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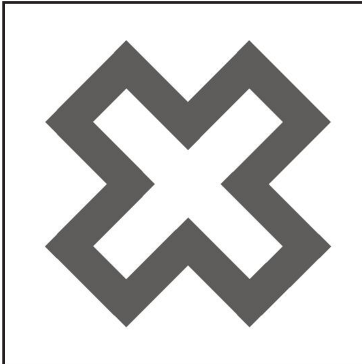
news-letter

labour and employment law

30yrs WARDYŃSKI+PARTNERS

10-12/2019

I Changes in law



Remuneration policy in public companies

As of November 30, 2019, the amended Act on Public Offering, on Conditions for the Introduction of Financial Instruments to the Organized Trading System and on Public Companies as well as certain other acts amended in conjunction therewith, introduced an obligation to implement a policy setting out the remuneration of members of management and supervisory boards in companies of which at least one share has been admitted to trading on the regulated market, as well as an obligation to adopt an appropriate resolution in this respect.

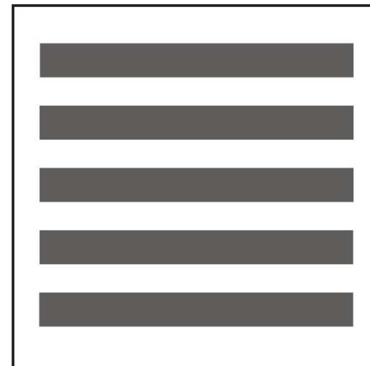
The remuneration policy should include in particular:

- Fixed and variable components of remuneration as well as bonuses and other pecuniary and non-pecuniary benefits which may be granted to management and supervisory board members (and, if the company grants variable components of remuneration to management and supervisory board members, also their granting criteria);
- Mutual proportions of remuneration components;
- Indication of how the conditions of work and pay of employees other than members of the company management and supervisory boards have been taken into account when establishing the remuneration policy;
- The period for which contracts (employment contracts, specific task execution contracts, etc.) are concluded and the periods and terms of notice, also when instead of concluding a contract the parties have only entered into a legal relationship;
- Main features of supplementary pension plans and early retirement plans;
- Description of the decision-making process carried out to establish, implement and review the remuneration policy.

The Act also introduces an obligation to draw up an annual remuneration report, which should contain a detailed description of all components of remuneration granted to management and supervisory board members. The report should be made available by the company free of charge on its website.

So far, having a remuneration policy has only been recommended by the Best Practices of Companies Listed on the Stock Exchange.

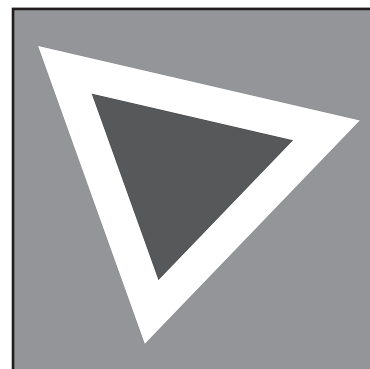
Protection of whistleblowers



On October 7, 2019, the Council of the European Union adopted a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law. The Directive lays down common minimum standards for the protection of whistleblowers, including the obligation to put in place procedures for internal reporting and for following up on infringement notifications. Member States have until December 17, 2021, to implement the Directive.

The provisions of the Directive apply to legal entities operating in the private sector that employ at least 50 persons (the inclusion of entities which employ less than 50 persons in the obligations under the Directive has been left to the discretion of the national legislator) and to entities operating in the public sector.

Employee Capital Plans (ECPs)

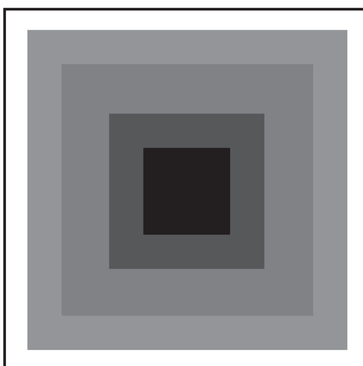


On January 1, 2020, the provisions of the Act on Employee Capital Plans became law for economic operators who on June 30, 2019, were employing at least 50 persons. But in 2021 the Act will become law also for small economic operators with less than 20 employees and for the public sector.

Full ban on Sunday shopping (but still with exceptions)

A full ban (but still with exceptions) on Sunday shopping has come into force in 2020 in accordance with the Trade Restrictions Act. The ban does not apply only on two consecutive Sundays preceding the first day of Christmas, the Sunday immediately preceding the first day of Easter and the last Sunday in January, April, June and August.

II Ongoing work on...

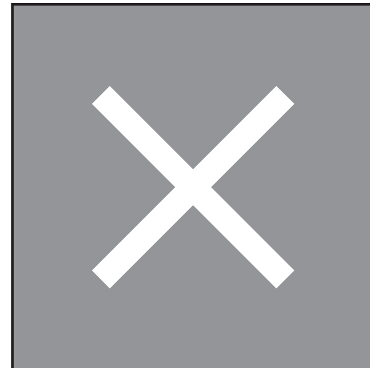


Remuneration must be specified in offers of employment

The lower house received a Labour Code amending bill, according to which employers would be obliged to specify the gross remuneration in employment advertisements. The requirement to indicate how much the advertised job will pay is meant to prevent discrimination of young people and women looking for work.

III From the court room

European Court of Human Rights: covert security camera surveillance of employees



ECHR judgement of October 17, 2019, in López Ribalda and Others v Spain

The Grand Chamber of the European Court of Human Rights found that, in certain situations, the employer's justified suspicion of serious fraud by employees, resulting in significant financial loss, may justify the use of covert camera surveillance.

The ruling concerned workers in a Spanish supermarket who had been fired due to theft. Recordings of hidden surveillance cameras were used as evidence of theft by the employees. The manager of the supermarket noticed discrepancies between the level of stock and sales results (each month amounting to several thousand Euros). Therefore, a camera surveillance system was installed in the supermarket – some cameras were visible to the employees and some were hidden. The employees were only informed about the installation of visible cameras. Surveillance camera recordings revealed thefts committed by a group of employees. As a result, the employer dismissed 14 people on disciplinary grounds.

According to the Court, the following circumstances in particular were relevant in the examined case:

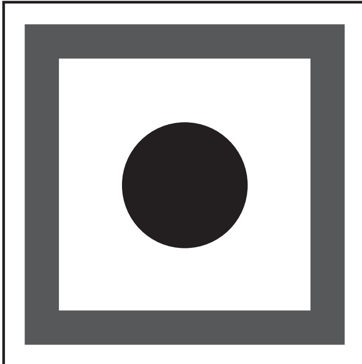
- The surveillance was limited to the area where there was a likelihood of theft;
- The area covered by surveillance cameras was open to the public, so employees could expect high restrictions on their privacy in such area;
- The surveillance only lasted 10 days and stopped when the thieves were detected;
- Only a restricted number of people involved in the investigation of the case had access to surveillance videos;
- These videos had not been used for any purpose other than to trace those responsible for the losses and terminate their employment contracts.

The Court also pointed out that the substantial extent of the damage could bring about the suspicion of a large group of employees committing thefts and that, consequently, the prior notification of the installation of a video-surveillance system could prevent the intended purpose of detecting the perpetrators from being achieved.

This judgement constitutes a departure from the Court's existing case law on covert video-surveillance. Until now the Court would as a rule give primacy to employees' right to privacy.

Issues related to CCTV monitoring are governed in Poland by the Labour Code. In the opinion of the Personal Data Protection Of-

fice, the regulations imposing on the employer an obligation to determine the purpose, scope and manner of applying video-surveillance in the collective agreement or work regulations implicitly prohibit the use of covert CCTV monitoring by the employer. Nevertheless, the Court's judgement contains a lot of practical guidelines as to the issues which should be taken into account when designing workplace surveillance systems.



Provincial Administrative Court in Warsaw: revocation of the first PDPO penalty

PAC judgement of December 11, 2019, II SA/Wa 1030/19 (non-final)

On December 11, 2019, a judgement was passed on the first fine imposed by the President of the Personal Data Protection Office (hereinafter: PDPO) on the Bisnode Company for non-compliance with the GDPR. The PAC in Warsaw repealed this fine.

Let us recap: by decision of March 15, 2019, Bisnode was fined more than PLN 943,000 after PDPO found a breach of an obligation to inform, namely the failure to provide the information contained in Article 14(1) and (2) GDPR to persons whose data were processed by the company (information provided in the case of obtaining personal data in a manner other than from the data subject). According to PDPO, the failure to fulfil the obligation concerned all natural persons whose personal data were processed by the company and who at that time or in the past were or had been self-employed.

The company appealed the decision in question to the Provincial Administrative Court in Warsaw. The company indicated, inter alia, that it had grounds to believe that it was exempt from the obligation to provide information under the exception of Article 14(5)(b) GDPR. According to this argument, providing information about the processing to all “interested parties” would require a disproportionate effort on the part of the company, understood as an excessive organizational and financial burden.

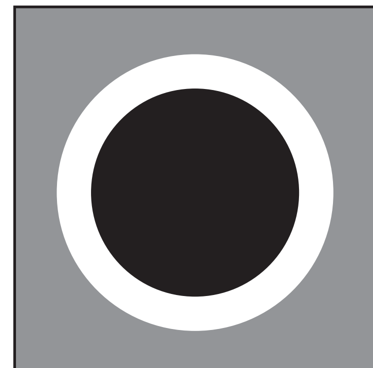
PAC did not agree with this argument and ruled that also an entity obtaining personal data of economic operators from public registers (such as KRS, CEIDG, etc.) in order to provide commercial services is obliged to fulfil the information obligation by providing information directly to the data subject (by letter or telephone).

Importantly, according to PAC, a potentially high cost of sending this information by traditional mail does not constitute a basis for exemption from the information obligation. The Court pointed out directly that the notion of “disproportionate effort” could not be equated with the amount of costs which the data controller would have to bear. Additionally, the Court indicated that, in fact, the company had been in a position to fulfil the information obligation towards persons who were or had been self-employed because it was in possession of their addresses (and in some cases also their telephone numbers).

The core of PAC's considerations is consistent with the PDPO President's decision, however it differs as regards the scope of persons who, according to PAC, should be informed about data processing. Indeed, PAC revoked the decision in the part concerning persons who had been self-employed **in the past**. As a consequence, the number of subjects affected by the infringement has changed and for this reason PAC repealed the fine imposed on the company.

The PDPO President is to conduct administrative proceedings again in accordance with PAC's instructions. He will have to reassess the possibility of fulfilling the obligation to provide information to persons who had been self-employed in the past. Interestingly, this will also require a prior determination of compliance with Articles 5 and 6 GDPR (legality of processing). In addition, he will have to reassess the necessity of imposing an administrative fine and, potentially, also its amount.

European Court of Human Rights: running a blog on work-related topics



ETCP judgement of November 5, 2019, Herbai v Hungary, 11608/15

On November 5, 2019, the European Court of Human Rights examined a complaint of a Hungarian bank employee. The complainant served as an expert in the human resources department and since 2011 has been running an online blog where he regularly published articles on HR issues.

The blog contained a note describing the complainant as an expert in the given field, working for a well-known bank, but did not contain any identifying information about his employer. The complainant was dismissed in 2011 because, according to the employer, his online entries violated the bank's confidentiality standards and financial interests.

The complainant initiated a proceeding to challenge the merits of his dismissal. Hungarian courts of successive instances (including the Hungarian Constitutional Court) sided with the employer pointing out, among other things, that information published on the blog undermined the principle of trust between the employee and the employer and was thus a sufficient reason for termination of the employment relationship. They also stressed that the complainant had obtained the information which he shared on the blog during and in connection with his employment. In addition, the Constitutional Court did not recognize the blog entries as a manifestation of freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The complainant countered by indicating that he did not disclose any company secrets or infringe the interests of the employer, but only initiated a discussion on professional matters.

Ultimately, the former employee brought an action before the Court of Human Rights alleging infringement of Article 10 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Human Rights sided with the complainant. It stated that freedom of expression should be protected also in relations between employees and employers. It pointed out that the complainant's entries had been addressed to professional recipients and, although they contained information with which the complainant became acquainted in the course of performing his work, they raised issues that fell within the permitted scope of freedom of expression. The Court of Human Rights took a position contrary to that of the Constitutional Court, stressing that a given employee statement does not have to be in the public interest to be considered as an acceptable expression of opinion.

Importantly, the judgement justification indicates four premises to be taken into account when examining whether a restriction of freedom of expression in an employment relationship is permitted:

- The nature of the expressed statement;
- Its author's motives;
- The damage caused to the employer as a result of the statement;
- The severity of the penalty imposed on the author.

In the view of the Court of Human Rights, the motives of the complainant, who wanted in good faith to spread knowledge and participate in a broader exchange of ideas between professionals, were not in doubt. The Court also considered that no damage on the side of the employer was demonstrated and that the fine imposed on the complainant was too severe. The Court referred to the judgements of the Hungarian courts pointing out their flaws which stemmed from not ensuring a sufficient balance between the employee's right to freedom of expression and the legitimate protection of the employer's interests.

For these reasons, the Court of Human Rights awarded the complainant EUR 10,000 in damages.

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