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EDITORIAL

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Dear Readers,

I cordially invite you to read the third edition of the PRO HR Year Book, in which once a year we discuss current and practical issues in the field of our main practices: labour law, health and safety, personal data protection, business crime & compliance, immigration & global mobility, lawsuits, taxes and wages in the financial sector.

As many employers are waiting for new regulations on remote work, which will replace telework and "covid" remote work, we devote two texts to this topic. In the first one, Iwona Jaroszewska-Ignatowska suggests how to deal with the working time of remote employees and how to encourage employees to return to the office. In the second, Agnieszka Anusewicz discusses the obligations of employers towards remote employees in the field of health and safety.

Dominika Dörre-Kolasa and Michalina Kaczmarczyk suggest how long candidates' data can be stored after the end of recruitment and how to justify it in the event of an inspection, while Janusz Tomczak and Ewelina Rutkowska explain the responsibility of managers and managing the risk of non-compliance in capital companies in the light of recent changes in the code commercial companies.

The year 2022 was a year of challenges in the area of global mobility, primarily due to the war in Ukraine, and this is how it is perceived by Michał Kacprzyk, Anna Bloch-Kurzyńska and Jan Pietruczuk - the authors of the next text. In it, they explain the reform of the immigration law from the beginning of 2022, dedicated to all foreigners, and then the regulations regarding Ukrainian citizens and their family members.

The litigation theme of this issue is the return of an employee to work after a reinstatement court verdict. Anna Boguska and Piotr Lewandowski explain what conditions an employee must meet and what obligations the employer has.

Regarding a tax topic we write about the Polish Deal and its consequences. In their text, Katarzyna Serwińska and Tomasz Kret indicate its advantages and disadvantages, as well as how these disadvantages are corrected. They also draw attention to the sanction for illegal employment, the impact of the Polish Deal on the annual settlement for 2022 and the new PIT-2 form template.

Our annual series of articles ends with a text on information obligations of banks and brokerage houses regarding gender pay differentiation by Natalia Krzyżankiewicz.

I wish you a pleasant reading!

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TOPIC 1 / EMPLOYEE BENEFITS

Remote working time and benefits associated with employees returning to the office

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Remote work, which has taken hold in companies for good, still raises many questions about the time of its performance.

Employees feel that they are working non-stop. They miss the completion of their work duties and the physical "transition" from the workplace to home. They expect the introduction of the right to be offline.

Employers, on the other hand, believe that with remote working they have lost control over employee's working hours. The employee may start work later than usual, end work early unnoticed, take more breaks, work nights, overtime and days off without the manager's knowledge or approval, be distracted and inefficient.

Meanwhile, the law gives employees protection and employers a variety of tools to respond to the challenges of remote work. Their choice depends on the employer's preferred way of organizing work and the goal it wants to achieve.

With regard to employees working remotely, the employer may apply the same working time system and schedule that applies to them when they work on the premises. They are regulated by a collective bargaining agreement or work regulations, and in the case of employers with fewer than 50 employees not covered by a collective bargaining agreement, by a notice. For both full-time and hybrid remote employees, a basic working time system can be introduced (8 hours a day, an average of 40 hours a week in a fixed reference period, as a rule no longer than 4 months), with rigidly defined working hours.

Sometimes, however, employers want to give more flexibility to employees who work remotely. It can involve making working hours more flexible or introducing task-based working time. Less frequently, an equivalent working time system is used, although it too is legally permissible in this case.

If the employer has rigid working hours (from-to), they can be make them more flexible for remote workers by introducing a certain range of hours in which remote workers will start and finish work. Thus, it can be established that the start of work will take place, for example, between 8 a.m. and 9:30 a.m., and the end of work will be after 8 hours, respectively. The employee will choose for himself/herself at what time, within his designated range, he/she will begin and end his/her remote work. Such flexible working hours, however, require an agreement with the company's trade unions, or, if there are no unions at the employer, with employee representatives.

Flexible remote working hours allow employees to combine their work life with their private life, e.g. driving their children to kindergarten/school in the morning or doing other household chores, and start working remotely at a time that is convenient for them, but still in a range that suits the employer. Thus, they address the needs of employees and ensure good organization of work at the employer.

If the company already has moving working hours, one can expand the range of hours in which work will start and end, for example, instead of 8:00 a.m. - 9:30 a.m. for those working remotely, one can introduce 7:00 a.m. - 10:00 a.m. However, this requires maintaining the same implementation procedure as described above.

If there are objective reasons for this, the range of hours can be made more flexible not for everyone, but only for certain groups of employees working remotely. In this case, the most objective criterion will be the type of work they do.

Flexible remote working hours can also be introduced for individual employees, upon their individual requests.

Increasingly, task-based working hours are being introduced for employees working remotely. The employee is then not subject to work start and end times, but to tasks. The work schedule is therefore in his/her hands. The rationale for the introduction of task-based working time only for employees working remotely will be the place where the work is performed, which in this case is outside the work establishment, which results in very limited possibilities for the employer to control the employee's working time. The introduction of such a hybrid working time solution, i.e. the use of the basic working time with rigid working hours for an employee working on-site and task-based working time for the same employee when working remotely is therefore legally permissible. It can only raise challenges for the employer in keeping working time records.

Research shows that the vast majority of employees want to continue working remotely, and with task-based working hours. However, since major international giants have announced a return to offices, employers in Poland are also following this trend.

HR departments are racing to implement more and more interesting benefits, which will make it more attractive for an employee to work in the office than at home. Thus, pizza Fridays, employer-sponsored breakfasts on Mondays and the holiday benefit of ice cream Wednesdays have returned. There are also new benefits addressing such employee needs that were not reported before the pandemic, such as days on which you can come to the office with children and pets, psychologist visits to the company, training with a well-known person on how to take care of one's wellbeing, a room with a massage therapist or a nap room. It is gradually becoming standard to subsidize the cost of commuting to work, meals at the office or attractive places near the office.

Employers are also increasingly financing flu vaccinations, consultations with a psychiatrist or subsidizing laser vision correction. They also allow remote work abroad or work done after a leave of absence in the place where the employee was resting (workation). Those working remotely appreciate a day without turning on their cameras.

Such a benefit is the equivalent of casual Fridays at the office, when there is no strict formal dress code at work.

Certainly, as the incidence decreases, pressure from managements to return to the office will increase to make teamwork more efficient, and with it will come new non-wage benefits.

Occupational safety and health in remote work

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The employer, as part of its general duty to ensure safe and healthy working conditions, is obliged to undertake certain occupational safety and health measures with appropriate use of scientific and technological achievements. This obligation is very broad and, in practice, shifts most occupational safety and health responsibilities to the employer.

However, when working remotely, fulfilment of some of the employer's duties is downright impossible. This has raised the question of whether the employer is responsible for occupational safety and health at all in remote work. Given the wording of the proposed regulations, it should be said that yes, although the scope of its duties and responsibilities is limited. The legislator explicitly states that in the case of remote work, the employer is exempted from, among other things, the obligation to appoint a coordinator, organize the workplace, ensure the safe and healthy condition of the premises, maintain the standard of the premises, provide hygienic and sanitary facilities and personal hygiene products.

At the same time, as part of OSH responsibilities, the employer is obliged first and foremost to:

- Provide the employee performing remote work with the materials and work tools, including technical equipment, necessary for the performance of remote work;
- Provide for the installation, service, maintenance of work tools, including technical equipment, necessary for the performance of remote work or cover the necessary costs associated with the installation, service, operation and maintenance of work tools, including technical equipment, necessary for the performance of remote work;
- Provide the employee performing remote work with the training and technical assistance necessary for the performance of such work.

Regardless of the basis for the performance of remote work, the relevant document (agreement with the trade unions, rules and regulations, remote work order, agreement with the employee) should specify, among other things:

- Rules for the employer to cover the costs associated with the installation, service, operation and maintenance of work tools or other costs associated with the performance of remote work;
- Principles of control in the field of occupational safety and health;
- Principles of installation, inventory, maintenance, update of the software and servicing of the work tools entrusted to the employee.

In addition, allowing an employee to perform remote work is subject to the employee's confirmation (on paper or electronically) that safe and healthy conditions for such work are provided at the remote workstation.

To make such a statement, the employee should know what conditions are to be considered safe and healthy. Therefore, it is reasonable to regulate in the document on the performance of remote work, for example, the following issues:

- Setting up the desk and chair in accordance with ergonomic principles;
- Minimum requirements for a display unit;
- The use of lighting that does not strain the eyes;
- The passability of traffic routes - cables, carpets and rugs;
- Separation of the eating area from the work area;
- Regular breaks after every hour worked in front of the computer.

Equipping the employee with tools and materials and reimbursing the costs of organizing remote work

Currently, the primary tool for remote work is a computer. Possible entrustment of additional tools, such as a printer or a business phone, should be linked to the specifics of the position and the need to provide them should be considered on a case by case basis. The obligation to provide office furniture, if any, remains an unresolved issue. Neither the wording of the proposed regulations nor the justification of the draft explicitly indicate whether office furniture is part of the “materials and work tools” that the employer is required to provide to the employee. It should be noted here that according to the position of the Ministry of Labour, Development and Technology of 8 January 2021,neither the current, nor the proposed regulations on remote work regulate the issue of the cost of purchasing office furniture. Therefore, in my opinion, it is possible to defend the position that the employer is not obliged to equip the employee with office furniture.

Before deciding to transfer company property, the employer should assess the possibility of offering all employees a comparable number and type of tools to work from home. Indeed, differential access of employees, especially those occupying the same position or having the same responsibilities, to the tools and materials needed to perform remote work may be considered unequal treatment or a manifestation of discrimination.

Occupational risk assessment

The employer should prepare an occupational risk assessment of an employee performing remote work, and this can be a universal assessment for specific job groups. This assessment should take particular account of the impact of remote work on vision, the musculoskeletal system and the psychosocial conditions of this work. While the first two factors are not surprising, the last one is a kind of novelty.

This is because the employer should assess how the employee may be affected by possible isolation resulting from remote working conditions. To date, employers have not, as a general rule, analyzed the impact of the work performed on the job on the psyche of employees. The above regulation may therefore have an impact on the practice of conducting occupational risk assessments also for positions where remote work is not performed.

Based on the results of the occupational risk assessment, the employer is required to develop information including:

- Principles and ways of proper organization of the remote workstation, taking into account the requirements of ergonomics;
- Principles of safe and healthy performance of remote work;
- Activities to be performed after the remote work is completed;
- The rules of conduct in emergency situations that pose a threat to human life or health.

Before being allowed to work remotely, the employee should confirm (on paper or electronically) that he/ she is familiar with the employer's occupational risk assessment and the above-mentioned information, and undertake to comply with them.

Inspection of compliance with occupational safety and health at the place of performing remote work

Under the proposed regulations, the employer has the right to inspect the employee's compliance with occupational safety and health rules and regulations at the place of performing remote work. The performance of inspection activities must not violate the privacy of the employee and others, nor impede the use of the home premises in accordance with their intended use, and its rules should be included in relevant documents.

An occupational safety and health inspection should be carried out by an employee of the employer's occupational safety and health service (only a qualified person can determine whether occupational safety and health rules are actually being followed), and the employee where the inspection is to take place should know who will carry it out and for what purpose. An occupational safety and health officer may only inspect the location designated by the employee from which he/she performs remote work. The prepared inspection report should be submitted to the employer.

According to the proposed regulations, when the employer, in the course of the inspection, finds deficiencies in compliance with occupational safety and health regulations, it obliges the employee to rectify them within a specified period of time, or revoke the permission for that employee to perform remote work. Therefore, the question arises whether, in view of the above, the employer may additionally impose on the employee a penalty for failure to comply with the occupational safety and health rules and regulations, in accordance with Article 108 of the Labour Code. The proposed regulations do not abrogate employees' disciplinary liability. Thus, in a situation where the employee knew the occupational safety and health rules that he/she should have complied with during the course of remote work, it is possible to impose a penalty on him/her. Especially since, according to the regulations, it is the employee himself/herself who organizes the remote work station.

Data retention in recruitment

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Retention of data after completion of recruitment is justified by the interests of the candidates themselves as well as employers.

The employer may keep the data collected in the course of recruitment from candidates for 3 years. During this period, candidates may raise the claim that their application was rejected due to discrimination or unequal treatment.

Existing position of the Polish regulator

The President of the Personal Data Protection Office has made several strong statements on the issue of possible retention of candidates' data after completion of recruitment. In the guide published in October 2018, “Personal Data Protection in the Workplace. A Guide for Employers” it was pointed out that “it is impermissible to process data for the sole purpose of safeguarding against a possible future and uncertain claim by the data subject,” and such an action, according to the President of the DPO, would constitute processing data “just in case.” In the Authority's view, the data of candidates with whom no employment contract has been concluded should be deleted immediately after completion of recruitment.

The position of the Voivodeship Administrative Court in Warsaw and the employer's arguments

The Authority's assessment was challenged by the Voivodeship Administrative Court in Warsaw which, in August 2022, overturned the regulator's decision and pointed out that the President of the DPO incorrectly interpreted the legally justified purpose of the controller (i.e. the employer), and failed to take into account the interests of other persons participating in the recruitment. He subscribed to the position presented by the employer, in which it was emphasized that the employer is even obliged to retain data from recruitment processes.

According to Article 183d of the Labour Code, a person with regard to whom the employer has breached the principle of equal opportunity in employment – and therefore also the candidate – has the right to damages. It is up to the employer to prove that the principle of equal treatment has not been breached, i.e. that it used objective criteria in selecting a new employee as part of the recruitment process. In order to be able to conduct such proof (whether discrimination has occurred in a specific case), it is necessary to compare the qualifications and qualities of the candidates who have advanced to the next stage of the recruitment process with those for whom the decision to terminate the process has been made. The employer must therefore have the data of both the person alleging discrimination and the other candidates with whom the person was compared.

Legal basis for processing data after completion of recruitment

Article 6(1)(f) of GDPR introduces a general clause according to which the processing of data without the consent of the data subject is permissible if two conditions are met. First, the processing must be necessary for the purposes of legitimate interests pursued by the controller or by a third party, and, second, there are no situations in which the interests are overridden by the well-being or fundamental rights and freedoms of the data subject.

The interest of the controller, i.e. the employer, is, of course, to protect against possible claims of unequal treatment in the establishment of the employment relationship. The interest does not disappear when the candidate requests the deletion of his/her data.

This is because other candidates can claim that they were the ones who were discriminated against in the recruitment process, for example on the basis of gender or age. For these reasons, the employer must have the data of all candidates in order to be able to demonstrate that it was guided by objective criteria both in selecting those qualified for the next stages and in hiring the selected candidate.

Prevention of discrimination is the employer's primary duty under the Labour Code. Employers should take measures of a preventive nature (the same applies to bullying), which will include supervision of the recruitment processes by random checks of objectivity in the selection of candidates for the various stages of recruitment. Deleting candidates' data immediately after recruitment would make it impossible to fulfil the obligation to prevent discrimination, because the hiring employer would have no way to supervise the transparency of recruitment processes.

Data retention is also justified by the interests of third parties. In the case of an allegation of, for example, age discrimination, the candidate will want to prove that older people were not admitted to subsequent stages of the recruitment process despite having the appropriate qualifications, education and experience. If the employer deleted all the data after the recruitment, it would be impossible to determine the criteria on the basis of which it decided to reject the elderly. Candidates would be deprived of evidence in the proceedings they initiate.

The verdict of the Voivodeship Court of Administration in Warsaw is not final. The President of the Personal Data Protection Office filed a cassation against it.

Impact of amendments to the Commercial Company Code on managers' liability and management of non-compliance risk in capital companies

The amendments to the Commercial Company Code which came into effect in October 2022 have significant implications for the liability of managers working in corporate groups.

For the first time, the legislator introduced into the Code a “group interest” within a holding of companies, which is not always the same as the interests of the individual companies that comprise it. In addition, the so-called “business judgement rule” was explicitly regulated to protect carefully acting managers from the consequences of their business decisions.

The powers of supervisory boards have also been strengthened, expanding their authority to investigate the company's assets and clarify potential irregularities. This may be important in the context of conducting internal investigation procedures at companies.

Group of companies and binding orders vs. managers' liability

The amendment introduced into Polish law the concept of a so-called “group of companies” (a parent company and subsidiaries with a common interest). In order for a corporate group to be recognized as a group of companies, it is necessary to adopt the relevant resolutions and make an entry in the company register. It is not enough for there to be only factual links between companies or for the parent company to exercise strategic leadership in the group.

Within a group of companies, it is possible for the management board, commercial proxy or attorney of the parent company to issue binding instructions to subsidiaries. In a situation where binding instructions are carried out, members of the subsidiary's management or supervisory board are not liable for the damage caused by carrying out the instruction. Also, the bodies of the parent company will not be liable for the damage, as long as they acted in the interest of the group of companies.

Managers will also not be criminally liable for the crime of mismanagement/abuse of trust, as long as they followed binding instructions. This is a significant change in the context of protecting managers who carried out the instructions of the owner (the parent company) and took actions that were beneficial to the group, but could be considered detrimental to a specific subsidiary. It has been recognized that managers of subsidiaries, in the case of implementation of the group's long-term strategy, e.g. its restructuring, change of profile/place of operations, have very limited freedom in decision-making, regarding the management of the subsidiary's assets, and must implement owners’ decisions. As a result of the amendment, their actions will be protected by law, and they will not face criminal liability for potential mismanagement.

Business judgement rule

Members of the corporate bodies of all limited liability companies (regardless of their participation in a group of companies) will receive protection from the introduction of the business judgement rule into the Code (until now, the so-called “business judgement rule” has been recognized by the courts in case law).

Managers do not violate the duty to exercise due diligence in the performance of their duties (as a member of the management board, supervisory board, audit committee, liquidator), as long as they act loyally towards the company and act within the limits of reasonable economic risk, including on the basis of authoritative information, professional analysis and opinion, which should be taken into account under the circumstances in making a careful assessment. This means that reckless actions unsupported by risk analysis will still be sanctioned. At the same time, members of the corporate bodies get additional protection and certainty that their actions will be evaluated at the time of making the decision, and not taking into account the situation after the event, when it occurs that a certain action turned out to be unfavourable for the company.

Internal investigations in a new way?

The amendment to the CCC has also strengthened the position of supervisory boards and expanded their powers. Supervisory boards are to be kept informed of the company's situation (e.g. transactions and other events or circumstances that materially affect or may affect the company's assets, including its profitability or liquidity, or the direction of the company's business). Within groups of companies, supervisory boards are also to oversee the subsidiary's pursuit of the group of companies' interests. It has also been confirmed that the supervisory board may appoint committees (to oversee a specific area of activity) and supervisory boards have been given the power to appoint a supervisory board advisor at the company's expense.

The catalogue of persons obliged to submit to supervisory boards explanations, reports and documents concerning the company, in particular, its activities or assets, has been expanded (the obligation applies to the management board, commercial proxies, employees and collaborators).

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In addition, a 14-day deadline has been introduced (unless a longer period is specified in the request) for providing this information. The regulation on the obligation to provide explanations to the supervisory board was already in force to a limited extent prior to the amendment, but due to the lack of specification of a deadline for its implementation, supervisory boards in practice often did not receive the requested information at all or received it with a delay that precluded adequate supervisory actions. Currently, failure to submit the data by the deadline may result in criminal liability - as the CCC provides for a new type of crime (punishable by a fine of not less than PLN 20,000 and not more than PLN 50,000 or a restriction of freedom).

The above may be important in light of the conduct of internal investigation procedures. Supervisory boards, due to the responsibilities assigned to them and their new powers, can take the initiative in initiating and conducting internal investigations - until now it was usually the domain of the management board to make decisions in this regard. Supervisory boards, in the course of their investigations, may use the services of an advisor appointed by them, whose activities will be financed by the company. After the amendment, it is expected that supervisory bodies will be more active in exercising day-to-day control over the company's activities and in clarifying any suspected irregularities.

A year of challenges in the area of global mobility

The changes in global mobility that took place in the past year are significantly linked to the armed conflict in Ukraine and the influx of that country's citizens to Poland. Although the long-awaited amendments to the Foreigners Act came into force still in early 2022, the rest of the year was marked almost exclusively by attempts to find solutions for Ukrainian citizens seeking refuge from the war. Also noteworthy is the further development of the Poland.Business Harbour program, dedicated to specialists in the IT / New Tech sector. At the beginning of 2023, further changes will come into force, which we would like to outline in our publication.

Regulations dedicated to all foreigners

At the beginning of the year, an immigration law reform went into effect that changed the rules for issuing residence permits introduced the possibility of changing a single temporary residence and work permit without having to obtain a new permit. This is a significant convenience for foreigners and their employers, which enables them to avoid the time-consuming procedure of applying for a new permit in case of a change of the place of work.

In the middle of the year, new regulations were introduced in the field of procedures related to legalization of foreigners' work and the practices that were previously followed by the authorities were systematized. The biggest changes involved streamlining the procedure for issuing the county administrator's information, the introduction of new templates for work permit applications, or the need to provide a current statement of no criminal record, which from now on is only valid for 30 days from the date of its signing.

The act also confirmed the practice followed by many offices, involving allowing only the persons disclosed in the employer's KRS Register of Businesses to sign the document.

The Poland.Business Harbour program has been extended to include specialists in the IT / New Tech sector with Azerbaijani citizenship (unconditionally), and under certain exceptions, in the case of significant investments in strategic sectors for the economy, also specialists regardless of citizenship.

Another important change concerns the issuance of national visas. For the first time, a select group of foreigners can obtain a visa in the territory of Poland, without going to the border. Belarusian citizens can apply for a national visa if they are unable to return to their country of origin due to threatening repressions, and are in the territory of Poland on the basis of a humanitarian visa, or have entered Poland from Ukraine after 24 February 2022, if they were legally in Ukraine before that date, or intend to work as an international driver. The introduced regulations also allow Ukrainian citizens who intend to work as an international driver or aircraft crew member to apply for a national visa.

Regulations for Ukrainian citizens and their family members

Due to the outbreak of the war in Ukraine and the ensuing migration crisis, a number of legal changes have also extended to Ukrainian citizens and their family members. Under the regulations adopted, both at the EU and local levels, i.e. Council Executive Decision 2022/382 of 4 March 2022, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and resulting in the introduction of temporary protection, and introduced on 12 March 2022 the Act on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of that State (hereinafter: “special act”), a number of solutions were adopted to regulate the stay of Ukrainian citizens and their family members who, as of 24 February 2022, entered Poland en masse, often without proper residence permits, in search of shelter from the ongoing armed conflict in their country.

The aforementioned persons were granted temporary protection, allowing them to continue their legal stay in the Republic of Poland until 24 August 2023. According to the original assumptions, after 9 months of stay in Poland counted from the date of entry, i.e. from 24 November 2022 at the earliest, citizens of Ukraine as well as their family members subject to special rules were to be given the possibility to apply for a one-off 3-year residence permit. No additional requirements had to be met to obtain the permit.

In the new year, however, we will see changes in this regard. According to the pending draft amendment to the special act (at the time of preparing this article, the date of introduction of the amendment is not known; we assume it will be the end of January 2023), provisions introducing the possibility of applying for a one-off 3-year residence permit will be removed. Instead, as of 1 April 2023, working Ukrainian citizens and their family members will be able to apply for standard permits for temporary residence and work or for the purpose of highly skilled work (the so-called “Blue Card”).

It is also worth noting that immediately after the adoption of the special act, people covered by the special residence rules were not able to travel to other Schengen countries due to the expiry of the visa-free period, and even a trip to Ukraine for several days could cause complications when trying to return to Poland. This problem was solved with the introduction of the Diia.pl electronic document. It is available to people who have a special residence status in Poland, a UKR PESEL number and an account in the mObywatel app. On the basis of the Diia.pl document, the aforementioned persons may leave the territory of Poland and travel within the Schengen area for up to 90 days in the subsequent 180-day period, the same as under the visa-free regime or on the basis of other residence documents.

Other important solutions adopted under the special act apply not only to Ukrainian citizens affected by the war. Starting from March 2022, Polish employers can hire Ukrainian citizens whose stay in Poland is legal, without being required to have a work permit. As a condition of employment, a notification must be submitted to the relevant county labour office. The notification must be submitted within 14 days of the employee's starting work.

During the year, the rules for submitting notifications were clarified several times. The latest rules to be introduced under the aforementioned amendment to the special act will pertain to the notification obligation when an employee has started work and has received a temporary residence permit, where an exemption from the requirement for a work permit on the basis of the notification is indicated.

With regard to Ukrainian citizens whose stay in Poland is not based on special status and who have temporary residence permits valid or extended under the so-called covid fiction, such as national visas or temporary residence permits, they will gain the possibility to extend their stay on the basis of the said documents, in the event of their expiration or where the validity is currently based on the covid fiction, until 24 August 2023.

We are confident that 2023 will bring further changes in the area of global mobility with special attention to the status of Ukrainian citizens in Poland. The emergency measures introduced due to the war in Ukraine will most likely be modified depending on its course and the further influx of foreigners to Poland. For obvious reasons, we would like to see them lose their extraordinary character with the rapid end of the war in Ukraine.

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Employee's return to work after court judgment

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The labour court may reinstate an employee if it is found that he/she was wrongfully dismissed. However, a judgment reinstating an employee does not cause his/her automatic reemployment. As a condition for the judgment to be effective, the employee must report his/her readiness to work. In this article, we discuss issues related to an employee's return to work after a reinstatement judgment.

Necessity to report readiness to work

The employer is obliged to reinstate the employee as a result of the judgment reinstating him/her. If the employee has filed an appropriate request, the court may order the employer to "temporarily reinstate" him/her, i.e. until the second-instance court decides whether the reinstatement judgment is correct. In the absence of such a request, as a rule, it is only as a result of the announcement of the judgment by the appellate court that the employee can return to work. The employee's reinstatement is not automatic. The effectiveness of the reinstatement judgment depends on the employee's notification of his/her willingness to work immediately. The employee has 7 days to do so after the judgment becomes final.

Ineffective notification of readiness to work

In a situation where an employee fails to report readiness to work or reports readiness to work before the judgment becomes final, or after the 7-day deadline, such action is ineffective. If the employer refuses to rehire the employee, the reinstatement judgment will have no effect.

As an exception, however, the employee will be allowed to return to work if he/she demonstrates that the missed deadline for reporting readiness to work was for reasons beyond his/her control. It is often a matter of dispute whether or not the employee missed the deadline for reasons beyond his/her control. If the employer refuses to rehire the employee, the employee can demand a determination that the delay was due to reasons beyond the employee's control. The Supreme Court's line of rulings recognizes, for example, the failure of an attorney of record to notify an employee of the reinstatement judgment as a cause beyond the employee's control (see Supreme Court judgment of 14 January 2008, II PK 104/07).

Enforcement of a reinstatement judgment

If the employer refuses to reemploy the employee, despite the fact that he/she reported his/her readiness to work within the prescribed period, the employee may request the enforcement of non-monetary benefits (Article 1050 of the Code of Civil Procedure). The court may impose a fine or order payment to the employee of a certain sum of money for each day of delay to force the employer to comply with the judgment.

When imposing a fine, the court, in the event of non-payment, orders the conversion of the fine into detention. Coercive measures are imposed on the employee responsible for the failure to comply with the court demand, and if it is difficult to determine such an employee - persons authorized to represent the employer.

The employer can defend against enforcement by bringing an action against the employee to render the judgment reinstating the employee unenforceable. At the same time as the lawsuit, the employer should file a motion to suspend the aforementioned enforcement proceedings, if initiated by the employee.

In an anti-enforcement proceeding, for example, the employer can prove that the employee did not effectively report his/her readiness to work. If the claim is upheld, the court will render the judgment unenforceable, and thus the employee will not be able to demand that the employer execute the obligation to reinstate him/her.

Criminal liability of the employer

An employer who fails to implement a final reinstatement judgment commits an offense against the rights of the employee. It faces a fine of between PLN 1,000 and PLN 30,000 (Article 282 § 2 of the Labour Code).

Refusal to comply with a court order can also be classified as a crime under Article 218 § 2 of the Criminal Code. It is punishable by a fine, restriction of freedom or imprisonment for up to a year.

Pay for the time of readiness to work

An employee whom the employer has not allowed to work, despite notification of his/her readiness to work, is entitled to remuneration for the time of readiness to work. An employee claiming such remuneration must prove before the court that he/she was ready to work and could not do so for reasons attributable to the employer. In practice, this can be a significant financial burden for an employer who has unjustifiably evaded compliance with a judgment reinstating an employee and waited for the court’s ruling. Such disputes, aiming to assess whether the employer had a duty to allow the employee to work, can take about two years. The consequence of the court's finding that such an obligation existed may be an award of remuneration to the employee for the entire period of not allowing him/her to work.

TOPIC 7 / TAX

Polish Deal and its consequences

2022 was a year of continuous changes in personal taxation laws.

Although the pace of change slowed noticeably in the second half of the year, you will have to deal with them in your annual tax return. However, it doesn't stop here because as of 1 January 2023, further changes to the regulations of great importance to employers and employees, as well as those performing work under civil-law contracts, have come into effect.

The Polish Deal, which came into force on 1 January 2022, was indeed a revolutionary change in the taxation of personal income, particularly for employees. Some of the changes introduced, such as: raising the tax-free amount to PLN 30,000, raising the tax threshold to PLN 120,000, and introducing new tax exemptions, including for families with many children, were certainly beneficial, as they result in lower tax liabilities. However, the abolition, after 22 years (!), of the right to deduct health insurance premiums from tax has resulted in an increase in the public burden for employees whose earnings are higher than the income level set by the authors of the Polish Deal to qualify them for the middle class (approx. PLN 152,000 per annum). Also, the abolition of the possibility for single parents to file a joint return with their child in exchange for a small tax relief was a disadvantage for many of them.

At the same time, during the year the Legislature introduced mechanisms aiming to mitigate the effects of this negative change. Some of them applied only to employees earning income from an employment relationship. Contractors and those receiving maternity benefits, for example, were originally excluded from these mechanisms.

The first was the infamous “middle class tax break” which applied automatically if an employee had income ranging from PLN 5,701 to PLN 11,141 per month, unless the employee himself requested that it not be applied.

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The second was calculating advance tax payments according to current regulations and those in effect on 31 December 2021, and then comparing them with each other and making the lower advance payment. Issuing a regulation introducing this mechanism, the Minister of Finance violated the law by causing doubts about the validity of the new regulation. This legislative error was removed by accordingly amending the PIT Act, effective 10 March 2022. At that time, contractors and those receiving maternity benefits were also included in the group of taxpayers eligible for the "middle class tax break."

The Polish Deal and the ad hoc patching of its shortcomings lasted until mid-2022, when the Polish Deal 2.0. adopted by another amendment to the PIT Act (dated 15 June 2022) abolished the above mechanisms, restored the possibility of single parents to file joint tax returns with their children, and reduced the base PIT rate to 12%.

Introduction of sanctions for illegal employment was a big change for payers that is not often talked about. If illegal employment is found, pension, disability and sickness insurance premiums on such wages are charged only to the employer, including in the part financed by the insured (employee). These premiums were not tax deductible expenses for employers.

Illegal employment should be understood as:

- employment by the employer of a person without confirming in writing within the required timeframe the type of contract concluded and its terms,
- failure to report a person employed or performing other gainful work to social security,
- taking up employment, other gainful employment or activity by an unemployed person without notifying the relevant county labour office,

Illegal employment regulations can be interpreted very broadly. One should expect that the tax authorities may try to qualify as illegal employment cases in which the employer has not confirmed the terms of employment in writing at all, as well as those in which, for example, a mandate agreement or B2B contract is concluded, and the actual relationship between the parties indicates the existence of an employment relationship.

Annual tax settlement for 2022

All these changes have left a large number of taxpayers unsure whether their annual tax return will lead to an extra amount to be paid or perhaps a refund.

The matter is further complicated by a solution introduced only for the purposes of the annual tax return for 2022, in which the tax office calculates a hypothetical tax liability which, by law, will apply to any taxpayer who has earned income this year from an employment relationship, mandate or business activity taxed according to the general rules, in an amount that entitles them to take advantage of the middle-class tax break, i.e. from PLN 68,412 to PLN 133,692. If such a hypothetical tax liability turns out to be lower than the amount resulting from the filed annual return, the taxpayer will receive a refund of the difference between these amounts without having to take any additional action. However, before such a hypothetical liability can be calculated, the taxpayer must either file a tax return himself/herself or accept (after any changes) a tax return prepared through the “Your e-PIT” service.

The latter solution seems more attractive because of the far-reaching changes in the tax return forms that will be used for the 2022 settlement. The PIT-11 form has also changed, and even transposing the amounts from this information into a tax return filed on the new template will require more attention than before.

The changes in the forms are mainly due to new tax exemptions that were introduced under the Polish Deal (e.g. relief for working seniors or relief for families raising 4 or more children). If the taxpayer filed to the remitter a timely statement about meeting the conditions for its application, the remitter did the lion's share of the work, deducting the exemption when collecting the advance tax payments during the year. However, if the taxpayer has done it late or has decided to account for a given exemption on his/her own in the annual tax return, this year's tax return may prove to be an insurmountable challenge.

New PIT-2 form template

As a result of the increase in the tax-reducing amount the filing of a statement on its application with the employer had a significant impact on the employees' net incomes in 2022. At the same time, the restrictions on the deadline for filing the statement in effect at the beginning of the year resulted in some taxpayers failing to acquire the resulting entitlements.

Still in the course of 2022 the legislature has abolished the condition of filing the statement before the first income is earned in a given tax year, and made changes to allow the taxpayers who receive a pension through a remitter to also file the statement. These changes have been incorporated into the wording of the eighth version of the PIT-2 form.

As part of the Polish Deal 2.0, another PIT-2 form template (version No. 9) has been prepared to be used for submitting statements and applications affecting the calculation of monthly personal income tax advances in 2023 and subsequent years.

The purpose of the form has changed. Using it, a taxpayer can make several statements and applications at the same time that affect the amount of the advance payment collected and that previously required the submission of document(s) separate from the PIT-2 form.

Another novelty is the possibility of filing a PIT-2 form regarding the application of the tax-reducing amount by taxpayers who are not employees. Until now, such taxpayers could deduct the tax-reducing amount on their own only in their annual tax return, while in 2023 this can be done by the remitter who collects the advance tax payment on the salary paid.

The new PIT-2 form also provides the possibility to divide the tax-reducing amount between two or three remitters, or between two legal titles with a single remitter (e.g. in the case of simultaneous employment under an employment relationship and a mandate agreement). This change makes it possible to take advantage of the tax-reducing amount to the largest possible extent in situations where the remuneration from individual contracts is too low to be able to deduct the entire PLN 300 from the advance tax payment collected on a single contract.

The new PIT-2 form is not free of shortcomings.

The first is the lack of a field in which the taxpayer can indicate which contract with a given remitter (if there are more of them) the submitted statements and applications relate to. It appears that in practice this problem will be solved by indicating the contract to which the submitted form applies in the remitter field.

In addition, the form does not include the taxpayer's request for application of a higher tax rate in calculating the advance payments and the request for the collection of advance tax payments where the income earned by the taxpayer from work performed outside the territory of the Republic of Poland is subject to foreign taxation. Such requests will have to be made by taxpayers to remitters separately, not with the PIT-2 form.

However, it should be emphasized that, as a general rule, taxpayers are not required to submit new statements and applications if, in accordance with current regulations, they also apply to subsequent tax years and the circumstances affecting the calculation of the advance payment have not changed. In view of this, remitters should not require employees to submit statements again just because there has been a change in the PIT-2 form.

Change in general rules for submitting statements affecting the amount of the advance payments

The Polish Deal 2.0. also introduced, as of 1 January 2023, some changes to the general rules for submitting statements and applications affecting the amount of the advances collected by remitters.

Starting from the new year, the taxpayer submits such a statement or application to the remitter in writing or in any other manner accepted by the remitter. This means that the remitter can introduce a different, more convenient way for employees to submit statements and applications (e.g. electronically) and does not have to use the PIT-2 form for this purpose. For the avoidance of doubt

Information obligations of banks and brokerage houses regarding gender pay differentials

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In 2022, we have seen further action by the European Union to ensure equal pay and to combat the gender pay gap, by which is meant differences in the salaries earned by women and men.

These actions have resulted in the introduction of new information obligations imposed on banks and brokerage houses. Financial institutions are required to report information on the gender pay gap, as well as to calculate and report information on how much the pay gap is in their organizations.

Gender-neutral remuneration policy

Remuneration policies of banks and brokerage houses must be gender-neutral. As defined in CRD V, a gender-neutral remuneration policy means a policy based on the principle of equal pay for male and female employees for the same work or work of equal value. The provisions of Polish law on remuneration policies in banks and brokerage houses explicitly refer to equal pay regardless of gender. The obligation of financial institutions to respect the equal treatment of men and women is correlated with information obligations.

Banks are required each year, by 31 January, to submit to the Polish Financial Supervision Authority information for the previous year on the gender pay gap. The Polish Financial Supervision Authority transmits information and data received from banks to the European Banking Authority. The EBA then uses the collected data to benchmark remuneration trends and practices at the European Union level.

Brokerage houses, in turn, are required to publish information on the gender pay gap (they usually do this on their websites). This information is collected and analyzed by the Polish Financial Supervision Authority in order to monitor the trends and practices in brokerages' remuneration policies.

Guidelines for sound remuneration policies

Applying a gender-neutral remuneration policy means for financial institutions that they should be able to demonstrate that all terms of employment affecting remuneration are independent of gender. The guidelines on sound remuneration policies issued by the European Banking Authority provide guidance to financial institutions and suggest what actions they should take to ensure that equal remuneration is indeed respected by them.

According to the guidelines, financial institutions are required to monitor whether their remuneration policies are gender-neutral. To this end, they should adequately document the value of individual positions, e.g. by drawing up job descriptions or defining salary categories, for all employees or categories of employees, and indicate which positions are considered to be of equal value, e.g. by implementing a job classification system.

Where a job classification system is used to determine remuneration, it should be based on the same criteria for men, women and non-binary people and be designed to exclude any discrimination, including on the basis of gender.

In turn, the Supervisory Board or the Remuneration Committee (if established) should ensure that, at least annually, the remuneration policy and practice is also subject to a central and independent internal review of whether the policy is gender-neutral.

The guidelines also explicitly indicate that, when determining employee compensations, financial institutions may take into account additional factors that result in differential remuneration.

The key is that they should be applied in a gender-neutral manner. Additional aspects considered by institutions may include, for example: educational, vocational and training requirements, place of employment and the cost of living, or seniority.

New EBA guidelines on gender pay gap

At the end of June 2022 the European Banking Authority published new guidelines for benchmarking compensation practices and the gender pay gap. The guidelines were prepared separately for banks and brokerage houses. New templates for collecting salary data have also been introduced.

Financial institutions do not have much time to prepare for the application of the new guidelines. Both the guidelines for banks and those for brokerage houses are to be applied starting 31 December 2022.

Financial institutions will be required to calculate the gender pay gap taking into account employees hired at the end of the fiscal year. Management Board members should be included in the calculation.

Supervisory board members, on the other hand, as a rule, should not be considered. In addition, the following are not included in the calculation: employees whose contract terminated during the fiscal year, employees hired in the last three months of the fiscal year, as well as employees who are out of work for a long time (e.g. on parental leave or long-term sick leave).

To calculate the pay gap, financial institutions will have to consider employees' gross annual salaries (both fixed and variable) on a full-time equivalent basis. Both financial and non-financial components will be taken into account, with the proviso that non-financial benefits should be taken into account only to the extent that they constitute taxable income.

Mandatory data collection as early as in 2023

Brokerage houses and banks will be required to report information on the pay gap every three years, starting in 2024 (by 15 June). This means that the first data collection should be for the fiscal year ending in 2023.

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