We invite you to attend the Seventh Edition of Masters of Employment Law

Applications and queries should be sent to: prohrevents@raczkowski.eu

Dear Readers,

major changes are coming to the civil procedure. An employee will no longer have to wait until there is a legally binding court ruling to be reinstated; in the case of protected employees, reinstatement will be possible immediately upon filing a suit.

Regulations concerning trade unions are also changing. Starting January 2019, mandate contractors and those employed on the basis of other civil law agreements will get the right to join trade unions and thus, trade union privileges.

The moment approaches when fixed-term agreements will be converted into indefinite-term agreements. We will point out what to watch out for if you are planning to terminate a fixed-term contract of employment prior to its conversion.

The maximum 18-month period for the use of the work of temporary employees is about to expire. It is a good idea to prepare for that already today.

We are also writing about changes that came into force on 1st July, facilitating the employment of foreigners. The Ministry has created a list of jobs that can be performed by foreigners on the basis of a work permit issued without carrying out the so-called ‘labour market test’.

I hope you will find the content useful,
Sławomir Paruch

Reinstatement before court ruling – major changes coming

The proposed changes with respect to job reinstatement are meant to enable employees to return to their positions faster, without waiting for a legally-binding ruling. In the case of employees under the so-called ‘special protection’, this might happen even before the court of first instance has issued its ruling.

legal advisor Grzegorz Ruszczyk

If a reinstatement ruling is issued by a court of first instance, the court will have the power to mandate that the dismissed employee be readmitted to work. The employee will not have to wait until there is a decision by the court of appeal. Of course, you will be able to continue your ‘fight' in court. However, filing the appeal will have no impact on the court-mandated obligation to readmit the dismissed employee to work. Moreover, employees under special protection will be able to obtain a reinstatement order at any stage of the proceedings, including immediately upon filing a suit. It will be enough for them to demonstrate that their claim is credible (they will not have to prove it).

The court will only be able to refuse to mandate reinstatement when the claim appears insufficiently credible. In addition, the court will be able to threaten the employer with the order to pay a certain amount to the employee if the employer fails to comply with the reinstatement order. The proposed regulations entail new challenges. In particular, they mean that it is imperative to be even more meticulous when formulating the reasons for contract termination and preparing for potential litigation. An error at this stage might entail the necessity to continue working with an employee who, in your judgement, has acted in a way that precludes further employment.

Contractors to get trade union privileges

Persons who provide paid work on a basis different than the employment relationship (e.g. on the basis of a contract of mandate or a contract for specific work) will get the right to create and join trade unions, and they will get certain trade union privileges. The changes are to come into force on 1st January 2019.

legal advisor Sandra Szybak-Bizacka

Persons employed on civil-law contracts will not only get the right to create and join trade unions, but also privileges stemming from union membership that have so far been restricted to employees. By way of example, they will have the right to be released from work with remuneration, or to special protection against termination. In the case of termination of a contract with a contractor who is a trade union official without the approval of the union, you may have to pay a severance payment amounting to 6 months of remuneration. The amount of the payment will be a lump sum, unrelated to the loss suffered. However, if the contractor's loss is higher, they will be able to pursue damages or compensation in excess of the severance payment.

EVENTS

Compliance in practice: Creating internal regulations.
20th September 2018

A workshop on the creation of a company's compliance system.

A paid event.
The program is available here.

The workshop will be held on **20th September 2018 (Thursday), at 10:00 – 15:30** at our offices at Bonifraterska 17 (21 floor) in Warsaw.

Please send questions and applications to:
prohrevents@raczkowski.eu

Employing foreigners will be easier for certain jobs

advocate
Karolina Schiffter

On 1st July 2018 a new, simplified procedure for obtaining work permits for foreigners for certain jobs came into force. The Ministry has created a list of jobs that can be performed by foreigners on the basis of a work permit issued without carrying out the so-called 'labour market test'. This means that in order to employ a foreigner in a job from the list, you will be able to immediately request a permit from a voivodship government, without the need to prove that you have been unable to find an appropriate employee in the local job market.

The new regulation encompasses nearly 40 professions. They include especially engineers and technicians specializing in electrical engineering, manufacturing and construction material technology, as well as construction workers (including machine operators). In addition, the list takes into account the needs of the broadly understood IT industry, by simplifying the procedure for software engineers, system analysts and database administrators. The simplified procedure will be also applicable to jobs in the transportation and care industry, as well as healthcare, with no limits for nurses (doctors must have a second level specialization or a specialist title). The new regulations apply to new cases, as well as to proceedings pending as of 1st July 2018.

Conversion of fixed-term agreements to indefinite-term agreements is approaching – the last moment to terminate employment without indicating the reason

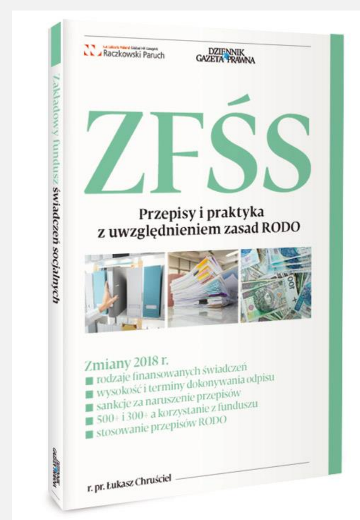
On 22nd November 2018, fixed-term contracts of employment which were in force on the day when the labor code was amended to introduce fixed-term employment limits (i.e. on 22nd February 2016) will, as a rule, be converted into contracts for indefinite term. The conversion will be the result of the lapse of a 33 month limit on fixed-term employment, which, in the case of such contracts, has been running since 22nd February 2016 and will end on 21st November 2018. The conversion will be automatic by virtue of the law, regardless of the wishes of the parties. It will not occur only for these fixed-term contracts which are not subject to term limits.

PUBLICATIONS

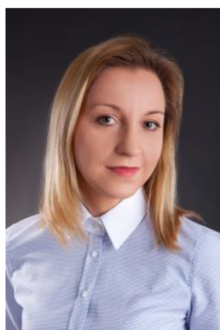
Company Social Benefits Fund. The regulations and the practice including GDPR rules

A practical guide that discusses issues related to the Company Social Benefits Fund, with particular attention paid to doubts that arise when using the funds. The publication takes into account the newest regulations, including the provisions of the GDPR. This new edition takes into account interpretations issued by the ZUS and by tax organs, as well as the newest rulings and jurisprudence.

Author:
legal advisor Łukasz Chruściel



Please send your questions to:
prohrevents@raczkowski.eu


legal advisor Paulina Zawadzka-Filipczyk

It may be risky to terminate an agreement close to the conversion date. This is because, should the conversion fall within the period of notice, there is a risk of the court deciding that the termination should meet the requirements for indefinite-term contracts. In practice, this would entail the need to indicate a reason and to hold consultations with trade unions. Failure to do so when terminating a contract that has been converted into an indefinite-term contract might lead to finding that the employer has breached the regulations on the termination of contracts of employment, which gives the employee the right to compensation.

If you have fixed-term contracts in place that were in force on 22nd February 2016 and remain in force, and you are considering terminating them, we recommend verifying that the period of notice will expire before 22nd November 2018. If you decide to terminate the contract shortly before its conversion into an indefinite-term agreement, and, as a result, 22nd November 2018 will fall during the notice period, we recommend a cautious approach, i.e. meeting the requirements for the termination of indefinite-term agreements. These recommendations are likewise applicable to the termination of fixed-term contracts signed after 22nd February 2016 for a period longer than 33 months and thus subject to conversion at a later date.

The maximum period for the use of temporary employees is about to expire.

At the end of November 2018, the 18 month period elapses during which, as a rule, work of a given temporary worker can be used. It will not be possible to use the work of the same individuals until further 18 months elapse. Changing the employment agency will not solve the issue.

If you have been using the work of specific temporary workers since the beginning of June 2017, or prior to that date, then by the end of November 2018 you will have to decide what to do with them. Employing them as temporary workers will no longer be possible. The same applies to temporary workers whose services you started using after 1st June 2017, with the caveat that the maximum allowable period will expire later (18 months after they started work).

There are several possible solutions. One is to employ them directly. It is a good idea to decide now which employees you might want to employ from December, and to prepare offers for them. Another solution is to dispose of the current workers and hire new ones. This is troublesome, however, because it means you will have to train new people. Therefore, it is a good idea to consider alternative scenarios and to use the work of such people in another form, not as temporary employees. What I have in mind in particular is outsourcing and a service agreement with a third party.

legal advisor Robert Stępień

I recommend considering these issues in advance, so that there is no need to make last-minute changes and no risk of being accused of circumventing the law. The terms of the cooperation must be appropriately regulated and implemented in order to mitigate the risk of an employment relationship being established or the risk of social security dues being payable.

Withholding agent to pay overdue social security contributions, and the insured to pay the tax?

The social security withholding agent has the sole responsibility for collecting contributions in the correct amount and paying them to the ZUS account. No other entity, including the insured individual, is obligated to pay the contributions in the case of a failure by the agent to fulfil its obligations. There are doubts, however, whether an income arises for the employee in the case when the withholding agent pays overdue contributions from its own funds.

tax advisor
Katarzyna
Serwińska

In 2015 the Supreme Administrative Court ruled unambiguously that a delayed payment of contributions by the withholding agent cannot be recognized as made 'for the insured', and thus it does not lead to taxable income arising. Recognizing the overdue contributions as a taxable income would be tantamount to demanding additional tax on amounts already taxed. However, in June the Director of National Revenue Information ('DKIS') issued at least three individual interpretations concluding that the payment of contributions from the agent's funds generates taxable income for the insured if they fail to return the contribution paid on their behalf in the same tax year. The interpretations were issued at the request of insured individuals who were parties to contracts for specific work which were reclassified by the ZUS as contracts of mandate. In one of the interpretations, the DKIS commented on the Supreme Administrative Court's arguments stating that no double taxation issue is involved, because the overdue contributions were not taxed in the years they were due, since they were not financed by the ordering party then. The issue is likely to return to courts.