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Raczkowski

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**COMPLIANCE**

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## TOPIC 1

# Employee sobriety testing procedure – bill

The bill drawn up by the Ministry of Development, Labour and Technology allows employers to independently control the sobriety of employees. This is a fundamental change of the approach caused by, among others, the widely discussed stance of the President of the Personal Data Protection Office (PUODO) from March 2020.

Let us recall that in this position PDPO concluded (incorrectly) that information about the employee's sobriety is personal data of special importance as it pertains to their health. However, the conclusion reached by the PDPO (prohibiting an employer from conducting a sobriety test) currently derives from different regulations.

The Act on Upbringing in Sobriety and Counteracting Alcoholism (Article 17 sec. 3) stipulates expressly that in the event of suspicion that an employee consumed alcohol at work or came to work having consumed it, the test may be carried out only by an authority appointed to protect public order – in principle the Police.

The bill differentiates the control of employee sobriety and sobriety testing. This creates a lot of confusion and ambiguity.

The employee's sobriety test, which will may indicate the presence of alcohol in the body will be still carried out by the Police. The employer will only be able to control the presence of alcohol in the employee's body – on an "either/or" basis, as it were.

In order to be able to control sobriety the employer will have to define control rules in the labour rules and regulations, collective bargaining agreement or an official announcement.

Such a regulation will have to take into account the personal rights of the employees and protection of their personal data, and give managers appropriate powers. The procedure should also provide for a path for reporting suspicions of employees being under the influence of alcohol.

The above issues should be incorporated into the compliance system in place at the employer. Sobriety control regulations should take into account the policies for prevention of irregularities and abuse and take into account personal data protection principles.

What is more, the procedure for reporting consumption of alcohol should be part of the whistleblowing policy.

## TOPIC 2

# More obligated institutions among accounting firms (AML)

Extensive amendment of the Money Laundering Prevention Act expanded the group of the obligated entities. Many more companies and entities providing accounting services will have to satisfy the requirements imposed by its provisions.

A lot of doubts have been raised by recognizing providers of bookkeeping services as obligated institutions. In accordance with the Accounting Act, such business involved performing a number of activities associated with the keeping of accounting ledgers, inventory-taking, valuation of assets and liabilities, and preparation of financial statements.

The definition of an obligated institution did not include entities which, in a group, performed the functions of a shared services centre or conducted only a portion of the accounting and bookkeeping activity.

The amendment adds a new category of obligated institutions to the act. These are entrepreneurs whose core business includes provision of services consisting in preparation of tax returns, keeping of accounting ledgers, providing advice, opinions or clarifications regarding the tax and customs law. Hence the new definition covers entities which perform only some services and even tax advisors.

The new obligated institutions will have to adapt their internal structure and procedures to the statutory requirements. They will have to appoint a management board member responsible for implementation of these obligations and senior management staff and AML manager to perform them.

The obligated institutions have to develop an assessment of the money laundering risk in their daily operations, which will constitute the basis of an internal money laundering prevention procedure. With regard to their clients, accountants will have to apply financial security measures – obtain information about beneficial owners, representatives, assets and scope of operations.

Application of these measures has to be documented and some transactions should be reported to the General Financial Information Inspector.

The new obligated institutions have very little time to adapt to the new regulations. They will enter into effect already on 31 July 2021. The implementation of all new obligations requires a lot of organizational effort, especially on the part of financial departments, HR departments and management boards.

### TOPIC 3

## Foreigners may “work” as shareholders in ltd. companies

Employment of foreigners is time-consuming and entails a number of costs and obligations. Many companies circumvent the regulations on employment of foreigners by establishing limited liability companies in which they acquire shares.

Foreigners working for such companies receive remuneration which is not subject to social security contributions or tax in Poland.

This is permitted by the provisions of the Commercial Company Code, however, what is of key importance, is that the shareholders are required to actually provide recurring performances to the company.

Working for the company's clients, discharging a function in its governing body or providing continuous performance, e.g. renting an office, may not be included among them. However, such performances may include advisory services, recruitment of new employees or delivery of goods.

Application of the provisions of the Commercial Company Code in similar cases may be treated by the state authorities (especially Border Guards and State Labour Inspection Service) as circumventing the regulations on employment of foreigners.

This, in turn, may lead to charging the persons organizing such “work” with a number of criminal allegations – illegal entrustment of work to foreigners, infringement of employee rights, failure to report data to the Social Security Institution and concealing the tax base.

Therefore the use of this scheme requires a detailed analysis and actual linking of the foreigner's shares in the company with the performances provided by them to the company. Otherwise, if such link is only “on paper” the organizer of the scheme expose themselves to serious legal consequences.

#### TOPIC 4

## How to act during a search?

The Polish law gives a number of institutions the right to carry out inspections in companies and other organizations.

Such right is vested in the State Labour Inspection Service, Border Guards, tax inspection authorities and law enforcement bodies, especially the Police. Employees should know the rights and obligations they have during such inspections.

The activities of government bodies conducted in the offices of companies are always stressful for the staff. During such events they may make mistakes, disclose proprietary information or issue restricted documents.

The cooperation with the government authorities should not lead to breach of the provisions of law and the employer's interests. Therefore it is recommended, for example by the Warsaw Stock Exchange, that companies implement guidelines in case of such events.

They should define how employees should behave when dealing with officers of various bodies with the right to inspect companies.

These types of procedures indicate the persons who should remain in current contacts with the officers and define the information that such persons may convey.

What is equally important, the procedure clearly distinguishes individuals who represent the organization in the contacts

with the officers and only such persons should provide detailed information, documents etc.

The purpose of the procedure called the Dawn Raid is not to obstruct government agencies. Their aim is to structure the activities which, in principle, are unannounced, and to balance the public interest and the interest of the company.

One should remember that during the inspection public authorities must comply with the laws which, unfortunately, the officers sometimes forget. This is exemplified by the Police's rampant abuse of Article 15 of the Code of Criminal Procedure.

This regulation allows the Police to demand information required in a conducted criminal procedure from anyone. However, it does not authorize the Police to demand any documents. In many cases, however, the Police demand from companies information and documents to back it up, which is an abuse of the law.

The procedure and guidelines for the eventuality of activities of state authorities makes it possible to avoid such situations. Thanks to that employees know who to turn to in the event of problems of this type. Company representatives, in turn, obtain guidance on how to avoid the risk of breach of personal data or issuance of privileged documents on the basis of an unauthorized demand.

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# INSIGHTS

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## COMPLIANCE DAY 2021

### SAVE THE DATE

The 5th edition of the Compliance Day Conference will be held on 23 September in a hybrid format. It will be devoted to the topic of HR compliance – whistleblowing through the eyes of HR.

In 2021, alongside the ever-present challenges of organizing work in the age of pandemics, whistleblowing is the most important topic in the field of compliance.

Although the Polish authorities are in no hurry to implement the whistleblower protection directive, the legislative work is already underway in many European Union countries.

We look at whistleblowing, protecting whistleblowers and conducting internal investigations through the eyes of practitioners and HR specialists.

Details and registration coming soon.

### **New series on criminal labour law | Criminal liability of employers and HR departments – what for and who can be held liable**

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