Therefore, its conscious infringement justifies termination without notice. A regional court, however, ruled differently by awarding the employee compensation for employment contract termination in breach of labour law provisions. It found that the scope of claimant authorization to process personal data was sufficiently broad to enable access to the subject matter, whereas the payer whose data was accessed did not raise any objections to a breach of his personal data. In the view of a regional court, these circumstances justified compensation, since no violation of payer or ZUS interests or conscious or gross claimant negligence can be declared in this case. Therefore, employment termination lacked justification.

The Supreme Court unambiguously stated, however, that termination of employment contract was justified, not only due to the claimant's activities during work hours that related to work for another entity, but also due to the processing of personal data collected by ZUS in violation of the purpose of processing and the scope of her authorization. The Supreme Court also did not accept the claim of the claimant undertaking the subject operations on personal data of the payer and his employees with consent of the entity to which such data pertains. Such consent, as an expression of will, should be submitted to a data administrator to whom consent to access to this data by further entities should be given.

The Supreme Court underscored that the consequences of illegal actions of persons authorized to process personal data should not be minimized. The institution of data administrator authorization for processing is not as much an obligation to observe data confidentiality as it is a certain type of general (common) order of obedience to an administrator bearing numerous responsibilities with regard to personal data protection, including legal liability. In light of the above, failure of the employee who was authorized to process personal data to observe this order constitutes a breach of employer interests.



An employee cannot allocate an entire hard disk on a work computer to store private documents – ECHR judgment dated 22 February 2018, Libert against France, complaint no. 588/13

The judgment was rendered following a complaint lodged by a citizen of France, who was dismissed from work after pornographic photographs and films as well as false certificates issued to third parties in the employer's name were found on the hard disk of his work computer. The complainant stated that his right to privacy was breached because the subject files were marked "personal." Therefore, the employer should have observed the procedure of access to such data mandated by French law, including its opening only in the employee's presence or after proper notification. The French court found, however, that the private files were not properly marked because the employee could not allocate an entire hard disk on his computer to store private documents. Therefore, although an employer intruded into the employee's right to privacy, this was not illegal and took place with observance of due balance between the parties' interests.

The ECHR concurred with this argumentation by adding that personal materials stored on work equipment can in certain cases be treated as part of the sphere of private life (particularly if – as in the circumstances of this case – an employer allows employees to occasionally use work equipment for purposes unrelated to work duties). However, the employee did not properly designate private data and, therefore, there was no illegal limitation of his right to privacy.

Contact
Agnieszka Lisiecka, *adwokat*, partner
tel.: +48 22 437 82 00, 22 537 82 00
e-mail: agnieszka.lisiecka@wardynski.com.pl