

6.12.2018 | Warsaw

Company criminal liability – a new deal



Dear Readers,

the government has accelerated the work on the new Act on the Liability of Collective Entities for Punishable Offences (new corporate criminal liability regime).

It will completely change the approach to the criminal liability of companies. It will also impact the internal organization of enterprises in Poland, forcing them to implement procedures preventing criminal offences from being committed.

The Act can be expected to come into force in the first quarter of 2019.

The bill foresees a very short *vacatio legis* of 3 months.

As we present the most important changes that the new law will bring, we are pleased to invite you to a meeting focused on the draft Bill that will take place on 6 December at our Firm's office in Warsaw at 10:00 a.m.

We would also like to take advantage of this opportunity, i.e. the publication of an issue of PRO HR that is devoted to criminal law and compliance issues, to welcome a new Partner to our Firm, Adwokat Janusz Tomczak.

Adwokat Dominika Stępińska-Duch

A company and a member of its board can be convicted simultaneously

Criminal liability of companies is not a new concept in the Polish law. However, the current bill totally overhauls the liability mechanism, by creating new basis for it and new procedures. The proposed solutions will force companies to reorganize.



Adwokat Janusz Tomczak

Currently, in order to indict a company (for some crimes), a criminal court must first issue a final binding conviction against an individual acting on company's behalf (e.g. member of the management board, authorized agent, employee).

The bill makes it possible to prosecute the company regardless of whether the individual who committed the crime has been identified and is going to be convicted. The proposed regulations allow for the company and for an individual acting on its behalf (e.g. management board member, authorized agent or manager) to be indicted simultaneously in the same proceedings.

The bill does not list the crimes for which a collective entity may be held liable (which is the case now). Its liability will be for criminal offenses related to the company's business activity.

By way of example, the current law does not make it possible to convict a company (employer) for mobbing, i.e. the crime of persistent or malicious infringement of employee rights. The new bill allows for this possibility. The situation is similar for offences such as obstructing the activities of a trade union, failure to submit required data to the Social Security Institution, failure to report a workplace accident or putting an employee's life or safety at risk through a violation of the health and safety regulations.

Companies will also bear liability for all tax offences committed in connection with their business.

The bill also increases the penalties which can be imposed on companies. The basic penalties foreseen in the Act are: dissolution of the entity and a financial fine ranging from 30,000 zloty to 30,000,000 zloty. In addition, the bill comprises multiple additional penalties that can be imposed on convicted companies, including an advertising ban, dissolution of a branch, ban on participation in public tenders, withdrawal of subsidies or other subventions, as well as a ban on certain business activities.

Failure to implement a compliance system as the company's "guilt"

A company's criminal liability, just like the criminal liability of an individual, is based on guilt. The company's guilt might lie in entrusting the management of its assets to a wrong person ("guilt in selection") or failure to supervise ongoing processes ("guilt in supervision"). Within the meaning of the Act, allowing an improper internal organization that facilitates a crime is also considered guilt.

Irregularities in the organization of the company, which facilitate a crime or make it possible, represent nothing other than a failure to implement the required elements of a compliance system. By defining the company's guilt this way, the bill indirectly obligates entrepreneurs to implement such procedures.

EVENTS

WEBINAR: Employee business travel and working time

29 November 2018

Conducted by: legal advisor Iwona Jaroszevska-Ignatowska, Ph.D.

A detailed program is available [here](#).

Registration: [here](#)

This is a free event.

Company criminal liability – a new deal: Business breakfast

6 December 2018, Warsaw

Conducted by: adwokat Janusz Tomczak and advocate Damian Tokarczyk, Ph.D.

Detailed information is available [here](#).

The meeting will take place on **6 December 2018 (Thursday), 10:00 – 12:00**, at our offices at Bonifraterska 17 (21 floor) in Warsaw.

This is a free event.

Please submit your applications and questions to:

prohvents@raczkowski.eu

EVENTS

Personal files and other employee records: new rules and GDPR compliance

8 January 2019, Warsaw

Conducted by: legal advisor Iwona Jaroszewska-Ignatowska, Ph.D., legal advisor Dominika Dörre-Kolasa, Ph.D and advocate Marta Kosakowska.

The program is available [here](#).

The workshop will be held on **8 January (Tuesday), at 10:00-16:10** at our offices at Bonifraterska 17 (21 floor) in Warsaw.

A paid event.

Employee Capital Plans – the employer's new duties| second edition

11 January 2019, Warsaw

Conducted by: legal advisor Łukasz Kuczkowski

The meeting will take place on **11 January 2019 (Friday), 11:30 - 13:30**, at our offices at Bonifraterska 17 (21 floor) in Warsaw.

Detailed information is available [here](#).

This is a free event.

An organization should have rules of conduct in case there is a risk of a crime being committed, as well as rules for reacting to incidents already discovered. Such a collection of rules in practice usually constitutes the company's ethical code, or its anti-infringement procedures. Construed more broadly, such procedures encompass training programs directed at groups of employees, as well as rules of conduct when irregularities are discovered.

The Act makes it necessary to define the duties of bodies, members of bodies and employees. Such a system should structure tasks, competences and responsibilities within a company, as well as, where necessary, indicate those responsible for irregularities.

The third element of compliance management in a company should be the appointment of an individual or an organizational unit to supervise compliance with binding rules and laws. Companies that employ at least 50 employees and achieve annual net sales of at least 10,000,000 euro will have to create a new position of the Compliance Officer, or, if necessary, a Compliance Division.

The new bill also foresees liability of a collective entity for the actions of its contractors. A company may be responsible for a crime committed by an employee of its contractor if it has benefitted from it. The company will be liable for this crime if it was easy to discover that the contractor has not implemented the abovementioned elements of the compliance system. This means that companies in a permanent business relationship (e.g. usual suppliers) will be able (or in fact required) to investigate each other's performance of the compliance obligations.

The bill obligates entrepreneurs to implement whistleblowing procedures

The bill on the liability of collective entities obligates all companies to accept and investigate reports from employees or other individuals concerning irregularities at the company. Such irregularities, but also all cases of a failure to keep due diligence, as well as gaps in the company's internal organization, could be crimes.



Adwokat Dominika Stępińska-Duch

In other words, the bill obligates entrepreneurs to implement a whistleblowing procedure, though it does not describe it in detail. Based on our experience, including international experience, a whistleblowing procedure must be based on shaping the employees' awareness.

An effective procedure also requires that communication channels between the employees and the bodies that consider the reports be adjusted to the realities of the given company. Finally, a whistleblower must be guaranteed anonymity and protection from all repression, from both corporate bodies and other employees. Corporate bodies, in particular the management board, will also be obligated to investigate reports, i.e. to conduct internal investigation whose goal will be to determine whether there has been an irregularity at the company, whether it constitutes a crime or a tax offence and whether it could have been prevented. If the management board fails to investigate the irregularity or if it fails to remove irregularities that have been discovered, the court will have the right to increase the fine imposed on the company to 60,000,000 zloty.

The situation of whistleblower employee

The bill on the liability of collective entities mandates that companies implement a whistleblowing procedure. The employee, or any other person (e.g. a contractor) who informs the company in good faith of a suspicion of an infringement will be subject to special protection. Not merely protection against revenge by other employees or company bodies, but also protection in the event of the occurrence of such actions.



advocate Damian Tokarczyk, Ph.D.

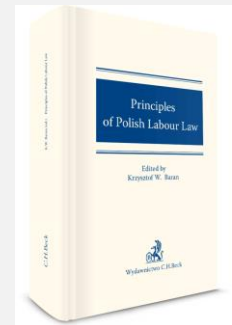
If the company fires an employee in connection with a whistleblowing report made by that employee, this termination will be defective and the employee will be entitled to damages or reinstatement. It is worth noting that it is enough for the termination or violation of employee rights to occur "in connection with" and not "as a result of" the whistleblowing report made. This means that employees do not have to prove that the reports made by them were the sole reason for termination or repressions.

PUBLICATIONS

Principles of Polish Labour Law

The monograph is devoted to basic issues of the Polish labour law. It analyzes the provisions of individual and collective labour law. It also discusses the rules of conduct in issues concerning labour law.

Edited by: Professor Krzysztof W. Baran, Ph.D. Hab.
Co-author: legal advisor Dominika Dörre-Kolasa



The Word - Forces for Change - Ius Laboris

The report *The Word – Forces for Change* examines the impact of geopolitical, demographic and technological changes on employers.

The full version of the report is available [here](#).



What is more, employees will be able to pursue their claims not just before a labour court, but also before criminal court, in proceedings against the company. This means that the whistleblower employees will have the public prosecutor on their side, who will support their claims in most cases.

The bill contains important provisions on whistleblowers who are also responsible for crimes. According to the bill, if such an employee reports to both the employer and to law enforcement agencies all the material circumstances of the crime, they will be able to take advantage of their rights and to pursue claims related to job termination. It can thus be inferred that an employee who reports such information only to law enforcement will not be able to use the right to be reinstated or to receive damages. Unfortunately, the bill does not specify whether this applies only to the specific right described in the bill, or the general right of a terminated employee stemming from the labour code. It does suggest, however, that the terminated employee can always pursue claims before a labour court.

Reporting some crimes waives liability

If, in the course of an internal investigation a crime is discovered and the company notifies law enforcement of this crime, it will not be liable for criminal penalties for some types of crimes.

The current provisions of the law only impose a legal obligation for reporting some types of serious crimes. These include, for example, crimes against the Republic of Poland, murder, exposing a human to a direct risk of the loss of life, false imprisonment, taking hostage. Members of management boards are not liable for criminal penalties for failure to report other crimes, e.g. corruption, theft or fraud. However, they have a social (and thus not legal) responsibility to report such events.

The bill on the liability of collective entities does not change the legal scope of the reporting requirement. It does, however, include a mechanism that encourages reporting these to the police or the public prosecutors. If, in the course of an internal investigation a crime is discovered which carries a penalty of up to 5 years imprisonment, and the company notifies law enforcement of this crime, it will not be liable for criminal penalties for this crime. Such voluntary disclosure will apply to such crimes as mobbing, giving a bribe to a business entity, document fraud or theft below 200,000 zloty.



trainee advocate.
Ewelina Rutkowska